

1997

Josie Ann Gunderson v. The May Department Stores Company, Payless Shoe Source, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOSIE ANN GUNDERSON,

Plaintiff/Appellant,

vs

THE MAY DEPARTMENT STORES
COMPANY, a New York corporation and
PAYLESS SHOESOURCE, INC , a Missouri
corporation,

Defendants/Appellees

Case No 970178

Category 15

Civil No 940901812

BRIEF OF APPELLEE

APPEAL FROM FINAL JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE LESLIE LEWIS PRESIDING

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COURT OF APPEALS

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Appellees, May Department Stores and Payless ShoeSource submit the following Brief of Appellees.

JURISDICTION

The defendants agree with the plaintiff's Statement of Jurisdiction.

ISSUES

1. Was the trial court correct in concluding that the plaintiff is barred from bringing an action for bad faith and for negligent infliction of emotional distress against her employer because of the exclusivity provision in the Utah Workers' Compensation Act, Utah Code Annotated § 35-1-1-60, *et. seq.*?

2. Was the trial court correct in concluding that the plaintiff cannot maintain a bad faith claim against the defendants as plaintiff is not in privity of contract with the defendants?

3. Was the trial court correct in concluding that the plaintiff's claim for negligent infliction of emotional distress was barred because the plaintiff was not threatened with physical injury?

STANDARD OF REVIEW

Plaintiff appeals the trial court's grant of summary judgment in favor of defendants. For the purposes of this appeal, the facts of this case are undisputed and plaintiff's appeal raises only a question of law. Accordingly, this Court reviews the trial court's order for correctness. *Schurtz v. BMW of N. Am., Inc.*, 814 P.2d 1108 (Utah 1991). Further, a reviewing court may affirm

a grant of summary judgment on any ground available to the trial court, even if it is one that was not relied on below. *Higgins v. Salt Lake County*, 855 P.2d 231 (Utah 1993).

DETERMINATIVE AUTHORITY

Utah Code Annotated § 35-1-12(2):

When injury is caused by the wilful failure of an employer to comply with the law or any lawful order of the commission or the employer's own written workplace safety program, compensation as provided for in this title shall be increased fifteen percent, except in case of injury resulting in death.

Utah Code Annotated § 35-1-46(2)

The commission is authorized and empowered to maintain a suit in any court of this state to enjoin any employer, within the provisions of this chapter, from further operation of the employer's business, where the employer has failed to provide for the payment of benefits in one of the three ways provided in this section. Upon a showing of failure to so provide, the court shall enjoin the further operation of the employer's business until the payment of these benefits has been secured by the employer as required by this section. The court may enjoin the employer without requiring bond from the commission.

Utah Code Annotated § 35-1-60(1) (1995):

The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent, or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any

and all other civil liability whatsoever, at common law or otherwise, to the employee or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated, or incurred by the employee in the course of or because of or arising out of his employment, and no action at law may be maintained against any employer or against any officer, agent, or employee of the employer based upon any accident, injury, or death of an employee. Nothing in this section, however, shall prevent an employee, or his dependents, from filing a claim with the Industrial Commission of Utah for compensation of those cases within the provisions of the Utah Occupational Disease Act, as amended. . . .

Utah Code Annotated § 35-1-78(1) and (3) (1995):

- (1) The powers and jurisdiction of the commission over each case shall be continuing. The commission, after notice and hearing, may from time to time modify or change its former findings and orders.

. . . .

- (3) Awards made by the commission shall include interest at the rate of eight percent per annum from the date when each benefit payment would have otherwise become due and payable.

. . . .

Utah Administrative Rule 568-1-14(C):

Failure to make payment or to deny a claim within the forty-five day time period without good cause shall result in a referral of the insurance company to the

Insurance Department for appropriate disciplinary action and may be cause for revocation of the self-insurance certification for a self-insured employer. . . .

Utah Administrative Rule 568-2-5(E):

(E) employees cannot be billed for treatment of their industrial injuries or occupational diseases.

. . . .

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiff's complaint alleged violation of public policy, insurance bad faith, negligent infliction of emotional distress and intentional infliction of emotional distress. Plaintiff is appealing issues pertaining to the dismissal of the bad faith claim and the negligent infliction of emotional distress claim.

B. Course of Proceedings and Disposition Below.

Defendants filed a Motion for Summary Judgment on or about October 12, 1995. Judge Leslie A. Lewis heard oral argument on April 9, 1996. The Court granted defendants' Motion with regards to plaintiff's claims for bad faith, intentional infliction of emotional distress and violation of public policy, but not with regards to plaintiff's claim for negligent infliction of emotional distress. The Court reasoned that plaintiff had no privity of contract with the defendants

and therefore could not maintain a cause of action for bad faith. (See Order dated May 8, 1996, R. at 314-318.)

On November 1, 1996, defendants filed a Motion for Reconsideration of the remaining claim for negligent infliction of emotional distress, which was granted on January 7, 1997. Judge Lewis found that plaintiff's claim for emotional disturbance could not stand because Utah law allows a negligent infliction of emotional distress claim only where the individual claiming such injuries has been physically injured, threatened with physical injury, or in the "zone of danger" of physical injury because of defendants' conduct, none of which were alleged here. (See Order dated January 7, 1997, R. at 377-379.)

C. Facts.

1. Appellees are self-insured for workers' compensation purposes. (See Complaint; ¶ 7, R. at 1-8.)

2. The Western Region Claims Office in Los Angeles, California of May Department Stores, Inc. handles the workers' compensation claims for Payless ShoeSource, Inc., as well as for other corporations. (See Complaint, ¶10; R. at 1-8.)

3. Plaintiff was assaulted while employed at a Payless Shoe Store on or about January 20, 1991. As a result of the injuries sustained in the assault, plaintiff filed a workers' compensation claim with defendants. (See Complaint; R. at 2.)

4. Plaintiff obtained an order from the Utah Industrial Commission on January 13, 1994, regarding her January 1991 workers' compensation claim. Plaintiff alleged that

defendants failed to pay certain medical bills which were required to be paid by the Order of the Utah Industrial Commission. (See Complaint; R. at 1-8.)

5. Plaintiff failed to return to the Utah Industrial Commission to seek enforcement regarding any noncompliance by defendants with the Industrial Commission Order. Plaintiff instead sought relief in the District Court by filing the Complaint in this action in March of 1994. (See R. at 185.)

6. Defendants filed a Motion for Summary Judgment on or about October 12, 1995. Judge Leslie A. Lewis heard oral argument on April 9, 1996. The Court granted defendants' Motion with regards to plaintiff for bad faith, intentional infliction of emotional distress and violation of public policy, but not with regard to plaintiff's claim for negligent infliction of emotional distress. The Court reasoned that plaintiff had no privity of contract with the defendants and therefore could not maintain a cause of action for bad faith. (See Order dated May 8, 1996; R at 314-318.)

7. On November 1, 1996, defendants filed a Motion for Reconsideration of the remaining claim for negligent infliction of emotional distress, which was granted on January 7, 1997. Judge Lewis found that plaintiff's claim for emotional disturbance could not stand because under Utah law, a negligent infliction of emotional distress claim is allowed only if the individual claiming such injuries has been physically injured, threatened with physical injury, or in the "zone of danger" of physical injury, none of which were alleged here. (See Order dated January 7, 1997; R. at 377-379.)

8. Plaintiff appeals the trial court's ruling regarding the scope of the exclusivity provision of the Workers' Compensation Act, the necessity of privity of contract for a bad faith claim, and whether a negligent infliction of emotional distress cause of action requires personal injury or the threat of physical injury. (See Docketing Statement on file herein).

SUMMARY OF ARGUMENTS

Plaintiff is barred from maintaining her actions for claims relating to bad faith and for negligent infliction of emotional distress against her employer because of the exclusivity provision of the Utah Workers' Compensation Act, Utah Code Annotated § 35-1-60, which provides plaintiff her sole remedy. An employee is limited to recourse and recovery under the Workers' Compensation Act; that remedy is in lieu of ordinary tort remedies. To allow a separate civil action would abrogate the exclusive remedy protection available to the employer and the authority of the Industrial Commission.

Plaintiff's claims relating to "bad faith" against the defendants also fail because plaintiff is not in privity of contract with defendants. Plaintiff's status as an employee is that of a third-party claimant, who, pursuant to a long line of Utah law, cannot maintain an action for bad faith against defendants. This issue was most recently addressed in *Savage v. Educators Ins. Co.*, 908 P.2d 862 (Utah 1995), and the holding there is directly applicable at bar.

Even if plaintiff's NIED claims were not barred by the exclusivity provision of the Utah Workers' Compensation Act, plaintiff cannot recover under a negligent infliction of emotional distress cause of action because plaintiff did not suffer physical injury nor was she placed in actual

physical peril by defendants. Plaintiff's claim is for negligent infliction of emotional distress without any risk of bodily harm and thus her negligent infliction of emotional distress claim must fail.

ARGUMENT

POINT I

PLAINTIFF IS BARRED FROM MAINTAINING AN ACTION FOR BAD FAITH AND FOR NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS AGAINST HER EMPLOYER BECAUSE THE UTAH WORKERS' COMPENSATION ACT PROVIDES THE EXCLUSIVE REMEDY FOR PLAINTIFF.

A. The Workers' Compensation Act Precludes Civil Liability Against Defendants.

If plaintiff has a claim or complaint against defendants, it is a workers' compensation claim handled by the Industrial Commission, which has exclusive jurisdiction over such claims. Plaintiff brings her tort actions as an attempt to circumvent the repercussions of her failure to exhaust her administrative remedies. Recognizing a cause of action in favor of employees against an insurer for the manner in which a claim is adjusted is inconsistent with the workers' compensation scheme and can do substantial harm to the system as a whole. *Savage v. Educators Ins. Co.*, 908 P.2d 862, 867 (Utah 1995).

Utah law is clear. The right to recover workers' compensation is the exclusive remedy against an employer or its agents. Utah Code Ann. §35-1-60 provides:

The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the

exclusive remedy against any officer, agent, or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to the employee . . . on account of any accident or injury or death, in any way contracted, sustained, aggravated, or incurred by the employee in the course of or because of or arising out of his employment, and no action at law may be maintained against an employer or against an officer, agent, or employee of the employer based upon any accident, injury, or death of an employee. . .

Utah Code Ann. §35-1-60 (1953) (amended 1995) (*emphasis added*). An injured employee's recovery under workers' compensation laws is in lieu of ordinary tort remedies. *Lantz v. Nat'l. Semi-Conductor Corp.*, 775 P.2d 935 (Utah App. 1989). This immunity from tort liability extends to the employer's insurer. *See e.g., Everfield v. State Compensation Ins. Fund*, 115 Ca. App.3d 15, 171 Cal. Rptr. 164, 165 (1981) (allegations of consistently delayed payments resulting in emotional suffering were not sufficient for action against the Fund); *Sullivan v. Liberty Mutual Ins. Co* , 367 So.2d 658 (Fla. App. 1979) *cert. denied*, 378 So.2d 350 (Fla. 1979) (court found injuries arising from lack of medical treatment were incidental to original compensable injury; workers' compensation is sole remedy available). The Utah Supreme Court in *Savage* quoted the Florida Court of Appeals with approval:

[B]eyond the legalistic objection to appellant's position, we must point out that if delay in medical service attributable to a carrier could give rise to independent third-party court actions, the system of workmen's compensation could be subjected to a process of partial disintegration. And the practical operation of the plan, minor delays in getting medical service, such as for a few days or even a few hours, caused by a carrier, could

become the basis of independent suits, and these could be many and manifold. The uniform and exclusive application of the law would become honeycombed with independent and conflicting rulings of the courts. The objective of the legislature and the whole pattern of workmen's compensation could thereby be partially nullified.

Savage, 908 P.2d at 867, quoting *Sullivan v. Liberty Mut. Ins. Co.*, *supra*, 367 So.2d at 660-61 (quoting *Noe v. Traveler's Ins. Co.*, 172 Cal. App. 2d 731, 342 P.2d 976, 979, 980 (D.Ct. App. 1959)). Plaintiff's claims which arise from the alleged delay in payments of plaintiff's medical providers are subject to the exclusive remedy provision as explicitly provided in the Utah workers' compensation statutes.

Defendants, in accord with Utah Code Ann. §35-1-46, provide the requisite workers' compensation by being self-insured. Defendants could have chosen to be insured through the Workers' Compensation Fund or through authorized private insurance. Defendants chose to comply with the law and protect their employees through self-insurance. There is no rational reason to expose self-insured employers to more claims than employers who are either privately insured, who are insured through the Workers' Compensation Fund, or who are self-insured but have their claims handled by an administrator (as was the case in *Savage*).

B. Utah Workers' Compensation Statutes Provide Plaintiff With Protection From Liability for Medical Bills.

Plaintiff alleges that defendants failed to pay medical bills knowing that plaintiff "would receive continued demands for payment of the bills. . . and . . . would suffer emotional distress and would be harmed as to her credit reputation" in support of her claim for negligent

infliction of emotional distress. Utah Workers' Compensation law is clear as to the liability for such medical expenses. Section 35-1-45 provides:

Each employee . . . who is injured . . . by accident arising out of and in the course of his employment, . . . shall be paid compensation for loss sustained on account of the injury . . . and such amount for medical, nurse, and hospital services The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

Utah Code Ann. §35-1-45 (1995) (*emphasis added*). Further, the Utah Administrative Code, Industrial Commission Rules, R568-2-5(E) specifically states that "[e]mployees cannot be billed for treatment of their industrial injuries or occupational diseases." Utah Admin. R.568-2-5(E).

Plaintiff suffered no injury to her credit reputation. Her only basis for that allegation was being informed that she had a "blip" on her credit report. The plaintiff never actually saw her credit report and, moreover, was not denied credit on any occasion. (Deposition of plaintiff, pp 21-23; R. at 209-211). Further, the plaintiff was aware that she was not responsible to pay any medical provider:

Q. (by defendants' attorney):

So you understood that was their [Western Region Claims Office's] responsibility to pay that as part of the Worker's Compensation process. Correct?

A. (by plaintiff):

Yes, I did understand that.

(Deposition of Plaintiff, p. 63; R. at 214.)

Utah Workers' Compensation law explicitly provides protection for an employee from any liability for payment of medical services. A medical provider could not bring an action against an employee seeking collection. The plaintiff, at bar, knew and understood that the bills she received were to be paid through the workers' compensation process and that she was not liable for unpaid bills.

C. The Industrial Commission Has Continuing Jurisdiction With Appropriate Remedies Available.

Plaintiff was injured in January of 1991. Plaintiff obtained an Order from the Industrial Commission in January of 1994. Plaintiff filed her action in Third District Court in March of 1994. Utah Code Ann. §35-1-78 provides that "[t]he powers and jurisdiction of the commission over each case shall be continuing. The commission, after notice and hearing, may from time to time modify or change its former findings and orders. . . ." Utah Code Ann. §35-1-78 (1994). This section also provides that an interest rate be added to awards:

(2) Awards made by the Industrial Commission shall include interest at the rate of 8% per annum from the date when each benefit payment would have otherwise become due and payable.

Utah Code Ann. §35-1-78(2) (1990) (amended 1995). Thus, had she returned to the appropriate forum, plaintiff could have sought such interest penalty as may have been appropriate. Section 35-1-12 provides that no employer shall "fail to obey and follow orders of the Commission" Utah Code Ann. §35-1-12 (1953) (amended 1995). In fact, if plaintiff feels that she needs another remedy, she could make an argument (before the Industrial Commission) for the penalty provided in that section:

. . . [w]here injury is caused by the willful failure of an employer to comply with the law or any lawful order of the industrial commission, compensation as provided for in this title shall be increased fifteen percent, except in case of injury resulting in death.

Utah Code Ann. §35-1-12 (1953) (amended 1995).

Rule 568-1-14(C) of the Utah Administrative Code provides yet another remedy for plaintiff's claims: "Failure to make payment without good cause shall result in referral of insurance companies to the Insurance Department for appropriate disciplinary action and may be cause for revocation of the Certificate of Self-Insurance from self-insured employers." Utah Administrative Code R. 568-1-14(C). Further, Utah Code Annotated § 35-1-46(2) authorizes the Industrial Commission to enjoin any employer from further operation of business where the employer has failed to provide for payment of benefits.

Plaintiff ignored the continuing jurisdiction of the appropriate forum and filed this action despite the remedies available. Plaintiff's recourse for alleged non-payment or delayed payment would be to return to the Industrial Commission to enforce the orders arising therefrom. This simple solution could have been adopted at any time, including the first moment that plaintiff allegedly experienced problems getting bills paid. That simple solution would have ended this matter efficiently and effectively. That is the purpose of an administrative remedy. If plaintiff has her way, the district courts will find themselves performing the duties assigned exclusively to the industrial commission, creating an inefficient and ineffective procedure in disregard of the statutory delegation of powers.

POINT II

PLAINTIFF CANNOT MAINTAIN A BAD FAITH CLAIM AGAINST THE DEFENDANTS BECAUSE THERE IS NO PRIVACY OF CONTRACT.

A third-party claimant, such as plaintiff, cannot maintain a cause of action against a party who is self-insured for workers' compensation purposes because she lacks privity of contract. *Savage v. Educators Ins. Co.*, 908 P.2d 862 (Utah 1995). *Savage* follows firmly established Utah law which holds that privity of contract must exist before a "bad faith" action can be brought. Utah law recognizes only "first-party" bad faith actions. *E.g., Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 958 (Utah App. 1989).

In *Savage*, the plaintiff, Savage, was employed by the Jordan School District ("District") as a bus driver. As in the present case, the District was self-insured for workers' compensation purposes.¹ During her employment, Savage was involved in an automobile accident, the result of which caused Savage serious injuries. Savage filed a worker's compensation claim against the District with the Industrial Commission of Utah. A settlement was reached between Savage and the District under which the District agreed to pay Savage's medical expenses. Savage subsequently filed a Complaint and later an Amended Complaint in District Court against the District's insurance administrator, alleging it failed to satisfy its obligation under the settlement agreement. Savage asserted similar causes of action as those alleged in the present case: bad faith and intentional infliction of emotional distress. In addition, Savage asserted causes of action for breach of good faith and fair dealing, breach of contract, breach of

¹ The District's workers' compensation insurance was administered by Educators Insurance Company. The Court specifically noted that such an arrangement had no effect on the Court's ruling. At bar, plaintiff was an employee of Payless ShoeSource, Inc.; her claims were administered by The May Department Stores Company, Western Regional Claims Office.

fiduciary relationship and interference with a protected property interest. Pursuant to defendant's Motion for Summary Judgment, the trial court dismissed Savage's claim on the basis that Savage lacked privity of contract with the administrator of the District's insurance.

The Utah Court of Appeals and subsequently the Utah Supreme Court held that Savage could not bring a cause of action for breach of the covenants of good faith and fair dealing as such an action may be brought only by a party to the insurance contract. *Savage*, 908 P.2d 862, 865 (Utah 1995). Both courts made reference to the line of cases from which this conclusion "naturally" flows: *Ammerman v Farmers Ins. Exch.*, 430 P.2d 576 (Utah 1967), *Beck v. Farmers Ins. Exch.*, 701 P.2d 795 (Utah 1985); and *Pixton v. State Farm Mut. Auto. Ins. Co.*, 809 P.2d 746 (Utah App. 1991). The court summarized the evolution:

In *Ammerman*, we recognize a tort cause of action for breach of an insurer's obligation to bargain properly in the context of a third-party insurance relationship. We concluded that insureds have a right to expect their insurers to represent the insured's interest by acting reasonably and in good faith in settling third-party claims against insureds and that under traditional agency principles, the insurer's contractually created duty to its insured was a fiduciary one, a breach of which sounded in tort. . .

. . . .

Although in *Ammerman* we adopted a tort remedy in the context of the third-party insurance contract because of the fiduciary nature of the relationships created by the contract, we have specifically rejected the tort-based approach in the first-party context where the relationship created by the insurance contract is not a fiduciary one. In *Beck*, we discuss the nature of the duty of good faith and fair dealing that exists in a first-party insurance contract. We noted that the factors which had led us to adopt a tort-based remedy in the third-party context were absent in the first-party insurance contracts.

. . . .

Taken together, *Beck* and *Ammerman* demonstrate that the duty of good faith and fair dealing is a contractual covenant, one that arises solely as an incident to contractual obligations owed by an insurer to its insured.

Savage, 908 P.2d at 865-66. The court unequivocally concluded that because *Savage* had no contractual relationship with Educators Insurance Company, she had no cause of action against it for breach of the covenant of good faith and fair dealing. The court further noted that that conclusion was consistent with the commentators and the great majority of courts in other jurisdictions that have addressed this issue.² *Id.* at 866

² The *Pixton* decision included reference to *OK Lumber Co., Inc. v. Providence Washington Ins. Co.*, 759 P.2d 523, 525-26 (Alaska 1988) (refusing to extend duty of good faith and fair dealing owed by insurer to third-party claimant as the common law duty only benefits the insured, stating "[a]n insurer could hardly have fiduciary relationship both with the insured and a claimant because the interests of the two are often conflicting"); *Scroggins v. Allstate Ins. Co.*, 74 Ill. App.3d 1027, 30 Ill.Dec. 682, 685, 393 N.E.2d 718, 721 (1979) (in the absence of statutory or contractual authority, third-party claimant cannot sue insurer for breach of duty of good faith and fair dealing as "that duty is one which the insurer owes to its insured, not to third parties"); *Linscott v. State Farm Mutual Auto Ins. Co.*, 368 A.2d 1161, 1163 (Me. 1977) ("'duty of good faith and fair dealing' in the handling of claims runs only to an insurance company's insured"); *Bean v. Allstate Ins. Co.*, 285 Md. 572, 403 A.2d 793 (Ct. App. 1979) ("insurer owes no duty to a claimant to settle a claim . . . obligation to deal with settlement offers in good faith runs only to insured") (citing *Ammerman [v. Farmers Ins. Exchange]*, 19 Utah 2d 251, 430 P.2d 576, 578-79 (1967)); *Chavez v. Chenoweth*, 89 N.M. 423, 553 P.2d 703 (1976) (duty to deal in good faith applies between insurer and insured); *Niemeyer v. United States Fidelity and Guar. Co.*, 789 P.2d 1318 (Okla. 1990) (in the absence of statutory or contractual relationship, third-party claimants cannot bring bad faith action against insurer as they are strangers to the contract); *Auclair v. Nationwide Mut. Ins. Co.*, 505 A.2d 431 (R.I. 1986) (no duty or fiduciary obligation running from insurer to third-party claimant); *Kranzush v. Badger State Mut. Casualty Co.*, 103 Wis.2d 56, 307 N.W. 2d 256 (1981) (insurer's duty of good faith arises from contract and runs to insured and cannot be implied in favor of third-party claimant as claimant is stranger to contract and fiduciary relationship it represents). See *Pixton*, 809 P.2d at 750. See also *Broadwater v. Old Republic Surety*, 854 P.2d 527, 536 (Utah 1993); *St. Joseph's Hosp. and Medical Center v. Reserve Life Ins. Co.*, 154 Ariz. 303, 742 P.2d 804, 807 (Ct. App. 1986), vacated in part on other grounds, 154 Ariz. 307, 742 P.2d 808 (1987); *Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 830 P.2d 1335, 1335-35 (1992); *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 780 P.2d 193, 197 (1989); *Roach v. Atlas Life Ins. Co.*, 769 P.2d 158, 161 (Okla. 1989); *Allstate Ins. Co. v. Amick*, 680 P.2d 362, 365 (Okla. 1984); *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 307 N.W. 2d 256, 265 (1981).

The holding in *Savage* is directly applicable to the present case. Defendants are self-insured. Plaintiff has no privity of contract with defendants in a workers' compensation insured-insurer context.³ Plaintiff did not purchase the insurance as would be the case in a first-party contractual relationship. Plaintiff's status as an employee is that of a claimant, exactly the same as in an automobile accident, where Party B makes a claim against Party A's insurance company. According to *Savage* and the numerous other Utah cases, plaintiff is a third-party claimant. As a result, plaintiff's cause of action against defendants for bad faith and her claim for punitive damages was correctly dismissed as a matter of law.

POINT III

PLAINTIFF CANNOT RECOVER UNDER A NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS CAUSE OF ACTION.

Plaintiff alleges that she has suffered emotional distress as a result of defendants' negligence in allegedly failing to pay plaintiff's medical bills timely which defendants knew or should have known would result in plaintiff's emotional distress and harm to her credit reputation. However, Utah law does not allow for recovery in such a case. At bar, plaintiff's claim is the negligent infliction of emotional distress claim without any bodily harm or exposure to any threatened bodily harm.

Utah law is consistent with the analysis of the Restatement (Second) of Torts §313 which limits recovery to those plaintiffs in a "zone of danger," who are actually placed in physical danger, fearing for their own safety. See *Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013, 1016 (Utah 1995); *Boucher v. Dixie Medical Center*, 850 P.2d 1179, 1182 (Utah 1992). In *Lawson*, *Boucher*, and *Hansen v. Sea Ray Boats, Inc.*, 830 P.2d 236, 239 (Utah 1992), the plaintiffs' claims for NIED were all dismissed because

³On page 20 of plaintiff's Brief of Appellant, in her discussion of privity of contract, plaintiff asserts, "Appellee admits below in their statement of facts in their Memorandum in Support of Partial Summary Judgment [sic]." This fragment inadvertently creates an inference that defendants admit that plaintiff is in privity of contract with defendants. This apparent typographical error by the plaintiff should not be misconstrued to indicate defendants admit any privity of contract between the plaintiff and the defendants on the issues before this Court.

plaintiffs were not in a zone of danger. Utah law allows a NIED claim only to “those placed in actual physical peril.” *Sea Ray Boats*, 830 P.2d at 239; *see also, Lawson*, 901 P.2d at 1016; *Boucher*, 850 P.2d at 1182. At bar, plaintiff was never in a zone of danger and was never threatened with physical injury as a result of defendants’ negligence.

As the comment to the Restatement (Second) §313 clarifies:

a. The rule stated in this Section does not give protection to mental and emotional tranquility in itself. In general, as stated in §436A, there is no liability where the actor's negligent conduct inflicts only emotional distress, without resulting bodily harm or any other invasion of the other's interests. Such emotional distress is important only in so far as its existence involves a risk of bodily harm, and as affecting the damages recoverable if bodily harm is sustained. . . .

Restatement (Second) of Torts, cmt. a (1965).

The Restatement of Torts 2d § 436A provides as follows:

Negligence resulting in emotional disturbance alone.

If the actor’s conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

Restatement of Torts (Second) § 436A (1965).

Plaintiff relies on *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993) for the proposition that emotional distress can be claimed absent a physical injury. However, the plaintiffs in *Mountain Fuel* were in fact exposed to bodily injury by inhaling asbestos. Further, those plaintiffs experienced physical ramifications, including coughing, wheezing, shortness of breath, chest tightness, headaches, and severe eye irritation as a result of their exposure. *Mountain Fuel*, 858 P.2d at 973. Nevertheless, four of the five justices of the Utah Supreme Court have challenged and expressly stated their

disagreement with Justice Durham's opinion in that case, criticizing her opinion's "wide-ranging dictum to the effect that mental illness, in the absence of a physical manifestation, is sufficient to support a claim." *Id.* at 982 (J. Zimmerman's concurring opinion.)

Even if *Hansen v. Mountain Fuel* stood for the proposition that emotional distress can be claimed absent a physical injury under Utah law, plaintiff's alleged anxiety does not rise to the level of severe emotional distress required in *Mountain Fuel*. Justice Durham clarified that a negligent infliction of emotional distress cause of action would be supported by severe emotional distress and that the severity must be such that "a reasonable [person] normal constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Mountain Fuel*, 858 P.2d at 975. In upholding the dismissal of plaintiffs' claims for negligent infliction of emotional distress, the court stated:

. . . Everyone must deal with stress and anxiety in daily life; most of us experience occasional sleeplessness. Transitory sleeplessness and anxiety do not amount to the type of emotional distress with which a reasonable person, normally constituted, would be unable to cope.

Mountain Fuel, 858 P.2d at 975.

Utah law, consistent with the Restatement of Torts, precludes a cause of action for negligent infliction of emotional distress where the plaintiff is without any bodily harm or exposure to any threatened bodily harm. The trial court's dismissal of plaintiff's claim for negligent infliction of emotional distress was correct as a matter of law.

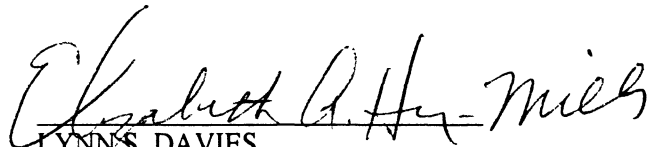
CONCLUSION

The Utah Workers' Compensation Act provides an exclusive remedy and precludes any other civil action against an employer by an employee. A multitude of remedies are available to this plaintiff through the Industrial Commission forum, which is the appropriate and only forum for her claims. Plaintiff has no privity of contract with the defendants and thus cannot maintain a cause of action for bad faith under

the long line of Utah cases addressing this issue. Utah law mandates that a plaintiff be at risk for physical injury in order to maintain a negligent infliction of emotional distress claim. Utah law, consistent with the Restatement of Torts, provides that there is no liability where an actor's conduct inflicts only emotional distress. Even if Utah allowed such a claim for emotional distress without physical injury, the threshold would be "severe emotional distress" and not the "stress" and anxiety in daily life, such as being informed there is a "blip" on one's credit report. Defendants respectfully request that this Court affirm the trial court's granting of defendants' Motions for Summary Judgment and dismiss plaintiff's claims on appeal.

DATED this 15th day of August, 1997.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was hand delivered on this 15th day of August, 1997, to the following:

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