

1988

Vickie D. Crowther v. Nationwide Mutual Insurance Company : Brief of Respondent

Utah Supreme Court

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BRIEF

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DOCKET NO. 88-0242-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

VICKIE D. CROWTHER,

Plaintiff and
Appellant,

vs.

Case No. 860433

NATIONWIDE MUTUAL INSURANCE
COMPANY,

Defendant and
Respondent.

88-0242-CA

BRIEF OF RESPONDENT

APPEAL FROM ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY

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Clerk, Supreme Court, Utah

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LIST OF ALL PARTIES TO THE PROCEEDING

Vickie D. Crowther, appellant, plaintiff below.

Nationwide Mutual Insurance Company, respondent, defendant
below.

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BRIEF OF RESPONDENT

STATEMENT OF ISSUES PRESENTED

This appeal presents for review the validity of two provisions of Nationwide's Utah no-fault Endorsement. The effect of those provisions is not in dispute. Rather, Crowther challenges whether the Utah Automobile No-Fault Insurance Act prohibits an insurer from including the provisions in its contract.

DETERMINATIVE STATUTES AND REGULATIONS

Utah Code Ann. § 31-41-7 (Supp. 1985) -

(1) The coverage as described in § 31-41-6 shall be applicable:

(a) Personal injuries sustained by the insured when injured in an accident in this state involving any motor vehicle.

(b) Personal injuries arising out of automobile accidents occurring in this state sustained by any other natural person while occupying the described motor vehicle with the consent of the insured or while a pedestrian if injured in an accident involving the described motor vehicle.

(2) When a person injured is also an insured party under any other policy, including those complying with this act, primary coverage shall be afforded by the policy insuring the motor vehicle out of the use of which the accident arose.

(3) The benefits payable to any injured person under § 31-41-6 shall be reduced by:

(a) Any benefits which that person receives or is entitled to receive as a result of an accident covered in this act under any workmen's compensation plan or similar statutory plan; and

(b) Any amounts which that person receives or is entitled to receive from the United States or any of its agencies because of his or her being on active duty in the military services.

Utah Code Ann. § 31-41-10. - Exclusions from coverage - Any insurer may exclude benefits:

(a) (i) For injuries sustained by the injured while occupying another motor vehicle owned by the insurance not insured under the policy, or

(ii) for an 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 of the insured motor vehicle.

(b) To any injured person, if such person's conduct contributed to his injury under any of the following circumstances:

(i) Causing injury to himself intentionally; or

(ii) While committing a felony.

Utah Insurance Department Regulation 73-1, Article 5, Paragraph (i) - It is the intent of the Act to provide a package of minimum Personal Injury Protection (PIP) benefits to each person injured in a motor vehicle accident occurring in Utah. The minimum PIP benefits are to be provided by the insurer of the motor vehicle which the person was occupying at the time of accident or by which he was struck as a pedestrian. The maximum amount of minimum PIP benefits an injured person may receive pursuant to involvement in a motor vehicle accident shall be those amounts specified under Section 31-41-6. There shall be no stacking or duplication of such benefits.

STATEMENT OF THE CASE

A. Nature of the Case.

Vickie Crowther, while a pedestrian, was struck by a motor vehicle and suffered bodily injury. She recovered medical benefits from the insurer of the vehicle which struck her and seeks in this action to recover additional medical benefits from her own no-fault insurer.

B. Course of Proceedings Below and Disposition.

On June 16, 1986, Vickie Crowther moved for summary judgment in her favor. On July 8, 1986, Nationwide filed its opposition to that motion and also filed a cross-motion for summary judgment in its favor. The motions were submitted to Judge Wilkinson on stipulated facts and oral argument was presented on July 18, 1986. Judge Wilkinson ruled orally in favor of Nationwide and against Vickie Crowther. On July 31, 1986, judgment was entered denying Crowther's Motion for Summary Judgment and granting Nationwide's Motion for Summary Judgment.

C. Statement of Facts.

Judge Wilkinson was presented with the following stipulated facts:

1. Defendant Nationwide Mutual Insurance Company (hereinafter referred to as "Nationwide") is an insurer doing business in the State of Utah and with an office and place of business in Salt Lake County, Utah.

2. On January 25, 1986, plaintiff was the insured under a policy of automobile insurance issued by Nationwide.

3. The automobile insurance policy issued by Nationwide included Endorsement 1594 providing for personal injury protection. A true and correct copy of Endorsement 1594 is attached to these stipulated facts as Exhibit A.

4. On January 25, 1986, plaintiff sustained accidental bodily injury while a pedestrian when struck by a motor vehicle, other than her own, which was covered as required under the Utah Automobile No-Fault Insurance Act.

5. As a direct a proximate result of the accident described in the preceding paragraph, plaintiff has incurred reasonable and necessary medical expenses in a sum in excess of \$4,000.

6. Plaintiff has been paid \$2,000 in personal injury protection medical expense benefits by the insurer of the motor vehicle which struck her.

7. \$2,000 is the entire amount of personal injury protection medical expense benefits available under the policy describing the automobile which struck plaintiff.

8. Plaintiff has made demand upon Nationwide for payment of \$2,000 medical expense benefits pursuant to the terms of the policy under which she was an insured.

9. Nationwide has failed within 35 days after receipt of proof of plaintiff's medical expenses, or at all, to pay personal injury protection medical expense benefits under the policy issued by it.

10. Plaintiff does not claim to be entitled to more than \$2,000 in benefits under the policy issued by Nationwide.
(The foregoing facts are contained in the Stipulated Facts

found in the record at R. 56-61, attached hereto including Endorsement 1594 as Addendum A.)

11. In the section entitled OTHER INSURANCE, the Endorsement states:

Similar insurance may apply to an accident involving bodily injury to you or a relative, or bodily injury to someone else involving the use of your auto. If it does, all benefits payable cannot exceed the highest available under any one policy.

SUMMARY OF ARGUMENT

The summary judgment in favor of Nationwide should be affirmed. Nationwide's policy does not provide benefits to Vickie Crowther under the factual situation presented. The Other Insurance clause of the policy properly restricts Vickie Crowther from stacking any Nationwide benefits on top of the benefits she has already received. That restriction is consistent with the No-Fault Act, it is consistent with the Insurance Commissioner's Regulation and it is consistent with existing Utah case law.

The Other Insurance clause is sufficient to uphold summary judgment for Nationwide; however, below Nationwide also asserted that exclusion (e) of the policy was a sufficient independent ground for the judgment. That exclusion eliminates coverage for injuries to a pedestrian insured when the motor vehicle in the accident provides no-fault benefits. On appeal

Nationwide does not rely on this exclusion because of this Court's ruling in Farmers Ins. Exchange v. Call, 712 P.2d 231 (Utah 1985).

ARGUMENT

POINT I

NATIONWIDE'S OTHER INSURANCE CLAUSE LIMITS
VICKIE CROWTHER'S BENEFITS TO THE BENEFITS
SHE HAS ALREADY RECEIVED.

The effect of Nationwide's Other Insurance clause on Vickie Crowther's claim is clear. She received \$2,000 in no-fault medical benefits from the insurer of the vehicle which struck her. Two thousand dollars was the limit on the benefits available under that policy. The Other Insurance section of Nationwide's Endorsement addresses this circumstance by stating:

Similar insurance may apply to an accident involving bodily injury to you or a relative, or bodily injury to someone else involving the use of your auto. If it does, all benefits payable cannot exceed the highest available under any one policy.

Here, both policies involved had a limit of \$2,000 on medical expense benefits. Two thousand dollars is the highest amount available under any one policy. In this situation, Nationwide's policy provides that all benefits payable cannot exceed \$2,000. Of course, if the other policy had a stated

limit greater than \$2,000, then that limit would have been the operative limit.

In Point C of her brief, appellant discusses the Other Insurance clause. She does not contest the effect of the provision as set forth above. Rather, she contends that it is an exclusion which is not permitted by Utah's No-Fault Act.

Although the impact of the No-Fault Act is addressed later, it should be clarified that the Other Insurance Clause is not an exclusion, but a limitation. The Other Insurance clause does not restrict the scope of coverage. In fact, coverage under Nationwide's policy must be presumed before the Other Insurance clause has any effect. If there is coverage under Nationwide's policy and another policy, then the provisions come into play to limit the amount of benefits recoverable. The clause does not eliminate coverage in the first instance and should therefore be viewed as a limitation on recovery rather than an exclusion of coverage.

POINT II

NATIONWIDE'S OTHER INSURANCE CLAUSE IS VALID UNLESS CONTRARY TO STATUTE OR PUBLIC POLICY.

In preparing its Utah no-fault Endorsement, Nationwide chose to limit the benefits available to the highest amount available under any one policy. Nationwide has the right to

make this a part of the contract because this limitation is not contrary to statute or to public policy.

Even in the area of no-fault insurance, there remains room for freedom of contract. This Court recently acknowledged as much in Farmers Insurance Exchange v. Call, 712 P.2d 231 (Utah 1985). In that no-fault coverage case this Court stated:

An insurer has the right to contract with an insured as to the risks it will or will not assume, as long as neither statutory law nor public policy is violated. Thus an insurer may include in a policy any number or kind of exceptions and limitations to which an insured will agree unless contrary to statute or public policy.

Id. at 233.

In Farmers v. Call, a household exclusion to no-fault coverage was invalidated because that exclusion was not specifically authorized by Utah Code Ann. § 31-41-10. The Court concluded that the household exclusion was contrary to the legislature's interest in requiring certain minimum coverage. Id. at 234. This reasoning probably also applies to Nationwide's exclusion (e) since the statute does not specifically allow an exclusion for injuries to an insured who is a pedestrian when struck by an otherwise insured vehicle.

The judgment in favor of Nationwide in this case should be affirmed, but the basis for affirmance should be the Other Insurance clause, not exclusion (e). The Other Insurance clause is a limitation on the benefits available which

Nationwide had the option to include in its endorsement. The effect of that provision is to prevent a stacking of no-fault coverages from two or more policies. According to Farmers v. Call, Nationwide is free to include such a limitation and Vickie Crowther is free to accept such a limitation.

POINT III

THE NO-FAULT ACT DOES NOT REQUIRE STACKING.

Nationwide's decision to prohibit the stacking of its benefits on top of another insurer's benefits is not contrary to the No-Fault Act. Unlike the statutes of several other jurisdictions, Utah's statute simply does not address stacking. Appellant admits this on page 10 of her brief where she states: "Utah's statutory no-fault scheme neither expressly permits nor prohibits so-called 'stacking' of benefits." If the statute does not speak on the question of stacking, then it must be within the latitude of the parties to the policy to deal with that question.

Throughout appellant's brief she gingerly chooses her words to describe the effect of the statute. She claims the act allows stacking but never contends that the act requires stacking. There is a vast difference between a statute which allows the parties to stack limits if they chose to so draft

their contract and a statute which requires that the parties so draft their contract.

Appellant's argument based on the language of the statute should be rejected. She contends that use of the word "primary" in the statute "infers the possible existence" of excess coverage. Again, for the statute to infer the possible existence of excess coverage is vastly different from the statute expressly requiring that excess coverage be provided. Appellant points to no other evidence in the statute that the statute requires such stacking. The reference to primary coverage in the statute simply clarifies which coverage is primary if there is more than one insurer providing coverage. To suggest that this statutory provision therefore requires an insurer to provide excess coverage is to stretch the rules of statutory construction beyond recognition.

It would also be inconsistent with the stated purpose of the act to require stacking of no-fault benefits. The stated purpose of the act is to:

[R]equire the payment of certain prescribed benefits in respect to motor vehicle accidents through either insurance or other approved security but on the basis of no-fault, preserving, however, the right of an injured person to pursue the customary tort claims where the most serious types of injuries occur. The intention of the legislature is hereby to possibly stabilize, if not effectuate certain savings in, the rising costs of automobile accident insurance and to effectuate a more efficient equitable method of handling the greater bulk of the personal injury

claims that arise out of automobile accidents, these being those not involving great amounts of damages.

Utah Code Ann. § 31-41-2. Plainly, the Act is not intended to provide a more seriously injured person with an alternative to a customary tort action. It is intended to leave that remedy for those with injuries in excess of the no-fault limits. It is also intended, or at least hoped, that the No-Fault Act would reduce the costs of auto insurance. Requiring the payment of no-fault benefits to one who has already received such benefits in the statutory amounts undercuts these legislative intents. Further, the legislature has demonstrated its concern for and ability to increase the statutory limits as the need arises. The Act was recently amended to increase the required medical benefits to \$3,000. See Utah Code Ann. § 31A-22-307(1)(a) (1986).

The No-Fault Act was enacted to provide a quick remedy for persons with relatively minor injuries. It requires certain coverages and allows certain exclusions. However, so long as the requisite minimum benefits have been provided, the purpose of the No-Fault Act is accomplished. Private insurers and private insureds might choose to contract for additional no-fault coverage; however, it is contrary to the stated purpose of the act to construe it to require such additional coverage. The judgment for Nationwide should be affirmed because the clause limiting benefits is not contrary to Utah statute.

POINT IV

PUBLIC POLICY DOES NOT REQUIRE STACKING.

Public policy does not dictate that Nationwide be required to pay benefits when Vickie Crowther has already been paid the statutory amount. As discussed, the express policy of the No-Fault Act is to provide minimum benefits at low cost. Public policy is further reflected in the Insurance Commissioner's Regulation, in prior Utah case law and in common sense. The opinions from other jurisdiction are largely not dispositive; however, they simply provide further good reasons for enforcing Nationwide's anti-stacking provision.

The Insurance Commissioner has considered whether stacking of no-fault benefits should be allowed and has concluded that stacking should be prohibited. Indeed, for Nationwide to pay Vickie Crowther additional benefits would be in violation of Insurance Department Regulation 73-1, Art. V, ¶ i. That section states in part:

The maximum amount of minimum PIP benefits an injured person may receive pursuant to involvement in a motor vehicle accident shall be those amounts specified under Section 31-41-6. There shall be no stacking or duplication of such benefits.

This regulation simply validates Nationwide's decision to include an anti-stacking provision in its endorsement.

Appellant makes the unnecessary argument that the Commissioner exceeded his authority in issuing this

regulation. However, this argument adds nothing because appellant simply contends that the Commissioner exceeded his authority for the same reason as appellant contends the no-fault statute requires stacking. Certainly, if this Court were to conclude that stacking is required, then the Insurance Commissioner's Regulation would have no effect.

However, the Insurance Commissioner has obviously considered the very question posed by this appeal and has done so in the context of the overall scheme of insurance benefits intended by the Legislature. Nationwide submits that the Insurance Commissioner's evaluation of whether to allow stacking should be given considerable weight by this Court because the Commissioner is in the unique position of not only having full knowledge of the Legislature's actions regarding insurance but also of implementing those enactments. Charged with that duty, the Commissioner has concluded that the interests of the people of the State of Utah are best served by prohibiting the stacking of no-fault benefits.

This Court found no good reason to require the stacking of uninsured motorist benefits in Martin v. Christensen, 22 Utah 2d 415, 454 P.2d 294 (1969). There, an insurer issued two separate automobile policies which both contained uninsured motorist protection. Each policy contained a provision similar to Nationwide's Other Insurance clause which had the effect of

limiting recovery to the highest applicable limit of any one policy. This Court rejected the insured's argument that the insurer could not so limit its obligation, stating:

The important fact would seem to be that, under one policy or two, the insured was protected against uninsured motorists to the extent the statute prescribes. So long as that coverage is provided, there is nothing in the statute which would prevent an insurer, in issuing a second policy, from limiting its coverage to the statutory requirement.

454 P.2d at 296.

There is even less reason to stack no-fault coverage than there is to stack uninsured motorist coverage. Uninsured motorist coverage serves the function of providing an injured person with protection in the event a tort-feasor is without any insurance. That type of injured person has no meaningful remedy other than to the extent there is uninsured motorist coverage. There may be nothing more to collect after the uninsured motorist benefits have been paid. By contrast, Vickie Crowther has an additional remedy. Presumably, the no-fault insurer of the motor vehicle which struck her also provides insurance for the driver of that vehicle if he is found negligent. That consideration leaves even less reason for stacking to be required in the no-fault context.

As appellant concedes, no court has ruled that Utah's No-Fault Act requires stacking. The statutes vary

significantly from jurisdiction to jurisdiction, making the cases cited by appellant inapposite.

In Wasche v. Milbank Mutual Insurance Co., 268 N.W.2d 913 (Minn. 1978), the court relied on its holdings in the uninsured motorist context to conclude that the legislature intended to require stacking of no-fault benefits. The Minnesota No-Fault Act had been passed when stacking of uninsured coverages was the recognized rule. The court noted that had the legislature intended to prohibit stacking in either the no-fault context or the uninsured motorist context, it could have so provided.

The exact opposite situation exists in Utah because of Martin v. Christensen, supra. That opinion was issued before the legislature enacted the No-Fault Act in 1973. Hence, if the reasoning of the Wasche court is applied to Utah, the conclusion should be that the legislature presumed anti-stacking provisions were valid when it enacted the No-Fault Act and would have provided to the contrary if it had so intended.

In Esler v. United Services Automobile Association, 273 S.C. 259, 255 S.E.2d 676 (1979), the court permitted an insured who, unlike Vickie Crowther, had paid two separate premiums for additional personal injury protections under two policies to recover under both policies. The court clarified however that stacking of the basic personal injury protection benefits was not permitted because of the specific language of the South

Carolina statute. The present case is not one where the insured has chosen and paid for benefits over and above the requisite statutory minimum.

In Porter v. Utah Home Fire Insurance Co., 58 Ore. App. 729, 650 P.2d 130 (1982), the court based its decision that the legislature intended to require stacking in part on the insurance commissioner's commentary which addressed multiple or double recovery situations but did not express an intent to preclude stacking. By contrast, the Utah Insurance Commissioner has expressly stated in Regulation 73-1 that stacking of no-fault benefits is not permitted.

National General Insurance Co. v. Meeks, 145 Ga. App. 830, 244 S.E.2d 920 (1978), is also distinguishable. There the Georgia statute under scrutiny required minimum medical benefits of \$2,500 but also stated that the total benefits to be paid should not exceed the sum of \$5,000. There is also no indication in the opinion that the insurer had expressly limited its benefits to the highest available limit.

In Baron v. State Farm Mutual Auto Insurance Co., 157 Ga. App. 16, 276 S.E.2d 78 (1981), the court was concerned with whether an insured could recover duplicate benefits, not additional benefits. The amount sought did not exceed the stated limit of either policy. The court did not consider the

effect of any other insurance clause which might have been in the policies under scrutiny.

Finally, in Traveler's Insurance Co. v. Lopez, 567 P.2d 471 (Nev. 1977), the court again considered whether an insured who had paid two premiums on two separate policies was entitled to stack the benefits. The court then construed the Other Insurance clause of the policies to apply only to duplication of benefits and not stacking.

Several courts have expressly enforced anti-stacking provisions such as that found in Nationwide's policy. Rana v. Bishop Insurance of Hawaii, Inc., 713 P.2d 1363 (Haw. 1985), is well-reasoned authority for this result. As in Utah, one of the primary purposes of the Hawaii no-fault act was to stabilize motor vehicle liability insurance premium rates. The court felt that the legislature had struck a balance between providing adequate and equitable reparation for the injured and keeping the cost of such reparation within the reach of every licensed driver. The court explained:

The legislative history of the No-Fault Law evinces a legislative concern to reduce and stabilize automobile insurance costs prevailing prior to its enactment and to provide and maintain reasonable premium rates for no-fault basic coverage. We discern therefrom a legislative intent to prohibit stacking which indubitably will lead to higher premiums for no-fault basic coverage.

Id. at 1369.

Although the Hawaii statute differs from the Utah statute, the policy consideration noted by the Hawaiian court applies with full force. The Rana court acknowledged that there is "no majority rule regarding stacking of no-fault insurance policies and coverages." Id. at 1371. Nationwide submits that this simply means that the best basis for deciding the issue in Utah is the Utah act, the Utah regulation and prior Utah case law.

In Kirsch v. Nationwide Insurance Company, 532 F. Supp. 766 (W.D. Pa. 1982), the insured had a single policy which covered two vehicles and sought to stack the no-fault benefits applicable to each vehicle. The court refused to allow this even though Pennsylvania courts had allowed stacking of uninsured motorist coverage. While in Utah even stacking of uninsured motorist benefits is not permitted, the differences between the purpose of no-fault insurance and the purpose of uninsured motorist coverage further underscore the propriety of not allowing stacking of no-fault benefits. As the Kirsch court stated:

The No-Fault Act, on the other hand, has an entirely different purpose. The No-Fault Act provides for a specific amount of possible recovery to be awarded to victims of motor vehicle accidents, regardless of fault. This arrangement allows for prompt compensation to victims. However, once the statutory ceilings are exceeded, the negligent party is still liable for

any further damages caused by his actions. The cause of action against the faulty driver is not limited at this point.

Id. at 768. The court rejected the reasoning in an opinion from a lower court in Philadelphia because that court ignored the legislative purpose of keeping down the cost of no-fault coverage. The court relied on the following language from another lower court Pennsylvania decision:

Although the No-Fault Act declares essential the maximum feasible restoration of injured individuals and the compensation of economic losses, it also emphatically states and reiterates the need for its own purported design of a low-cost insurance system.

532 F. Supp. at 770.

The Rana court also distinguished between stacking of uninsured motorist coverages and stacking of no-fault coverages. In addition to quoting heavily from Kirsch, the court noted:

Furthermore, under our uninsured motorist statute, although the automobile liability insurance policy must include uninsured motorist coverage, the insured may "reject the coverage in writing." However, as indicated supra, no-fault basic coverage is compulsory for each motor vehicle. "Because no-fault insurance is compulsory insurance, and it is important that the premiums be kept as well as possible while allowing adequate coverage, there is a public policy argument against stacking. 8 D Appleman, § 5192 at 613 (footnote omitted).

Id. at 1371.

In Davis v. Hughes, 229 Kan. 91, 622 P.2d 641 (1981), the Supreme Court of Kansas expressly dealt with the validity of policy endorsements prohibiting stacking. The endorsement provided that regardless of the number of persons insured or the number of applicable coverages, the amount of benefits recoverable under the policy were limited to the statutory amounts. The Kansas court concluded that "the intent of the statute is to permit insurance carriers to insert provisions and policies preventing "stacking" of PIP benefits - regardless of whether one or two policies are involved." 622 P.2d at 649.

Other courts have also concluded that statutes requiring no-fault protection do not permit stacking. See Georgia Casualty Co. v. Waters, 146 Ga. App. 149, 246 S.E.2d 202 (1978); Antanovich v. Allstate Insurance Company, 320 Pa. Super. 322, 467 A.2d 345 (1983) aff'd 507 Pa. 68, 488 A.2d 571 (1985); and Guerrero v. Aetna Casualty & Surety Co., 575 S.W.2d 323 (Tex. App. 1978).

In sum, public policy favors a restriction of Vickie Crowther's no-fault benefits to those which she has already received. Nationwide has chosen to so limit its benefits. That limitation is consistent with the design of the No-Fault Act to provide minimum benefits at minimum cost. Injured persons such as Vickie Crowther whose injuries exceed those levels are free to pursue their ordinary tort remedies. To

require stacking would lead to varying amounts of benefits to different injured persons depending solely on the number of no-fault coverages applicable. In concord with the Insurance Commissioner's decision to prohibit stacking, Nationwide's limitation serves the beneficent purpose of allowing Nationwide to keep its no-fault premium down while still insuring that Vickie Crowther receives the benefits required by the No-Fault Act. The judgment for Nationwide should be affirmed because public policy does not require the stacking of no fault benefits.

POINT V

REGARDLESS OF THE OUTCOME OF THIS APPEAL,
APPELLANT IS NOT ENTITLED TO ATTORNEY FEES.

Appellant's request for attorneys' fees was properly denied. That request is based on a misapplication of Utah Code Ann. § 31-41-8. That section provides for recovery of attorneys' fees when an insurer refuses to pay overdue no-fault benefits. However, that section should not be applied to a case such as the present one where an insurer's obligation is in legitimate doubt. Appellant admits that the plain effect of the endorsement is to preclude her recovery. She further admits that this is the plain effect of the Insurance Commissioner's Regulation. To expect that Nationwide should have

concluded its policy provisions were void and also should have concluded that the Insurance Commission exceeded its authority in issuing its regulation is incredible.

This Court addressed and rejected a similar claim for attorney's fees in Farmers Ins. Exchange v. Call, 712 P.2d 231 (Utah 1985). There, the insured was successful in establishing that a household exclusion to no-fault benefits was contrary to public policy and statutory requirements. This Court nevertheless refused to award attorneys' fees and costs because there was no showing that the insurance company had acted in bad faith or fraudulently. The following statement from Farmers v. Call is directly applicable:

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). We agree with the trial court that there is no foundation for the award of attorney fees and costs to the defendant and affirm that portion of the judgment.

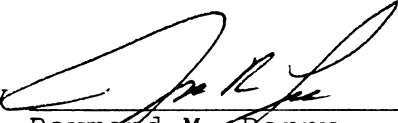
Id. at 237-38. Similarly, here, regardless of the outcome of this appeal, Nationwide's reliance on its Other Insurance clause and the Insurance Commissioner's Regulation was plainly in good faith. An award of attorneys' fees to either party to this controversy would be inappropriate.

CONCLUSION

For the foregoing reasons, Nationwide respectfully submits that the ruling of the lower court should be affirmed on the grounds that Nationwide's anti-stacking provision is valid and enforceable.

DATED this 3rd day of November, 1986.

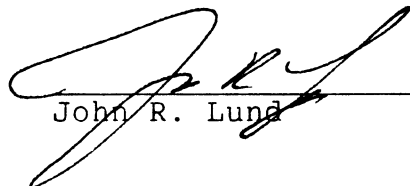
SNOW, CHRISTENSEN & MARTINEAU

By 
Raymond M. Berry
John R. Lund
Attorneys for Respondent
Nationwide Mutual Insurance
Company

CERTIFICATE OF MAILING

I hereby certify that I did cause to be mailed, postage prepaid, four copies of the foregoing Brief of Respondent to Stephen H. Lybbert, Suite 114, Oquirrh Place, 350 South 400 East, Salt Lake City, Utah 84111.

Dated this 3rd day of November, 1986.


John R. Lund

FILED IN CLERKS OFFICE
SALT LAKE COUNTY, UTAH

JUN 20 3 49 PM '86

H. DIXON HADLEY CLERK
3RD DIST. COURT

BY ~~DEPUTY CLERK~~

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR COUNTY OF SALT LAKE, STATE OF UTAH

VICKIE D. CROWTHER,

Plaintiff,

STIPULATED FACTS

vs.

NATIONWIDE MUTUAL INSURANCE
COMPANY,

Defendant.

Civil No. C86-2548

Honorable Homer F. Wilkinson

Plaintiff, by and through her attorney, Steven H. Lybbert, and defendant, by and through its attorney, John R. Lund, stipulate to the following facts. In doing so, counsel agree that other facts not stipulated to may be relevant to the issues raised in the pleadings.

STIPULATED FACTS

1. Defendant Nationwide Mutual Insurance Company (hereinafter referred to as "Nationwide") is an insurer doing business in the State of Utah and with an office and place of business in Salt Lake County, Utah.

ADDENDUM "A"

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2. On January 25, 1986, plaintiff was the insured under a policy of automobile insurance issued by Nationwide.

3. The automobile insurance policy issued by Nationwide included Endorsement 1594 providing for personal injury protection coverage. A true and correct copy of Endorsement 1594 is attached to these Stipulated Facts as Exhibit "A".

4. On January 25, 1986, plaintiff sustained accidental bodily injury while a pedestrian when struck by a motor vehicle, other than her own, which was covered as required under the Utah Automobile No-Fault Insurance Act.

5. As a direct and proximate result of the accident described in the preceding paragraph, plaintiff has incurred reasonable and necessary medical expenses in a sum in excess of \$4,000.00.

6. Plaintiff has been paid \$2,000.00 in personal injury protection medical expense benefits by the insurer of the motor vehicle which struck her.

7. Two Thousand Dollars (\$2,000.00) is the entire amount of personal injury protection medical expense benefits available under the policy describing the automobile which struck plaintiff.

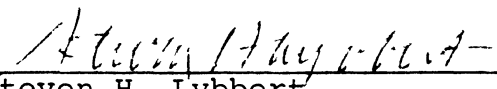
8. Plaintiff has made demand upon Nationwide for payment of \$2,000.00 medical expense benefits pursuant to

the terms of the policy under which she was an insured.

9. Nationwide has failed within thirty-five (35) days after receipt of proof of plaintiff's medical expenses, or at all, to pay personal injury protection medical expense benefits under the policy issued by it.

10. Plaintiff does not claim to be entitled to more than \$2,000.00 in benefits under the policy issued by Nationwide.


DATED this 17th day of June, 1986.



Steven H. Lybbert
Attorney for Plaintiff

DATED this 20th day of June, 1986.

SNOW, CHRISTENSEN & MARTINEAU

By 

John R. Lund
Attorneys for Defendant



Endorsement 1594

personal injury protection (Utah)

Please attach this important addition to your Century II policy.

With this endorsement your Century II auto policy is amended to provide Personal Injury Protection. Coverage is subject to all terms and conditions of your policy, except as changed by this endorsement.

SECTION I

PERSONAL INJURY PROTECTION COVERAGE

We will pay benefits for accidental bodily injury arising out of the ownership, maintenance, or use of a motor vehicle. It pays regardless of fault in the accident. Benefits include Medical Expenses, Work Loss, Funeral Expenses, and Survivors' Loss benefits.

For purposes of this coverage:

- 1. the words "you" and "your" mean the policyholder first named in the attached Declarations. They do not include that policyholder's spouse.**
- 2. the word "relative" means your spouse, any other person related to you by blood, marriage, and a ward or foster child. A relative may temporarily be living elsewhere.**
- 3. the words "bodily injury" mean bodily injury, sickness, disease, or death.**
- 4. the words "motor vehicle" mean any vehicle of a kind that must be registered with the Division of Motor Vehicles of the Utah State Tax Commission under Title 41-1-19, Utah Code Annotated 1953. A motor vehicle does not include a motorcycle.**
- 5. the word "insured" means a relative or anyone using your auto with your permission.**

You and your relatives are covered for bodily injury caused by accident involving the use of any motor vehicle.

Other persons are covered, provided your auto is not a motorcycle, as follows:

- 1. While occupying your auto with your consent or the permission of an insured.**
- 2. While occupying any motor vehicle other than your auto, if it is not used to carry persons for a fee. Such motor vehicle must be operated by you or a relative. Shared-expense car pools will not be considered carrying persons for a fee.**
- 3. As a pedestrian if hit by your auto. Anyone occupying a motorcycle is not a pedestrian.**

We will pay benefits minus any deductible per person, per accident shown in your policy Declarations. Benefits are as follows:

MEDICAL EXPENSES We will pay reasonable and necessary medical expenses incurred. We will pay them up to \$2000 per person, per accident. We will pay for the following: medical, surgical, x-ray, ambulance, hospital, nursing, dental, prosthetic, and rehabilitation services and any recognized religious healing method. For hospital services, we will pay only up to the semi-private room charge unless more intensive medical care is needed.

(Continued on other side)

EXHIBIT "A"

WORK LOSS We will pay for the covered person's loss of income if he is unable to work because of the **bodily injury**. We will pay for income lost beginning three days after the accident, and for up to the 52 weeks after that day. If the **insured** is unable to work for the first two weeks after the accident we will pay for income lost beginning the day after the accident, and for up to 52 weeks after that day. We will pay for 85% of lost gross income, not to exceed \$150 per week. We will only pay, however, for income lost during the covered person's lifetime.

We will also pay for services the covered person would have performed for his household, but for the **bodily injury**. We will pay up to \$12 per day. We will pay for expenses incurred beginning three days after the accident, and for up to 365 days after that day. If the **insured** is unable to perform such household services for the first 14 days after the accident, we will pay beginning the day after the accident, and for up to the 365 days after that day. We will pay for expenses incurred only during the person's lifetime.

FUNERAL EXPENSES If the covered person dies from the **bodily injury**, we will pay for funeral and burial or cremation expenses incurred. We will pay up to \$1,000.

SURVIVORS' LOSS If the covered person dies from the **bodily injury**, we will pay \$2,000 to his natural heirs.

COVERAGE EXCLUSIONS

1. We will not pay for **bodily injury** to anyone arising from any of the following:

- a. The **insured's** intentional act.
- b. Committing a felony.
- c. Operating your auto without the consent of the **insured** or while not in lawful possession of it.
- d. Occupying a motor vehicle you own but do not insure under this endorsement.
- e. Occupying or being hit as a pedestrian by any motor vehicle, other than your auto, which is covered as required under the Utah Automobile No-Fault Insurance Act.
- f. Using a motor vehicle located as a residence or premises
- g. Any act of war.
- h. Any hazard of nuclear material.

2. We will not pay for **bodily injury** to you or a relative while occupying a motor vehicle owned by a relative and not insured as required under the Utah Automobile No-Fault Insurance Act.

3. We will not pay for **bodily injury** to anyone entitled to benefits under Utah's Workmen's Compensation Law.

INSURED PERSONS' DUTIES

The **insured** or someone for him will promptly report any accident to us in writing. This report will identify injured persons. It will give information about the time, place, and circumstances of the accident.

The **insured** or someone for him will promptly submit written proof of claim to us. This will be under oath if we require. The proof will give all necessary information for us to determine benefits and amounts payable. The **insured** will submit to physical and mental examinations, by physicians we choose, whenever we reasonably request.

If the **insured**, his legal representative, or his survivors bring an action against anyone for the **bodily injury**, a copy of the summons or complaint or other process served will be promptly forwarded to us.

LIMITS AND CONDITIONS OF PAYMENT

BENEFITS PAYABLE Insuring more than one person or vehicle under your policy does not increase our liability to one person in one accident.

We will reduce any amount payable by any amount paid, payable, or required as follows: Under any workmen's compensation or similar plan except Utah's Workmen's Compensation Plan. By the United States or any of its agencies related to active military duty.

OTHER INSURANCE No insured may receive duplicate benefits under this and any similar insurance

Similar insurance may apply to an accident involving **bodily injury** to you or a **relative**, or **bodily injury** to someone else involving the use of **your auto**. If it does, all benefits payable cannot exceed the highest available under any one policy. We will pay our proportional share of such benefits. That share will be our proportion of the total benefits available.

Similar insurance may apply to an accident that does not involve you, a **relative**, or use of **your auto**. If it does, we will pay only over and above what is available under the other insurance.

TRUST AGREEMENT

To the extent of any payment we make for a loss, we are entitled to any payment to **the insured** by anyone legally liable for the **bodily injury**. **The insured** will hold in trust for us his rights of recovery against any such party. He will do whatever is proper to cure such rights. He will do nothing to prejudice them. All related papers and instruments will be executed and delivered to us.

SUBROGATION

We have the right of subrogation. This means that after paying a loss, we will have **the insured's** right to sue for or otherwise recover the amount of our payment from anyone who may be liable. **The insured** will do nothing to prejudice this right. **The insured** will sign all papers and do whatever is necessary to transfer this right to us.

ASSIGNABILITY

No interest in your policy can be transferred without our written consent. However, if you die, this coverage will stay in force for the rest of the policy period for others who were entitled to coverage when you died.

SECTION II

PREMIUM RECOMPUTATION

We have certain rights if there is a judicial finding that any provisions of the Utah Automobile No-Fault insurance law limiting lawsuits are invalid. We will have the right to recompute the premium for any coverage under this policy. We will also have the right to void or amend the provisions of this endorsement.

SECTION III

OTHER COVERAGES

We will pay benefits under any Medical Payments coverage provided by this policy only over and above any Personal Injury Protection benefits that are paid or payable for **bodily injury** under this or any other policy. This includes any benefits that would be payable except for a **deductible** provision.

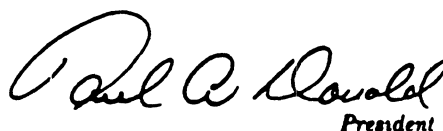
The limits of and any amounts payable under Uninsured Motorists coverage will be reduced by sums paid or payable under any Personal Injury Protection coverage. This includes any benefits that would have been paid or payable except for a **deductible** provision.

This endorsement applies as stated in the Declarations attached to your policy.

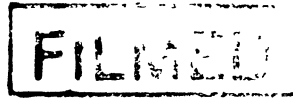
The endorsement is issued by the Nationwide Mutual Insurance Company or Nationwide Mutual Fire Insurance Company, whichever has issued the policy to which it is attached.

**NATIONWIDE MUTUAL INSURANCE COMPANY
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY
Columbus, Ohio**


Secretary


President

6000



FILED IN CLERK'S OFFICE
Salt Lake County, Utah

JUL 31 1986

H. D. V.

By

Deputy Clerk

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR COUNTY OF SALT LAKE, STATE OF UTAH

VICKIE D. CROWTHER,
Plaintiff,

vs.

NATIONWIDE MUTUAL INSURANCE
COMPANY,
Defendant.

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDG-
MENT AND GRANTING DEFEN-
DANT'S MOTION FOR SUMMARY
JUDGMENT

Civil No. C86-2548

Honorable Homer F. Wilkinson

Plaintiff's motion for summary judgment and defendant's motion for summary judgment having come on regularly for hearing before the Honorable Homer F. Wilkinson, Third District Judge, on July 18, 1986, at 10:00 a.m., plaintiff having been represented by her counsel, Steven H. Lybbert, and defendant having been represented by its counsel, John R. Lund, and the Court having reviewed the memoranda filed herein, having heard oral argument and having been fully advised it is hereby

ORDERED as follows:

1. Plaintiff's motion for summary judgment is denied.

ADDENDUM "B"


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2. Defendant's motion for summary judgment is granted.


Each party will bear their own costs.

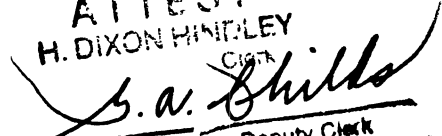
DATED this 31 day of July, 1986.


BY THE COURT:


Homer F. Wilkinson, Judge
Third Judicial District

Approved as to Form:


Steven H. Lybbert
Attorney for Plaintiff

ATTEST
H. DIXON HINDLEY
Clerk

Deputy Clerk


John R. Lund
Attorney for Defendant