1980

Clarice Dupuis v. Edwin Cyrill Nielson : Appellant'S Reply Brief

Utah Supreme Court

JAMES F. Hawks; Attorney for Appellant Frank N. Karras; Attorney for Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

CLARICE DUPUIS,

Plaintiff-Appellant and Cross-Respondent,

vs.

EDWIN CYRILL NIELSON,

Defendant-Respondent and Cross-Appellant.

Case No. 16865

APPELLANT'S REPLY BRIEF

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APPELLANT'S REBUTTAL TO RESPONDENT'S STATEMENT OF FACTS

In appellant's Statement of Facts, she cited the trial transcript for each factual statement she advanced.

Respondent's Statement of Facts does not contain a single cititation to the record, making it most difficult for appellant to respond.

> "Rule 75(p)(2). Briefs on Appeal. Contents. The appellant's brief shall contain in order: (2)(d) a concise statement of the material facts of the case citing the pages of the record supporting such statement; ... ."

> "If the respondent agrees with the Statement of Facts set forth in appellant's brief, he shall so indicate. If he controverts it, he shall state wherein such statement is inconsistent with the facts and shall make a statement of the facts as he finds them, giving reference to the pages of the record supporting his statement and controverting appellant's statement."

As appellant has complied with Rule 75(p)(2), and respondent has chosen not to, appellant submits that the Statement of Facts submitted by her in her original brief in this appeal should be taken as uncontroverted.

POINT I.

RESPONDENT IS ATTEMPTING TO CLAIM AS A SET OFF DAMAGES WHICH WERE NEVER CLAIMED NOR AWARDED AT TRIAL.

Respondent maintains he should be subrogated to PIP received by plaintiff due to "loss of services." That is, the statutory allowance for household help claimed by an injured party pursuant to 31-41-6(b)(ii), Utah Code Annotated. Such loss of services were not plead, claimed, nor awarded. At trial, appellant had extensive testimony as to her suffering relating to general damages, but did not allege that it was necessary for her to go out-of-pocket to pay for household help.

The problem is that the statute allows $12.00 per day for household expense while a PIP claimant is disabled, regardless of whether actual expense is incurred or proved. This is a humanitarian provision of the statute, recognizing that within a family extra allowance money to help an injured parent is not the kind of expense that would be receipted.

Such a party, during trial, would look ridiculous at best with receipts from laundromat and children.

Contrasted to the statute, special damages at trial must be specifically proven. The kind of expense covered by the

statute is thus not reimbursable by a jury verdict.

The prevailing plaintiff in a personal injury action should not be required to reimburse for "loss of Services" involved in PIP, as there is no award for that specific claim from which reimbursement can be made. The jury award covers other losses but not the one of loss of services.

Appellant is not responsible for payments made by others in arbitration with appellant's PIP carrier to which the appellant was not a party.

POINT II.

APPELLANT HAS PAID FOR HER RIGHT TO RECEIVE BENEFITS FROM HER PIP CARRIER AND SHOULD NOT HAVE TO PAY HER JURY VERDICT OVER TO RESPONDENT'S INSURER TO REIMBURSE FOR THEM.

Appellant has paid premiums to her insurance company under the no-fault provisions of the Utah state law. She was involved in an accident. She had a right to receive PIP benefits from her carrier. She received benefits for medical expense and loss of wages. Respondent's insurance company has the right to arbitrate with appellant's insurance company. Appellant was not present at that arbitration. Defendant should not be allowed to bind plaintiff to bad judgments, if any, of respondent's insurance company during arbitration.

Respondent should not be allowed to thwart appellant's claim to her contractual rights under PIP payments for fear of

subrogation. The issue has been recently decided in Allstate Insurance Company v. Ivie, Utah (15983, decided February 7, 1980) and reiterated in Allstate Insurance Company v. Richard Bruce Anderson (16411, decided March 3, 1980).

CONCLUSION

In regard to the merits of Appellant's appeal, respondent should not be rewarded for breach of the rules of appeal by a favorable decision.

In regard to the counterappeal, the issue has recently been decided favorable to appellant in applicable decisions.

August 20, 1980

Respectfully submitted,

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MAILING CERTIFICATE

I certify I mailed two copies of the foregoing to Frank N. Karras, attorney for Defendant-Respondent, and Cross-Appellant, 321 South 6th East, Salt Lake City, Utah 84102, August 20, 1980.

Hazel Sykes