

1989

Kim J. Tanner v. The Phoenix Insurance Company : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO.

890521-CA

IN THE UTAH COURT OF APPEALS

KIM J. TANNER,)	APPELLANT'S REPLY
)	TO RESPONDENT'S BRIEF
Plaintiff and Appellant,)	
)	Court of Appeals
vs.)	No. 890521-CA
)	
THE PHOENIX INSURANCE COMPANY,)	
)	Priority No. 14b
Defendant and Respondent.)	

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Appellant Kim J. Tanner submits the following Reply to Respondent's Brief pursuant to the Rules of the Utah Court of Appeals:

POINT I.

RESPONDENT HAS NEITHER ACKNOWLEDGED
NOR RESOLVED THE STATUTE'S AMBIGUITY.

Respondent Phoenix does not acknowledge the ambiguity in U.C.A. §31A-22-307(1)(b)(ii). The statute refers to "\$20 per day" but does not state whether "day" means "day of disability" or "day in which services are received." It does not clarify matters to simply assert:

The literal reading of this section is that a \$20 per day limit is placed on services actually rendered or reasonably incurred that day. (Brief of Respondent, p. 6.)

Plaintiff has acknowledged the inherent ambiguity in the statutory language. In arguing for the "day of disability" interpretation, she has shown that her position is supported by

prior legislation, construction rules requiring liberal and equitable interpretation, logical consistency with related provisions, and the only court case squarely on point which counsel have discovered.

POINT II.

THE QUESTIONS OF FAMILY SERVICES AND RESTAURANT MEALS SHOULD BE RESOLVED.

In spite of the defenses set forth in its Answer (Record pp. 8-9), respondent Phoenix contends that "issues concerning allowance for services by family members and restaurant meals are moot and not properly on appeal." (Brief of Respondent, p. 5.)

The present appeal arises out of an action for declaratory judgment authorized by U.C.A. 31A-2-307. Such an action requires only that the petitioner have a substantial interest in the matter being interpreted. Phoenix's interest is undeniable.

Plaintiff Tanner has opposed Phoenix's interpretation in the trial court (Kim Tanner's Motion for Summary Judgment, Record pp. 10-11; Brief in Support of Kim Tanner's Motion for Summary Judgment, Record pp. 16, 20-21.) Her Motion for Summary Judgment determining these issues against Phoenix was denied. The issues are properly before this Court on appeal.

POINT III.

NEITHER JAMISON NOR THE REVOKED
STATUTORY INTENT LANGUAGE IS IN POINT.

Respondent has sought to support its position by reference to Jamison v. Utah Home Fire Insurance Company, 559 P.2d 958, 960 (Utah, 1977), and former U.C.A. §31-41-2.

Jamison dealt with issues quite different than those presented here. It was decided under the original version of the No-Fault Household Services statute which provided \$12 per day whether or not expenses were actually incurred. In Jamison, \$12 per day was sought for the lost services of an injured boy. The court balked and essentially determined that the family could not have reasonably incurred any expenses to replace the boy's services. Since no reasonable expenses were possible, the \$12 per day was not payable.

The Court's concerns in Jamison were addressed by the Legislature in Laws 1979 Chapter 1190, Section 1. The No-Fault Household Services statute was therein amended to provide benefits only for "services actually rendered or expenses reasonably incurred for services that, but for the injury, the injured person would have performed for his household." This requirement of actual expenses or services makes Jamison moot.

Phoenix cites Jamison for a legislative objective "to effectuate . . . savings in the rising costs of automobile accident insurance." (Respondent's Brief, pp. 7-9.) This

language comes from U.C.A. §31-41-2 which was repealed in Laws 1985 and not re-enacted. It is not an objective of the present Insurance Code, the purposes of which are set out in U.C.A. §31A-1-102.

Phoenix asserts that "Plaintiff here seeks to recover payments automatically" (Respondent's Brief, p. 9) with the purpose of drawing an analogy to Jamison. This is very inaccurate. Under plaintiff's interpretation, no claimant would receive more than the value of services actually received or expenses reasonably incurred.

POINT IV.

ADMINISTRATION IS NOT COMPLICATED BY APPELLANT'S INTERPRETATION.

Phoenix asserts that "Plaintiff's interpretation is cumbersome, leads to uncertainty, delay, and increased expense and cost." (Respondent's Brief, p. 14.) This assertion is based upon two basic premises: 1) a carrier might overpay claims by anticipating a longer period of disability than actually occurs, and 2) a \$20 per day of services limit speeds processing by relieving the carrier from the burden of scrutinizing each claim. Neither assertion should be persuasive.

A carrier can avoid overpayment by the simple expedient of never paying more in the aggregate than \$20 times elapsed days of disability. Claims would first be approved as to actuality

and reasonableness. Elapsed days of disability would then be calculated. Approved claims would be paid up to an aggregate amount of \$20 per day of disability. This is not a difficult administrative task and can be updated monthly.

Phoenix argues that the legislature must have intended "\$20 per day of services" because this minimizes the insurer's burden of verification. To begin with, such an intention is not supported by the statute or its history. More interestingly, the argument points out precisely why Phoenix's position is not liberal or equitable.

The only reason "\$20 per day of services" would reduce an insurer's burden of verification is because it consistently undercompensates insureds. Suppose an injured housewife has a housekeeper come once a week for six hours at \$10 per hour, not recognizing the pit allegedly dug by her legislature. The insurer requires name, date, hours, and pay rate then grants only \$20, secure in the knowledge that if its insured claims six hours there were probably at least two hours actually worked. This is not equity. This is not a liberal remedy for the injured. This is simply a ploy to reduce expenditures.

POINT V.

GULLA IS PRECISELY ON POINT.

Phoenix distinguishes Gulla v. Allstate Insurance Co., 180 N.J. Super. 413, 434 A.2d 1158 (1981) on the grounds that the

New Jersey statute does not permit compensation for gratuitous services received as opposed to expenses incurred. This difference allegedly increases the burden of insurers to verify claims. A limit of \$20 per day of services supposedly reduces this burden upon the insurer, if not the insured.

The distinction lacks a true difference. All that is required to convert a gratuitous service to an expense is a request for payment. What the party rendering service does with the compensation is up to that party. He or she may simply assign the compensation to the injured person or choose to never collect. An insurer's verification concerns are not substantially increased by allowing compensation for gratuitous services.

Gulla represents the only case found by counsel in which the exact issue presented to this Court has been ruled upon. The reasoning behind the New Jersey decision is sound. A liberal, remedial interpretation of a statute strikingly similar to Utah's No-Fault Household Services Benefit required rejection of "\$20 per day of services."

CONCLUSION

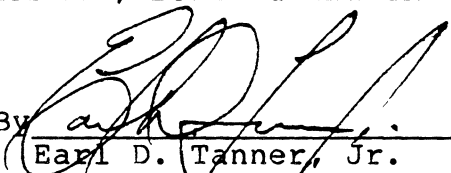
The No-Fault Household Services Benefit is undeniably ambiguous on the issue presented to this Court. It is only by reference to statutory history, rules of construction, and case law that a proper interpretation can be made.

That ambiguity is resolved consistently by these tools. The history of the statute shows that days of disability was the original criteria for compensation but was later restricted to actual expenses and services. Liberal, equitable, and internally consistent interpretation points again to compensation based upon days of disability but limited to actual expenses and services. Case law confirms the analysis a third time.

Appellant respectfully urges the Court to resolve the ambiguity by ruling that this allowance is based upon days of disability, not days of service.

DATED this 23rd day of January, 1990.

TANNER, BOWEN & TANNER

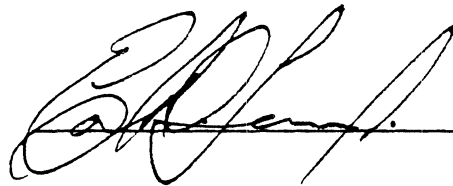
By 

(Earl D. Tanner, Jr.)
Attorneys for Plaintiff and
Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January, 1990, four (4) true and correct copies of the foregoing APPELLANT'S REPLY TO RESPONDENT'S BRIEF were mailed, postage prepaid, to the following:

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