

1990

Glenda Versluis v. Guaranty National Companies : Brief of Appellee

Utah Supreme Court

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BRIEF

900409

IN THE SUPREME COURT OF UTAH

GLEND A VERSLUIS,)	
)	Case No. 900409
Plaintiff/Appellant,)	
)	Category #16
vs.)	
)	
GUARANTY NATIONAL COMPANIES,)	
)	
Defendant/Appellee.)	

BRIEF OF APPELLEE

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT,
HONORABLE JUDGE PAT B. BRIAN PRESIDING,
GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT

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Clerk, Supreme Court, Utah

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PARTIES TO PROCEEDING BELOW

The caption of the case on appeal contains the names of all parties to the proceeding in the trial court below.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Article VIII § 2 of the Utah Constitution, Utah Code Ann. §78-2-2(3)(j) (1987 & Supp. 1990) and Rules 3 and 4 of the Utah Rules of Appellate Procedure.

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

Did the trial court err in ruling that summary judgment was appropriate in this case since plaintiff could not prove actual loss of income and earning capacity pursuant to Utah Code Ann. § 31A-22-307 (1986 & Supp. 1990)

On appeal, the Utah Supreme Court accords no deference to the trial court's legal conclusions in granting a motion for summary judgment, but reviews them for correctness. Madsen v. Borthick, 769 P.2d 245, 246 (Utah 1988).

DETERMINATIVE STATUTE

Utah Code Ann. § 31A-22-307 (1986)(amended 1989 & 1990)
in part provides:

(1) Personal injury protection coverages
and benefits include:

....

(b)(i) the lesser of \$250 per week or 85% of any loss of gross income and loss of earning capacity per person from inability to work, for a maximum of 52 consecutive weeks after the loss, except that this

benefit need not be paid for the first three days of disability, unless the disability continues for longer than two consecutive weeks after the date of injury;

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the trial court's ruling that plaintiff was not entitled to compensation for loss of income and earning capacity under Utah Code Ann. § 31A-22-307, where the stipulated facts evidenced that Plaintiff lost no income or earning capacity.

B. Course and Disposition of Proceedings Below.

Plaintiff filed suit against her insured, defendant Guaranty, to recover PIP benefits for loss of income and earning capacity, which benefits were refused. On cross motions for summary judgment the trial court ruled that plaintiff was not entitled to benefits under the applicable statute since under the stipulated facts she could not demonstrate both loss of gross income and loss of earning capacity.

C. Statement of Relevant Undisputed Facts.

1. On the evening of February 1, 1989, the plaintiff, Glenda Versluis, was in an automobile accident at 2500 South and 4000 West, Salt Lake City, Utah. (R. 21-22).

2. The defendant, Guaranty National Insurance Company ("Guaranty"), was plaintiff's no-fault insurance carrier. (R. 41).

3. The day following the accident, plaintiff was examined by Dr. Joseph Valley. (R. 21).

4. On plaintiff's second visit to Dr. Valley, x-rays were taken which showed no sign of injury. Dr. Valley, however, gave plaintiff a prescription for pain. (R. 21).

5. At the end of February 1989, plaintiff saw her own doctor, Dr. Dan Henry, who prescribed exercises. (R. 21).

6. Plaintiff also saw a chiropractor in February, 1989, because neither the prescriptions nor the physical therapy prescribed by the physicians seemed to help. The chiropractor, Dr. Jim Van Slooten, did not advise plaintiff not to work. (R. 21).

7. Neither Dr. Henry nor Dr. Valley opined that the injury would be permanent. (R. 21).

8. Dr. Henry allegedly told plaintiff not to work. However, no written evidence is available to support this allegation. And, Dr. Henry did not give plaintiff a disability or impairment rating. (R. 21).

9. Dr. Nathaniel Nord and Dr. Gordon Kimball subsequently examined plaintiff. While both physicians

characterized plaintiff's concerns as soft tissue injuries, neither advised her not to work nor issued a disability or impairment rating. (R. 22).

10. Plaintiff was employed by Service Incorporated from 1977 to 1979. Plaintiff quit this job in 1979 to have her first child. Plaintiff was employed by Litton Industries between 1981 and 1983. She quit this job to take care of her child and because she did not get along with others at work and had a misunderstanding with her supervisor. Plaintiff was briefly employed by Central Valley Tire Inc. during 1985. (R. 22).

11. Between December 1985 and April 1986, plaintiff was employed by John's Diesel. Plaintiff was employed by Cencor Temporary Services between June, 1986 and February, 1987. (R. 22).

12. Plaintiff received unemployment benefits between March and May of 1987. Beginning in the summer of 1987, plaintiff began receiving welfare assistance which continued through 1988, 1989, and at least until the day of plaintiff's deposition on March 16, 1990. (R. 22-23).

13. Plaintiff had been unemployed for thirteen months prior to the accident in question. (R. 42).

14. Plaintiff did not look for work in 1988 and only looked for work during January of 1989. (R. 42).

15. Plaintiff worked at the Utah Auto Auction for two days in early 1989. (R. 23).

16. On February 15, 1990, plaintiff filed suit against her insured, defendant Guaranty, to recover PIP benefits for loss of income and earning capacity allegedly resulting from the accident. (R. 3).

17. The parties filed cross motions for Summary Judgment. (R. 18, 34).

18. In both her Memorandum in Support of her Motion for Summary Judgment and in her Memorandum in Opposition to Defendant's Motion for Summary Judgment, plaintiff failed to cite the trial court to any evidence, or even any reference in the record, supporting the allegation in her complaint that she had suffered loss of gross income and earning capacity as a result of the accident. (R. 35, 47).

19. On July 17, 1990, the Third Judicial District Court, the Honorable Pat B. Brian presiding, entered summary judgment in favor of defendant Guaranty, concluding in part that:

1. Plaintiff was not employed at the time of the accident.
2. Plaintiff had not been employed for a period of thirteen months before the accident.
3. Plaintiff presented no provable evidence that she had eminent employment, including the following:
 - a. No evidence of a job offer; and
 - b. No evidence of hours that she would work; and
 - c. No evidence of wages that she would be receiving while working; and

d. No detailed specific evidence that she was seeking employment.

4. The Court concluded as a matter of law that pursuant to the statute 31A-22-307, U.C.A., that [sic] plaintiff must prove actual lost wages and loss of earning capacity. The court further found that the two prong requirement of the statute had not been met by the plaintiff. The court did acknowledge that plaintiff had submitted tax records and income records for periods in her life when she was working, but that none of the income periods included any time within the thirteen months before the accident.

(R. 55 Attached as Exhibit "A"). Importantly, Plaintiff stipulated to the above factual statements of the court, which determination by the court compelled the conclusion that Plaintiff could not prove loss of income and earning capacity.

20. Plaintiff filed her Notice of Appeal on August 15, 1990. (R. 58).

21. On appeal, plaintiff has not disputed the trial court's explicit conclusions and factual statements plaintiff stipulated to below regarding plaintiff's lack of evidence on the issue of loss of income and earning capacity. (Cf., R. 55 with Appellant's brief at P. 2.)

SUMMARY OF ARGUMENT

The trial court correctly ruled that summary judgment was proper since plaintiff could not demonstrate actual loss of gross income and earning capacity as required to recover benefits under Utah Code Ann. § 31A-22-307 (1986 & Supp. 1990).

ARGUMENT

I. SUMMARY JUDGMENT WAS APPROPRIATE IN THIS CASE SINCE THE FACTS TO WHICH PLAINTIFF STIPULATED EVIDENCED THAT PLAINTIFF FAILED TO COMPLY WITH THE STATUTORY REQUIREMENTS FOR RECOVERY.

A. Assuming The Statutory Scheme Would Allow Recovery By Merely Showing A Loss Of Earning Capacity, Summary Judgment Was Appropriate Given The Stipulated Facts In This Case.

Rule 56(c) of the Utah Rules of Civil Procedure recognizes that summary judgment is proper when, after reviewing relevant pleadings, depositions, admissions, answers to interrogatories and other documents, the court determines there is no genuine issue of material fact and the moving part is entitled to a judgment as a matter of law. See generally, Horgan v. Industrial Design Corporation, 657 P.2d 751 (Utah 1982) (existence of genuine issue of fact does not preclude summary judgment if issues are immaterial to resolution of case); Aird Insurance Agency v. Zions First National Bank, 612 P.2d 341, 343 (Utah 1980) (motion for summary judgment permits excursion beyond pleadings; where facts irrefutably disproved facts pleaded summary judgment is appropriate); Rich v. McGovern, 551 P.2d 1266 (Utah 1976) (court may look beyond motion for summary judgment in determining appropriateness thereof).

In the case below, plaintiff sought to recover benefits from Guaranty for loss of income and earning capacity she claimed to have allegedly sustained from an automobile accident. Utah Code Ann. § 31A-22-307(1)(b)(i) (1986)(amended 1989 & 1990),¹ under which plaintiff sought to recover, explicitly provides:

(1) Personal Injury Protection Coverages And Benefits Include:

....

(b)(i) the lesser of \$250 per week or 85% of any loss of gross income and loss of earning capacity per person from an inability to work, for a maximum of 52 consecutive weeks after the loss.

. . . .

Also, Utah Code Ann. §31A-22-309(5) (Supp. 1990) outlines the procedure for the receipt of PIP benefits:

Benefits for any period are overdue if they are not paid within 30 days after the insurer receives reasonable proof of the fact and amount of expenses incurred during the period. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after that proof is received by the insurer.

(Emphasis added). Applying the standard for summary judgment noted above, the trial court analyzed this statutory scheme and granted Guaranty summary judgment after correctly concluding that plaintiff's claim failed since, under the facts to which she

¹ Subsequent amendments to this statutory chapter & section have not changed the language or analysis of the relevant provision.

stipulated, she could not demonstrate reasonable proof that she had suffered both loss of gross income and loss of earning capacity as required by statute.

The trial court's conclusion is supported by the facts stipulated to by the Appellant below, the plain language of the statute, the history and intent underlying the same and sound legal reasoning and policy; and the trial court's order should accordingly be affirmed on appeal.

Plaintiff's primary argument on appeal is that the trial court incorrectly ruled that summary judgment was proper since plaintiff was unable to demonstrate that she had suffered both a loss of gross income and a loss of earning capacity as required for recovery of PIP benefits under Utah Code Ann. §31A-22-307. Plaintiff claims that she was only required to demonstrate a loss of earning capacity in order to recover thereunder. Although, as discussed below, the subject legislation requires a showing of both loss of gross income and loss of earning capacity for recovery of such benefits, even under plaintiff's construction of the statutory scheme, her action fails given the facts to which she stipulated.

In this regard, while this Court has not heretofore addressed the specific claim raised by the plaintiff, it has, by analogy, previously considered the degree of proof necessary to

demonstrate loss of earning capacity. Indeed, in Nelson v. Trujillo, 657 P.2d 730 (Utah, 1982), this Court considered a negligence action, analogous to that at hand, arising out of an automobile collision where the defendant had asserted that the trial court erred in instructing the jury that it could award the plaintiff damages for the loss of future earnings. Therein, the trial court had instructed the jury that the plaintiff would be entitled to an award for the present value of loss of future earnings if the jury believed from a preponderance of the evidence that he was reasonably certain to suffer such loss in the future. In responding to defendant's motion for a new trial on the basis that the plaintiff had provided no evidence that he would sustain loss of future earnings as a result of his injury, the trial court had ruled:

The defense attorney is correct in that there was no direct evidence of dollar anticipated loss in the future. However, plaintiff's appearance is now abnormal. There is evidence from his mother, and from himself, that indicates that it has definitely affected his personality. That such an event would occur without affecting the general lifetime expected earnings of an individual would be unlikely. While it is possible that the plaintiff will find some type of endeavor that he can pursue which will return to him the same general earnings that he would have had had he not suffered the injury, the court believes that the jury could well consider that this is extremely unlikely. Plaintiff is a college student who was injured when he was 19 years of age. He is now majoring in business-type classes. The jury could easily

conclude that his potential as an earner has been substantially reduced.

Id. at 735

In addressing the issue on appeal, this Court held that the trial court had erred in instructing the jury on the issue since the plaintiff could point to no evidence upon which the jury could realistically assess damages for future loss of earnings and the jury had no basis, except pure guesswork, for estimating earnings reasonably certain to be lost in the future. Id. at 735 (citations omitted). In short, there was no evidence upon which the jury could reasonably base such an award.

As analogous to the case at hand, Nelson accurately sets forth the rule that reasonable and sufficient proof or evidence is required of a non-speculative nature before the issue of earnings reasonably certain to be lost in the future ("earning capacity") can be submitted to the jury. This holding comports with this Court's long standing recognition of the principle that a trier of fact "should not be allowed to assess future damages on probability, but only such damages as it believes from the preponderance of the evidence the plaintiff will with reasonable certainty incur in the future." See Robinson v. Hreinson, 17 Utah 2d. 261, 409 P.2d 121, 125 (1965)(emphasis in original;

footnote omitted). Damages cannot be based upon speculation, guesswork or conjecture.

Other courts have focused upon the degree of proof necessary in order to establish entitlement to disability benefits for loss of earning capacity. As the Kansas Supreme Court of Appeals noted in a case analyzing the issue of whether an unemployed person with no past employment history and no firm offer of future employment is entitled to disability benefits:

[T]remendous proof problems exist regarding the amount of anticipated future earnings, where there is no past employment record to review nor any bona fide offer of future employment to consider. Undoubtedly, some persons without prior working experience and otherwise qualified might be able to adequately demonstrate entitlement to disability benefits. Such unemployed persons might include a college student who anticipates employment after the school term, a person engaged in a job training program with placement opportunities, or a person possessing special skills or education in high demand in the job market at the relevant time.

* * *

In summary, the plaintiff in this action would be required to prove the following to establish entitlement to disability payments:

1. That she was unable to engage in available and appropriate gainful employment by showing (a) the nature and extent of her injuries; (b) her injury was the cause of her inability to work; (c) potential employment was accessible, obtainable and commensurate with her skills, educational background, work experience and any other relevant employment criteria.

2. That the time at which she would become regularly employed would be within one year after

becoming unable to work as a result of her injuries.

3. Since she is unable to show an actual offer of employment, that she possess something more than a mere hope or wish that employment will be forthcoming, i.e., her efforts to gain employment must reflect diligent attempts and a serious intention to join the work force which persuades the trier of fact that regular employment is a reasonable expectation.

4. A reasonable basis to calculate anticipate future earnings must be provided, eg., the prevailing wage and the particular employment field being pursued, the minimum wage, etc.

See, Morgan v State Farm Mutual Auto Ins. Co., 613 P.2d 684, 689 (Kansas Ct. App. 1980). Having failed to meet such a showing, the Kansas Court upheld the trial court's conclusion that the plaintiff could not recover for disability benefits for loss of future earnings, or in other words, loss of earning capacity.

In striking comparison to facts in the Nelson case previously decided by this Court and the facts determined by the Kansas Court of Appeals in Morgan as justifying the conclusion that loss of earning capacity could not be proven, the facts noted by the trial court below, to which plaintiff stipulated, likewise demonstrate that plaintiff in this case failed to reference any reasonable, non-speculative proof that she had actually lost her capacity to earn. Indeed, plaintiff stipulated that she had no evidence of a job offer, no evidence of hours she worked, no evidence of wages she would be receiving while working, and no specific evidence that she was seeking employment

at the time she sought the claimed disability benefits for loss of earning capacity. Further, plaintiff did not dispute the facts raised in defendant's summary judgment motion that plaintiff's doctors gave no disability or impairment ratings, nor in most if not all instances, even opined that the injury would be permanent or affect plaintiff's capacity to work. And, in comparison to criteria stressed in Morgan, plaintiff likewise failed to demonstrate the existence of facts to show (1) the nature and extent of her injuries; (2) that her injuries were the cause of her inability to work; (3) that potential employment was accessible given her background and work experience; (4) that absent the injury she would have been regularly employed; (5) that she had something more than a wish for employment and (6) that she exhibited diligent attempts and an intention to join the work force. See id. Instead, the facts to which plaintiff stipulated and her employment history, including the undisputed fact that she had been unemployed for 13 months prior to the accident in question compelled the trial court's conclusion that, as in Nelson, there was no basis, except pure guesswork, speculation or conjecture for plaintiff to claim loss of earning capacity. See Nelson, 657 P.2d at 735.

Accordingly, even assuming that the legislature intended that a claimant, such as plaintiff, could recover benefits under

Utah Code Ann. Sec. 31A-22-307(1)(b)(i) solely by showing loss of earning capacity without also demonstrating actual loss of gross income, the trial court's conclusion granting summary judgment was appropriate in this case given the undisputed and stipulated facts that plaintiff was clearly unable to even demonstrate a loss of earning capacity resulting from her accident.

B. The Trial Court Correctly Ruled That Plaintiff Could Not Demonstrate Both The Statutory Requisites Of Loss Of Income And Earning Capacity to Recover Benefits Under Utah Law.

In addition to claiming that she was entitled to benefits under Utah Code Ann §31A-22-307, merely by claiming an alleged loss of earning capacity as a result of the accident, plaintiff also urges on appeal that the trial court incorrectly ruled that her claim failed since she could not demonstrate that she had suffered both loss of gross income and loss of earning capacity as required by statute.

As this Court has repeatedly held, a statute should be applied according to its literal wording unless it is unreasonably confused or inoperable; and it must be assumed that each term in a statute was used advisably by the legislature and that each should be interpreted and applied according to its usually accepted meaning and in harmony with the other provisions

within an Act since it is not the duty of the courts to assess the wisdom of a statutory scheme. See, West Jordan v. Morrison, 656 P.2d 445, 446 (Utah 1982).

Applying these principles to the case at hand, a plain reading of the relevant statutes noted above required that the plaintiff in this case demonstrate reasonable proof of actual "loss of gross income" and, in addition to, "loss of earning capacity" before she could receive any benefits thereunder. In order to determine whether genuine facts existed as to the issue of plaintiff's potential recovery for loss of gross income and earning capacity, the court considered the above-noted facts plaintiff stipulated to at oral argument below, and concluded that, notwithstanding the fact plaintiff had plead that she had allegedly provided defendant reasonable proof of plaintiff's inability to work, summary judgment against the plaintiff was appropriate because according to plaintiff's own account and testimony: (1) she was not receiving any income at the time of her accident; (2) she had not been employed for at least 13 months prior thereto; (3) she had not even substantially looked for work for approximately two years; and (4) she could not provide evidentiary support for the allegation that she was physically unable to work. (R. 21-22, 42). In short, she had suffered no loss of income.

Accordingly, inasmuch as a plain reading of the applicable statutes clearly require that plaintiff must provide reasonable proof of a loss of gross income in order to receive disability loss of income and loss of earning capacity benefits and since the facts stipulated to by plaintiff in this case clearly demonstrate that she could not meet this proof as there was no evidence that she was receiving any income at the time of the incident nor that she had been employed or even looked for work for over a year prior thereto, the trial court correctly ruled that plaintiff would not be entitled to the claimed benefits and summary judgment was appropriate as a matter of law.

C. Summary Judgment Was Appropriate In This Case
Since The Legislature Clearly Intended To Deny
Benefits For Loss Of Earning Capacity When There
Was No Reasonable Proof That Plaintiff Would Be
Entitled To The Same.

Finally, plaintiff's simple "mathematical computation" set forth in her appellate brief, while interestingly novel, in no way reflects the policy underlying Utah Code Ann. §31A-22-307(1)(b)(i), application of which, in addition to the plain language of the subject legislation, compels the conclusion that the trial court correctly ruled below. Indeed, although plaintiff urges this court to read the word "and" as a "computational" term in the statutory phrase, "gross income and loss of earning capacity," the history of and intent underlying

the statute clearly demonstrates that the legislature carefully chose the term "gross income and loss of earning capacity" in order to avoid meritless claims by limiting recovery under the No-Fault Act only to cases where there is both a loss of gross income and a loss of earning capacity.

In this regard, Utah Code Ann. § 31-41-2 (1973), although repealed in 1985, emphasizes the policy underlying Utah's No-Fault Act. When the act was overhauled in 1985 specific procedures and details of the same were modified, but the substantial purpose underlying the legislation was not changed:

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.

(See Exhibit B).

This Court has emphasized this essential policy in a case analogous to that at hand. In Jamison v. Utah Home Fire Ins. Co., 559 P.2d 958 (Utah 1977), the plaintiff had contended that a twelve-year-old boy was entitled to benefits under the household services provision of the no-fault act simply because, under a technical and imaginative reading of the statute, he was theoretically unable to perform minor household chores after being injured by an automobile while riding his bicycle. In

denying the plaintiff recovery, this Court stressed that the interpretation and application of law should not be a process of technical or computational application, but rather a process of considered rational reasoning. Accordingly:

[t]he principle which best serves the objective to be desired is to give both parties the benefit of a sensible, even-handed and practical application of the statute, under the assumption that all of its language was used advisedly and in harmony with its purposes. If the Act had intended reimbursement for any and all duties performed by members of households, it could have been plainly so stated. But it does not do so. Only by keeping the awards within reason, and excepting therefrom claims that might be unrealistic, fanciful, or perhaps even fraudulent, can the stated objective, "to effectuate . . . savings in the rising costs of automobile accident insurance . . ." be accomplished. Otherwise it is obvious that necessary increases in premiums would defeat, rather than promote the purposes of the Act.

Id. at 960 (footnotes omitted; emphasis and ellipsis in original). Thereafter, this Court applied the purpose of the no-fault insurance act to the statute analogous to that at hand and concluded:

[I]t becomes plain that the Act both in its statement of general purpose and its specific provisions, was not intended to provide an automatic reward or a "windfall," for being involved in an accident by requiring payment when there was no loss actually suffered, nor for any expense not reasonably to be incurred, but should be construed in conformity with the fundamental principle of insurance law, that the purpose of insurance is to indemnify for losses or damages suffered, as contrasted to gambling for a munificent reward if a loss occurs.

Id. at 960-961 (footnotes omitted; emphasis added); see also, Jones v. Transamerica Ins. Co., 592 P.2d 609, 612 (Utah, 1979) (No-Fault Insurance Act was never intended to give injured plaintiff windfall or extra income as benefit for having had accident).

In addition, commensurate with the standard in Utah Code Ann. § 31A-22-309(5)(Supp.1991), requiring that "reasonable proof" of loss of income be produced requisite to any PIP benefits being paid, this Court added:

[I]t is also pertinent to observe that the general rule is that an award of damages cannot properly be made on mere possibility or conjecture, there must be a firmer foundation. That is, any such award must be supported by proof upon which reasonable minds acting fairly thereon, could believe that it is more probable than not, that damage was actually suffered.

Id. at 961-962 (footnote omitted).

Applying herein this Court's analyses and holding in Jamison that (1) proof of damages meriting PIP benefits must be made upon firm foundation (2) losses must actually be suffered before PIP benefits are appropriate bases for recovery; and (3) had the legislature intended to provide for the relief plaintiff

seeks it could have so stated², compel the conclusion that section 31A-22-307 must likewise be read to require reasonable proof of both actual loss of income and loss of earning capacity before recovery is appropriate thereunder. Either element alone constitutes a necessary but insufficient condition for the payment of PIP benefits, which, if paid out as plaintiff urges, would negate the sensible and evenhanded purpose of the legislation while allowing for unrealistic and fanciful claims based upon "mere possibility or conjecture". Jamison, 559 P.2d at 961-62.

Application of the Jamison principles to the facts of the instant case also demonstrates the reasonableness of the legislative scheme and the correctness of the trial court's decision below. Here, the facts to which plaintiff stipulated compelled the conclusion that plaintiff had no reasonable proof of loss of actual income. As noted above, her claim of loss of earning capacity was also tentative at best. Thus, it was

² Had the legislature intended that an unemployed claimant could recover benefits under Utah Code Ann. 31A-22-307(1)(b)(i) by merely showing only a loss of earning capacity without also showing a loss of income, it would have expressly so provided as have other states. See e.g. Marryshow v. Nationwide Mutual Ins. Co., 452 A.2d 530 (Pa. Super. 1982). (statute provided for benefits for victims who were not employed when accident resulting in injury occurred); Morgan v. State Farm Mutual Auto Ins. Co., 613 P.2d 684 (Kansas Ct. App. 1980) (applying statutory scheme explicitly addressing unemployed persons).

questionable whether plaintiff met either of the conditions required for PIP benefits, let alone both criterion.

Nevertheless, plaintiff implicitly attempted to argue that since she had begun to search for a job after years of unemployment and since she had worked for two days after the accident that somehow she should receive benefits for that work which she would have theoretically done had she not been injured. As noted above, the statutory scheme does not provide for such eventualities and for an "automatic reward" or a 'windfall' for being involved in an accident" when there is no loss actually suffered. See id. The statutory scheme further requires reasonable proof of loss, of which none has been provided. See, Utah Code Ann. §31A-22-309(5). The general rule of damages is that the plaintiff must provide proof of damage; damages cannot be based upon possibility or conjecture.

Accordingly, since plaintiff provided no reasonable proof to show actual loss of gross income the trial court correctly ruled that she could not recover any benefits under the applicable statute ³ and its order should be affirmed on appeal.

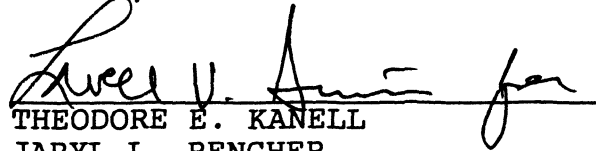
³ The cases are distinguishable that appellant cites in support of her claim. See e.g. Marryshow v. Nationwide Mutual Ins. Co., 452 A.2d 530 (Pa. Super. 1982); Minier v. State Farm Mutual Automobile Ins. Co., 454 A.2d 1078 (Pa. Super. 1982). (statute provided for benefits for victims who were not employed when accident resulting in injury occurred).

CONCLUSION

The trial court correctly ruled that summary judgment was appropriate in this case inasmuch as plaintiff failed to comply with the no-fault statutory requirement that a reasonable showing of loss of income must be made requisite to obtaining any disability benefits and since plaintiff failed to otherwise demonstrate a loss of earning capacity as required by law. The trial court's conclusion should be affirmed in all respects.

DATED this 14th day of March, 1991.

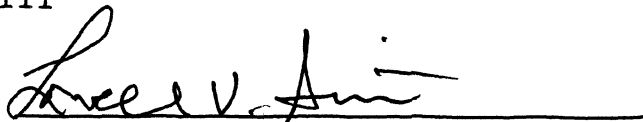
HANSON, EPPERSON & SMITH


THEODORE E. KANELL
JARYL L. RENCHER
HANSON, EPPERSON & SMITH

MAILING CERTIFICATE

This is to certify that four true and correct copies of this Brief were mailed, postage prepaid, to the following on this 14th day of March, 1991.

Robert Breeze
Attorney for Plaintiff/Appellant
230 East 300 South, #215
Salt Lake City, Utah 84111



A D D E N D U M

Exhibit "A" - Order on Summary Judgments, dated July 17, 1990

Exhibit "B" - §31-41-2, Utah Code Ann.

EXHIBIT "A"

JUL 17 1990

By Tracy Bastien
DEPUTY CLERK

THEODORE E. KANELL (1768)
HANSON, EPPERSON & SMITH
Attorney for Defendant
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

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

GLENDIA VERSLUIS,	*	ORDER ON SUMMARY JUDGMENTS
	*	
Plaintiff,	*	
vs.	*	
	*	
GUARANTY NATIONAL COMPANIES,	*	Judge Pat B. Brian
	*	Civil No.: 900900964PI
Defendant.	*	

The above-entitled matter came on regularly for hearing pursuant to the joint request of both parties for oral arguments on the cross-motions for summary judgment on the 22nd day of June, 1990, at 8:30 a.m. before the Honorable Judge Pat B. Brian. Plaintiff appeared by and through counsel of record, Robert B. Breeze and Defendant appeared by and through counsel of record, Theodore E. Kanell. The Court after reviewing all memoranda, pleadings and depositions, heard arguments of counsel. The Court after being fully apprised in the premises and after hearing all that was presented by the parties denied Plaintiff's Motion for Summary Judgment and granted the Defendant's Motion for Summary Judgment. The Court based its' rulings on the following findings:

1. Plaintiff was not employed at the time of the accident.

2. Plaintiff had not been employed for a period of thirteen months before the accident.

3. Plaintiff presented no provable evidence that she had eminent employment, including the following:

- a. No evidence of a job offer; and
- b. No evidence of hours that she would work; and
- c. No evidence of wages that she would be receiving while working; and
- d. No detailed specific evidence that she was seeking employment.

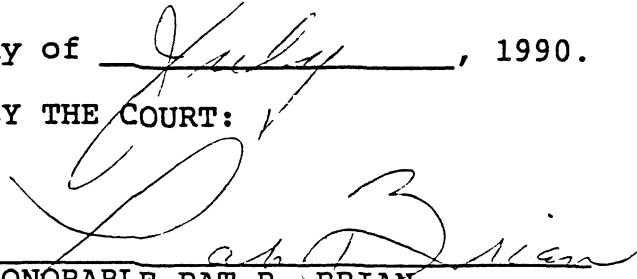
4. The Court concluded as a matter of law that pursuant to the statute 31A-22-307, U.C.A. that Plaintiff must prove actual lost wages and loss of earning capacity. The Court further found that the two prong requirement of the statute had not been met by the Plaintiff. The Court did acknowledge that Plaintiff had submitted tax records and income records for periods in her life when she was working, but that none of the income periods included any time within the thirteen months before the accident.

Based upon the foregoing, the Court hereby denies Plaintiff's Motion for Summary Judgment and grants Defendant's

Motion for Summary Judgment, each party to bear their own costs and attorney's fees.

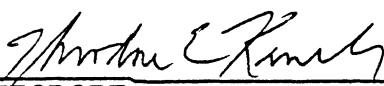
DATED THIS 17 day of July, 1990.

BY THE COURT:


HONORABLE PAT B. BRIAN
DISTRICT COURT JUDGE

Approval as to Form:

 7-13-90
ROBERT B. BREEZE
Attorney for Plaintiff


THEODORE E. KANELL
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of June, 1990, a true and correct copy of the foregoing ORDER was mailed, postage prepaid, to the following:

Mr. Robert Breeze
Attorney for Plaintiff
211 East 300 South, #215
Salt Lake City, Utah 84111

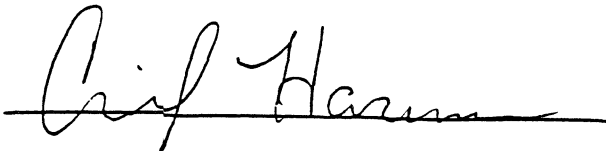


EXHIBIT "B"

APPENDIX "A"

31-41-2

INSURANCE

clude: Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania, Puerto Rico and South Carolina.

Cross-Reference.

Safety Responsibility Act. 14-12-1 et seq.

Law Reviews.

No-Fault Automobile Insurance in Utah—State Constitutional Issues, 1970 Utah L. Rev. 248.

Compensation Systems and Utah's No-Fault Statute, 1973 Utah L. Rev. 383.

Countrywide Overview of Automobile No-Fault Insurance, 23 Defense L. J. 443 (1974).

31-41-2. Purpose of act—Property damage claims not affected.—The purpose of this act is to require 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. This act is not designed to have any effect on property damage claims.

History: L. 1973, ch. 55, § 2.

See Am. Jur. 2d. No-Fault Insurance §§ 1-34, when published.

Collateral References.

Insurance—4.1.

44 C.J.S. Insurance § 64.

Validity and construction of "no-fault" automobile insurance plans, 42 A. L. R. 3d 229.

31-41-3. Definition of terms.—As used in this act:

(1) "Motor vehicle" means any vehicle of a kind required to be registered under Title 41, but excluding, however motorcycles.

(2) "Person" includes every natural person, firm, partnership, association, corporation, or any governmental entity, or agency of it.

(3) "Owner" means a person who holds the legal title to a motor vehicle, or in the event a motor vehicle is the subject of a security agreement or lease with option to purchase with the debtor or lessee having the right to possession, then the debtor or lessee shall be deemed the owner for purposes of this act.

(4) "Insured" means the named insured, the spouse or other relative of the named insured who reside in the same household as the named insured, including those who usually make their home in the same household but temporarily live elsewhere, or any person using the described motor vehicle with the permission, either expressed or implied, of the owner.

(5) "Occupying" means being in or upon a motor vehicle as a passenger or operator or engaged in the immediate acts of entering, boarding, or alighting from a motor vehicle.

(6) "Pedestrian" means any natural person not occupying or riding upon a motor vehicle.

(7) "Department" means the Utah insurance department.

History: L. 1973, ch. 55, § 3.

31-41-6. Minimum benefits — Determination of reasonable value of medical expenses—Medical expenses include nonmedical remedial care and treatment in accordance with religious method—Deductible amounts allowed.—(1) Every insurance policy or other security complying with the requirements of subsection (1) of section 31-41-5 shall provide personal injury protection providing for payments to the insured and to all other persons suffering personal injury arising out of an accident involving any motor vehicle, except as otherwise provided in this act, in at least the following minimum amounts:

(a) Medical benefits: the reasonable value of all expenses for necessary medical, surgical, X-ray, dental, and rehabilitation services, including prosthetic devices, necessary ambulance, hospital, and nursing services not to exceed a total of \$2,000 per person, as determined under subsection (2) of this section.

(b) Disability benefits: (i) 85% of any loss of gross income and loss of earning capacity per person from inability to work during a period commencing not later than three days after the date of the injury and continuing for a maximum of 52 consecutive weeks thereafter, not to exceed a total of \$150 per week, but if the person's inability to work shall so continue for in excess of a total of two consecutive weeks after the date of the injury, this three-day elimination period shall not be applicable; and (ii) in lieu of reimbursement for expenses which would have been reasonably incurred for services that, but for the injury, the injured person would have performed for his household and regardless of whether any of these expenses are actually incurred, an allowance of \$12 per day commencing not later than three days after the date of the injury and continuing for a maximum of 365 days thereafter, but if the person's inability to perform these services shall so continue for in excess of a total of fourteen days after the date of the injury, this three-day elimination period shall not be applicable.

(c) Funeral benefits: funeral, burial, or cremation benefits not to exceed a total of \$1,000 per person.

(d) Survivor benefits: compensation on account of death of a person, payable to his heirs, in the total of \$2,000.

(2) To determine the reasonable value of the medical expenses provided for in subsection (1) of this section and in subsection (1) (e) of section 31-41-9, the department shall conduct a relative value study of services and accommodations for the diagnosis, care, recovery, or rehabilitation of an injured person in the most populous county in the state for the purpose of assigning a unit value and median charge to each type of service and accommodation. In conducting the study, the department shall consult with appropriate public and private medical and health agencies. Upon completion of the study, the department shall prepare and publish a relative value study which sets forth the unit value and median charge assigned to each type of service and accommodation. The value of any service or accommodation shall be determined by applying the unit value and median charge assigned to the service or accommodation under

the relative value study. If a service or accommodation is not assigned a unit value or median charge under the relative value study, the value of the service or accommodation shall equal the reasonable cost of the same or similar service or accommodation in the most populous county of this state. Nothing herein shall preclude the department from adopting a schedule already established if it meets the requirement of this subsection. In disputed cases, a court on its own motion or the motion of either party may designate an impartial medical panel of not more than three licensed physicians to examine the claimant and testify on the issue of the reasonable value of their medical expenses.

(3) Medical expenses as provided for in subsection (1) of this section and in subsection (1) (e) of section 31-41-9 shall include expenses for any nonmedical remedial care and treatment rendered in accordance with a recognized religious method of healing.

(4) At appropriately reduced premium rates insurers may offer deductibles in amounts not exceeding \$500 per accident in respect to the insurance coverages required by this act applicable, however, only to claims of the insured.

(5) Nothing contained in this act shall be construed to prohibit an insurance policy from providing coverage for any nonmedical remedial treatment rendered in accordance with a recognized religious method of healing.

History: L. 1973, ch. 55, § 6.

44 C.J.S. Insurance § 64.

Collateral References.

7 Am. Jur. 2d 298, Automobile Insurance § 6.

Insurance—11.1.

31-41-7. Personal injuries covered—Primary coverage—Reduction of benefits.—(1) The coverages described in section 31-41-6 shall be applicable to:

(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 section 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 any 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 military enlistment, duty or service.

History: L. 1973, ch. 55, § 7.

44 C.J.S. Insurance § 64.

Collateral References.

7 Am. Jur. 2d 298, Automobile Insurance § 6.

InsuranceⒸ11.1.

31-41-8. Payment of benefits—Time limit—Action for overdue benefits and interest.—Payment of the benefits provided for in section 31-41-6 shall be made on a monthly basis as expenses are incurred. Benefits for any period are overdue if not paid within 35 days after the insurer receives reasonable proof of the fact and amount of expenses incurred during the period. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 35 days after such proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is also overdue if not paid within 35 days after such proof is received by the insurer. In the event the insurer fails to pay such expenses when due, the amount of these expenses shall bear interest at the rate of 1½% per month after the due date, and the person entitled to such benefits may bring an action in contract to recover these expenses plus the applicable interest. If the insurer is required by such action to pay any overdue benefits and interest, the insurer shall also be required to pay reasonable attorney's fees to the claimant.

History: L. 1973, ch. 55, § 8.

46 C.J.S. Insurance § 1407.

Collateral References.

44 Am. Jur. 2d 718, Insurance § 1798.

InsuranceⒸ675.

31-41-9. Limitations on tort actions—Liability of non-covered owner.—
(1) No person for whom direct benefit coverage is provided for in this act shall be allowed to maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident except where there has been caused by this accident any one or more of the following:

- (a) Death;
- (b) Dismemberment or fracture;
- (c) Permanent disability;
- (d) Permanent disfigurement; or
- (e) Medical expenses to a person in excess of \$500.

(2) The owner of a motor vehicle with respect to which security is required by this act who fails to have such security in effect at the time of an accident shall have no immunity from tort liability and shall be personally liable for the payment of the benefits provided for under section 31-41-6.

History: L. 1973, ch. 55, § 9.

automobile insurance plans, 42 A. L. R. 3d 229.

Collateral References.

InsuranceⒸ4.1.

44 C.J.S. Insurance § 64.

See Am. Jur. 2d, No-Fault Insurance §§ 1-34, when published.

Validity and construction of "no-fault"

Law Reviews.

No-Fault Automobile Insurance in Utah —State Constitutional Issues, 1970 Utah L. Rev. 248.

Countrywide Overview of Automobile No-Fault Insurance, 23 Defense L. J. 443 (1974).