

1988

Vickie D. Crowther v. Nationwide Mutual Insurance Company : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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DOCKET NO.

88-0242-CA

VICKIE D. CROWTHER,

Plaintiff and
Appellant,

vs.

NATIONWIDE MUTUAL INSURANCE
COMPANY,

Defendant and
Respondant.

No. 860433

Category No. 13b

88-0242-CA

APPELLANT' REPLY BRIEF

Appeal from Order Denying Plaintiff's Motion for Summary
Judgment and Granting Defendant's Motion for Summary Judgment
of the Third Judicial District Court of Salt Lake County,
The Hon. Homer F. Wilkinson, Judge Presiding

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ARGUMENT

A.

NATIONWIDE'S "OTHER INSURANCE" CLAUSE IS CONTRARY TO
UTAH CODE ANN. § 31-41-10

At Point II of Respondent Nationwide's Brief, beginning at page 8, Nationwide argues that its "Other Insurance" clause is valid "unless contrary to statute or public policy". Appellant respectfully submits that the Other Insurance clause is in fact contrary to U.C.A. § 31-41-10, which was in effect at the time of the accident giving rise to appellant's claim. As was argued in Appellant's Opening Brief, § 31-41-10 sets forth specifically the only circumstances under which an insurer may exclude its insured from receiving personal injury protection benefits. Farmers Ins. Exchange v. Call, Utah, 712 P.2d 231 (1985).

Nationwide's characterization of its Other Insurance clause as "a limitation on the benefits available" (Respondent's Brief, p. 9) rather than an exclusion is an attempt to exalt form over substance. If the legislature wanted to permit insurers to exclude coverage to insureds who had received some, but less than complete, compensation for their medical bills from another insurance carrier, it could have easily added another subdivision to § 31-41-10. It is significant to note that upon amendment of the Insurance Code in 1986, the legislature specifically sanctioned prorating of liability coverage [U.C.A. § 31A-22-303(2)(a)] and specifically prohibited stacking of uninsured motorist coverage [U.C.A. § 31A-22-305(6)] but left the language of § 31-41-10 intact at § 31A-22-309(2).

B.
NATIONWIDE'S RELIANCE ON MARTIN V. CHRISTENSEN, AN UNINSURED
MOTORIST CASE, IS NOT PERSUASIVE

Nationwide argues that because, even prior to the enactment of the Utah Automobile No-Fault Insurance Act, this court upheld the validity of an "other insurance" clause in a case involving an insured who wished to stack uninsured motorist benefits [Martin v. Christensen, 22 Utah 2d 415, 454 P.2d 294 (1969)], it should do likewise in the instant case involving an insured who wishes to stack PIP benefits. Martin involved an attempt by a driver to stack uninsured motorist benefits from two policies issued by the same insurer on the same vehicle. The policy provision which the court considered stated, "With respect to any occurrence, accident or loss to which this and any other insurance policy or policies issued to the insured by the company also apply, no payment shall be made hereunder which . . . would result in a total payment . . . in excess of the highest applicable limit of liability under any one such policy." This court held that "there is nothing in the [uninsured motorist] statute which would prevent an insurer, in issuing a second policy, from limiting its coverage to the statutory requirement. At page 13 of her Opening Brief, appellant pointed out that one of the three categories of cases where courts have prohibited "stacking" is where "an insured tried to make a claim on multiple vehicles insured under one policy or by a single insurer". Martin is such a case.

Closer to the point is Thamert v. Continental Cas. Co., Utah, 621 P.2d 706 (1980), also an uninsured motorist coverage

case, where the Court held void a policy provision providing for a set off from uninsured motorist benefits for any amounts received pursuant to workmen's compensation laws. This court held that any insurance policy attempt to reduce the amounts payable below that specified in the uninsured motorist statute would be contrary to the statute. Similarly, in the instant case, despite the language of U.C.A. § 31-41-7 providing for possible "excess" coverage and priority of payment, Nationwide seeks to set off the payment received by Vickie Crowther from another insurance company against the coverage it is statutorily bound to provide and for which it accepted premium payments.

The grounds upon which the courts in some states have upheld prohibitions against "stacking" in the uninsured motorist context is to prevent the insured from being financially better off when he is injured by an uninsured motorist than he would be had he been injured by a properly insured motorist. One who is injured by an insured motorist has only the tortfeasor's insurer to look to for recovery. One who is injured by an uninsured motorist who happens to have two policies covering the same vehicle, as was the case in Martin v. Christensen, supra, can theoretically double his recovery by "stacking" benefits from the two policies. This court has expressed that concern. See, Lyon v. Hartford Accident and Indemnity Co., Utah, 480 P.2d 739 (1971), overruled on other grounds at 701 P.2d 798. In the instant no-fault benefit dispute, Vickie Crowther has incurred more medical bills than the sum of the limits of the two policies providing PIP medical benefits. Regardless of whether she is

paid by one or both of the insurers, she is not entitled to claim those same benefits in a personal injury lawsuit against the driver who struck her. Allstate Ins. Co. v. Ivie, Utah, 606 P.2d 1197 (1980).

Also distinguishable are those foreign jurisdiction cases discussed in Nationwide's brief. In Rana v. Bishop Ins. of Hawaii, Inc., Haw., 713 P.2d 1363 (1985), Rana sought to stack no-fault insurance earning loss coverage on seven different automobiles owned by him and used in his taxicab business, each of which was insured by Bishop. He sought benefits of \$800 per month up to his actual earnings loss of \$2,000 per month. One provision of the Hawaii no-fault scheme, HRS § 294-3(c), provided in part as follows: "'Maximum limit.' The total no-fault benefits payable per person . . . on account of accidental harm sustained by him in any one motor vehicle accident shall be \$15,000, regardless of the number of motor vehicles involved or policies applicable". Another provision, HRS § 294-2(10), provided, "'No-fault benefits' with respect to any accidental harm shall be subject to an aggregate limit of \$15,000 per person" The insurer had paid Rama \$800 per month and had terminated payments at \$15,000. In view of the statutes quoted above, the Hawaii court had no trouble concluding that "Based on the plain and unambiguous language in HRS §§ 294-2(10) and -3(c), buttressed by the statute's legislative history, we construe the No-Fault Law to preclude stacking." (713 P.2d at 1367) The Utah No-Fault Act, on the other hand, contains no similar "maximum limit".

Kirsch v. Nationwide Ins. Co., 532 F. Supp. 766 (W.D. Pa. 1982), discussed in Nationwide's brief beginning at page 19, involved an attempt to stack work loss benefits where the insured had a single policy issued by Nationwide insuring two vehicles. The insured wished to stack work loss benefits under both vehicles and thus receive up to \$30,000 in work loss benefits despite a statutory \$15,000 ceiling on receipt of such benefits. It is not at all clear that the same result would have been reached had the insured attempted to stack medical benefits. See, Antanovich v. Allstate Ins. Co., Pa., 488 A.2d 571 (1985), which points out the Pennsylvania no-fault "Act's distinction between unlimited recovery under Sections 103 and 202(a) for allowable medical expense and the limited recovery under Section 202(b) for basic work loss". (488 A.2d at 575) On the other hand, the Utah No-Fault Act discusses minimum benefits which must be provided under each motor vehicle policy issued in Utah (U.C.A. § 31-41-6) but, as previously stated, nowhere discusses maximum benefits payable.

Equally distinguishable is Davis v. Hughes, Kan., 622 P.2d 641 (1981), discussed in Nationwide's brief at page 21. In Davis, plaintiff was injured in an accident involving her own vehicle in which she was a passenger. The vehicle was being driven by her husband. She sought to stack PIP benefits and uninsured motorist benefits from the policy describing her vehicle and from a policy describing a vehicle owned by her son-in-law, in whose home she resided. The Kansas Supreme Court first observed that "This court has previously held uninsured

motorist coverage in two policies may be stacked up to the full amount of damages sustained" (622 P.2d at 648), and concluded it was proper to permit the stacking of uninsured motorist coverages from the two policies. The court then turned to the issue of stacking PIP benefits and looked to a Kansas statute, K.S.A. 1979 Supp. 40-3108, which provided that "Any insurer may exclude [PIP] benefits . . . (a) for injury sustained by the named insured and relatives residing in the same household while occupying another motor vehicle owned by the named insured and not insured under the policy" The policy issued to plaintiff's son-in-law contained such an exclusion. In view of the fact that plaintiff, by virtue of being a relative residing in the same household as her son-in-law, was an insured under the son-in-law's policy and was injured in a vehicle owned by her but not described in the son-in-law's policy, the court, quoting from McNemee v. Farmers Insurance Group, Kan., 612 P.2d 645 (1980), concluded as follows:

"The question in this case is whether 'stacking' of PIP medical benefits is permitted. We hold that it is not. Any insurer may exclude benefits required by the Kansas Automobile Injury Reparation Act: For injury sustained by the named insured and relatives residing in the same household while occupying another motor vehicle owned by the named insured and not insured under the policy When, as in the present case, the exclusion has been inserted in a PIP endorsement, the exclusion is binding on the parties. The exclusion is authorized by statute and governs the extent of personal injury protection benefits recoverable when inserted in an insurance contract." (622 P.2d at 649) (emphasis added)

The policy exclusion relied on by the Kansas court to prohibit plaintiff in Davis from stacking benefits was an exclusion permitted by statute--the same exclusion permitted insurers in Utah by U.C.A. § 31-41-10(a)(i). The Davis case is

not, as Nationwide would imply, authority that every policy exclusion or limitation serving to prevent stacking of benefits is enforceable. The exclusion advanced by the insurer in Davis was permitted by statute. The exclusion from coverage set forth in Nationwide's Other Insurance clause, whether labeled an "exclusion" or a "limitation", is not one specified in U.C.A. § 31-41-10.

The one case which has been cited to the court which considered the effect of an "other insurance" clause in the context of an effort to stack no-fault benefits is Travelers Ins. Co. v. Lopez, Nev., 567 P.2d 471 (1977). In that case Lopez sustained injury when his automobile collided with that of an uninsured motorist. His automobile was covered under two separate policies, each containing no-fault coverage. His medical bills exceeded the limits of medical benefits available under the combined limits of both policies. One of the insurers paid its limits. The other, Travelers, refused to pay relying in part on the "other insurance" clause in its policy. The Nevada Supreme Court noted that the original reason for "other insurance" clauses--to prevent overinsurance and double recovery under property and fire insurance policies--was of limited importance under an automobile liability policy and that "If there ever was a strong rationale for the use of 'other insurance' clauses it has, on facts such as those presently before us, substantially evaporated". (567 P.2d at 475) The court construed the "other insurance" clause to mean "that the insured shall not collect twice for the same medical bills" (567

P.2d at 474) and held that "the better view favors respondent's position that an insured is entitled to payment in full up to the policy limit, with respect to each policy under which coverage is afforded, and that 'other insurance' clauses and similar clauses which purport to limit liability are void". Id.

C.

APPELLANT'S CLAIM FOR ADDITIONAL BENEFITS FROM NATIONWIDE
IS NOT INCONSISTENT WITH THE STATED PURPOSE OF THE
UTAH AUTOMOBILE NO-FAULT INSURANCE ACT

Appellant acknowledges that when enacted the purpose of the Utah Automobile No-Fault Insurance Act was to "stabilize, if not effectuate certain savings in, the rising costs of automobile accident insurance". U.C.A. § 31-41-2.¹ Vickie Crowther is only attempting to be indemnified from as many of the medical bills she incurred as a result of her accident as policy limits will permit. She is not seeking payment of benefits in excess of the limits of the policy on which she paid premiums. In no event is she going to receive full indemnification for her medical bills through receipt of PIP benefits; payment of benefits by Nationwide will not result in receipt of duplicative benefits. Appellant submits that requiring Nationwide to pay benefits for which it accepted a premium, when the clear language of U.C.A. § 31-41-7(2) contemplates possible payment under more than one policy, "including those complying with this act", will do nothing to thwart the legislature's intentions.

1. Appellant wishes to note, for whatever significance it may have, the absence of a "purpose" statute in that portion of the new Insurance Code, Title 31A, Chapter 22, Part III, dealing with motor vehicle insurance.

D.
SHOULD SHE PREVAIL ON THIS APPEAL,
FARMERS INS. EXCHANGE V. CALL OUGHT NOT PRECLUDE
AN AWARD OF ATTORNEY FEES TO APPELLANT

In its brief, Nationwide argues that Farmers Ins. Exchange v. Call, Utah, 712 P.2d 231 (1985), precludes an award of attorney fees to Vickie Crowther because there is no evidence that Nationwide acted in bad faith in denying benefits. The opinion in Farmers Ins. Exchange fails to take into account the language or purpose of U.C.A. § 31-41-8, reenacted in substantially unchanged form at U.C.A. § 31A-22-309(5).

Farmers Ins. Exchange, quoting from American States Insurance Co. v. Walker, 26 Utah 2d 161, 486 P.2d 1042 (1971), does state as follows:

"Before an award of attorney's fees [can] be made in the declaratory judgment action, it must appear that the insurance company acted in bad faith or fraudulently or was stubbornly litigious." . . . The defendant has not demonstrated that this litigation was not brought in good faith.

When faced with a decision as to whether to defend or refuse to defend, an insurer is entitled to seek a declaratory judgment as to its obligations and rights. [citation] An award of attorney fees is not warranted 'where the plaintiff merely stated its position and initiated this action for determination of what appears to be a justiciable controversy' Western Casualty & Surety Co. v. Marchant, Utah, 615 P.2d 423, 427 (1980)." (emphasis added)

Contrary to the Farmers Ins. Exchange, American States Insurance Co., and Western Casualty & Surety Co. cases, Nationwide did not bring a declaratory judgment action in order to have its rights and obligations judicially determined. Instead, Nationwide simply denied coverage (R. 48) and placed the onus on Mrs. Crowther to seek judicial relief. Appellant does

not contend that failure to file a declaratory judgment action in and of itself constitutes bad faith. Nor does appellant claim that Nationwide has in any way exhibited bad faith. Appellant does submit that Nationwide's wrongful denial of benefits, when coupled with its failure to seek declaratory relief, justify imposition of attorney fees upon no greater degree of culpability than its mistake as to the law resulting in detriment to its insured. Assuming Vickie Crowther prevails on this appeal, the question should be: "If an insurer guesses wrong as to whether coverage to its insured is available, who is to bear the burden of the insured's attorney fees so as to enable the insured to recoup 100% of the benefits to which she was entitled? Appellant respectfully submits that to ask the question is to answer it. If Vickie Crowther prevails on this appeal, whether her attorney is being paid on an hourly basis, pursuant to a percentage contingent fee, or on a flat rate basis, she will not net the \$2,000 to which she submits she was entitled unless she is also awarded attorney fees.

If the Farmers Ins. Exchange holding on attorney fees cannot be distinguished on the basis that Farmers took the initiative of filing a declaratory relief action, then this court should overrule the attorney fee holding in Farmers. If a finding of bad faith is required before an insured becomes entitled to attorney fees from her insurer based upon nonpayment of no-fault benefits, the last sentence of U.C.A. § 31-41-8 would be legislative surplusage. A prevailing litigant can claim attorney fees in every case in which the opposing party brings an action or asserts a defense in bad faith. U.C.A. § 78-27-56.

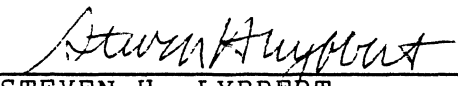
CONCLUSION

Appellant submits that a review of the new Insurance Code, Utah Code Ann. Title 31A, shows a clear legislative intent to distinguish between the permissible exclusions, limitations and conditions allowed an insurer providing no-fault benefits, and those allowed an insurer providing liability or uninsured motorist benefits.

Nationwide's "Other Insurance" clause is a limitation to coverage not permitted by U.C.A. § 31-41-10 and, as applied to Vickie Crowther, should be held void.

Appellant respectfully submits that the Order (summary judgment) entered by the District Court should be reversed and that summary judgment should be entered in her favor and against respondent Nationwide for \$2,000 together with interest, costs, and reasonable attorney fees. The action should be remanded to the District Court for determination of the appropriate amount of attorney fees.

Dated: November 18, 1986.


STEVEN H. LYBBERT
Attorney for Appellant
Vickie D. Crowther

CERTIFICATE OF SERVICE

I certify that on the 17th day of November, 1986, I hand delivered four (4) copies of the foregoing Appellant's Reply Brief to John R. Lund, Esq., attorney for respondent, at 10 Exchange Place, Eleventh Floor, Salt Lake City, Utah.

