

1988

Michael H. McCaffery v. Terry Raymond Grow : Reply Brief

Utah Court of Appeals

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Darwin C. Hansen; Hansen & Crist; Attorneys for Respondent.

James T. Brown; Harold L. Reiser; Jardine, Linebaugh, Brown & Dunn; Attorneys for Appellant.

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880566

IN THE UTAH COURT OF APPEALS

MICHAEL H. McCAFFERY, as
personal representative for
and on behalf of CHRISTOPHER M.
McCAFFERY, Deceased,

Plaintiff/Appellant,

vs.

TERRY RAYMOND GROW, as personal
representative of RODNEY V.
GROW, Deceased, TERRY RAYMOND
GROW, individually, and STATE
FARM MUTUAL AUTOMOBILE INSUR-
ANCE COMPANY,

Defendants,

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Respondent.

APPELLANT'S REPLY BRIEF

Civil No. 880566-CA
Argument Priority 14(b)

APPEAL FROM CROSS-MOTIONS FOR SUMMARY JUDGMENT
IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH,
HONORABLE JAMES S. SAWAYA PRESIDING

James R. Brown
Harold L. Reiser
JARDINE, LINEBAUGH, BROWN & DUNN
Attorneys for Appellant
370 East South Temple, Suite 400
Salt Lake City, Utah 84111

Darwin C. Hansen
John C. Hansen
HANSEN & CRIST
Attorneys for Respondent
State Farm Mutual Automobile
Insurance Company
110 West Center Street
Bountiful, Utah 84010

FILED

JAN 30 1997

Mary T. Norton
Clerk of the Court

MICHAEL H. McCAFFERY, as)
personal representative for)
and on behalf of CHRISTOPHER M.)
McCAFFERY, Deceased,)

VS.

Respondent.

Civil No. 880566-CA
Argument Priority 14(b)

James R. Brown
Harold L. Reiser
JARDINE, LINEBAUGH, BROWN & DUNN
Attorneys for Appellant
370 East South Temple, Suite 400
Salt Lake City, Utah 84111

Darwin C. Hansen
John C. Hansen
HANSEN & CRIST
Attorneys for Respondent
State Farm Mutual Automobile
Insurance Company
110 West Center Street
Bountiful, Utah 84010

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SUMMARY OF APPELLANT'S REPLY TO RESPONDENT'S BRIEF

The trial court erroneously concluded that a private agreement, State Farm's insurance policy, could nullify State law requiring a motorist to provide PIP benefits to those injured as a result of its insured's negligence. The exclusions in State Farm's policy on which it relies to deny coverage to Appellant are not allowed under Utah Code Ann. § 31A-22-309(2)(a) and, therefore, State Farm must, under Utah law, provide PIP benefits on behalf of its insureds for Appellant's benefits.

Even if State Farm could exclude the payment of PIP benefits to Appellant under its policy, (which it cannot) State Farm is ultimately and legally liable to provide PIP benefits on behalf of its insureds. Therefore, under Utah Code Ann § 31A-22-309(6)(a)(1988), State Farm must reimburse Appellant for his payment of the PIP benefits on behalf of his deceased son for which State Farm's insureds, Rodney and Pat Grow, are legally liable.

As set forth in Farmers Ins. Exchange v. Call, 712 P.2d 231 (Utah 1985), State Farm Mut. Auto. Ins. Co. v. Mastbaum, 748 P.2d 1042 (Utah 1987), the legislative history of the No-Fault Act and the Act itself, the objective of insurance coverage and PIP benefits is to provide minimum benefits to all innocent victims of automobile accidents sustaining personal

injuries without regard to fault and make such benefits available as expeditiously as possible. The only way such objective can lawfully be achieved is to reverse the lower court's summary judgment and enter judgment in Appellant's favor.

REPLY TO RESPONDENT'S STATEMENT OF FACTS

Respondent State Farm attempts to obfuscate the issues before the Court by a lengthy recitation of extraneous and irrelevant facts concerning the events leading to the automobile accident which claimed Christopher McCaffery's ("Chris McCaffery") life.

The relevant, undisputed facts in this case are:

1. On August 27, 1989, Chris McCaffery, Appellant's son, was fatally injured in an automobile accident when the automobile in which he was a passenger impacted a tree at approximately 90 miles an hour. (R. 130, 135, 146, 131, 135.).
2. The driver of the automobile, Rodney Grow, did not own the automobile he was driving and did not have the automobile owner's permission to drive the automobile. (R. 130, 49, 50).
3. At the time of the accident, State Farm insured Rodney Grow and his mother, Pat Grow, the signer of Rodney's driver's license application, for liabilities arising from the use of non-owned automobiles, which coverage included both liability coverage and personal injury protection coverage required by State law. (R. 71).
4. Appellant Michael McCaffery, Chris McCaffery's father, has incurred \$8,819

in special damages, which exceed the amounts provided under the Utah No-Fault Insurance Act. (R. 106).

By its recitation of the events leading to Chris McCaffery's death, State Farm evidently attempts to impute to Chris some fault which would not entitle Chris, or his survivors, to coverage under the No-Fault Act. It would be anomolous, inconsistent and unjust to impute fault to McCaffery under a No-Fault Act. As stated by the Utah Supreme Court in Allstate Ins. Co. v. Ivie, 606 P.2d 1196, 1200 (Utah 1980), "under [Utah's No-Fault Act] first party PIP benefits . . . are paid to an injured person without regard to fault."

The additional facts cited by State Farm are irrelevant to the issue before the Court on appeal. It is undisputed that Chris McCaffery died as a result of Rodney Grow's negligence and that Rodney Grow was not using the automobile with permission. However, Grow and his mother are responsible to provide PIP benefits on behalf of Chris McCaffery in accordance with Utah law.

ARGUMENT

POINT I

McCAFFERY IS ENTITLED TO PIP BENEFITS FROM GROW AND STATE FARM UNDER UTAH LAW

State Farm asserts that Appellant confuses liability and PIP coverage, relying on its own insurance policy to

determine whether State Farm has complied with state law requiring it to provide PIP coverage on behalf of Rodney and Pat Grow for the benefit of Chris McCaffery. State Farm cites Osuala v. Aetna Life and Cas., 608 P.2d 242 (Utah 1980) for the proposition that McCaffery is not entitled to coverage. In Osuala, the plaintiff was the driver of the automobile, not a passenger as in the instant case and had violated the law by not maintaining his own insurance which would have provided PIP benefits to him as the driver of the automobile. As a passenger, McCaffery is not required to maintain any insurance to ride in an automobile. Grow's insurance provides certain minimum, mandatory coverage which includes PIP benefits. Every insurer licensed to issue policies in Utah must write a policy which complies with the required minimums found in Utah Code Ann § 31A-22-302, which provides in part:

Every policy of insurance or combination of policies, purchased to satisfy the owner's or operator's security requirement of § 41-12A-301, **shall also include personal injury protection under § 31A-22-306 though 31A-22-309.**

Id. (emphasis added). In the Utah Supreme Court's most recent analysis and pronunciation concerning PIP benefits, the Court held:

The statutory requirements found in Utah's No-Fault Insurance Act . . . as to minimum benefits must be provided to all persons sustaining personal injuries.

State Farm Mut. Auto. Ins. Co. v. Mastbaum, 748 P.2d 1042-43 (Utah 1987) (emphasis added). Not surprisingly, State Farm would require every person, whether or not owning an automobile, to have insurance as a passenger in another person's automobile. Again, State Farm relies on its insurance policy to nullify specific state statute which allows only certain specific exclusions and cites Protective National Ins. Co. of Omaha v. Padron, 310 So.2d. 432 (Fla. App. 1975), a Florida case, as dispositive on Utah law. However, unlike Padron, Utah statute and case law specifically and unequivocally prohibit the very exclusion on which State Farm and Padron rely to deny PIP benefits to an injured person. Utah Code Ann. § 31A-22-309 designates the exclusions an insurer may attach to a policy providing personal injury protection, § 309 providing in pertinent part:

(2)(a) Any insurer issuing personal injury protection coverage under this part may only exclude from this coverage benefits:

(i) for any injury sustained by the injured while occupying another motor vehicle owned by the insured and not insured under the policy;

(ii) for any injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession the insured motor vehicle;
or

(iii) to any injured person, if the person's conduct contributed to his injury:

(A) by intentionally causing injury to himself; or

(B) while committing a felony.

(Emphasis supplied). Despite State Farm's protest to the contrary, the exclusion on which it relies is simply not allowed under Utah law. The Court need look no further than the plain language of the statute to determine that the exclusion is unlawful and impermissible and that McCaffery is entitled to PIP protection as a matter of law. State Farm cannot exclude itself from statutory requirements merely by waving its policy in an injured person's face.

The discussion of Mastbaum in Appellant's initial brief and the cases cited therein are dispositive as to State Farm's statutory obligation to provide PIP coverage to McCaffery and further clarifies the permissible exclusions an insurer may make under Utah law. Under Utah law, State Farm, as the Grows' insurer, must provide PIP benefits on behalf of Chris McCaffery.

The lower court erroneously granted summary judgment in State Farm's favor because it failed to recognize State Farm had unlawfully excluded Chris McCaffery from the mandatory PIP coverage. Accordingly, the trial court's summary judgment must be reversed and judgment entered in Appellant's favor Appellant awarding the PIP benefits to which he is entitled together with attorneys' fees, costs and interest assessed under Utah Code Ann. § 31A-22-309(5).

POINT II

STATE FARM IS ULTIMATELY LIABLE FOR PAYMENT OF McCaffery's PIP BENEFITS

Although State Farm admits that McCaffery is entitled to PIP benefits under Utah law, State Farm asserts that McCaffery must look to his own insurer for PIP protection citing Osuala, supra, as the leading, and only, Utah case for that proposition. Even if State Farm were correct, which it is not, that McCaffery must first look to his own insurer for PIP protection, a careful reading of Osuala and applicable Utah statute reveals that State Farm would still be ultimately liable for the payment of Appellant's PIP benefits under the Grows' insurance policy.

In Osuala, Plaintiff sought PIP from the insurer of the automobile with which Osuala had collided. The Utah Supreme Court upheld the trial court's summary judgment for defendant on the basis that Osuala had failed to comply with law and have mandatory insurance as a driver of the automobile. In Osuala, the Utah Supreme Court recognized that although "[a]n important aspect of the [No-Fault Insurance] Act is the requirement that the PIP protections for an injured motorist are to be paid by his own insurer, . . . "[t]his is said in awareness that, under Section 31-41-11, [now § 31A-22-309(6)(a)] this responsibility may be ultimately shifted

to a wrongdoer who causes the injury." Id. at 243 and at n.8. (emphasis added). State Farm cannot escape its liability and is ultimately liable for Appellant's PIP protection under Utah Code Ann. § 31A-22-309(6)(a) which provides in relevant part that:

Every policy providing personal injury protection coverage is subject to the following:

- (a) that where the insured under the policy is or would be held legally liable for the personal injuries sustained by any persons to whom benefits required under personal injury protection have been paid by another insurer, including the Workers' Compensation Fund of Utah, the insurer of the person who would be held legally liable shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable

Id. (emphasis added).

As expressly recognized by the Utah Supreme Court in Osuala and as required by § 309(6)(a), the responsibility for the payment of PIP benefits "may be ultimately shifted to the wrongdoer who causes the injury." This is precisely the case here. There is no dispute that State Farm's insured was responsible for Chris McCaffery's fatal injuries and that Appellant's damages exceed those provided under PIP. State Farm must ultimately pay Appellant the PIP benefits to which he is entitled.

There is no absurd statutory requirement that Appellant first recover from his own insurer and then litigate the reimbursement to his insurer. Instead, Appellant brought suit against State Farm under Utah Code Ann. § 31A-22-309(5) demanding that the statutory PIP benefits be paid directly to him by State Farm on behalf of its insureds, Rodney and Pat Grow.

Inasmuch as State Farm admits that McCaffery is entitled to PIP under his own policy and Utah state law, and State Farm is ultimately responsible for such payment under Utah Code Ann. § 31A-22-309(6)(a), there is no perversion or contravention of policy, statute, contract or public policy by requiring State Farm to pay the PIP benefits directly to Appellant under Grows' policy together with interest, costs and attorneys' fees assessed under Utah Code Ann. § 31A-22-309(5).

The lower court erred by not compelling State Farm to comply with its statutory duty and obligation and reimburse Appellant for the PIP benefits to be paid on behalf of his deceased son. The lower court's summary judgment must, therefore, be reversed and judgment granted in Appellant's favor for the benefits to which he is legally entitled and for which State Farm is, under any theory, legally responsible.

POINT III

**McCAFFERY IS ENTITLED TO GENERAL DAMAGES
AND PIP COVERAGE UNDER THE GROW'S POLICY**

Appellant agrees with State Farm that "the only remaining issue is PIP coverage" and that "liability coverage and PIP coverage are two different issues." See Respondent's Brief at 14, 15. However, State Farm mistakenly believes that because Appellant has settled his claim for general damages, he is not entitled to any PIP benefits. The record and rulings of the Utah Supreme Court hold differently. Appellant specifically reserved his claim for PIP benefits against State Farm, the explicit language of the Release of All Claims providing:

The undersigned [appellant] specifically reserves his claims for no-fault insurance benefits, including claims for costs and attorney's fees arising therefrom, if any, against State Farm Mutual Automobile Insurance Company

Of the Release's ten paragraphs, seven cite that all claims are released "except for those claims specifically reserved against Defendant State Farm Mutual Automobile Insurance Company." The Release could not have set forth with more actual specificity that Appellant was reserving his claim for PIP against State Farm. Moreover, the Court's Order of Dismissal recited:

2. Plaintiff's Complaint against Defendant State Farm Insurance Company for no-fault insurance benefits arising out of the no-fault statute of the State of Utah, and

all of State Farm's defenses to such claims are reserved and remain pending in this litigation

See Release, Addendum to Respondent's Brief at 7.

Finally, dispositive of State Farm's fallacious argument is the Utah Supreme Court's ruling in Allstate Ins. Co. v. Ivie, 606 P.2d. 1197 (Utah 1980) wherein the Court held:

The tort-feasor's liability insurer, in fulfilling its duty to respond to the claims of injured party to the limits of its policy, stands in the shoes of its insured and pays on the basis of its insured's personal liability to the tort victim; this personal liability does not include PIP payments. Thus, the tort victim's recovery from the liability insurer cannot be reduced by the PIP payments.

Id. at 1203. (Emphasis added).

McCaffery, as was intended, released the Grow's from their liability for general damages and specifically reserved his claims against State Farm for its wrongful denial of PIP benefits from McCaffery which State Farm is required to pay and for which it is ultimately responsible for under Utah law. State Farm cannot pay two separate, distinct claims with the same dollar. The claim against State Farm for PIP benefits was not settled or released by McCaffery. The issue remains pending in this appeal.

POINT IV

STATE FARM, AS PAT GROW'S INSURER,
IS LIABLE FOR THE PAYMENT OF PIP
BENEFITS TO APPELLANT

State Farm asserts that Pat Grow is absolved from her joint and several liability with her son for Chris McCaffery's

fatal injuries and all damages arising therefrom merely by providing automobile insurance for her son. State Farm misreads the plain language of Utah Code Ann. § 41-2-115(3) and fails to consider the provisions and requirements of Utah Code Ann. § 41-12a-402.

State Farm relies on Utah Code Ann. § 41-2-115(3) which provides:

(3) If a minor deposits, or there is deposited on his behalf, proof of financial responsibility, in respect to the operation of a motor vehicle he owns, or with respect to the operation of any motor vehicle if he does not own one, in form and in amounts as required under Chapter 12a, Title 41, Financial Responsibility of Motor Vehicle Owners and Operators Act, the division may accept the application of the minor when signed by a parent or guardian of the minor. While the proof is maintained, that person is not subject to the liability imposed under Subsection (2).

Id. (emphasis added).

However, Utah Code Ann. § 41-2-115(3) must be read in conjunction with Utah Code Ann. § 41-12a-402 to understand the specific conditions precedent the protection afforded by Section 115(3). Utah Code Ann. § 41-12d-402 reads:

Proof of owner's or operator's security may be furnished by filing with the department the written certificate of any insurer licensed in Utah certifying that there is in effect an insurance policy or combination of policies conforming to Section 31A-22-302 for the benefit of the person required to furnish

proof of owner's or operator's security. This certificate shall be furnished to the department in the form of an SR-22 issued by any insurer licensed in Utah. The certificate shall give each policy number and the effective date of each policy. The effective date of the policy may not be later than the effective date of the certificate. The certificate shall designate by explicit description or by appropriate reference all motor vehicles covered, unless the policy is issued to a person who is not the owner of a motor vehicle.

(Emphasis added). There is absolutely no evidence before this court, and there was none before the lower court, that the Grow's complied with Section 41-12a-402 and "fil[ed] with the department the written certificate of any insurer . . . certifying that there is in effect an insurance policy . . . for the benefit of the person required to furnish proof of owner's or operator's security." No "SR-22" exists as required by Section 402. Pat Grow is vicariously liable for her son's negligence unless Rodney Grow before submitted his application, deposited proof of financial responsibility in respect to the operation of a motor vehicle he owns, or with respect to the operation of any motor vehicle if he does not own one" Rodney Grow never complied with the statute to invoke its protection. Had such a deposit been made by Rodney Grow "with respect to the operation of any vehicle," Chris McCaffery would be covered by Grow's policy and receive PIP protection even though Grow was not driving the automobile because, under Utah Code Ann. § 31A-22-303(1)(b)(ii), the policy must cover any

automobile Rodney Grow drives. Therefore, the automobile involved in the accident claiming Chris McCaffery's life would be a "motor vehicle described in the policy" (i.e. any motor vehicle Grow was driving) under Utah Code Ann. § 31A-22-308, thereby entitling Chris McCaffery to PIP benefits under the same section. However, there is absolutely no evidence before this court or before the lower court that such deposit was ever made by Grow prior to filing his driver's license application.

Under State Farm's argument, Pat Grow is absolved of joint and several liability with her son Rodney merely by his compliance with Utah Code Ann. § 31A-22-302 which mandates minimum automobile insurance coverage. If such were the case, there would be absolutely no need for Utah Code Ann. § 41-2-115(3), its provisions rendered meaningless by mere compliance with § 302 and § 402 would be unnecessary. However, because it is presumed under the rules of statutory construction that each statute has a purpose and significance, State Farm's argument fails. By requiring the deposit of independent financial responsibility in the form of Form SR-22 to be made before the acceptance of a driver's license application, all statutes are harmonized and retain their underlying purpose and legislative significance. Section 41-2-115(3) unequivocally requires the independent deposit to be "in the form and in amounts as required by Chapter 12A, Title 41" viz. Form SR-22. No deposit in compliance with

Section 41-2-115(3) was ever made and, therefore, Pat Grow is jointly and severally liable under § 41-2-115(2) for her son's negligence and any damages caused by such negligence, including the payment of PIP benefits to injured persons.

No matter the theory, defense or argument, it is undisputed Rodney Grow caused Chris McCaffery's fatal injuries. Therefore, State Farm, Grow's insurer, is ultimately liable for the payment of PIP benefits to the person paying such benefits, Appellant Michael McCaffery.

CONCLUSION

In Osuala v. Aetna Life and Cas., supra, the Utah Supreme Court outlined rules of statutory construction and enunciated public policy which are dispositive to the specific issue before this court on appeal. The court held:

There are some cardinal rules of statutory construction to be considered in relation to this controversy. If there is doubt or uncertainty as to the meaning or application of the provisions of an act, it is appropriate to analyze the act in its entirety, in the light of its objective, and to harmonize its provisions in accordance with the legislative intent and purpose. A further basic rule to be applied in connection therewith is that specific provisions prevail over more general expressions.

Id. at 243 (footnotes omitted). Utah Code Ann. § 31-A-22-309 only allow certain specific exclusions under any insurance policy providing PIP benefits. The exclusion on which State

Farm relies to deny PIP benefits to Appellant is not found in those specific exclusions. Because the specific exclusions prevail over any other general exclusions or statutory reference pertaining to PIP benefits, State Farm must provide the PIP benefits to Appellant. Furthermore, consistent with the guidelines outlined in Osuala to "analyze the [No-Fault Insurance] act in its entirety," in light of its objective and in order to harmonize its provisions in accordance with the legislative intent and purpose of the Act, regarding the No-Fault Insurance Act, the Utah Supreme Court found in Osuala that:

The stated purposes of the No-Fault Insurance Act are to effectuate savings in the ever-increasing costs of automobile insurance, and to minimize the difficulties and hardships that often result from delays in the determination of fault, by providing for expeditious payment to injured persons of certain basic expenses and loss of income (referred to as PIP's) without regard to fault.

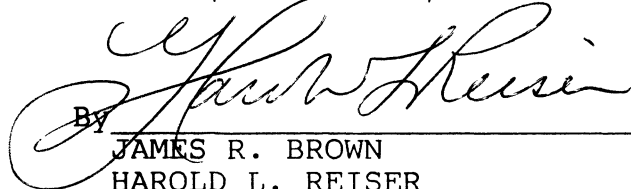
Id. (footnotes omitted, emphasis added). In order "to minimize the difficulties and hardship" resulting to Appellant by his payment of the medical and funeral expenses on behalf of his son, to compensate him for his son's untimely and tragic death, and to provide the most expeditious method of payment directly to him, judgment must be entered against State Farm for the PIP benefits which it is legally and contractually obligated to pay on behalf of its insureds, Rodney and Pat Grow.

Instead, State Farm has chosen to hide behind its ambiguous and unlawful insurance policy to deny Appellant the PIP benefits he paid on behalf of his son which State Farm admits he is entitled to and for which State Farm, under statute, is ultimately liable to pay under Utah Code Ann. § 31A-33-309(6)(d).

The lower court's summary judgment must be reversed and judgment entered in Appellant's favor for \$7,500 together with interest, costs and attorneys' fees assessed under Utah Code Ann. § 31A-22-309(5).

RESPECTFULLY SUBMITTED this 30th day of January, 1989.

JARDINE, LINEBAUGH, BROWN & DUNN

By 

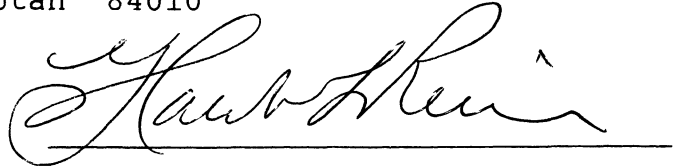
JAMES R. BROWN
HAROLD L. REISER
Attorneys for Appellant

HLR-P796

MAILING CERTIFICATE

I hereby certify that four genuine copies of the foregoing Appellant's Reply Brief were deposited in the United States mail, first class, postage prepaid, on this 30th day of January, 1989, addressed to:

Darwin C. Hansen
John C. Hansen
HANSEN & CRIST
110 West Center Street
Bountiful, Utah 84010

A handwritten signature in cursive script, appearing to read "Darwin C. Hansen", is written over a horizontal line.