

2004

# Irma Martinez v. Progressive Northwestern Insurance Co. : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

Brief of Appellee, *Martinez v. Progressive Northwestern Insurance Co.*, No. 20040799 (Utah Court of Appeals, 2004).  
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**IN THE UTAH COURT OF APPEALS**

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IRMA MARTINEZ,

Plaintiff / Appellant,

v.

PROGRESSIVE NORTHWESTERN  
INSURANCE CO.,

Defendant / Appellee.

Appellate Case No. 20040799-CA

District Court Civil No. 970905939 CV

Priority No. 15

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**BRIEF OF APPELLEE**

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APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT,  
SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ANTHONY B. QUINN

---

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**UTAH COURT OF APPEALS  
BRIEF**

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2004 079 9-CA

**FILED  
UTAH APPELLATE COURTS  
MAR 23 2005**

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## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF AUTHORITIES .....	iii
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES .....	1
RELEVANT STATUTORY PROVISIONS .....	1
STATEMENT OF FACTS .....	2
SUMMARY OF THE ARGUMENT .....	5
ARGUMENT .....	6
I. THIS COURT DOES NOT HAVE JURISDICTION BASED ON PLAINTIFF’S UNTIMELY NOTICE OF APPEAL. ....	9
A. The Trial Court Did Not Abuse its Discretion When it Refused to Set Aside the Minute Entry .....	9
B The Trial Court Did Not Abuse its Discretion When it Refused to Enlarge the Time for Filing a Notice of Appeal. ....	10
II. THE TRIAL COURT CORRECTLY DETERMINED THE PLAINTIFF WAS NOT ENTITLED TO ATTORNEY’S FEES .....	14
III. UTAH LAW IS CLEAR: PIP BENEFIT COVERAGE IS GOVERNED BY THE “REASONABLE AND NECESSARY” STANDARD .....	18
IV. THE PLAINTIFF IS NOT ENTITLED TO RECOVER ALL ATTORNEY FEES INCURRED ON APPEAL .....	24
CONCLUSION .....	25

## TABLE OF AUTHORITIES

### Cases

<u>Amica Mut. Ins. Co. V. Schettler</u> , 768 P.2d 950 (Utah Ct. App. 1989). . . . .	7
<u>Automatic Control Prods. Corp. v. Tel-Tech. Inc.</u> , 780 P.2d 1258 (Utah 1989) . . . . .	11
<u>Birch v. Birch</u> , 771 P.2d 1114 (Utah Ct. App. 1989). . . . .	9
<u>Boren v. Burlington Northern &amp; Santa Fe Railway Co.</u> , 637 N.W.2d 910 (Neb. App. 2002) . . . . .	19
<u>Cabrera v. Cottrell</u> , 694 P.2d, 622, (Utah 1985). . . . .	16
<u>Culbert v. Calderon</u> , 17 Pa. D. & C.3d 499, 1980 WL 550 (Pa. Com. Pl. 1980) . . . . .	19
<u>Elkins v. New Jersey Mfrs. Ins. Co.</u> , 583 A.2d 409, 412 (N.J. Super. Ct. App. Div. 1990) . . . . .	22
<u>Gallardo v. Bolinder</u> , 800 P.2d 816 (Utah 1990). . . . .	8
<u>In re M.S.</u> , 781 P.2d 1287, 1288 (Utah Ct. App. 1989) (per curiam). . . . .	6
<u>In re T.D.C.</u> , 748 P.2d 201 (Utah Ct. App. 1988) . . . . .	8
<u>Jamison v. Utah Home Fire Ins. Co.</u> , 559 P.2d 958 (Utah 1977) . . . . .	20
<u>J.P.W. Enters, Inc. v. Naef</u> , 604 P.2d 486 (Utah 1979). . . . .	9
<u>Labat v. Mallard Bay Drilling, Inc.</u> , 806 So.2d 917, 923 (La. App. 2002) . . . . .	19
<u>Nasser v. Auto Club Ins. Ass’n</u> , 457 N.W.2d 637, 645 (Mich. 1990) . . . . .	22, 23, 24
<u>Prince v. Bear River Mutual Insurance Co.</u> , 56 P.2d 524 (Utah 2002) . . . . . . . . . .	15, 16, 18, 19, 20, 21, 22, 23, 24

<u>Richins v. Delbert Chipman &amp; Sons</u> , 817 P.2d 382 (Utah Ct. App. 1991). . . . .	9
<u>Rindahl v. National Farmers Union Insurance Co.</u> , 373 N.W.2d 294, 296 (Minn. 1985) . . . . .	19, 22, 23
<u>Smyers v. Workers’ Compensation Appeals Board</u> , 157 Cal. App.3d 36, 203 Cal.Rptr. 521 (1984) . . . . .	19
<u>State v. Leatherbury</u> , 65 P.3d 1180, 1182 (Utah 2003). . . . .	7
<u>Versluis v. Guaranty National Companies</u> , 842 P.2d 865 (Utah 1992) . . . . .	20
<u>Walker v. Carlson</u> , 740 P.2d 1372 (Utah Ct. App. 1987) . . . . .	9
<u>West v. Grand County</u> , 942 P.2d 337, 339 (Utah 1997) . . . . .	11, 12, 13

#### **Statutes and Rules of Civil Procedure**

Utah Code Ann. § 31A-22-307 . . . . .	19, 21, 22
Utah Code Ann. § 31A-22-309(5)(d). . . . .	14
Rule 4, Utah Rules of Appellate Procedure. . . . .	6, 8, 10
Rule 60(b) Utah R. Civ. Pro. . . . .	9

#### **Other Authorities**

Utah Code of Professional Responsibility, DR 2-106 . . . . .	17
Utah Rules of Professional Conduct, 1.5(a) . . . . .	17

### **STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to Utah Code Ann. Section 78-2-2(3)(j). This case is before The Utah Court of Appeals pursuant to section 78-2-2(4) of the Utah Code Annotated. However, this Court does not have jurisdiction over this appeal based on Appellant's untimely notice of appeal.

### **STATEMENT OF THE ISSUES**

1. Does this Court have jurisdiction over this matter based on Appellant's untimely notice of appeal.
2. Was the trial court correct when it refused to set aside the minute entry dated, April 6, 2004?
3. Was the trial court correct when it refused to enlarge the time for filing of Notice of Appeal?
4. Did the trial court correctly determine that plaintiff was not entitled to attorney's fees?
5. Did the trial court correctly determine that the "reasonable and necessary" standard is applicable to PIP benefit coverage?

### **RELEVANT STATUTORY PROVISIONS**

Utah Code Ann. §31A-22-307 & Utah Code Ann. §31A-22-309 are set forth in an addendum to this brief.

## **STATEMENT OF THE FACTS**

1. Progressive insured the plaintiff for a 1988 Cadillac Seville, for among other things, personal injury protection (“PIP”) coverage. ( R. 1-9).

2. The plaintiff was involved in the first automobile accident on April 14, 1997 with John Ray. ( R. 1-9).

3. The plaintiff incurred medical expenses as a result of the accident. ( R. 1-9).

4. The plaintiff was involved in a second automobile accident on June 8, 1997 with Brandy Bunnel. ( R. 1-9).

5. On June 8, 1997, plaintiff had recovered 80% from her first accident. ( R. 100).

6. On June 24, 1997, plaintiff told Progressive agents that she was not feeling any worse than she felt prior to the accident. ( R. 100).

7. On June 24, 1997, plaintiff’s husband spoke with James Szalay at Progressive and told him that the plaintiff sustained no injury whatsoever in the second collision and that he and the plaintiff did not wish to open up a new PIP claim file.( R. 103).

8. In June, 1997, Progressive requested that Corvel, a medical management program that assists insureds in their return to work after an accident, conducted a medical review of the plaintiff in order to assist her in returning to work. ( R. 106).

9. In connection with the medical review, Corvel requested copies of all medical records from plaintiff’s medical providers. ( R. 106).



10. Some of plaintiff's medical providers did not give Corvel copies of their records. Accordingly, the medical review was unable to be conducted. ( R. 106).

11. Progressive paid all of the plaintiff's reasonable and necessary medical expenses up to the statutory limit, reasonable and necessary lost wages through June 20, 1997, and reasonable and necessary costs for household services through June 23, 1997.

12. On August 19, 1997, the Plaintiff filed a Complaint against Progressive for a cause of action for breach of insurance contract, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, fraud, and the tort of violation of public policy embodied in the No-Fault Insurance Act. ( R. 1-9).

13. Progressive filed a Motion for Partial Summary Judgment asking the Court to dismiss all of Plaintiff's claims except for that of breach of contract.( R. 127-46).

14. Briefs were submitted on the matter and oral argument was heard.

15. On November 6, 1998, the trial court signed an Order granting Defendant's Motion for Partial Summary Judgment and dismissed all of Plaintiff's claims except for that of breach of contract. ( R. 265).

16. On June 11, 2003, the parties entered into stipulation that all claims, except for plaintiff's claims for attorney's fees, were settled and compromised and that plaintiff's claims against Progressive, except for the claims for attorney's fees, were dismissed with prejudice. ( R. 638-39).

17. After five months of plaintiff's counsel doing nothing, defense counsel filed

with a motion for determination of attorneys fees. (R. 640).

18. In response to defendant's motion, plaintiff's counsel filed his affidavit and proposed order awarding over \$72,000 in attorney fees for his pursuit of the \$3000.00 PIP claim. ( R. 648-62).

19. On December 15, 2003, the defendant filed an objection to plaintiff's proposed order because of the unreasonableness of fees being sought by plaintiff's counsel. ( R. 679-98).

20. A hearing took place on January 12, 2004, wherein the court found that no attorney's fees were to be awarded. ( R. 703).

21. On February 4, 2004, a final Order was entered denying plaintiff's request for attorney's fees. ( R. 716-19).

22. On February 17, 2004, plaintiff filed a motion to reconsider, reverse, permit a new trial regarding attorney's fees. ( R. 720).

23. On April 6, 2004, a Minute Entry was entered denying plaintiff's motion to reconsider. ( R. 766).

24. On May 7, 2004, 31 days after the Minute Entry was signed, the plaintiff filed her Notice of Appeal. ( R. 767).

25. On June 4, 2004, plaintiff filed a Motion for Entry of Final Judgment; or Rule 60(b) Motion to Set Aside; or Rule 4(e) Motion for Extension of Time to Appeal.

26. On June 17, 2004, The Utah Court of Appeals filed their Memorandum

Decision dismissing plaintiff's untimely appeal. ( R. 827-28).

27. On August 16, 2004, plaintiff's Motion for Entry of Final Judgment; or Rule 60(b) Motion to Set Aside; or Rule 4(e) Motion for Extension of Time to Appeal was denied. ( R. 834).

### **SUMMARY OF THE ARGUMENT**

The trial court's rulings were consistent and correct. First, the trial court was correct in holding that plaintiff's affidavit for attorney's fees totaling \$72,885.00 was clearly unreasonable and incredulous when viewed in light of the actions taken in pursuit of the breach of contract claim. Plaintiff's counsel was advised of the burden to allocate for his time as it related specifically to the pursuit of the breach of contract claim and he failed to do so.

Second, the Utah Court of Appeals correctly held that plaintiff did not file her Notice of Appeal timely.

Third, the trial court correctly held that plaintiff's counsel did not properly demonstrate any excusable neglect for his failure to file the Notice of Appeal timely and properly denied plaintiff's Rule 60(b) Motion. The trial court was also correct in denying plaintiff's Motion for Enlargement of Time to File Notice of Appeal as the burden was on plaintiff's counsel to check with the court, as often as necessary, as to the date of entry of judgment in order to ensure that the notice of appeal would be timely filed.

Finally, the trial court was correct in reaffirming Utah case law by applying the

“reasonable and necessary” standard for the payment of PIP benefits.

## **ARGUMENT**

### **I. THIS COURT DOES NOT HAVE JURISDICTION BASED UPON PLAINTIFF’S UNTIMELY NOTICE OF APPEAL.**

This Court must dismiss this appeal for lack of jurisdiction based on an untimely notice of appeal. Rule 4 of the Utah Rules of Appellate Procedure sets forth the time limit in which an appeal must be filed. That Rule states, in pertinent part:

In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from.

Rule 4, Utah Rules of Appellate Procedure.

The district court entered a final judgment denying plaintiff’s request for attorneys fees on February 4, 2004. (R. 716-19). Pursuant to Rule 59, plaintiff filed a post-judgment motion seeking reconsideration and/or recusal of Judge Quinn. (R. 720-41). The Order denying plaintiff’s Rule 59 motion was entered on April 6, 2004. (R. 766). Plaintiff filed her Notice of Appeal to the Utah Supreme Court on May 7, 2004. (R. 767-68). Because the notice of appeal was filed 31 days after entry of the Order denying plaintiff’s rule 59 motion, plaintiff’s notice of appeal is untimely and should be stricken. Accordingly, this Court is “bound by the filing date indicated on the notice of appeal transmitted to it by the trial court.” In re M.S., 781 P.2d 1287, 1288 (Utah Ct. App. 1989) (per curiam).

It is undisputed that the February 4, 2004, order was the final order as it stated the issue

regarding attorney fees was the only remaining matter in this case and the case was to be dismissed in its entirety with prejudice. The Order expressly provided, in relevant part:

Based on the foregoing, this Court hereby ORDERS, ADJUDGES, AND DECREES that plaintiff is to be awarded no attorney's fees in this matter. Because this was the only remaining issue in this matter, this Court hereby also orders that this case is hereby dismissed in its entirety with prejudice.

(R. 716-19).

Plaintiff's counsel appealed the district court's final order. The district court once more denied plaintiff's post-judgment motion seeking recusal and reconsideration on April 6, 2004.

The court's language was unambiguous. The district court ordered:

Plaintiff's motion to reconsider is denied. The motion does not address the problems with Plaintiff's initial application. Plaintiff has completely failed in its burden to produce credible evidence from which an award of a reasonable attorneys fee can be fashioned.

(R. 766).

The Utah Supreme Court recently clarified that in similar situations, any signed minute entry shall constitute a final order unless there is substance or language in the order which indicates that it is not intended as final. Further, where no further action is contemplated by the express language of the minute order, it is a final determination susceptible to enforcement. State v. Leatherbury, 65 P.3d 1180, 1182 (Utah 2003). The Utah Court of Appeals held in similar circumstances that generally an order denying relief regarding a prior final order constitutes a final order in itself. See Amica Mut. Ins. Co. V. Schettler, 768 P.2d

950 (Utah Ct. App. 1989).

Plaintiff's counsel claimed that a reasonable attorney would not understand that the denial of his motion to reconsider left the underlying final order intact, or that there was no final order related to his post-judgment motion. However, the Utah Supreme Court and the Utah Court of Appeal's case law is clear. The district court's orders comport with such case law. There was an original final order which stated that it disposed of all remaining issues in the case. Once plaintiff's post-judgment motion was denied, as of that day, a final order had been entered in this case. Utah Courts hold that where the trial court has signed an order which states that it disposes of all remaining issues, such order is a final order. In re T.D.C., 748 P.2d 201 (Utah Ct. App. 1988); Gallardo v. Bolinder, 800 P.2d 816 (Utah 1990).

Rule 4(b) of the Utah Rules of Appellate Procedure provides that when faced with a post-judgment order regarding a post-judgment motion, "the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion." The time for appeal shall remain 30 days after the filing of such order. Rule 4(b) Utah Rules of Appellate Procedure.

Based on Rule 4(b) of the Utah Rules of Appellate Procedure, Plaintiff had 30 days to file a timely notice of appeal. Plaintiff's right to file a Notice of Appeal expired on May 6, 2004. It is undisputed however, that plaintiff instead filed her Notice of Appeal on May 7, 2004. Such Notice is untimely and does not comply with the Rules of Appellate Procedure. Therefore, under Rule 4(b), plaintiff's right to appeal expired on May 6, 2004. Because the

district court had denied plaintiff's motion to reconsider a "final judgment", there was no need for the district court to enter another "final judgment" in this matter.

**A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO SET ASIDE THE MINUTE ENTRY.**

The district court is afforded broad discretion in ruling on a motion for relief under Rule 60(b) and its determination will not be disturbed absent an abuse of discretion. Birch v. Birch, 771 P.2d 1114 (Utah Ct. App. 1989).

Rule 60(b) of the Utah Rules of Civil Procedure provides that the Court may excuse a party or his legal representative from compliance with a final judgment or order for: (1) mistake, inadvertence, surprise, or excusable neglect; (2) new evidence; (3) fraud; (4) void judgments; (5) the judgment has been satisfied, discharged, or released, or (6) any other reason justifying relief. See Rule 60(b) Utah R. Civ. Pro.

In determining whether to grant such motion, the trial court must review the underlying facts of the matter and determine whether relief for mistake or excusable neglect is warranted. Walker v. Carlson, 740 P.2d 1372 (Utah Ct. App. 1987); Richins v. Delbert Chipman & Sons, 817 P.2d 382 (Utah Ct. App. 1991). In making such determination, courts are to consider the type of hardship placed on a litigant, for example if such non-compliance results in a default judgment. J.P.W. Enters, Inc. v. Naef, 604 P.2d 486 (Utah 1979). There is no case law which suggests that the denial of a plaintiff's attorney's outlandish attorney fees constitutes the same type of hardship experienced by the entry of a default judgment against a party to the suit.

In the present matter, plaintiff's counsel did not properly demonstrate any excusable

neglect. He merely provided an affidavit that once he realized the 30 days to file a notice of appeal had nearly expired, he called this Court once to find out whether the minute order was final. (See R. 780-81). He also states that his assistant made a similar phone call which was never returned. (See R.783-84).

Even assuming the truth of such statements, blaming this Court for his failure to comply with the provisions in Rule 4(b) does not constitute excusable neglect. Further Rule 4(b) of the Utah Rules of Appellate Procedure clearly states that “the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other [post-judgment] order.” Rule 4(b) Utah R. App. Pro.

It is clear that plaintiff’s counsel filed a post-judgment motion regarding the final order which denied his attorney fees. Such order was denied on April 6, 2004. A reasonable attorney (especially one who charges \$500 an hour) would have known that he or she had “30 days after the date of entry of the judgment or order denying his post-judgment motion.” Plaintiff’s counsel has failed to demonstrate any excusable neglect. In fact, plaintiff’s counsel has succeeded only in placing the blame for such delinquency on everyone but himself. As such, the trial court was correct when it denied plaintiff’s Rule 60(b) Motion.

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO ENLARGE THE TIME FOR FILING A NOTICE OF APPEAL.**

Plaintiff’s counsel argues that the 30 day time limit should be extended because he calendared the date wrong, he did not know whether the order would be viewed as final, the



court clerk never called back regarding whether the minute entry would be viewed as final, and plaintiff's counsel had a busy schedule. (Brief of Appellant, pp. 5-9). However, Utah's rules "put the burden on counsel to check periodically with the clerk of the court as to the date of entry [of judgment]." Automatic Control Prods. Corp. v. Tel-Tech. Inc., 780 P.2d 1258 (Utah 1989).

In Automatic Control Prods. Corp., the Utah Supreme Court remanded the case to the trial court to determine whether the plaintiff's time should have been extended based on her argument that she was lulled into a false belief that the court would take an extended amount of time in deciding the decision based on past decisions. The court placed the burden on the attorney to check periodically with the court to determine whether an order has been signed. In that case and others following its holding, the supreme court has refused to place any responsibility on the courts to notify counsel regarding decisions. Moreover, the court noted that Rule 58A(d) of the Utah Rule of Civil Procedure provides that a judgment shall be promptly served by a party preparing it. However, the rule also states that "[t]he time for filing a notice of appeal is not affected by the requirement of this provision." This rule was in effect at all times material to the instant case. The purpose of this rule is to maintain the burden of discovering the outcome of a court's decision on those interested in the decision. Utah law clearly provides that interested parties, not the court, has the burden of discovering the outcome of matters placed before the court.

In West v. Grand County, 942 P.2d 337, 339 (Utah 1997), the Utah Supreme Court

held that in the absence of other evidence supporting a finding of excusable neglect, a court clerk's failure to send notice cannot act as a basis for finding excusable neglect in order to extend the time for filing a notice of appeal.

In West, the plaintiff brought an action against Grand County in federal court and in state court. The county moved for and was granted summary judgment on the state court claims. The court subsequently considered two post-judgment motions. The first filed by the plaintiff was a motion to amend the judgment. The second motion, filed by the county, was a motion to strike the affidavits accompanying the plaintiff's motion to amend. On April 13, 1995, the court signed orders denying the plaintiff's motion and granting the county's motion. The plaintiff learned of the entry of the orders in June 1995, after the 30 day period for filing appeals had run.

Plaintiff then filed for an extension of time in which to file a notice of appeal based on her failure to receive notice from the clerk that the orders had been signed by the judge, on the county's failure to send the court extra mailing copies as required under the rules of civil in effect at the time, and upon her own excusable neglect for failing to periodically check with the clerk to verify whether an order had been entered. The court granted the plaintiff's extension without allowing the county to file an opposition to the motion. The plaintiff continued her appeal and the county then moved for summary disposition on the plaintiff's appeal. The Utah Supreme Court denied the county's motion but remanded the case to the district court for determination of whether the court had considered the county's opposition

to the plaintiff's motion for extension of time. On remand, the district court denied the plaintiff's motion for extension and the supreme court was asked to review the decision.

At the time the case was decided, Rule 77(d) of the Utah Rules of Civil Procedure stated that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve the party for failure to appeal within the time allowed." Id., at 340. The court held that, based on the language of Rule 77, the court could not find excusable neglect based solely on a court clerk's failure to mail notice. With regard to the plaintiff's failure to check periodically with the clerk to determine whether the order had been signed, the court stated that the plaintiff's failure to check was neglect.

In this case, the district court entered its judgment against Martinez on February 4, 2004. (R. 716-19). The plaintiff filed a post-judgment motion seeking reconsideration and/or recusal of Judge Quinn, which was denied on April 6, 2004. (R. 766). Plaintiff filed her Notice of Appeal to the Utah Supreme Court on May 7, 2004. (R. 767-68). Martinez's time for filing her notice of appeal was not affected by the numerous excuses offered by plaintiff's counsel. The burden was on plaintiff's counsel to check with the court, as often as necessary, as to the date of entry of judgment in order to ensure that the notice of appeal would be timely filed. The burden was on plaintiff's counsel to calendar the day correctly. The burden was on plaintiff's counsel to "un-busy" his schedule to make more than one phone call to the court. The time period to file Martinez's Notice of Appeal expired on May 6, 2004. As such, any argument by Martinez regarding the trial court's or the court's clerk's failure to provide notice

is irrelevant and should be disregarded.

**II. THE TRIAL COURT CORRECTLY DETERMINED THE PLAINTIFF WAS NOT ENTITLED TO ATTORNEY'S FEES BECAUSE COUNSEL'S ATTORNEY'S FEES WERE NOT REASONABLE.**

The Utah No-Fault statute provides that a person entitled to PIP 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 insurer is also required to pay a **reasonable** attorney's fee to the claimant.

UCA 31A-22-309)(5)(d).

In the present case, Progressive voluntarily paid the applicable PIP benefits to the claimant. However, because the claimant brought a cause of action for breach of contract, the court ordered that a "reasonable" attorney's fee be paid. Plaintiff's counsel submitted an affidavit for attorney's fees totaling \$72,885.00. Such an amount is clearly unreasonable, and is in fact, incredulous, viewed in light of the actions taken in pursuit of the breach of contract claim. Little action was taken by the plaintiff to pursue payments of the PIP benefits beyond the filing of the original Complaint. The many hours detailed in plaintiff's affidavit for attorneys fees include hours spent pursuing plaintiff's claims for bad faith and violation of the tort of public policy, as well as plaintiff's attempts to turn this matter into a class action, all which have failed. In fact, the breach of contract claim was but a minimal part of the Complaint filed by the plaintiff. Instead, the majority of the Complaint set forth allegations of bad faith, fraud, breach of fiduciary duty and numerous other causes of action which were

promptly dismissed by the Court. Because little work was done to pursue the breach of contract claim, attorney fees should be limited in this matter.

The issue of attorney fees in the PIP context has been dealt with by the Third District Court and the Utah Supreme Court in an identical case to the present. This matter is identical in every way to the case of Prince v. Bear River, 56 P.3d 524 (Utah 2002) which involved the identical issues, claims, pleadings and counsel. In that case, Mr. Waddoups filed the identical briefs verbatim as were filed in this case, and, like this case, attempted a failed effort to turn the matter into a class action. In that case, a motion was made for determination of attorney fees, and Mr. Waddoups submitted an affidavit for over \$22,000 in fees (R. 688-98) In fact, on careful inspection of the fee affidavit submitted in that case, 15 of the time/date entries submitted by Mr. Waddoups are identical to the time/date entries submitted in this case. (see R.648-62; 688-98) The only difference between the two is that in the Prince case, Mr. Waddoups charged \$250.00 for his time and in this case, he is attempting to charge \$500.00 for his time. In the Prince case, the efforts of counsel in pursuit of PIP benefits were a mirror image to what transpired in this case. In that matter, the trial court awarded counsel \$450.00 in attorneys fees. On appeal, the Utah Supreme Court affirmed the trial court's ruling regarding the attorney fee award. The Court upheld the trial court's ruling, noting that the plaintiff was "not entitled to all the attorney fees he incurred pursuing this suit because he prevailed only on the contract claim. . . Therefore the trial court did not abuse its discretion in awarding \$450 in attorney fees" Id. at 56, 57.

In the present case, a similar type of award is necessary. Counsel's actions were identical to those taken in the Prince case. In fact, an argument can be made that such fees should even be less as the brunt of the research and work had already been performed and billed in the Prince case, and the only actions that were undertaken in this matter by counsel consisted of little more than "cutting and pasting" the pleadings. Counsel has attempted to double bill many of the exact time entries that were submitted in the Prince case, which were denied by the Utah Supreme Court. However, counsel failed in his attempt to collect thousands of dollars in the Prince case, and is therefore seeking a second chance in this case. Such a tactic is not warranted and should not be justified by this Court. The plaintiff did nothing to pursue his cause of action for breach of contract in the underlying case. Other than filing the original complaint, there was no discovery, motions, memoranda, or arguments presented to the trial court regarding the breach of contract claim. Because Progressive paid the full PIP limit, such attorney's fees could never have arisen in the underlying case.

The Utah Supreme Court has held that "reasonable" attorney's fees are not measured by what an attorney actually bills, nor is the number of hours spent on the case determinative in computing fees. Cabrera v. Cottrell, 694 P.2d, 622, (Utah 1985). The Supreme Court has provided guidance to trial courts when determining the reasonableness of attorney's fees. The Supreme Court has recommended that a trial judge may take into account the provision in the code of professional responsibility which specifies the elements that should be considered in setting reasonable attorney's fees.

Utah Code of Professional Responsibility, DR 2-106 provides that a court may consider, among other factors, the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained and the expertise and experience of the attorneys involved. (Utah Rules of Professional Conduct, 1.5(a)).

Applying the standards set forth in the Rules of Professional Conduct, it is clear that counsel's request for attorney's fees is unreasonable. This matter involved a simple request for payment of PIP expenses. The lawsuit was filed, and thereafter Progressive paid the full amount of PIP benefits available under the policy. Although the PIP benefits were not paid for a number of years, the time that lapsed consisted of the plaintiff pursuing failed claims unrelated to the breach of contract as well as years of virtual inactivity in the case.

It is apparent from counsel's affidavit he is attempting to collect attorney's fees for amounts billed in connection with numerous hours of research and preparation of memoranda regarding his arguments dealing with the "reasonable and necessary" standard in this case, as well as other attempts to turn this matter into a class action, etc. Such arguments were futile and were promptly dismissed by the Court. As such, attorney fees are not available for the time spent pursuing these meritless claims.

Counsel's affidavit also sets forth his hourly rate for services rendered. Counsel represents that prior to 1997, his rate was \$150 per hour; and thereafter, more than tripled to

\$500 per hour. Defendant would submit that such rates are extremely high and are not comparable to those customarily charged in Utah for simple cases such as the recovery of PIP benefits. In 1997, Plaintiff's counsel had only been out of law school for one to two years and was in no way entitled to command such premium rates.

In the Prince case, plaintiff's counsel was advised of the burden to allocate for his time as it related specifically to the pursuit of the breach of contract claim. Plaintiff's counsel failed to make any sort of allocation of time and fees spent on preparing the complaint for the recovery of PIP expenses as well as work on interrogatory responses. Instead, plaintiff's counsel is trying to pass off the entire "alleged" cost of the litigation. Because the issues in this case are neither novel nor complex and because plaintiff's counsel failed his burden in allocating fees for the breach of contract claim, the district court did not err when it held that plaintiff was not entitled to attorney's fees.

### **III. UTAH LAW IS CLEAR: PIP BENEFIT COVERAGE IS GOVERNED BY THE "REASONABLE AND NECESSARY" STANDARD.**

Plaintiff asks this Court to create an interpretation of the Utah No-Fault statute which contradicts Utah precedent. Plaintiff's interpretation would require insurance companies to pay for all incurred expenses within the \$3,000 statutory limit regardless of the reasonableness or necessity of those payments. Plaintiff is unable to cite any legal precedent to support the proposition that the reasonableness or necessity of No-Fault payments should not be considered in determining PIP benefits. However, without a "reasonable and necessary" standard, plaintiff's proposal would provide an automatic reward or "windfall" for being



involved in any accident– even when no loss was actually suffered.

The Utah Supreme Court recently held that a “reasonable and necessary” standard should be used when determining PIP benefit payments. Prince v. Bear River Mutual Insurance Co., 56 P.2d 524 (Utah 2002). Further, the “reasonable and necessary” standard is a broadly recognized standard for the payment of PIP benefits, not only in Utah, but throughout the United States. See Rindahl v. National Farmers Union Insurance Co., 373 N.W.2d 294, 296 (Minn. 1985) (household service benefits provided by insurer when *reasonably* incurred); Culbert v. Calderon, 17 Pa. D. & C.3d 499, 1980 WL 550 (Pa. Com. Pl. 1980) (Pennsylvania court finding expert testimony admissible on the *reasonableness* of household service in PIP claims); Smyers v. Workers’ Compensation Appeals Board, 157 Cal. App.3d 36, 203 Cal.Rptr. 521 (1984) (household services should be medically *necessary and reasonable*); Labat v. Mallard Bay Drilling, Inc., 806 So.2d 917, 923 (La. App. 2002)(*reasonable* standard applied when determining household services expenses). Boren v. Burlington Northern & Santa Fe Railway Co., 637 N.W.2d 910 (Neb. App. 2002)(damages allowed for *reasonable* household services).

Utah Code Ann. § 31A-22-307 sets forth the “reasonable and necessary” standard in the context of PIP coverage:

(1) Personal Injury Protection coverages and benefits include: (a) the **reasonable** value of all expenses for **necessary** medical, surgical, x-ray, dental, rehabilitation, including prosthetic devices, ambulance, hospital, and nursing services, not to exceed a total of \$3,000 per person...(ii) a special damage allowance not exceeding \$20 per day for a maximum of 365 days, for services

actually rendered or **expenses reasonably incurred**, for services that, but for the injury, the injured person would have performed for his household. (emphasis added).

The plain language of the statute requires a “reasonable” standard. Without the “reasonable and necessary” standard, insurance companies would be forced to pay claimants the \$3,000 statutory limit regardless of whether such expenses were legitimate. This standard, proposed by plaintiff, conflicts with the long held tenant that the Utah No-Fault Act:

both in its statement of general purpose, and its specific provisions, **was not intended to provide 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 no **reasonably** to be incurred.

Jamison v. Utah Home Fire Ins. Co., 559 P.2d 958 (Utah 1977); Versluis v. Guaranty National Companies, 842 P.2d 865 (Utah 1992).

Recently, the Utah Supreme Court addressed plaintiff’s counsel’s same argument that a “reasonable and necessary” standard did not apply to PIP benefits with respect to medical benefits. In Prince v. Bear River Mutual Insurance Co., 56 P.3d 524 (Utah 2002), the Utah Supreme Court determined PIP benefits should be considered in light of the reasonableness or necessity of medical payments.

In Prince, the plaintiff sued to collect PIP benefits under an insurance policy for alleged injuries suffered in an automobile accident. Id. The plaintiff underwent a medical examination to “investigate the necessity of Prince’s medical expenses.” Id. The medical examination revealed that plaintiff’s chiropractic care was merely “palliative,” because it did not provide

any legitimate corrective care. Id.

Based on the medical examiner's findings, a Bear River claims adjustor determined that prolonged chiropractic care was neither reasonable nor necessary and discontinued payment for future chiropractic visits. Id. Plaintiff sued Bear River claiming that the insurance company was obligated to pay up to \$3,000 in PIP benefits because it did not matter if such treatment was "reasonable or necessary." Id. at 530.

Defendant Bear River presented evidence that the "reasonable and necessary" standard was a recognized standard in the insurance industry. Further, the Utah No-Fault Automobile Insurance Act included the "reasonable and necessary" standard within the statute. Id. at 531.

The Utah Supreme Court inspected the Utah No-Fault act set forth in Utah Code Ann. § 31A-22-307(1)(a) and found that PIP benefits were intended to cover out-of-pocket expenses incurred **for necessary** expenses. Id. at 531. The Court agreed with prior Utah case law which stated that:

PIP benefits were not intended 'to provide an automatic reward or 'windfall' for being involved in an accident by requiring payment when there was no loss actually suffered...[Further] a PIP insurer can deny coverage if no loss was actually suffered or if the expenses incurred were outside the scope of coverage.

Id.

Based on this language, the Utah Supreme Court found that some standard of reasonableness or necessity must exist with respect to PIP payments in order to avoid an automatic windfall for unnecessary PIP expenses. Id. The Court pointed out that section (a)

of the Utah No-Fault Act provides:

(a) the **reasonable** value of all expenses for **necessary** medical, surgical, x-ray,...hospital, and nursing services, not to exceed a total of \$3,000 per person. Utah Code Ann. § 31A-22-307(1)(a)(emphasis added).

The Utah Supreme Court held that “under the plain language of the relevant statute...Bear River was required to pay PIP benefits to cover only expenses for **necessary** medical treatments.” Id. The Court further supported this finding by citing case law from other jurisdictions which hold that No-Fault insurance payments must not be made unless “reasonably necessary.” Id. at 533; See also Nasser v. Auto Club Ins. Ass’n, 457 N.W.2d 637, 645 (Mich. 1990); Elkins v. New Jersey Mfrs. Ins. Co., 583 A.2d 409, 412 (N.J. Super. Ct. App. Div. 1990). Finally, the Utah Supreme Court ended its discussion of the “reasonable and necessary” standard by holding that if Prince incurred unnecessary PIP expenses, “then Bear River was not required to pay PIP benefits to cover those expenses.” Id.

Other jurisdictions hold that No-Fault insurance payments for household services must be reasonable and necessary. See Rindahl v. National Farmers Union Insurance Co., 373 N.W.2d 294, 296 (Minn. 1985). In Rindahl, the plaintiff was injured in a car accident and sued to collect household benefits under the Minnesota No-Fault statute. She claimed that although she had a full-time job outside the home, she was entitled to replacement service loss benefits for the reasonable value of her household services under the No-Fault Act. The court found that because she did some work in the household, she was entitled only to a reasonable and necessary amount of the statutory limit, rather than automatically receiving the statutory

benefits. Id. at 296.

The court held that No-Fault benefits cover only the reasonable value of household services and that “service loss benefits shall reimburse all expenses *reasonably* incurred by or on behalf of the non-fatally injured person in obtaining usual and *necessary* substitute services.” Id. at 296 (emphasis added) . Further, “benefit[s] to be provided under this subdivision shall be the *reasonable* expenses incurred in obtaining usual and *necessary* substitute care and maintenance of the home.” Id. (emphasis added).

In yet another jurisdiction, the New Jersey Superior Court found that No-Fault benefits are to be “construed to effect the prompt and efficient payment of benefits for victims of auto accidents.” Id. at 700. However, the court further went on to hold that “notwithstanding this requirement, however, in order to be compensable such medical expenses must be both *reasonable and necessary*.” Id. (emphasis added).

Similarly, in Nasser v. Auto Club Ins. Assoc., 457 N.W.2d 637 (Mich. 1990), the court discussed the “reasonable and necessary” standard under the Michigan No-Fault Act. The court determined that under that act “an insurer is not liable for any medical expense to the extent that it is not a reasonable charge for a particular product or service, or if the product or service itself is not *reasonably necessary*.” Id. at 645. (emphasis added).

Based on Prince v. Bear River Mutual Insurance Co., it is clear that under the Utah No-Fault Statute PIP benefits cover only reasonable and necessary expenses. Further, courts agree that PIP benefits do not extend to unreasonable and unnecessary charges “for a particular

product or service.” Nasser, 457 N.W.2d at 645.

The household service benefit is a service governed by the same reasonable and necessary standard as chiropractic services in Prince. Case law, and the plain language of the statute, supports this assertion. It would be a flawed and inconsistent interpretation of the No-Fault Act to provide an automatic payment for some PIP services and not others. The Utah Supreme Court found “PIP benefits were not intended ‘to provide an automatic reward or ‘windfall’ for being involved in an accident by requiring payment when there was no loss actually suffered.” Id. at 531. If household services were paid when no loss was actually suffered and without some consideration of their reasonableness or necessity insureds would receive this very windfall.

#### **IV. THE PLAINTIFF IS NOT ENTITLED TO RECOVER ATTORNEY FEES INCURRED ON APPEAL.**

Progressive recognizes that attorney’s fees are available on appeal. However, such fees are not warranted for the plaintiff in this case. Instead, it is the defendant who is justified in asking for fees.

Plaintiff’s appeal is meritless. As such, Progressive should be awarded the attorney’s fees that have been generated in having to defend such a frivolous appeal. The plaintiff has had several bites at the apple to argue his meritless position at the trial court level and every time, the plaintiff was defeated. In fact, Progressive has prevailed on every issue presented to the trial court. The plaintiff had no basis in law or fact for bringing his claims for bad faith, breach of contract, fraud, infliction of emotional distress, etc. against Progressive.

Furthermore, plaintiff has no basis for bringing an appeal where the Notice of Appeal was filed after the statutory deadline. The plaintiff has attempted to create new law in this case, and by doing so, has ignored the existing case law, statutory provisions and contract language that govern. This Court should not reward the plaintiff for such conduct through an award of attorney's fees. Instead, such conduct should be deterred, and Progressive should be compensated for having to defend this matter once again.

### **CONCLUSION**

The trial court correctly held that plaintiff's counsel did not properly demonstrate any excusable neglect for his failure to file the Notice of Appeal timely and properly denied plaintiff's Rule 60(b) Motion. The trial court was also correct in denying plaintiff's Motion for Enlargement of Time to File Notice of Appeal as the burden was on plaintiff's counsel to check with the court, as often as necessary, as to the date of entry of judgment in order to ensure that the notice of appeal would be timely filed.

The trial court also properly held that the plaintiff was not entitled to attorney's fees where the plaintiff's affidavit for attorney's fees totaled \$72,885.00 and were clearly unreasonable and incredulous when viewed in light of the actions taken in pursuit of the breach of contract claim. Plaintiff's counsel was advised of the burden to allocate for his time as it related specifically to the pursuit of the breach of contract claim and he failed to do so. As such, only attorney's fees generated in the pursuit of PIP payment were justified. Because the only actions taken to pursue the payment of PIP benefits was the filing of the portion of

the Complaint dealing with the breach of contract action, the trial court's award of \$450.00 in attorney's fees was reasonable.

The trial court in the underlying case was just, reasonable and correct in all of its rulings. As such, Progressive respectfully requests that this Court affirm the trial court's rulings denying plaintiff's motion to reconsider, enlargement of time, and awarding the plaintiff attorney's fees. Progressive would also ask that this Court deny plaintiff's request for attorney's fees on appeal, and instead, award Progressive its attorney's fees in having to defend this meritless appeal.

DATED this 22 day of March, 2005

STRONG & HANNI

By 

Kristin A. VanOrman

James D. Franckowiak

Attorneys for Defendant/Appellee



## MAILING CERTIFICATE

I hereby certify that on the 23 day of March, 2005, a true and correct copy of the foregoing document was mailed via U.S. mail, postage prepaid, to the following:

Taylor D. Carr, Esq.  
Trent J. Waddoups, Esq.  
CARR & WADDOUPS  
8 East Broadway, Suite 609  
Salt Lake City, Utah 84111  
**Attorneys for Plaintiff/Appellant**

A handwritten signature in black ink, reading "Deane Smith". The signature is written in a cursive style with a large, looped initial "D".