

1992

# Kenneth W. Larsen v. Allstate Insurance Company : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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IN THE UTAH COURT OF APPEALS

KENNETH W. LARSEN

Plaintiff and Appellant,

vs.

ALLSTATE INSURANCE CO., et al.,

Defendant and Appellee.

**92-0334-CA**

Court of Appeals No.  
**920068CA**

Priority No. 16

REPLY BRIEF OF PLAINTIFF/APPELLANT

APPEAL FROM AN ORDER OF THE  
THIRD DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH,  
GRANTING DEFENDANT'S/APPELLEE'S MOTION FOR SUMMARY JUDGEMENT

District Court Civil No. 91090421 CV

HONORABLE RICHARD H. MOFFAT, DISTRICT JUDGE

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JUL 30 1992

COURT OF APPEALS

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### **Introduction**

The thrust of defendant Allstate Insurance Company's ("Allstate") Brief is that Utah's No-Fault Act (the "Act") is designed to provide a "quick, definite, but limited source of funds" and that the interpretation of the Act urged by plaintiff Kenneth W. Larsen ("Larsen") is contrary to that design. In attempting to advance this argument, Allstate disingenuously charges Larsen with attempting to expand benefits provided by the Act and incorrectly characterizes Larsen as attempting to obtain the 52 weeks of benefits provided for under the Act from a time "when benefits are first requested."

Larsen does not seek to "expand" the limited benefits provided for under the Act. Nor does he seek to toll receipt of the 52 weeks of benefits until those benefits first are requested. Rather, Larsen simply seeks to receive exactly what the Act provides - - 52 weeks of specified benefits after he suffered a loss for which the Act provides compensation.

In connection with Larsen's breach of good faith claim, that claim was dismissed based upon the trial court's improper dismissal of Larsen's claim for full benefits under the Act. That claim should be reinstated.

### **ARGUMENT**

#### **I. THE ACT PROVIDES FOR 52 WEEKS OF BENEFITS FOLLOWING THE DATE OF LOSS.**

The relevant provision of the Act that is at issue provides for payment to a claimant of

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.

Utah Code Ann. § 31A-22-307(1)(b)(i) (1987) (emphasis added).

Allstate erroneously insists that the word "loss" as used in the Act really means "date of the accident," despite the same word's earlier use in the sentence as unambiguously referring to lost income and earning capacity.

In Utah, as well as in other jurisdictions, courts apply the general rule of statutory construction that a word or phrase used multiple times within the same statute carries the same meaning throughout the statute. State v. Oehlerking, 709 P.2d 900, 902 (Ariz. Ct. App. 1985); Bishop v. Wood, 134 P.2d 180, 182 (Utah 1943).<sup>1</sup> Applying this logical rule to section 31A-22-307(1)(b)(i), it becomes clear that "loss" as used in the Act refers to loss of income and earning lost resulting from a claimant's inability to work.

**II. PAYING BENEFITS AS THE LOSS IS INCURRED WILL NOT IMPAIR THE ACT'S PURPOSE IN PROVIDING EFFICIENT AND LOW-COST INSURANCE PROTECTION.**

Allstate's contention that Mr. Larsen's interpretation of the Act's benefit provisions will complicate the Act by allowing potential recovery of wage loss benefits for an indefinite time after

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<sup>1</sup> In Bishop, the court declared that a term used more than once in the same statute has the same meaning, "unless a manifest difference requires a different meaning to be attached." Bishop, 134 P.2d at 182.

an accident, thereby subverting the Act's basic purpose of reducing insurance costs and providing quick payment of expenses, is unpersuasive. Statutory and common-law remedies exist that preclude the filing of untimely claims, such as the statute of limitations, the laches defense as well as evidentiary and proof issues.

In support of its supposition, Allstate sets forth a list of inconveniences to them that allegedly would result from Larsen's interpretation of the statute. In reality, the problems listed by Allstate would only arise in the most rare of cases, and in those cases, Allstate retains numerous procedural and substantive defenses to protect its interests. Furthermore, Mr. Larsen's claim is not extraordinary as it was filed within months of the accident, after Mr. Larsen attempted to return to work but was unable to continue because of the injuries he suffered as a result of the accident.

### **III. COMMON SENSE AND REASON SUPPORT LARSEN'S INTERPRETATION OF THE ACT.**

Allstate attempts to characterize the many bad possible scenarios resulting from Larsen's interpretation of the Act. Allstate urges reason and common sense in interpreting and applying the Act but then abandons the very reason and common sense it urges in attempting to advance its self-serving interpretation of the Act.

Larsen attempted to return to work following the accident. Had his efforts been successful, he would not have been entitled to receive, and there would have been no reason for him to receive, the benefits provided under the Act. Allstate now seeks to disadvantage

Larsen because of his efforts, apparently suggesting that Larsen simply should have accepted benefits under the Act immediately following the accident and not returned to work. This result flies in the face of reason and fairness.

IV. GUIDELINES FOR NO-FAULT LEGISLATION SUPPORT LARSEN'S INTERPRETATION OF UTAH'S NO-FAULT ACT AS PROVIDING LOSS-OF-INCOME BENEFITS WHEN THE CLAIMANT ACTUALLY SUFFERS THE LOSS OF WAGE OR INCOME.

Contrary to Allstate's contentions, Mr. Larsen's interpretation of section 31A-22-307(1)(b)(i), which grants wage-loss benefits when the claimant can no longer work, rather than when the accident occurs, is consistent with a well-reasoned approach taken by leading legal scholars.

For example, the Commissioners on Uniform State Law in formulating a model no-fault act recognized that benefits, both medical expenses and wage-loss, are to be calculated from the time of loss, not when the injury occurs. See Uniform Motor Vehicle Accident Reparations Act § 23(a) (1972). Other commentators have noted that the public policy behind no-fault insurance is to compensate accident victims for their out-of-pocket medical expenses and loss of earnings as such expenses accrue. George G. Couch, Couch on Insurance, 2d § 45:661 (rev. ed. 1981).

Furthermore, Allstate's application of the Utah Supreme Court's narrow interpretation of the Act, taken in Jamison v. Utah Home Fire Insurance Co., 559 P.2d 958 (Utah 1977), is inappropriate to the case at hand, since Mr. Larsen is not seeking to expand the



available benefits in the Act.<sup>2</sup> In Jamison, the court refused to expand the household services reparation benefits available under the Utah No-Fault Act, and accordingly found that an injured twelve-year-old boy's parents were unjustly enriched by compensation for household chores previously performed by their son. Id. at 960. The court found 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.

As previously pointed out, Larsen is not asking in this case for an expansion of existing benefits; he is merely requesting, as a primary wage-earner attempting to support his family, exactly the compensation provided in the Act. Larsen's loss of income is precisely the harm the Act is intended to provide. See Couch on Insurance at § 45:661. In contrast, the parents in Jamison were attempting to profit from their son's inability to carry out the family garbage, a situation that clearly abuses the equitable goals of the Act.

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<sup>2</sup> Allstate incorrectly contends that the commencement of wage-loss benefits when the loss of income occurs violates the purpose of the No-Fault Act. Utah Supreme Court has determined that the Act's objective is to control insurance costs. Jones v. Transamerica Insurance Co., 592 P.2d 609, 611 (Utah 1979); Jamison v. Utah Home Fire Insurance Co., 559 P.2d 958, 960 (Utah 1977). Here, Larsen has made every effort to avoid claiming wage-loss benefits by attempting to return to work after the accident. He filed his claim only after it was physically impossible for him to work. Allstate's interpretation of the Act, if accepted, would punish individuals such as Larsen and condemn their work ethic by denying benefits rightly due resulting from income loss.

Granting Larsen wage loss benefits from the time of his loss conforms with guidelines for no-fault legislation set out by legal scholars, and is within the limitations imposed by the Utah Supreme Court in their interpretation of the Utah No-Fault Act.

**V. LARSEN'S BAD FAITH CLAIM SHOULD BE REINSTATED.**

Allstate contends that Larsen's bad faith claim properly was dismissed. It asserts two bases for its argument. First, Allstate argues that there existed "a fairly debatable reason for an insurer's conduct or decision." This is a fact-intensive inquiry, and it is undisputed that Larsen had no opportunity to conduct any discovery on this issue. The trial court dismissed Larsen's bad faith claim based on its erroneous decision that Allstate properly had refused to pay Larsen 52 weeks of benefits under the Act.

Allstate claims that its position on summary judgment was supported by the uncontroverted affidavit of its lawyer, who Allstate contends is an expert. Although the propriety of such an affidavit is questionable in that it results in Allstate's lawyer acting as a witness in the case, it demonstrates the fact-intensive nature of the relevant inquiry. It cannot be fairly concluded in this case in light of the complete absence of discovery that Allstate took a position in the trial court that was "fairly debatable." Furthermore, it should be noted that Allstate's attorney's affidavit is not "uncontested." In response, Larsen's attorney filed a proper Rule 56(f) affidavit indicating that additional discovery was necessary to determine

whether Allstate acted in bad faith. Larsen should be granted the opportunity to pursue that discovery.

A second argument Allstate makes in support of the trial court's dismissal of Larsen's bad faith claim is that such a claim cannot be brought under the Act because the remedies enumerated by the Act are exclusive remedies for a party wrongfully denied benefits under the Act. In this regard, the Act provides as follows:

If the insurer fails to pay the expenses when due, these expenses shall bear interest at the rate of 1 1/2 percent per month after the due date. The person entitled to the benefits may bring an action in contract to recover the expenses plus the applicable interest. If the insurer is required by the action to pay any overdue benefits and interest, the insure is also required to pay reasonable attorney's fees to the claimant.

Utah Code Ann. § 31A-22-309(5) (1987).

Although the statute makes no mention of additional damages, at the same time it makes no mention of limiting remedies to only interest on benefits and reasonable expenses and attorneys' fees. These specified remedies are the minimal remedies that may be pursued, but they are not exclusive. Just as the Act is not intended to provide compensation for all losses suffered by claimants, it is also not intended to provide all remedies for wrongful actions suffered by claimants. Furthermore, the statute provides the claimant with an "action in contract," and bad faith claims may also be made pursuant to a contract claim. In Beck v. Farmers Insurance Exchange, 701 P.2d 795 (Utah 1985), the court allowed an insured to bring a bad faith contractual claim against his insurer for no-fault medical and wage-

loss benefits owed in conjunction with a hit-and-run accident. "In an action for breach of a duty to bargain in good faith, a broad range of recoverable damages is conceivable, particularly given the unique nature and purpose of an insurance contract." Id. at 802.

Accordingly, Mr. Larsen is free to pursue any valid contractual remedy, including the bad faith claim, beyond the minimal remedies of interest on overdue benefits and attorney's fees provided by section 31A-22-309(5).


#### CONCLUSION

This Court should reverse the trial court's grant of summary judgement in favor of Allstate, and order the trial court to enter judgement in favor of Mr. Larsen on his breach of contract claim against Allstate. It also should reinstate Larsen's bad faith claim against Allstate.

Dated this 29<sup>th</sup> day of July, 1992.

KIMBALL, PARR, WADDOUPS, BROWN & GEE

By:



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 29<sup>th</sup> day of July, 1992, I mailed four (4) true and correct copies of the foregoing REPLY BRIEF OF PLAINTIFF/APPELLANT by U.S. mail, first-class, postage pre-paid to the following:

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