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Pat Christine Savage v. Educator's Insurance Company, a Utah Corporation : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

PAT CHRISTINE SAVAGE, Plaintiff/Appellant, vs. EDUCATORS INSURANCE COMPANY, a Utah Corporation, Defendant/Respondent.	: : : : : : : : : :	Case No.920769-CA Classification 15

REPLY BRIEF OF PLAINTIFF/APPELLANT PAT CHRISTINE SAVAGE

APPEAL FROM AN ORDER IN JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY,
STATE OF UTAH
Honorable Leslie A. Lewis, District Judge
[Classification 15]

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ISSUES REVIEWED IN REPLY

The main issue of this Appeal is can an employee sue his or her employer's workers compensation carrier for cause related to the processing and/or adjusting of a workmans compensation claim for an injury on the job.

A further refinement of that issue, or a branch of that issue, is whether or not an employee can sue his employer's workers compensation insurance carrier for bad faith adjusting of a claim.

Utah Code Ann. §31A-22-1004 allows an employee (Ms. Savage) to enforce the liability of her employer's workers compensation insurance carrier (Educators), in a court of competent jurisdiction.

The Pixton case is not controlling, since it can be distinguished in that it does not relate to workers compensation-type insurance but relates to a typical third party claim.

ARGUMENT

Interestingly, Educators Insurance Company, defendant and appellee (hereinafter "Educators"), does not, in their Brief, suggest there is any legal remedy in court for Christine Savage, plaintiff and appellant (hereinafter Ms. "Savage"). However, Article 11 of the Utah Constitution provides that all persons shall have a remedy at law in a civil action, Which reads:

> "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have a remedy by due course of law . . ."

The Legislature, recognizing this deficiency when they enacted Utah Code Ann. §31A-22-1004 which uses the clear and unmistakable language that "employees may enforce, in their own names, the liability of the insurer." (emphasis added)

What conceivable means does an employee have to force an insurer to do what the insurer is supposed to do, and did not do, if it cannot go into court and sue in their own names the insurer?

Utah Code Ann. §31A-22-103 is also misinterpreted by Educators. There is no limitation cited in this section as to how an employee can enforce potential liability of the workers compensation insurer, to the employee.

Statutory Construction

When the word "shall" in a statute is present it presumes that the requirement is mandatory. The Board of Education of Granite School District v. Salt Lake County, 659 P.2d 1030 (Utah 1983). Utah Code Ann. §31A-22-103 states that every workmans compensation insurance carrier "shall" have a provision in the policy that provides for the insured to be able to "enforce, in their own names, the liability of the insurer."

The word "may" is used in the same statute indicating that the employee (insured) "may" enforce the terms and conditions of the insurance contract in their own name if they wish. Obviously, the employee is not obligated to enforce the insurance contract.

In taxation the Utah courts have ruled that in interpreting a Utah tax statute the Court must look to the plain meaning of the language to discern the legislative intent. Chris & Dick's Lumber & Hardware v. Tax Commission of State of Utah, 791 P.2d 511 (Utah 1990). Further, the taxation statutes are to be construed liberally in favor of the taxpayer, Salt Lake County Board of Equalization v. State Tax Commission, 779 P.2d 1131 (Utah 1989). It would seem unlikely that these two legal concepts embraced by our Supreme Court would not be as true for an employee in a workers compensation context as they would be as for an employee in a taxpayer context. In the rules of statutory construction it is held that any construction should be avoided which would operate to frustrate and nullify the object of the statute. 73 Am. Jur. 2d 155.

Ms. Savage contends that the plain meaning of those words allow her as an employee to sue Educators in a court of law to enforce her rights under her employer's workers compensation insurance policy.

There is no likeness, as Educators would have us believe, between workers compensation insurance coverage (a policy obtained by the employer), to a statutory requirement that requires motor vehicle owners and drivers to have insurance. No likeness at all. The motor vehicle driver's insurance is a policy that each individual has on themselves and/or their motor vehicle. Workers compensation insurance is a policy that is obtained by the employer and the individual employees are not listed by name in the policy. The policy does not become activated or available to any employee until that employee has an injury on the job.

Distinguishing the Pixton Case

Educators, in their Brief, discusses at length and rely heavily upon Pixton v. State Farm Mut. Auto Ins. Co., 809 P.2d 746 (Utah App. 1991). Educators' analysis of the Pixton case does not distinguish between a third party going to court to enforce a provision of someone else's insurance policy and the relationship of an employee to the workers compensation insurance policy of his employer. This is a most important distinction.

As previously indicated, the workers compensation insurance policy is peculiar because it is obtained by the employer for the benefit of the employer's

unnamed employees. Jordan School District (the employer), itself, could not make any claim against the workers compensation insurance policy except through one of their employees. The only insureds are the employees. That is quite a different matter than car insurance as far as the legal analysis of third party beneficiaries is concerned. In workers compensation insurance there are only third party beneficiaries, using that same logic.

Ms. Savage argues that there is in fact an implied contract between the employee and the employer's workers compensation insurance policy and the employee is not a traditional third party beneficiary.

CONCLUSION

Ms. Savage, plaintiff/appellant, urges this Court to reverse the trial court's conclusion of law that an employee cannot sue his or her emlployer's workmans compensation carrier in a court of competent jurisdiction and remand the case for trial.

DATED this 8 day of March, 1993.

John Preston Creer
Attorney for the Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF PLAINTIFF/APPELLANT PAT CHRISTINE SAVAGE was mailed, postage prepaid, this 8 day of March, 1993, to the following:

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