2001

Regal Insurance Company v. Canal Insurance Company : Reply Brief

Utah Court of Appeals

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Heinz J. Mahler; Kipp and Christian; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

REGAL INSURANCE COMPANY,	:	
Plaintiff/Appellee,	:	Case No. 20010317-AC Priority No. 15
vs.	:	
CANAL INSURANCE COMPANY,	:	
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from Summary Judgment of the
Third Judicial District Court, Salt Lake County
Judge Ronald Nehring

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ARGUMENT

I. THE DEFINITION CLAUSE IN THE CANAL POLICY OF INSURANCE IS NOT AMBIGUOUS

Regal alleges that the relevant insuring and/or definition clauses of the Canal policy are "ambiguous." Regal's conclusory claim that the policy provisions are "ambiguous" is without basis. The "ambiguity" argument was not made at the trial court level. Canal respectfully submits that this Court can review the relevant Personal Injury Protection ("PIP") sections of the Canal policy and make a determination based on the policy language and Utah law whether or not PIP coverage applies to the KC Trucking semi-trailer under the circumstances of the accident. Canal issued a policy of insurance to KC Trucking. The KC Trucking semi-trailer was borrowed by Donald Boyet ("Boyet") and was being pulled by and was attached to a semi-tractor owned by Boyet and operated by Kelly J. Devey ("Devey"). This semi-tractor trailer unit collided with Christina Chatwin, a pedestrian.

The plain language of the policy defines "eligible injured person," includes:

> A pedestrian <u>if</u> the accident involves the use of an insured motor vehicle. (Emphasis added).

The plain language of the definition of "insured motor vehicle," is defined as a motor vehicle with respect to which:

> (a) The bodily injury liability insurance of the policy applies and for which a specific premium is charged and
>
> (b) The named insured is required to maintain security under the provisions of Title 31A Utah Code Annotated . . . (Emphasis added).

The language contained in § 31A-22-302(2) specifically exempts semi-trailers from the security requirements of § 41-12a-301. When the KC Trucking trailer is attached to the tractor insured by another company, it becomes part of that "motor vehicle" and the tractors insurers have responsibility for the entire vehicle. (Utah Code Annotated § 41-12a-103(4)). When the KC Trucking trailer is not attached to the KC Trucking tractor, the trailer, in and of itself, is not covered under the PIP provision of the Canal policy.

This Court can and should review the relevant policy provisions and statutory provisions without the need to resort to Regal's claim of "ambiguity."

II. REGAL'S CLAIM IS SUBJECT TO MANDATORY ARBITRATION

In Regal's Appellee Brief, Regal continues to argue and assert the fiction that Christina Chatwin, the injured pedestrian, has made a claim for PIP benefits against Canal and that Canal refused to pay such PIP benefits to Christina Chatwin. Regal then claims, based upon this fictional argument, that Regal's so-called "subrogation" rights in attempting to enforce Christina Chatwin's rights, somehow negate the mandatory arbitration provisions of § 31A-22-310(6)(b).

Regal makes much of the argument that if Canal's policy does provide PIP coverage, then the Canal policy would be "primary" and Regal's policy only "secondary." However, even a "primary" insurer cannot pay a claim that is never made. Canal wishes to emphasize the fact that at no time has Christina Chatwin ever made a claim against Canal or otherwise contacted Canal in connection with her PIP benefits nor has Christina Chatwin made any other claim at any time to this day against Canal Insurance Company. Regal, and not Chatwin, contacted Canal long after the accident and after it had already paid its PIP limits to its insured, Chatwin, and demanded that Canal reimburse Regal for PIP benefits paid to its insured.

Regal would now have this Court accept and believe the fiction that when Regal contacted Canal demanding reimbursement of PIP benefits paid to Chatwin, that under principles of subrogation, it was really Chatwin making the request and as such, Canal's denial of Regal's request for PIP reimbursement constitutes a direct denial by Canal of PIP benefits to Chatwin. Regal would further have the Court accept the pretension that since Canal did not reimburse Regal PIP benefits previously paid to Chatwin within 30 days of Regal's demand, that Canal must also pay interest and attorneys fees pursuant to the provisions of § 31A-22-310(5).

Canal respectfully requests that this Court should not accept Regal's fiction under the guise of "subrogation" but look at the facts as they actually took place. Specifically, Chatwin at no time has made application for or a claim for PIP benefits to Canal. Instead, Chatwin made a claim for PIP benefits to Regal. Regal paid those benefits and subsequently sought reimbursement of PIP benefits from Canal. Canal declined to reimburse Regal for PIP benefits paid to Regal's insured, Chatwin, based on Canal's understanding of its policy provisions and further based upon Canal's reliance on Utah law, which requires that a request for reimbursement of PIP benefits from one insurance carrier to another is subject to mandatory arbitration.

Canal respectfully submits that there is no reason to pretend that Christina Chatwin, after sustaining an injury in the accident of November 11, 1995, made application to PIP benefits to Canal. She did not. There is no reason to pretend that Canal refused to pay Christina Chatwin PIP benefits within 30 days of her application and that Canal should therefore be liable for interest and attorneys fees. This did not happen. There is no reason to pretend that Regal's request for reimbursement of PIP benefits from Canal is really just a "coverage question" and therefore not a reimbursement claim subject to the mandatory arbitration provisions of § 31A-22-310(6)(b).

Should these fictions asserted by Regal be accepted by this Court, the provisions of § 31A-22-310(6)(b) would become virtually meaningless. Any insurance carrier having paid PIP benefits to its insured, which carrier did not want to go to the trouble of mandatory arbitration, could claim that it was merely exercising its "subrogation" rights and, as Regal did herein, file a direct suit against an adverse insurance carrier claiming that since it is exercising its "subrogation rights," it need not comply with the mandatory arbitration provisions under Utah law.

Regal paid $3,000.00 in PIP benefits to its insured, Christina Chatwin. Subsequently, Regal requested reimbursement of those PIP benefits from Canal Insurance Company, the insurer of the semi-trailer (apparently Regal has never demanded reimbursement of PIP benefits from the insurers or owners of the semi-tractor involved in the accident). Regal may well be entitled to reimbursement of PIP benefits from either the insurers of the tractor or Canal, the insurers of the trailer. However, the appropriate forum to determine whether or not Regal is entitled to reimbursement of PIP benefits paid to its insured, is arbitration.

Canal has never received an application for PIP benefits from Christina Chatwin. Chatwin has never contacted Canal and has never made a claim for PIP benefits or any other insurance benefits from Canal at any time. Canal has never denied PIP benefits to Chatwin and in fact has had no contact with Chatwin whatsoever. Chatwin was paid PIP benefits within 30 days of her application, by Regal. There is no legal or factual basis for the trial court's awarding prejudgment interest and attorneys fees to Regal, Chatwin's insurers, pursuant to the provisions of § 31A-22-310(5), which section was intended to protect insureds such as Chatwin making PIP claims against an insurance carrier from waiting an inordinate amount of time before those claims are processed

and payments are made. This section was never intended to be used as a basis for a windfall award of attorneys fees and prejudgment interest to one insurance carrier, in this case Regal, seeking reimbursement of PIP benefits from another insurance carrier, in this case Canal.

CONCLUSION

The trial court erred in finding that the Canal policy of insurance provided PIP coverage on the KC Trucking semi-trailer under circumstances involved in the accident in question, specifically while the semi-trailer was borrowed by another entity and attached to and being pulled by a tractor not insured by Canal and presumably insured by another carrier. Canal's policy only intents that PIP coverage is provided to the extent required by Title 31A, which statute does not require PIP coverage on semi-trailers.

Even if Canal's policy does provide PIP coverage, Christina Chatwin has never at any time made application for PIP benefits to Canal. Chatwin requested PIP benefits from her insurance carrier, Regal, Regal paid those benefits and subsequently requested reimbursement from Canal. If reimbursement by Canal or any other insurance carrier

is appropriate, then the proper forum to decide that issue is arbitration pursuant to § 31A-22-310(6).

Canal has never denied PIP benefits to Chatwin and the trial court erred in awarding to Regal attorneys fees and prejudgment interest pursuant to § 31A-22-310(5).

Respectfully submitted this 3 day of December, 2001.

KIPP AND CHRISTIAN, P.C.

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CERTIFICATE OF HAND-DELIVERY

On this 3rd day of December , 2001, I caused a true and correct copy of the foregoing **Reply Brief of Appellant** to be hand-delivered to the following:

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