

2004

Irma Martinez v. Progressive Northwestern Insurance Co. : Brief of Appellant

Utah Court of Appeals

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IRMA MARTINEZ,
Plaintiff / Appellant,

PROGRESSIVE NORTHWESTERN
INSURANCE CO.,

Appellate Case No. 20040799-CA
Civil No. 970905939 CV

Priority Number: 15 **BRIEF**

UTAH COURT OF APPEALS

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DOCKET NO. 20040799-CA

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ff / Appellant, FILED
UTAH APPELLATE COURTS

FEB 18 2005

ORAL ARGUMENT REQUESTED

IN THE UTAH COURT OF APPEALS

UTAH APPELLATE COURTS
NOV 30 2004

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Irma Martinez,)	
)	
Plaintiff and Appellant,)	ORDER
)	
v.)	
)	Case No. 20040799-CA
Progressive Northwestern)	
Insurance Co.,)	
)	
Defendant and Appellee.)	

This matter is before the court on Appellant's motion to clarify scope of appeal and on Appellee's motion for summary disposition.

IT IS HEREBY ORDERED THAT Appellant's motion to clarify scope of appeal is denied.

IT IS FURTHER ORDERED THAT Appellant's motion to strike Appellee's motion for summary disposition as untimely is denied.

IT IS FURTHER ORDERED THAT Appellee's motion for summary disposition is denied, and all issues are reserved for plenary consideration by this court.

Dated this 30TH day of November, 2004.

FOR THE COURT:



Gregory K. Orme, Judge

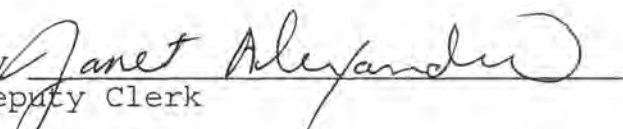
CERTIFICATE OF MAILING

I hereby certify that on November 30, 2004, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

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Dated this November 30, 2004.

By 
Deputy Clerk

Case No. 20040799
District Court No. 970905939

IRMA MARTINEZ,)	
)	
Plaintiff / Appellant,)	Appellate Case No. 20040799-CA
)	Civil No. 970905939 CV
)	
vs.)	
)	
PROGRESSIVE NORTHWESTERN)	Priority Number: 15
INSURANCE CO.,)	
)	
Defendant / Appellee.)	
)	
)	

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

Counsel for Defendant / Appellee,
Progressive Northwestern Ins. Co.

Counsel for Plaintiff / Appellant,
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DETERMINATIVE STATUTES AND CONSTITUTIONAL PROVISIONS

The Utah no-fault statute and the right of appeal clause of the Utah Constitution:

Utah Const. Art. VIII, §5.

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, **there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.**

Utah Code Ann. §§ 31A-22-306 - 309.

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PARTIES TO THE PROCEEDING IN THE DISTRICT COURT

The proceeding before the Third District Court was an action for breach of contract, breach of fiduciary duty, and bad faith involving Irma Martinez who was injured by the Defendant's misconduct (hereinafter "Plaintiff"), plaintiff and appellant, and Progressive Northwestern Insurance Company (hereinafter "Progressive"), defendant and appellee, Civil number 9 7 0 9 0 5 9 3 9 CV. (R. 1). The primary issue presented to the district court was whether Progressive owed indemnification to Plaintiff under her automobile insurance policies containing personal injury protection coverage ("PIP"). (R. 4).

Progressive refused to pay the expenses incurred by Plaintiff because (1) it claimed a "reasonable and necessary" defense to household benefits; (2) it claimed that Irma Martinez's husband waived all claims to medical expenses benefits; and (3) it claimed that it would obtain an opinion from CorVel to justify a refusal to pay lost wages. (R. 2-3). None of these claimed defenses were ever supported with any admissible evidence or by any provision of the no-fault statute or the insurance policy.

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction in this matter pursuant to §78-2-2(3)(j), UTAH CODE ANN. (1953, as amended). And this matter was poured over to the Utah Court of Appeals pursuant to § 78-2-2(4), UTAH CODE ANN. (1953, as amended).

COURSE OF PROCEEDING AND DISPOSITION BELOW

A final judgment denying any attorney fees under Utah Code Ann. § 309 which

requires that the court is “required” to award attorney fees was entered by the trial court on February 4, 2004. Plaintiff filed a timely post-judgment motion contesting the trial court’s decision to award no fees on February 17, 2004. That motion was denied in a minute entry which did not comply with Utah R. Civ. P. 7 on April 6, 2004. A Notice of Appeal was filed 31 days after the minute entry and disposed of by the Utah Court of Appeals on a finding that it lacked jurisdiction on June 17, 2004. On June 4, 2004 Plaintiff filed a motion for the entry of a final judgment or to set aside the minute entry pursuant to Rule 60(b) or to enlarge the time for appeal under Utah R. App. P. 4(e). The trial court denied that motion from which Plaintiff appeals.

ISSUES PRESENTED FOR REVIEW AND APPLICABLE STANDARDS OF APPELLATE REVIEW

A. Were the findings of the district court in refusing to award attorney fees sufficient? Reviewed for abuse of discretion. Endrody v. Endrody, 914 P.2d 1166, 1171 (Utah App. 1996) (a trial court “abuses its discretion in awarding less than the amount [of attorney fees] requested unless the reduction is warranted by one or more of the above [Dixie] factors.”); see also Saunders v. Sharp, 818 P.2d 574, 580 (Utah App. 1991).

B. Did the trial court err in refusing to award any attorney fees despite the statute’s use of the word “required”? Reviewed for correctness. See Whipple Plumbing v. Aspen Construction, 2004 UT 47 at ¶ 7 (“By its use of the word “shall,” the provision mandates that the successful party be allowed to recover reasonable

attorney fees. . . . “Thus courts do not have discretion to decide whether to award reasonable attorney fees to the ‘successful party.’”).

C. Is Plaintiff entitled to a summary judgment for the full amount of damages claimed plus additional attorney fees because Defendant did not present any admissible evidence in its opposition? Reviewed for correctness. See South Sanpitch v. Pack, 765 P.2d 1279, 1283 (Utah App. 1988).

D. Is the judgment appealed from a final appealable order from the entire litigation and not just the Rule 60(b) denial because the minute entry did not constitute a final appealable judgment; rather the time for appeal began to run at the time a final order was entered on Plaintiff’s post-judgment motion? Reviewed for correctness. Utah R. Civ. P. 7; Utah R. App. P. 4(b).

E. Should the court vacate its ruling (2004 UT App 204) which the trial court considered res judicata because it considered an issue that was not briefed and because the trial court’s minute entry failed to comply with Rule 7? Reviewed for correctness. Utah R. Civ. P. 7.

F. Did the trial court err in refusing to set aside the judgment based on a lack of “excusable neglect” when (a) Plaintiff moved based on mistake and inadvertence and (b) the trial court failed to comply with Rule 7 and (c) an extension of time for appeal was supported by good cause? Reviewed for correctness. See Kizer v. Semitool, Inc. (1991), 251 Mont. 199, 824 P.2d 229 (“The request to extend the time for filing a notice of appeal must be made within thirty days after the initial thirty-day period

for filing a notice of appeal has expired. Here, Semitool filed its motion to extend the time for filing a notice of appeal one day after the initial thirty-day period had expired. Apparently, it was unclear to counsel for Semitool whether the District Court had denied Semitool's post-trial motions from the bench or would be making a decision post-hearing. Under these circumstances, the District Court found that good cause existed to extend the time for filing a notice of appeal. We hold that Semitool's notice of appeal was timely filed.”)

STATEMENT OF FACTS

a. Mrs. Martinez paid an insurance premium to Defendant in return for which Defendant agreed to insure a 1988 Cadillac Seville owned by Mrs. Martinez’s husband Juan Martinez for, among other things, personal injury protection benefits (“PIP”) (R.246).

b. Pursuant to said insurance policy and Utah law, Defendant agreed to pay said PIP expenses within 30 days of receiving reasonable proof of the fact and amount of expenses incurred (R.2).

c. For all PIP benefits claimed by Mrs. Martinez, Defendant Progressive received reasonable proof of the fact and amount of expenses, but disputed its coverage obligation for the amount of those expenses.

A. THE FIRST ACCIDENT

d. On or about April 14, 1997, Mrs. Martinez was driving the insured vehicle

when she was involved in a chain-reaction accident in which Mrs. Martinez's vehicle was rear-ended (R. 247).

e. Mrs. Martinez was injured in the above-described accident and incurred medical expenses, loss of earning capacity, and expenses for household services for which Mrs. Martinez provided reasonable proof to Defendant through Mrs. Martinez's treating physicians, medical providers, employer, worksheets showing actual housework performed, and a statement that she owed \$20.00 per day for services to Julia Flores (R. 248).

f. Defendant paid the limits of its PIP medical expenses coverage — \$3,000.00 — for Mrs. Martinez's medical expenses as required under Utah's no-fault statute.

g. Defendant paid a portion of Mrs. Martinez's PIP lost wages benefits until approximately June 20, 1997.(R.2)

h. Defendant paid a portion of Mrs. Martinez's PIP household services benefits through June 23, 1997.(R.33)

i. Defendant refused to continue to pay said PIP lost wages benefits and PIP household benefits purportedly because it wanted an entity called CorVel ("CorVel") to study Mrs. Martinez's medical records, work duties at her place of employment, etc. (R.33)

j. Defendant refused to pay more than a portion of said PIP benefits because it asserted that payment was contingent upon the results of the CorVel study which could not be performed "without treatment notes from her providers' [sic] to support her

disability.”(R.34)

k. Defendant never performed any “study.”

l. The second stated reason for Defendant’s partial payment of said PIP household services benefits was Defendant’s insurance adjuster’s opinion of what “[she] thought” were the hours of work actually performed by Julia Flores which were “reasonable and necessary” according to her homespun chart (not set forth in the statute or the contract) despite Mrs. Martinez’s explanation that she hired the woman at the rate of \$20.00 per day in reliance upon Defendant’s insurance policy and its letter explaining PIP benefits which indicated that Defendant would pay actual costs of \$20.00 per day, and the provision of reasonable proof of services actually provided.(R.34)

B. THE SECOND ACCIDENT.

m. On or about June 8, 1997, Mrs. Martinez was driving the insured vehicle when she was involved in second accident in which she was rear-ended again.(R.248)

n. Mrs. Martinez was injured in the above-described accident and incurred medical expenses for which Mrs. Martinez provided reasonable proof to Defendant through Mrs. Martinez’s treating physicians and medical providers.(R.249)

o. On or about July 10, 1997, Defendant retroactively refused to pay any of Mrs. Martinez’s PIP benefits arising from the second accident purportedly because Mrs. Martinez told Defendant that she did not feel “more pain” after the second accident than before it.(R. 249)

p. No evidence of this alleged statement or any legal foundation for a

conclusion (see Utah R. Evid. 402) that such a statement if made was ever provided by Defendant.

q. Mrs. Martinez's treating physicians and medical providers diagnosed additional injury, complications or aggravation arising out of the second accident and submitted medical bills to Defendant for payment which Defendant refused to pay.

r. Defendant received reasonable proof of medical bills for Mrs. Martinez which arose out of the second accident in the amount of \$1,161.00.

s. Defendant refused and refuses to pay the medical bills which arose out of the second accident because it asserts that those medical bills were not "reasonable and necessary" — among other varying assertions.

C. THE CORVEL "STUDY"

t. On or about June 30, 1997, Defendant advised Mrs. Martinez that her PIP lost wages benefits would cease being paid "pending an independent work review performed by CorVel."(R.35)

u. Defendant also refused to pay any PIP household services benefits beyond the date upon which Defendant made its decision to attempt to obtain a "study" from CorVel (approximately June 23, 1997).(R.35)

v. Defendant terminated all of Mrs. Martinez's PIP benefits on or about June 23, 1997 because of its decision to hire CorVel, however, it did not attempt to assist CorVel in its study until July 15, 1997 (more than three weeks later) when Defendant began requesting documentation it believed was necessary for CorVel's study.(R.36)

w. Defendant refused payment of all PIP benefits until such time that CorVel was able to review all Mrs. Martinez's medical records including "treatment notes from her providers' [sic] to support her disability. . . ." (R.36)

x. Defendant intended to have CorVel's "medical managers" review the treatment received by Mrs. Martinez and then have CorVel perform a "work evaluation review" which would include "a meeting with her employer for information on her job duties and any restrictions she may have" to "assist [Mrs. Martinez] on a release to work program." (R.36)

y. Upon completion of its extensive reviews of medical records and employment duties, CorVel planned to send Mrs. Martinez to a doctor who would perform an "independent" medical examination ("IME") in order for Defendant to determine Mrs. Martinez's continuing eligibility for PIP benefits. (R.36)

z. During the pendency of the review, Defendant ceased all payments and asserted that it was permitted to cease paying any PIP benefits pending the CorVel study's outcome.

aa. On or about August 25, 1997 (more than two months after terminating Mrs. Martinez's PIP benefits), Defendant advised Mrs. Martinez that it had not yet started the CorVel study because it had not received treatment notes and treatment plans from Mrs. Martinez's medical providers. (R.37)

bb. No evidence of its alleged efforts to obtain any information then, and no evidence of an alleged effort during litigation, was ever provided.

D. DEFENDANT'S REFUSALS TO PROVIDE PIP BENEFITS.

cc. Mrs. Martinez's attorney wrote to Defendant on June 25, 1997 advising Defendant that Mrs. Martinez had retained counsel and Defendant would be required to provide PIP medical benefits to Mrs. Martinez for the second accident.(R.37)

dd. Defendant responded on July 10, 1997 that it had "closed the PIP claim" and would not reopen it because Mrs. Martinez had said that she "did not feel anymore [sic] pain than what she was feeling before this [second] accident."(R.37)

ee. Later, in the hearing before Judge Nehring on Plaintiff's motion to compel (April 14, 2003), Defendant claimed that this was not its justification for denying the PIP benefits.(R.856)

ff. On July 28, 1997, Mrs. Martinez's attorney again wrote to Defendant demanding that it pay Mrs. Martinez's PIP benefits and reopen the PIP file because her medical providers had diagnosed injury and she had incurred medical expenses.(R.37)

gg. On July 30, 1997, Defendant again refused to pay Mrs. Martinez's PIP benefits for the second accident because, in its opinion, the injuries did not arise out of the accident because the accident only caused minor property damage and based on its interpretation of its insurance policy's "reasonable and necessary" language.(R.37)

hh. On August 5, 1997, Mrs. Martinez's attorney wrote to Defendant explaining the no-fault statute and Defendant's duties pursuant to the no-fault statute and demanding payment of all PIP benefits.(R.38)

ii. On August 25, 1997, Defendant again refused to pay any of Mrs. Martinez's

PIP benefits.(R.38)

jj. Defendant advises its insureds (in literature provided after an insured reports an accident) that it will pay for all PIP medical expenses incurred, and warns its insureds, in underlined language, that an insured may be responsible for bills incurred for any medical procedure which costs in excess of the statutorily defined “reasonable value” of the medical procedure.

kk. Defendant does not warn its insureds that it may decide not to pay PIP medical expenses on the basis that it may attempt to elicit a statement from the insured stating that she does not feel more pain.

ll. Defendant advises its insureds that it will pay for all PIP lost wages during the period of disability, and warns its insureds that “dates of disability must be verified by a **doctor**.” (Emphasis added).

mm. Defendant advises its insureds, in bold letters, that “You must provide a disability slip from **your physician** in order for benefits to be paid.” (Emphasis added).

nn. Defendant does not warn its insureds that despite providing a disability slip issued by a doctor as instructed, Defendant may decide to terminate PIP lost wages benefits if it chooses to hire CorVel and ask doctors for their treatment notes to “verify her disability.”

oo. Defendant advises its insureds that it will pay a maximum of \$20.00 per day for “actual services rendered” for PIP household services benefits, and warns that a doctor’s disability slip is required in order to receive PIP household services benefits.

(R.34)

pp. Defendant refused to pay Mrs. Martinez's PIP benefits despite receiving the required disability slips.

qq. Defendant does not warn that its claims adjuster will review the actual services rendered and will refuse to pay if she believes the services were not "reasonable and necessary" according to a homespun chart which was never made a part of the insurance policy.

rr. Defendant refused to pay Mrs. Martinez's PIP household services benefits for actual services rendered and refused to pay any benefits after it thought about hiring CorVel despite receiving disability slips and reasonable proof of actual services rendered.

ss. Defendant warns that "We will also require verification from **your providers** that the injury and lost wages are a direct result of the above captioned matter."

tt. Defendant does not warn that it may refuse to pay any PIP benefits pending an evaluation and independent medical examination performed by CorVel.

uu. On August 19, 1997, after waiting two weeks for a response to Mrs. Martinez's final demand, Mrs. Martinez filed a Complaint initiating this action.(R.1)

vv. Defendant agreed to pay the full PIP benefits it owed to Plaintiff in the hearing before Judge Nehring on April 14, 2003.(R.856)

ww. Defendant also agreed that it would waive any right to rely on the sole

statutory defense to paying attorney fees: i.e., that the payment was not required by the action.(R.856)

xx. Plaintiff's counsel filed a verified application for attorney fees December 5, 2003.(R.663)

yy. Defendant did not provide any admissible evidence to contradict the amount of fees or the rate charged by counsel.

zz. At a hearing held on January 12, 2004 Judge Quinn did not hear any argument from Defendant and refused to award any attorney fees.(R.857)

SUMMARY OF THE ARGUMENT

The district court issued a ruling denying Plaintiff's Rule 59 motion via a minute entry. That ruling was finally formalized in an order on August 16, 2004. This appeal is taken from that final, appealable order.

Progressive improperly concluded that the minute entry ruling was an order. There is a legal distinction between a ruling and an order. Orders are governed by Rule 7. Specifically, Progressive was required by Utah R. Civ. P. 7(f)(2) to prepare and serve an order complying with the district court's ruling. It failed to do so. Later, it attempted to avail itself of its own failure contending that its failure stripped Plaintiff of her constitutional right of appeal. See Utah Const. Art. VIII, §5.

A procedurally flawed process in the Court of Appeals led the Court to affirm, in *dicta*, that the ruling was an order. See Wayne Garff Const. Co. v. Richards, 706 P.2d

1065 (Utah 1985) (holding that a defendant's failure to comply with the precursor to Rule 7(f)(2) by preparing and serving a proposed judgment rendered it unfiled); Anderson v. Schwendiman, 764 P.2d 999, 1000 (Utah App. 1988) (holding that an order is "entered" pursuant to the requirements of Utah R. Civ. P. 58A); Hartford Accident & Indem. Co. v. Clegg, 103 Utah 414, 420, 135 P.2d 919, 922 (1943) (quoting 33 C.J. *Judgments* § 118 (1924)) (same). Plaintiff had no opportunity to contest Progressive's assertions or the Court's conclusions because the Court's absence of jurisdiction over the prior notice of appeal was clear because the prior notice of appeal was premature. See Reeves v. Steinfeldt, 915 P.2d 1073 (Utah 1996). Opposing the remedy sought by Progressive would have been both inappropriate and futile. Plaintiff was never put on notice that the Court would perform extensive analysis that Progressive itself failed to perform. See Johnson v. Rappleye, 2004 UT App 290. If Plaintiff had had notice, she would have brought Utah R. Civ. P. 7(f)(2) to the Court's attention.

Because Plaintiff appeals from the only final, appealable order, the Rule 60(b) and Rule 4(e) matters are not relevant. Those motions are properly viewed as superfluous because those motions were unnecessary under the correct legal analysis of Rule 7(f)(2).

Progressive refused to pay PIP benefits to Mrs. Martinez although it was required to pay within 30 days and although the no-fault statute provides no basis for its refusal. As a result of Progressive's refusal to perform its contractual obligations, Mrs. Martinez incurred more than \$70,000 in attorney fees to avail herself of her contractual and

statutory rights. The district court erred when it refused to award attorney fees despite the statutory obligation to award fees. The district court applied the wrong legal standard when it reviewed the application of attorney fees. The district court apparently asserted that Plaintiff's fully supported affidavit in which fees were apportioned between compensable and non-compensable work was insufficient to satisfy the Plaintiff's *prima facie* obligation to provide sufficient proof. But see Meadowbrook, LLC v. Flower, 959 P.2d 115, 119 (Utah 1998) ("Indeed, attorney fees are routinely established by **proffer or affidavit**, and by evidentiary hearing when necessary."). The district court's legal conclusion that some additional burden was borne by Plaintiff (the district court did not identify the nature of the additional burden) led it to its erroneous conclusion. See J.V. Hatch Constr., Inc. v. Kampros, 971 P.2d 8, 15 (Utah App. 1998) ("Our supreme court has identified 'prima facie evidence' as follows: "'Such evidence as, **in the judgment of the law** is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or depose, **and which if not rebutted or contradicted, will remain sufficient.**"' State v. Asay, 631 P.2d 861, 864 (Utah 1981) (citation omitted).").

Attorney fees are required under the no-fault statute in order to "ensur[e] that someone who successfully [brings an action] to enforce a payment obligation . . . will not ultimately bear the legal costs of that enforcement action." A.K. & R. Whipple Plumbing and Heating v. Guy, 2004 UT 47, ¶ 24, 94 P.3d 270. The district court's refusal to award attorney fees would defeat the legislative intent of the no-fault statute.

But see Kimball Condos. Owners Ass'n v. County Bd. of Equalization, 943 P.2d 642, 648 (Utah 1997) (requiring that statutory provisions be harmonized with legislative intent).

ARGUMENT

I. THE AUGUST 16, 2004 ORDER WAS THE FINAL APPEALABLE ORDER; THEREFORE, THE COURT HAS JURISDICTION OVER ALL INTERMEDIATE ORDERS.

A final order was issued in this case on February 4, 2004. (Record at 716). The time for appeal was tolled pending the district court's resolution of Plaintiff's timely Rule 59 motion. Transamerica Cash Reserve, Inc. v. Hafen, 723 P.2d 425 (Utah 1986).

Although Progressive failed to respond to Plaintiff's post-judgment motion, the district court denied the motion — without a hearing — in a minute entry. (Record at 766). The minute entry was a ruling which was silent as to an order. Id.

A premature notice of appeal was filed 31 days later on May 7, 2004. This premature notice of appeal did not confer jurisdiction on this Court. See Martinez v. Progressive, 2004 UT App 204. A new Notice of Appeal was filed on September 15, 2004 from a final order issued August 16, 2004. (Record at 840). This Notice of Appeal was not premature, and it was timely filed after the final appealable order entered denying Plaintiff's post-judgment motion. Therefore, all intermediate orders are before this Court. See Speros v. Fricke, 2004 UT 69, ¶ 16, 98 P.3d 28.

The Utah Supreme Court addressed a very similar situation in 1985. Wayne Garff Const. Co. v. Richards, 706 P.2d 1065 (Utah 1985). The issue in Richards was whether the court had jurisdiction to consider an appeal as a result of the defendants'/appellees' "failure to comply with Rule 2.9(b) of the Rules of Practice in the District Courts and Circuit Courts of the State of Utah." Id. at 1066. The

defendants' failure related to a requirement that copies of orders were required to be served on opposing counsel in order to permit objections. See also Utah R. Civ. P. 7(f)(2). The supreme court ruled that compliance with this requirement was necessary to a final order, and the defendants' failure to comply with the requirement rendered the appeal premature.

Compliance with Rule 2.9(b) is necessary in order that a judgment be "filed" as we have construed that term under Rule 58A(c) of the Utah Rules of Civil Procedure. *Larsen v. Larsen*, Utah, 674 P.2d 116, 117 (1983); *Bigelow v. Ingersoll*, Utah, 618 P.2d 50, 52 (1980). The record indicates that no copies of the proposed judgment and findings were sent to counsel for plaintiffs, **and there is nothing in the trial transcript to show that the trial court waived that requirement.** Therefore, no judgment has been "filed" within the meaning of the Rule, and this appeal is premature. Utah R. Civil P., Rules 58A(c) and 72(a).

Id.

Similarly, in this case, the minute entry was silent regarding a waiver of the requirements of Rule 7(f)(2). And Rule 7(f)(2) serves the same goals as Rule 2.9. Because of the district court's silence, the minute entry cannot be considered a final appealable order.

Rule 7(f)(2) only exempted Progressive from its obligation to prepare a proposed order and serve it on Plaintiff if "otherwise **directed** by the court." Because a district court must "direct" a specific procedure in order that the "prevailing party" may be relieved of its obligation to prepare and serve "a proposed order," and because the minute entry was silent, the holding in Richards binds this Court.

The lack of a clear instruction as to whether the minute entry would constitute an order meant that the default provision of Rule 7 governed. Progressive's failure to comply with its duties prevented the "filing" of a final appealable "order." This failure was only remedied on August 16, 2004. Any conclusions to the contrary in the Court's Memorandum Decision should be disavowed.

II. IN THE ALTERNATIVE, THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO SET ASIDE THE MINUTE ENTRY.

Rule 60(b) motions are to be granted freely when a denial would result in a party's loss of constitutionally protected rights such as the right of appeal. Oseguera v. Farmers Insurance Exchange, 2003 UT App 46, ¶ 10, 68 P.3d 1008. This Court held in Oseguera that relief under Rule 60(b) is "foreordained" when, as here, a party is denied the right to appeal because of the lack of a notice or because of being misled. Id. (quoting Wright & Miller). And a trial court's failure to grant a motion under these circumstances is an abuse of discretion. Id.

The Utah Supreme Court also taught in Olsen v. Cummings, 565 P.2d 1123 (1977), that "it is quite uniformly regarded as an abuse of discretion to refuse to vacate a [minute entry] where there is reasonable justification or excuse for the [party's] failure to appear and timely application is made to set it aside." And in Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 877-78 (Utah 1975), the court cautioned that while expeditious handling of calendars is commendable, it is

“even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them.” Id. And it is no answer to assert that Mrs. Martinez was able to appear before the district court. The right of appeal is a constitutionally protected right that cannot be abrogated by reference to the existence of the legal predicate to the constitutional right.

In the instant case, Plaintiff’s filing of her notice of appeal one day late was a mistake. It was also excusable neglect. It was also inadvertent. And the obligation to file it 30 days after the minute entry was a surprise.

A. The Single Day Delay Was Excusable Neglect.

The United States Supreme Court has taught that the determination of whether neglect is excusable is essentially equitable, and a court must take all factors into account. See Jennings v. Rivers, 04-6000 (10th Cir. 2005) (citing Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P’ship, 507 U.S. 380, 394 (1993)). And all doubts should be resolved in favor of the party seeking relief.

Relevant factors for excusable neglect include the danger of prejudice to the opposing party. In this case, no imaginable prejudice inures to the opposing party. Progressive itself never identified any potential prejudice. (Record at 809). The balance obviously tilts in favor of setting the minute entry aside because there is no prejudice.

The length of delay and its impact on judicial proceedings is another relevant

factor. The delay in this case was one (1) day. A single day delay cannot adversely affect the administration of justice by any standard. So this factor tilts in favor of setting aside the minute entry.

The reason for the delay is a factor that also tilts the equitable balance toward Plaintiff's substantive right to appeal. The delay was caused by a number of things. Most of these factors were outside Plaintiff's control. As set forth above, the delay was caused by Progressive's failure to prepare an order. As set forth in the affidavits presented to the district court (Record at 780-85), the delay was also caused by the clerk of the district court promising to find out if the court intended to comply with Rule 7(f)(2) or whether the court considered the minute entry to be an order rather than a ruling. Although the clerk promised to call back, she never did and she never claimed that she could not respond except to the degree that she could not provide conclusions except by asking the judge. Id. These reasons should be balanced against the district court's contention that it was prevented from responding to counsel's telephone calls because it would be an *ex parte* communication.¹ (Record at 858, p. 9). This contention provides additional weight favoring relief for Plaintiff. This contention concedes that the district court knew about the flawed minute entry. The court could have held a telephone conference, it could have issued an amended minute entry, and it could have

¹ Communication between a court and a litigant on a procedural issue is not an improper *ex parte* communication. But even if it were, it would still tend to require setting aside the minute entry rather than refusing relief. And if it were, the district court should have instructed to tell Plaintiff that the court considered communication improper.

set an emergency hearing. The fact that the district court knew that its minute entry was misleading and incomplete, but did nothing to cure the known problem it caused, means that the court should have granted the relief sought by plaintiff. The last reason was the busy schedule of Plaintiff's counsel in out-of-state depositions, miscounting 30 days as a result of not believing the minute entry was a final order (thereby never formally calendaring the appeal pending the court's promised response), and the desire to not waste \$300 filing a premature appeal until the last minute (which turned out to be a day late). On balance, the factors that were out of Plaintiff's control are more pervasive than the factors within Plaintiff's control. Therefore, this prong favors relief.

The final prong² that should be considered is the Plaintiff's good faith. The affidavits, legal arguments, and the hearing all attest to the fact that the extremely short delay was not caused by any bad motive. Nothing comparable to a defendant's refusal to answer the complaint or disrespect for the judicial system exists in this case.

In sum, every prong favors, on balance, relief for the Plaintiff on the basis of excusable neglect. Nevertheless, the district court stated: "there has been no showing of excusable neglect." (Record at 858, p. 9). The court then asked counsel for Progressive to prepare an order (the court asked for an order to be prepared on every other motion except the minute entry).

² The prongs are not exhaustive, and a meritorious claim is another prong. Plaintiff refers the Court to the sections of this Brief which deal with the merits when considering that prong.

The district court's conclusion is not supported by the record and contains no analysis.³ The district court "did not support this conclusion with a discussion of the relevant factors. Moreover, the district court did not consider the possibility of other 'terms as are just' under which plaintiff could be relieved from final judgment." Jennings v. Rivers 04-6000 at section III(A). Therefore, the district court abused its discretion because it did not analyze the motion under the correct standard. Id. (reversing a district court's decision to award \$0.00 in damages including its denial of post-judgment motions and a 60(b) motion).

B. The Single Day Delay Was a Mistake.

The district court ruled, incorrectly, that there was no showing of excusable neglect. The court failed to consider mistake at all despite knowing the mistake prong was the primary argument made by Plaintiff. (Record at 820).

Considerations under the mistake prong of Rule 60(b) include whether the mistake was an isolated incident or whether it was a part of a pattern of dilatoriness and delay. "[A] mistake could occur in any [attorney's] office no matter how well run." See Hancock v. City of Okla. City, 857 F.2d 1394, 1396 (10th Cir. 1988). And the

³ *Pioneer* thus indicates that a district court may find neglect "excusable" if it is caught quickly, hurts no one, and is a real mistake, rather than one feigned for some tactical reason — *even if* no decent lawyer would have made that error. There is no linguistic flaw in terming such errors "excusable," meaning nothing more than "appropriate to excuse." Pincay v. Andrews, No. 02-56577 (9th Cir. 2004) (Berzon, Circuit Judge, concurring).

attorney's prompt actions to correct the mistake after discovery should also be considered.

This case involved a single day delay in response to an ambiguous minute entry. Plaintiff waited until the last day to file because of the costs associated with filing a notice of appeal. The costs were especially onerous because of the thousands of dollars in other costs that were incurred in the previous appeal, several transcripts, and the district court's refusal to award the attorney fees incurred. Plaintiff attempted to avoid making such a mistake by diligently calling the court and asking what the minute entry meant. The single day mistake was a slip-up which occurred as a result of noting that the day of entry is not counted and then concluding (incorrectly) that May 7, 2004 was the 30th day.

The mistake of Plaintiff was compounded by the mistake of the court in not making a clear minute entry that complied with Rule 7. By Defendant's failure to comply with Rule 7. And by the court not telling the court clerk to advise Plaintiff that she would not be providing a response to Plaintiff's numerous inquiries. Mistakes are cumulative. Mistakes are made. Mistakes can be fixed by the express provision of Rule 60(b). The district court abused its discretion in failing to consider the mistake prong.

C. The Single Day Delay Was Inadvertent.

Without too much repetition of the foregoing, inadvertence implies the lack of intent. In this case, 30 days was calendered incorrectly. It was calendered as a

contingent date because Plaintiff expected a response from the court. It was calendared as a contingent date because Plaintiff knew that Rule 7 required Progressive to prepare an order. Nothing contradicts the affidavits and the record showing there was no intent by Plaintiff to miss the date on purpose.

D. The Single Day Delay Was a Surprise.

Although Plaintiff diligently attempted to figure out whether the minute entry would serve as the order, the district court's failure to respond resulted in the absence of knowledge regarding the court's intent. There was no way to determine that the order would be viewed as final. This is true in light of the fact that Rule 7(f)(2) is clear and unequivocal in its requirement. See Lundahl v. Quinn, 2003 UT 11, ¶ 12, 67 P.3d 1000 (stating "Where rule 25(c) provided the proper mechanism, if any, for Holli to obtain the relief she requests, her petition for extraordinary relief is frivolous on its face."). The district court's failure to invoke or apply Rule 7(f)(2) is incorrect. Plaintiff's reliance on that rule is proper. Progressive's refusal to comply with that rule is improper. There is no rule that would have provided Plaintiff with the opportunity to learn that the district court did not intend to comply with Rule 7(f)(2).

E. Plaintiff Invokes "Any Other Reason Justifying Relief."

All of the provisions of Rule 60(b)(1) besides excusable neglect are broader than excusable neglect. For example, the United States Supreme Court noted in the seminal

Pioneer case as follows:

Although inadvertence, ignorance of the rules, or mistakes
construing the rules do not usually constitute excusable neglect . . .

Pioneer 507 U.S. at 392. And the “any other reason” prong is broader than all of the other prongs. It relates to the just and fair result — whether a litigant should have her case reviewed by a superior court.

Plaintiff is entitled to appeal the district court’s refusal to award attorney fees. The refusal was contrary to law. The single day delay was caused in part by the district court, the Defendant, and the Plaintiff. All things considered, a single day’s delay does not outweigh Plaintiff’s right to present her arguments to an appellate court.

III. IN THE ALTERNATIVE, THE DISTRICT COURT ABUSED
ITS DISCRETION WHEN IT REFUSED TO ENLARGE THE
TIME FOR FILING THE NOTICE OF APPEAL.

When Plaintiff discovered that the premature notice of appeal had been filed 31 days after the minute entry, Plaintiff immediately sought relief in the district court. Rule 4(e) provides that the district court is empowered to enlarge the time for appeal upon a showing of good cause or excusable neglect. As set forth above, the district court concluded that there was “no showing” of excusable neglect. It failed to consider good cause at all. This fact alone is sufficient for a showing of excusable neglect because the court did not analyze and evaluate Plaintiff’s motion under the appropriate legal standard.

The primary case analyzing Rule 4(e) is not exactly on point, but it provides some helpful analysis. The supreme court considered a case where a losing party was not notified of an order because the clerk of the court failed to send it. West v. Grand County, 942 P.2d 337 (Utah 1997). The court noted that counsel is required to check with the clerk periodically to learn about the status of cases.⁴ It then proceeded to adopt the general principles of excusable neglect applicable to Rule 60(b) motions.

The primary factor discussed by the court in West was the court's practices having lulled the litigant into delay. Similarly, in this case, every order issued by the district court, except the minute entry, complied with Rule 7(f)(2). The court clerk's promise to find out whether the judge wanted compliance with Rule 7 or whether the court considered the minute entry to be an order by itself. These two facts, combined with the requirements of Rule 7, constituted excusable neglect. The district court's claim there was "no showing" is error.

Moreover, good cause is a lower bar. If a district court is focused on ensuring that all litigants are provided with the opportunity to protect and invoke their constitutional rights, the court would be within its discretion to enlarge the time for appeal under the good cause prong. In this case, the district court wholly ignored the good cause prong. Based on its failure to analyze Plaintiff's motion under the

⁴ An obligation to check with the clerk surely rests on the assumption that the clerk can and will discuss such matters with the litigant. This concept is contrary to the district court's *post hoc* assertion that any response to Plaintiff in this case would have been improper.

appropriate standards, the district court abused its discretion.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY REFUSING TO AWARD ANY ATTORNEY FEES.

PIP benefits must be paid to an insured “immediate[ly] . . . without having to bring a lawsuit.” Versluis v. Guaranty National Cos., 842 P.2d 865 (Utah 1992). When a lawsuit is required in order to force an insurer to fulfill its contractual promises, two contingent contractual benefits are available — interest and attorney fees. Progressive admitted that these contingent benefits were due, and it paid the interest. (Record at 856, pp. 27-29).

The question as to the amount of the attorney fees was to have been resolved by the district court. However, the district court refused to award any attorney fees. “An award that does not fully compensate an attorney for his time plainly does not meet the standard of reasonable fees required by section [309(5)].” See King v. Greenblatt, 560 F.2d 1024, 1026 (1st Cir. 1977), *cert. denied*, 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978).

The justification given by the court was not legally valid. Although Plaintiff provided a duly sworn affidavit which complied with Utah R. Civ. P. 73, offered to provide sworn testimony in open court and referred to the extensive, nearly 900 pages, record, the district court claimed that there was no “credible” evidence that any attorney fees had been incurred over the course of six years of litigation that the district court

incongruously described as “World War III.” (Record at 857, p. 48).

Essentially, the judge slandered⁵ an officer of the court and used that conclusion to completely ignore all admissible evidence because the court claimed to disbelieve all the admissible evidence. However, the district court’s negative personal feelings directed toward an officer of the court who appears before it is not one of the elements underlying a district court’s very limited discretion. Its role is to advance the intent of the statute authorizing the statutory obligation to pay attorney fees. The Utah legislature decided that PIP carriers are **required** to pay attorney fees if the PIP carrier is required by the action to pay any past due benefits.

(c) . . . these expenses **shall** bear interest at the rate of 1½% per month after the due date.

(d) . . . the insurer **is also required** to pay a reasonable attorney’s fee to the claimant.

UTAH CODE ANN. § 31A-22-309(5)(c)-(d) (emphasis added). Because it is undisputed that Progressive was required by the action to pay past due benefits, Mrs. Martinez is required to receive indemnification for her attorney fees debt.

Attorney fees are required to be paid so that the intent of the legislature is fulfilled and so that the administration of justice is capable of protecting statutory rights. This is not to protect attorneys individually so much as it is to protect the administration

⁵ The statement falls into the judicial proceedings privilege, but it is highly inappropriate for one officer of the court to impugn another officer of the court without any factual evidence to support such personalized animosity.

of justice.

“In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.”

* * *

And a word of caution to the commission may be appropriate here. While attorneys may not hope to be compensated to the full⁶ measure of the value of their time and work, **they must not be limited to such niggardly fees that they cannot afford to accept compensation cases.** And particularly where it has become necessary to carry a compensation case to this court should the commission be at least moderately liberal in allowance of attorney’s fees. Better that an applicant should lose 15% to 20% of his benefits in attorney’s fees **than that he should receive no benefits at all merely because no lawyer could afford or would be willing to accept his case and properly present it to the commission and the courts, for the main reason that the compensation for such services would be grossly inadequate.**

Thatcher v. Industrial Comm’n, 207 P.2d 178 (Utah 1949) (**bold added**).

Regardless of the district court’s unexplained personal feelings about a non-party to the litigation, it did not possess any discretion to refuse to make an award of attorney fees to Mrs. Martinez — the party whose right must be protected. The legislature decided what the law is, and the legislature “require[d]” the district court to make a “reasonable” award in this matter. See Whipple Plumbing 2004 UT 47 at ¶ 7.

⁶ The Court’s fantastic assumptions about “World War III” notwithstanding: “It is a simple fact in a lawyer’s life that it takes about the same amount of time to collect a note in the amount of \$1,000 as it takes to collect a note for \$100,000.” Dixie State Bank v. Bracken, 764 P.2d 985, 990 (Utah 1988); accord Govert Copier Painting v. Van Leeuwen, 801 P.2d 163, 174 (Utah App. 1990) (explaining that courts must make findings to explain reduction of attorney fees and to demonstrate that the court utilized *proper factors* for reducing fees).

We begin our analysis with the premise that "[p]rovisions in written contracts providing for payment of attorney fees should ordinarily be **honored by the courts.**" *Stacey Properties v. Wixen*, 766 P.2d 1080, 1085 (Utah Ct.App. 1988) (quoting *Soffe v. Ridd*, 659 P.2d 1082, 1085 (Utah 1983)). "Furthermore, contrary to [the] contention that attorneys fees should be determined on the basis of an equitable standard, **attorneys fees, when awarded as allowed by law, are awarded as a matter of legal right.**" *Cabrera v. Cottrell*, 694 P.2d 622, 625 (Utah 1985). "Since the right is contractual, **the court does not possess the same equitable discretion to deny attorney's fees** that it has when fashioning equitable remedies, or applying a statute which allows the discretionary award of such fees." *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 226 (5th Cir. 1975).

Cobabe v. Crawford, 780 P.2d 834, 836 (Utah App. 1989).

It is true that the amount of attorney fees which are deemed "reasonable" is to be determined by an impartial district court. But the courts are required to follow the principles of Utah law which sets forth the elements that a district court must consider and which must guide the court's limited discretion.

A. Plaintiff Provided Prima Facie Evidence of the Amount of Reasonable Fees.

This case involves the no-fault statute. The statute's defined benefit is a contractual obligation which is not identical to the awards of attorney fees in other cases (often as punishment) because the structure and the purpose of attorney fees under the no-fault statute is not identical to other contracts or statutory schemes. All motorists must pay a monthly insurance premium to PIP carriers or else the law imposes a merciless punishment and a Class B Misdemeanor. In turn, the no-fault statute creates

an obligation in PIP carriers to pay defined benefits to injured motorists who are at their most vulnerable on a monthly basis or else the law imposes a merciless obligation to absorb all the legal costs resulting from the failure.

The no-fault statute requires that the PIP benefits be paid to an injured party after a simple process of submitting proof of loss. Attorneys are forbidden from taking a cut of PIP benefits in the normal case because the system is designed to be so simple that an attorney is not necessary.⁷

The simple system that precludes attorney participation has led to gross abuses by PIP carriers. Primarily, this abuse takes the form of claiming that “reasonable and necessary” renders the scope of coverage a “question of fact.”⁸ But see Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 132 (1982) (discussing health insurer’s use of peer review and “reasonable and necessary” and noting that the use of “Peer Review Committee as an aid in its decisionmaking process **is a matter of indifference to the policyholder**” because the failure to pay a claim under the scheme addressed by the Court meant that the third-party provider would not be paid pursuant to contracts

⁷ “It would be unethical, in virtually all cases, for a lawyer to charge a contingent fee for collecting a claim against his client’s own insurer under the PIP coverage when the attorney has been engaged on a contingent fee basis to handle a personal injury claim against a third party” Archuleta v. Hughes, 969 P.2d 409 at n. 3 (Utah 1998) (quoting Utah State Bar Ethics Advisory Opinion No. 114-15).

⁸ “This premise is contrary to the fundamental principle of insurance that the insurance policy defines the scope of risk assumed by the insurer from the insured.” Pireno 458 U.S. at 131 (citing 9 G. Couch, *Cyclopedia of Insurance Law* § 39.3; R. Keeton, *Insurance Law* § 5.1(a) (1971)).

entered into between the provider and the insurer⁹).

Along with the carrot of a steady stream of paying customers enforced by the penalties of criminal law,¹⁰ the statute provides a stick — an attorney fees benefit when the injured person is forced to retain an attorney to enforce payment. But it is a stick whose blow can be drastically softened simply by the PIP carrier's own actions. If a PIP carrier fears being required to pay \$72,885 (and increasing) in attorney fees,¹¹ it has the option of not presenting a stubbornly litigious defense and frivolous legal conclusions for six years. A PIP carrier that claims that a material term of an integrated contract is a "question of fact" for six years despite every principle of contract law to the contrary¹² "chose not to perform [its] obligation when costs were lower, [and]

⁹ This is the fundamental difference that neither Progressive nor any Utah court to consider the no-fault statute has understood — that insureds under Utah's no-fault statute are forced into bankruptcy by the "reasonable and necessary" regime. The money savings are not a matter between sophisticated provider and a sophisticated insurer through clear and specific contracts like in health insurance and HMO contracts; rather the money savings result from abusing unsophisticated insureds and exposing them to liability for expenses incurred but not paid by the PIP carrier. Moreover, these "standards" and "procedures" are completely incomprehensible and impossible to litigate.

¹⁰ This is why PIP carriers occupy a position of public trust and should be held to a higher standard of care toward those who place their faith in the PIP carrier's assertions.

¹¹ "It is a simple fact in a lawyer's life that it takes about the same amount of time to collect a note in the amount of \$1,000 as it takes to collect a note for \$100,000." Dixie State Bank v. Bracken, 764 P.2d 985, 990 (Utah 1988); accord Govert Copier Painting v. Van Leeuwen, 801 P.2d 163, 174 (Utah App. 1990) (explaining that courts must make findings to explain reduction of attorney fees and to demonstrate that the court utilized *proper factors* for reducing fees).

¹² If Progressive had retained coverage counsel, it could have learned that claiming that the scope of coverage set forth in the no-fault statute is a "question of fact"

cannot now complain about the increased cost of performance.” Alexander v. Brown, 646 P.2d 692, 695 (Utah 1982).

The statute provides the basis for attorney fees. The first aspect of prima facie evidence consists of demonstrating that the insurer was required by the action to pay past due benefits. This was undisputed. (Record at 617). Rules applicable to proof of damages apply to the second step. The black-letter standard is that a prevailing insured should be awarded “**all** attorney fees reasonably incurred in the litigation.” Dejavue, Inc. v. U.S. Energy Corp., 1999 UT App. 355, ¶ 20, 993 P.2d 222 (addressing the analogous situation of a plaintiff bringing multiple claims and prevailing on only some of them and noting that the plaintiff was entitled to all its attorney fees) (emphasis added). Where the “issue was all part and parcel of one matter counsel should not be penalized for every lost motion.” Lamphere v. Brown University, 610 F.2d 46, 47 (1st Cir. 1979).

The prima facie evidence is simply an affidavit or proffer. See Meadowbrook, LLC v. Flower, 959 P.2d 115, 119 (Utah 1998) (“Indeed, attorney fees are routinely established by **proffer or affidavit**, and by evidentiary hearing when necessary.”).

Plaintiff provided prima facie evidence consistent with the requirements of Utah R. Civ.

would mean that the parties did not have a meeting of the minds as to all material terms of the insurance contract. Therefore, coverage counsel would have taught Progressive that its assertions would mean that the no-fault statute does not give rise to an enforceable contract at all — an untenable conclusion. “The ancient legal maxim continues to apply: ignorance of fact may excuse; ignorance of law does not excuse.” Advance Estimating System, Inc. V. Riney, 130 F.3d 996, 999 (11th Cir. 1997).

P. 73.

That evidence, the duly sworn affidavit, was sufficient to meet Plaintiff's burden unless contradicted by other admissible evidence. In *Atkin, Wright & Miles v. Mountain States Telephone & Telegraph*, the court stated the standard for prima facie proof of damages:

While the standard for determining the amount of damages is not so exacting as the standard for proving the fact of damages, there still must be **evidence that rises above speculation and provides a reasonable, even though not necessarily precise, estimate of damages.**

Atkin, Wright & Miles v. Mountain States Telephone & Telegraph, 709 P.2d 300 (Utah 1985).

Progressive provided no admissible evidence contradicting any of Plaintiff's sworn testimony meaning that the prima facie evidence withstood attack and supported Plaintiff's full claim. (Record at 679). Instead of admissible evidence, Progressive provided an attorney fee affidavit from a different case in which no net attorney fees were awarded and claimed that Mrs. Martinez was attempting to collect twice for the same work even though Progressive knew that Mrs. Martinez had no affiliation with that different litigation.

The issues are: How much does Mrs. Martinez owe for this litigation? \$72,885, plus the expense of this appeal. Was that amount of contractual damages proved by and through the uncontradicted affidavit? Yes.

Although the attorney for Mrs. Martinez was the same as the attorney in the

unrelated action, such a fact is not relevant to the debt owed by Mrs. Martinez. The plaintiffs (the parties entitled to recover attorney fees under the statute) were not the same. The similarity of the some of the entries was in no sense relevant to the amount of attorney fees owed by Mrs. Martinez in this action. Her debt was properly established. And her debt establishes Progressive's contractual liability because the two are exactly coextensive.¹³ Debts owed by unrelated entities do not constitute evidence contradicting Plaintiff's prima facie case.¹⁴

"Credibility" (the alleged justification for the district court's refusal to acknowledge the only admissible evidence before it) is not relevant to a determination of attorney fees owed by Mrs. Martinez and therefore recoverable as benefits under the no-fault statute. Essentially, the district court was inexplicably angered because of three things, and each of these points led to the court's conclusion that the affidavit was not "credible": (1) \$500 per hour seems high (2) that the case did not appear present

¹³ See also Campbell v. State Farm, 2001 UT 89, 65 P.3d 1134 at ¶ 121 "Extending the rationale advanced in the first-party bad faith cases to the third-party bad faith case before it, the trial court concluded that attorney fees should likewise be recoverable. The trial court offered the following in support of its conclusion: a. An award of attorney's fees . . . **removes some of the incentive for an insurer to breach** the duty of good faith and fair dealing. b. Such an award **encourages insurers to act reasonably**. c. The award of "actual" attorney's fees is designed to **assist in fully compensating the insured for the damages caused by the breach** of good faith duties, whether such good faith duties arise from a first-party or a third-party situation. d. For purposes of this issue, there is no reasonable basis to distinguish an insured's damages incurred in a first-party or third-party context[.] e. The duties of good faith arising in a third-party context include fiduciary duties and are higher duties than the duties arising under the contract theory in a first-party context."

¹⁴ The irrelevant and inadmissible affidavit from the separate litigation did appear to inflame the passions of Judge Quinn.

difficult or novel issues of fact or law (Judge Quinn never participated in any of the legal issues in the underlying case) (3) that the apportionment of time to compensable and non-compensable work did not favor non-compensable work. (Record at 857, pp. 48-49).

These “findings” were not based on any “evidence.” “Although trial courts are normally afforded broad discretion in determining what constitutes a reasonable fee, such an award must be based on the evidence and supported by findings of fact.”

Anderson v. doms, 1999 UT App 207, ¶ 9, 984 P.2d 392.

First: The district court believed that \$500 per hour is too high because it is higher than Plaintiff’s attorney charges to insurance companies that pay him on a monthly basis. This “finding” is simply a recognition of the time-value of money principle. A person who may charge one rate to a low risk client will not charge the same rate to a high risk client. This is especially true when the likelihood of a misled district court awarding nothing is possible.

If Progressive had paid what it owed in December 1997 when Plaintiff filed the first motion on the breach of contract issue and it became apparent that Progressive had no valid defense, the rate would have been drastically lowered voluntarily. But 7 years later, the increase from \$250 to \$500 per hour is probably hitting the low end of reasonableness.¹⁵ No other officer of the court would postpone their income for 7-8

¹⁵ The value of a rate at \$200 per hour in November 1997 when subjected to the 1½% monthly interest rate that is applied to the unpaid PIP benefits is \$730.42.

years without remuneration for the delay — especially when payment is not guaranteed. There is no legal basis for asserting that those who protect insureds from PIP carriers should be uncompensated for diligent and successful provision of legal services. The legislative intent behind requiring attorney fees is to attract qualified attorneys and allow them to protect the rights provided by the no-fault statute.

Second: Judge Quinn “found” that the case did not raise novel issues. While it is true that the no-fault statute is and should be simple, the trial court permitted Progressive to present its frivolous “question of fact” argument relating the scope of coverage. Transforming the question relating to the meaning of a material term of an integrated contract into a “question of fact” relating to medical disputes is as novel as it is frivolous. See, e.g., State v. Ireland, 2005 UT App 22, ¶¶ 7-20. Therefore, Judge Quinn’s second “finding” is a question of law which is incorrect.

Third: Judge Quinn found that Plaintiff did not try very hard to apportion more time to non-compensable work. This seemed to be the major irritant for Judge Quinn and the source of his “credibility” assertion. What the court misunderstood is that Plaintiff is under no obligation to present an attorney fee affidavit in the light most favorable to the other party. Without a duty to slice one’s own throat, the failure to do so can hardly be described as “bad faith” as Judge Quinn believed. “It is not a plaintiff’s burden to produce the evidence on which any reduction of damages is to be predicated.” John Call Eng’g, Inc. v. Manti City Corp., 795 P.2d 678, 680 (Utah 1990) (quotations and citations omitted).

Plaintiff apportioned between non-compensable and compensable time. Plaintiff continued to argue and explain that the two classes were not distinct because most of the issues relating to breach naturally led to bad faith and fraud. For example, Progressive relied on a defense that it simply made up. That is bad faith because there is no valid basis for claiming a defense that is not set forth in the contract. See Adams v. Swenson, 2005 UT 8 (interpreting the procedure for “disability” under the election statute and ruling that the statute only requires the opinion of the treating doctor). It is also fraud. The explanation of the latter conclusions is simple after the explanation of the former. It is the former conclusion which was never resolved as a result of the “question of fact” assertions made by Progressive. See Associated General Contractors v. Board of Oil, Gas & Mining, 2001 UT 112, 38 P.3d 291 (holding that judicial review of the board’s conclusion is limited to an arbitrary and capricious standard). And Plaintiff was under no duty to go further with apportionment than she did. Her attorney apportioned fees as required and no more. Judge Quinn’s assumption that more was required was a legal error.

Because all three “findings” allegedly justifying the district court’s refusal to award any fees as “reasonable” fees are without merit, the conclusion must be reversed. The district court’s assumption that its legal errors permitted it to divine credibility where such issues were irrelevant means that the district court abused its discretion. See State v. Krukowski, 2004 UT 94, ¶ 23 (explaining that the credibility of the police officers was not legally relevant because their alleged failure related to a duty which did

not exist).

V. THE NO-FAULT STATUTE IS IMPOSSIBLE TO LITIGATE
BECAUSE THERE ARE NO STANDARDS.

Progressive never had a valid defense. It never had any contractual basis to refuse to pay PIP benefits to Mrs. Martinez. The six years of frivolous litigation was based on circular arguments and stalingrad defenses. Only after Judge Nehring granted Plaintiff's motion to compel discovery did Progressive express a desire to partially fulfill its statutory duty. (Record at 856).

For example, Progressive refused to pay household benefits to Mrs. Martinez. Mrs. Martinez is an illiterate, janitor, mother of three who fully complied with her obligation to perform her contractual obligations. Progressive never claimed that she failed to comply with a condition precedent of providing proof of loss. (Record at 16-20; compare Utah R. Civ. P. 9(c)).

Instead, Progressive told her that her household benefits claim was "not reasonable and necessary." But see Salt Lake County v. Ramoselli, 567 P.2d 182 (Utah 1977) (holding that the word "necessary" does not present a justiciable issue. "With the degree of necessity or the extent which the property will advance the public purpose, the courts have nothing to do. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance." (citations omitted)); accord Mikkelsen v. Haslam, 764 P.2d 1384, 1387 (Utah 1988) ("[t]he

physician-patient relationship permits a patient to rely on a doctor's professional skill and advice.""). It claimed that its characterization of the undisputed fact of loss was a "question of fact" rendering the amount of its obligation subject to the whims of a jury. In fact, questions of fact under contract law relates to a determination of the intent of the parties at the time they entered into the contract. And that inquiry only applies to contracts which, unlike insurance contracts, are not fully integrated.

The "question of fact" argument needs to be viewed through analogy. If a person goes to a restaurant and asks for a lobster after being assured that the lobster is "good," the diner cannot simply refuse to pay by claiming that it plans to hire an agent to characterize the lobster as "un-good." The trick identified by Progressive is that the diner claims that he does not *refuse* to pay — only that the question as to the "un-goodness" of the already-consumed food is a "question of fact" and "accordingly" a "question for a jury."¹⁶ Therefore, the restaurant will need to bring a lawsuit and convince a jury that the food was not "un-good" before the diner has an obligation to pay for his meal.

If the independent contractor hired by the diner is a five-star chef, the "question

¹⁶ "A court of equity will endeavor, to the extent of its powers, to bind men's consciences so far as they can be bound to a true and literal performance of their agreements, and **will not suffer them to depart from their contracts at pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give.** It will, therefore, in a proper case, enforce a contract by enjoining violations of the terms thereof." Disabled Am. Veterans v. Hendrixson, 340 P.2d 416 (Utah 1959) (quoting 28 Am. Jur., page 270, section 77).

of fact” argument is no less frivolous. The chef’s addition of the prefix “un” to the adjective “good” does not divest the diner of her obligation to pay for her meal pursuant to the terms of the contract. The third-party’s opinion is not relevant to the contractual obligation to pay for the food that is ordered and consumed.¹⁷ Because the third-party’s opinion is not relevant to the contractual obligations of the parties, the opinion does not give rise to a “question of fact” and cannot justify dragging out litigation for six to eight years.

On the household services breach, Progressive used the “un-good” argument. But here, the analogy changes. Progressive ordered the lobster and ate it. It then asserted that the price of a hamburger on the menu is cheaper and, accordingly, it is entitled to pay the price of a hamburger because that price is listed in the same menu.

Medical expenses coverage uses the word “reasonable value” and the word “necessary” is contained in a prepositional phrase describing the scope of medical expenses coverage. But household services benefits are triggered by proof of “services actually rendered or expenses reasonably incurred” at the rate of \$20 per day. Utah Code Ann. § 31A-22-307(1)(b)(ii). “Reasonable and necessary” has **nothing** to do with household services benefits just as the price of a hamburger has nothing to do with the price of a lobster despite being found on the same menu at the same restaurant.

¹⁷ Of course, if the lobster was filled with maggots, the diner has a defense for an “un-good” food. The defense would be a *breach of warranty of merchantability* or some other recognized *legal* defense. “Un-good,” “reasonable and necessary,” and “question of fact” are not competent legal arguments under contract law.

Mrs. Martinez provided proof of both the nature of the services actually provided on behalf of Mrs. Martinez and the fact that she promised to pay a person \$20 per day to take care of her house, her husband, and her three children. (Record at 257). But Progressive ignored the plain language of the statute and based its refusal to pay on the opinion, untethered to the terms of the contract, of its claims adjuster regarding “reasonable and necessary” which, again, is found nowhere in the statute relating to household services. (Record at 68). Why can a person not pay the price of a hamburger when ordering and eating a lobster, yet Progressive may take the legally-identical position and be absolved of its obligation to pay the attorney fees benefit that it promised to pay?

Along with the made-up test relying on irrelevant words, Progressive also ignored the 30-day payment obligation. Utah Code Ann. § 31A-22-309(5) requires that a PIP carrier “shall” pay PIP benefits within 30 days, and the same paragraph provides the penalties — attorney fees — for insurers that refuse. There are no exceptions for any of the alleged defenses relied on by Progressive. The maxim *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another, supports the view that the Legislature intended to preclude defenses not specifically listed. See Salt Lake City v. Ohms, 881 P.2d 844, 855 (Utah 1994); accord McCaffery v. Grow, 787 P.2d 901 (Utah App. 1990) (holding that the no-fault statute “prevents the insurer from excluding PIP benefits to its insureds except in seven narrowly defined situations” set

forth in Section 309.)¹⁸).

Basic contract law and Section 31A-21-106 require that all material terms of a contract are to be contained in the four-corners of the contract and are to be interpreted in the manner of a reasonable layman. See Cullum v. Farmers Insurance Exchange, 857 P.2d 922, 925 (Utah 1993). Because Progressive's breach was obvious and indisputable, Plaintiff moved for a partial summary judgment on the issue of Progressive's breach immediately after filing suit. Progressive opposed the motion with double-talk and no evidence.¹⁹ (Record at 84). But it admitted the material facts: It received reasonable proof of the fact and amount of expenses incurred, but it refused to pay. (Record at 94-95). Nevertheless, the district court (Judge McCleve) denied Plaintiff's motion at Defendant's urging and adopted all defendant's arguments as its own. (Record at 265). Attorney fees should have stopped being incurred at that point,

¹⁸ Injuries which are not covered are those sustained: (1) in a family vehicle not insured under the policy; (2) by a person driving the insured vehicle without permission; (3) intentionally; (4) while committing a felony; (5) when using the vehicle as a residence; (6) due to war or rebellion; or (7) from nuclear materials. Utah Code Ann. §§ 31A-22-309(2)(a)(i) - (vi).

¹⁹ Moreover, Progressive provided letters in which it asserted certain conclusions and asserted that because it asserted those conclusions in those letters, the letters proved the truth of the previously-made assertions. Id. May one "prove" the earth is flat by simply writing it in a letter and then showing the letter as proof of the absurd fact? Of course not. Later, Progressive appeared to claim that Plaintiff never even filed this motion at all despite the fact that the breach of contract action was the focus of the first 269 pages of the record. (Record at 684). And it attributed all manner of rulings to Judge Nehring regarding its "reasonable and necessary" defense which the court never really made. (Record at 680; compare Record at 856).

but the law was not properly interpreted or applied as a result of the assertions made by Progressive together with its stubborn defense. Plaintiff attempted to appeal the purely legal issue of whether a PIP carrier can deny PIP benefits based on language that is made up by a claims adjuster out of thin air, but the Supreme Court refused to permit the appeal claiming that that question might become changed or affected by irrelevant facts. (Record at 280).

VI. PLAINTIFF IS ENTITLED TO RECOVER ALL ATTORNEY FEES INCURRED ON APPEAL.

Progressive concedes that Plaintiff was entitled to attorney fees below. The district court's refusal to award any attorney fees must be reversed. Moreover, because Plaintiff is entitled to recover attorney fees under the no-fault statute, attorney fees are an appropriate measure of damages that should be awarded for this appeal. See R & R Energies v. Mother Earth Indus., Inc., 936 P.2d 1068, 1081 (Utah 1997). The attorney fees incurred on appeal are due as a matter of legal right. See Shields v. Santana, 2000 UT App 298 (discussing the situation where attorney fees are alleged to be excessive but the excess was caused by the litigation tactics of the resisting party).

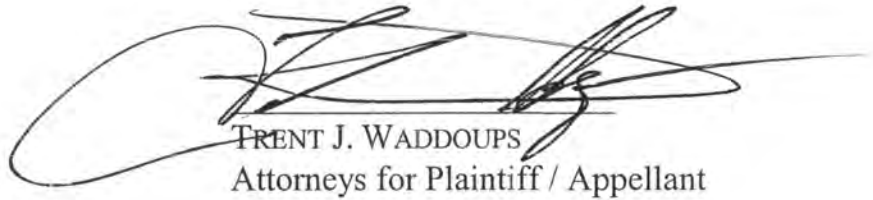
CONCLUSION

The district court's order refusing to award attorney fees should be vacated. Because Progressive failed to provide any admissible evidence contradicting Plaintiff's

application for attorney fees, the Court should enter a judgment in Plaintiff's favor for the sum of \$72,885. This matter should then be remanded to the Third District Court for a determination of attorney fees incurred on appeal. The Court should also order that a new judge be appointed to make the determination on remand.

DATED this 18 day of February, 2005.

CARR & WADDOUPS

A large, stylized handwritten signature in black ink, likely belonging to Trent J. Waddoups, is written over the printed name and title.

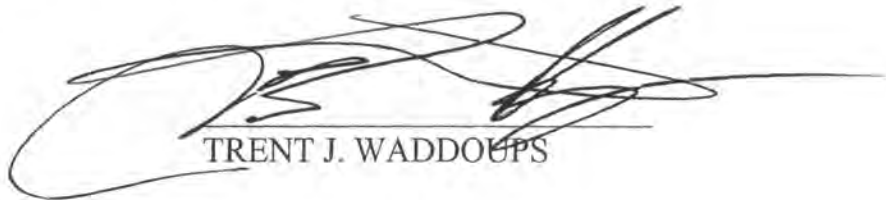
TRENT J. WADDOUPS

Attorneys for Plaintiff / Appellant

MAILING CERTIFICATE

I HEREBY CERTIFY that on the 18 day of February, 2005, a true and correct copy of Plaintiffs' Appeal Brief was mailed, via U.S. Mail, postage prepaid, to the following:

Mr. Mr. Joseph J. Joyce
Ms. Kristin A. VanOrman
STRONG & HANNI
3 Triad Center, #500
Salt Lake City, Utah 84180



TRENT J. WADDOUPS

Appendices

APPENDIX

Order Denying Plaintiff's Request for Attorney's Fees	Exhibit A
Minute Entry	Exhibit B
Order Denying Plaintiff's Motion for Entry of Final Judgment, Rule 60(b) and/or Rule 4(e) Extension of Time	Exhibit C
Memorandum Decision	Exhibit D
Order	Exhibit E
No-Fault Statute	Exhibit F

FILED DISTRICT COURT
Third Judicial District

FEB 14 2004

SALT LAKE COUNTY

By KS
Deputy Clerk

Kristin A. VanOrman (Bar No. 7333)
James D. Franckowiak (Bar No. 9578)

STRONG AND HANNI

Attorneys for Defendant
9 Exchange Place
Sixth Floor Boston Building
Salt Lake City, UT 84111
Telephone: (801) 532-7080
Facsimile: (801) 596-1508

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

IRMA MARTINEZ,

Plaintiff,

vs.

PROGRESSIVE NORTHWESTERN INSURANCE
COMPANY,

Defendant.

**ORDER DENYING PLAINTIFF'S
REQUEST FOR ATTORNEY'S FEES**

Civil No. 970905939

Judge Anthony Quinn

This matter came before the Court on January 12, 2004, pursuant to defendant Progressive Insurance's motion for determination of attorney's fees. Both parties submitted memoranda and plaintiff's counsel submitted an affidavit of attorney's fees. After reviewing and considering the submitted memoranda and affidavit of attorney's fees, and after hearing oral argument, this Court hereby finds as follows:

1. This matter involved the pursuit of payment of PIP benefits. It was not a novel nor difficult case and yet it was litigated like World War III.

2. Plaintiff's application for attorney's fees was incredible. The amount of time charged for each task performed was inappropriate and excessive.

3. Counsel's hourly rate of \$500 an hour is more than three times the going rate for such litigation. \$500 an hour is not justified by the risk or novelty of this case.

4. Plaintiff's counsel has set forth no good faith effort to differentiate between the time that was spent pursuing plaintiff's breach of contract claim versus the number of failed causes of action that were pursued in the present matter.

5. This Court has read the case of Prince v. Bear River wherein the Court awarded \$450 in attorney's fees and which the Utah Supreme Court upheld. In its appellate decision, the Utah Supreme Court found that the trial court has the discretion to award no attorney's fees in certain circumstances.

6. Under the case of Prince v. Bear River, which is applicable in this matter, this Court has the authority to award no attorney's fees. Because plaintiff's counsel has set forth only a perfunctory effort in his affidavit of attorney's fees and this Court believes that the affidavit was not submitted in good faith, and no good faith attempt was made to allocate between the breach of contract and other failed causes of action, there is no justification for an award of attorney's fees in this case.

7. The credibility of plaintiff's counsel is undermined with his submitted affidavit of attorney's fees.

8. Plaintiff's counsel has completely failed in his burden to demonstrate to this Court the attorney's fees that are warranted in this matter.

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.

DATED this 4th day of Feb, 2004.

BY THE COURT:

By

Judge Anthony Guinn



Approved as to form:

Trent J. Waddoups, Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16 day of January, 2004, a true and correct copy of the foregoing ORDER DENYING PLAINTIFF'S REQUEST FOR ATTORNEY'S FEES was served by mail, postage fully prepaid, upon the following:

Trent J. Waddoups
Carr & Waddoups
8 East Broadway, Suite 609
Salt Lake City, UT 84111

Alicia Smith

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

IRMA MARTINEZ,	:	
Plaintiff,	:	MINUTE ENTRY
	:	
	:	
vs.	:	Case No: 970905939
	:	
PROGRESSIVE INSURANCE CO,	:	Judge: ANTHONY B. QUINN
Defendant.	:	Date: 04/06/2004


Clerk: kimbers

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.

 
Judge ANTHONY B. QUINN

AUG 16 2004

SALT LAKE COUNTY

By  Deputy Clerk

Kristin A. VanOrman (Bar No. 7333)
Robert W. Harrow (Bar No. 9814)

STRONG AND HANNI

Attorneys for Defendant
3 Triad Center, Suite 500
Salt Lake City, UT 84180
Telephone: (801) 532-7080
Facsimile: (801) 596-1508

**IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH**

IRMA MARTINEZ,

Plaintiff,

vs.

PROGRESSIVE NORTHWESTERN INSURANCE
COMPANY,

Defendant.

**ORDER DENYING PLAINTIFF'S
MOTION FOR ENTRY OF FINAL
JUDGMENT, RULE 60(B) AND/OR
RULE 4(E) EXTENSION OF TIME**

District Court Civil No. 970905939

Judge Anthony Quinn


This matter came before the Court on July 27, 2004 regarding plaintiff's Motion for Entry of Final Judgment, Rule 60(b) and/or Rule 4(e) Extension of Time to file an appeal. Briefs were submitted by both parties and oral argument was heard. After considering the submitted briefs and argument, and for good cause appearing, this Court hereby rules and Orders as follows:


The minute entry issued by this Court on April 6, 2004 was a final order. The minute entry determined the rights of the parties and did not require any further action. This Court agrees with and is bound by the June 17, 2004 ruling of the Utah Court of Appeals which also determined that the minute entry was a final order which began the running of time for filing a notice of appeal.

This Court does not believe that the plaintiff has made a viable argument for excusable neglect. Any confusion by the plaintiff regarding the finality of the minute entry should have been addressed by motion, rather than through inappropriate ex-parte communications.

The minute entry issued in this matter on April 6, 2003 was a final order, nothing else needs to be issued by this Court. As such, this Court hereby DENIES plaintiff's motion for an entry of a final judgment, Rule 60 (b) and/or Rule 4(e) extension of time.

DATED this 16, ^{Aug} July, 2004.


Judge Anthony Quinn
Third District Court Judge



Approved as to form:

Trent Waddoups
Counsel for the plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27 day of July, 2004, a true and correct copy of the foregoing **ORDER DENYING PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT, RULE 60(B) AND/OR RULE 4(E) EXTENSION OF TIME** was served by mail, postage fully prepaid, upon the following:

Trent J. Waddoups
Carr & Waddoups
8 East Broadway, Suite 609
Salt Lake City, UT 84111



JUN 17 2004

IN THE UTAH COURT OF APPEALS

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Irma Martinez,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellant,)	
)	Case No. 20040377-CA
v.)	
)	F I L E D
Progressive Northwestern)	(June 17, 2004)
Insurance Company,)	
)	2004 UT App 204
Defendant and Appellee.)	

Third District, Salt Lake Department
The Honorable Anthony B. Quinn

Attorneys: Trent J. Waddoups, Salt Lake City, for Appellant
Kristin A. VanOrman and Robert W. Harrow, Salt Lake
City, for Appellee

Before Judges Bench, Greenwood, and Orme.

PER CURIAM:

Irma Martinez seeks to appeal the trial court's denial of her motion for a new trial regarding attorney fees. This matter is before the court on Progressive Northwestern Insurance Company's (Progressive) motion for summary disposition based on an untimely notice of appeal.

The core issues of this case were settled in 2003, leaving attorney fees for later resolution. In January 2004, the trial court held a hearing to determine attorney fees. The trial court found the fees claimed by Martinez's counsel to be excessive and unreasonable, and awarded no fees. The trial court entered a final order regarding fees and the dismissal of the case on February 4, 2004.

Martinez filed a timely motion for a new trial regarding attorney fees pursuant to rule 59 of the Utah Rules of Civil Procedure. Her motion was denied by the trial court in a signed minute entry dated April 6, 2004. Martinez filed her notice of appeal from the April 6 minute entry on May 7, 2004.

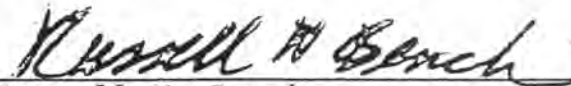
Rule 4 of the Utah Rules of Appellate Procedure requires that a notice of appeal be filed within thirty days from the entry of the final judgment. See Utah R. App. P. 4(a). The time

for filing an appeal is tolled, however, by the filing of certain postjudgment motions, including a motion for new trial under Utah Rule of Civil Procedure 59. See Utah R. App. P. 4(b). When a timely rule 59 motion has been filed, the time for filing the notice of appeal will run from the order disposing of the motion. See id. Martinez's counsel filed a timely motion for new trial pursuant to rule 59 of the Utah Rules of Civil Procedure, thus tolling the time for appeal. The court disposed of Martinez's motion by the signed minute entry dated April 6, 2004.

It is well established that a signed minute entry "may be a final order for purposes of appeal." Dove v. Cude, 710 P.2d 170, 171 n.1 (Utah 1985); see also Cannon v. Keller, 692 P.2d 740, 741 n.1 (Utah 1984). The signed minute entry may be final if "the ruling specifies with certainty a final determination of the rights of the parties and is susceptible of enforcement." Cannon, 692 P.2d at 741 n.1. In this case, the minute entry disposed of Martinez's motion and gave a rationale for the court's decision. It determined the rights of the parties without requiring any further action. Cf. State v. Leatherbury, 2003 UT 2, ¶9, 65 P.3d 1180 (noting minute entry not a final order where further action contemplated by the express language of the order requiring counsel to prepare findings). As a result, it is a final order for purposes of appeal, and the time for filing the notice of appeal began to run from that date. See Utah R. App. P. 4(b).

Martinez filed her notice of appeal thirty-one days after the signed minute entry disposing of her motion for new trial. Because it was not filed within thirty days, the notice of appeal is untimely. If an appeal is not timely filed, this court lacks jurisdiction to hear the appeal. See Utah R. App. P. 4; Serrato v. Utah Transit Auth., 2000 UT App 299, ¶7, 13 P.3d 616. Once this court determines that it lacks jurisdiction, it "retains only the authority to dismiss the action." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App. 1989).

Accordingly, we dismiss this appeal.


Russell W. Bench,
Associate Presiding Judge


Pamela T. Greenwood, Judge


Gregory K. Orme, Judge

IN THE SUPREME COURT OF THE STATE OF UTAH

----oo0oo----

Irma Martinez,
Plaintiff and Appellant,

No. 990039

v.

Progressive Northwestern
Insurance Co.,
Defendant and Appellee.

ORDER

The court dismisses this appeal on its own motion on the ground that the issues raised are not certifiable under Kennecott Corporation v. Tax Commission, 814 P.2d 1099 (Utah 1991). The court also denies plaintiff's request to treat this appeal as an interlocutory appeal, as certain issues may be rendered moot should plaintiff prevail. The dismissal is without prejudice, and the appeal may be renewed after trial on the merits.

BY THE COURT:





Date:

3-8-99



Richard C. Howe
Chief Justice

Utah Statutes

-  Utah Statutes
 -  TITLE 31A INSURANCE CODE
 -  CHAPTER 22 CONTRACTS IN SPECIFIC LINES
 -  PART III MOTOR VEHICLE INSURANCE
-

31A-22-306. Personal injury protection.

Personal injury protection under Subsection **31A-22-302** (2) provides the coverages and benefits described under Section **31A-22-307** to persons described under Section **31A-22-308**, but is subject to the limitations, exclusions, and conditions set forth in Section **31A-22-309**.

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Utah Statutes

- ☐ Utah Statutes
- ☐ TITLE 31A INSURANCE CODE
- ☐ CHAPTER 22 CONTRACTS IN SPECIFIC LINES
- ☐ PART III MOTOR VEHICLE INSURANCE

31A-22-307. Personal injury protection coverages and benefits.

(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 the total minimum required coverage of \$3,000 per person;

(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; and

(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 the injured person's household, except that this benefit need not be paid for the first three days after the date of injury unless the person's inability to perform these services continues for more than two consecutive weeks;

(c) funeral, burial, or cremation benefits not to exceed a total of \$1,500 per person; and

(d) compensation on account of death of a person, payable to the person's heirs, in the total of \$3,000.

(2)(a)(i) To determine the reasonable value of the medical expenses provided for in Subsection (1) and under Subsection **31A-22-309**(1)(a)(v), the commissioner 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 to assign a unit value and determine the 75th percentile charge for each type of service and accommodation.

(ii) The relative value study shall be updated every other year.

(iii) In conducting the relative value study, the department may consult or contract with appropriate public and private medical and health agencies or other technical experts.

(iv) The costs and expenses incurred in conducting, maintaining, and administering the relative value study shall be funded by the tax created under Section **59-9-105**.

(v) Upon completion of the relative value study, the department shall prepare and publish a relative value study which sets forth the unit value

and the 75th percentile charge assigned to each type of service and accommodation.

(b)(i) The reasonable value of any service or accommodation is determined by applying the unit value and the 75th percentile charge assigned to the service or accommodation under the relative value study.

(ii) If a service or accommodation is not assigned a unit value or the 75th percentile 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.

(c) This Subsection (2) does not preclude the department from adopting a schedule already established or a schedule prepared by persons outside the department, if it meets the requirements of this Subsection (2).

(d) Every insurer shall report to the commissioner any pattern of overcharging, excessive treatment, or other improper actions by a health provider within 30 days after the insurer has knowledge of the pattern.

(e)(i) In disputed cases, a court on its own motion or on 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 the claimant's medical services or expenses.

(ii) An impartial medical panel designated under Subsection (2)(e)(i) shall consist of a majority of health care professionals within the same license classification and specialty as the provider of the claimant's medical services or expenses.

(3) Medical expenses as provided for in Subsection (1)(a) and in Subsection 31A-22-309(1)(a)(v) include expenses for any nonmedical remedial care and treatment rendered in accordance with a recognized religious method of healing.

(4) The insured may waive for the named insured and the named insured's spouse only the loss of gross income benefits of Subsection (1)(b)(i) if the insured states in writing that:

(a) within 31 days of applying for coverage, neither the insured nor the insured's spouse received any earned income from regular employment; and

(b) for at least 180 days from the date of the writing and during the period of insurance, neither the insured nor the insured's spouse will receive earned income from regular employment.

(5) This section does not:

(a) prohibit the issuance of policies of insurance providing coverages greater than the minimum coverage required under this chapter; or

(b) require the segregation of those minimum coverages from other coverages in the same policy.

(6) Deductibles are not permitted with respect to the insurance coverages required under this section.

Utah Statutes

-  **Utah Statutes**
 -  **TITLE 31A INSURANCE CODE**
 -  **CHAPTER 22 CONTRACTS IN SPECIFIC LINES**
 -  **PART III MOTOR VEHICLE INSURANCE**
-

31A-22-308. Persons covered by personal injury protection.

The following may receive benefits under personal injury protection coverage:

(1) the named insured, when injured in an accident involving any motor vehicle, regardless of whether the accident occurs in this state, the United States, its territories or possessions, or Canada, except where the injury is the result of the use or operation of the named insured's own motor vehicle not actually insured under the policy;

(2) persons related to the insured by blood, marriage, adoption, or guardianship who are residents of the insured's household, including those who usually make their home in the same household but temporarily live elsewhere under the circumstances described in Section (1), except where the person is injured as a result of the use or operation of his own motor vehicle not insured under the policy; and

(3) any other natural person whose injuries arise out of an automobile accident occurring while the person occupies a motor vehicle described in the policy with the express or implied consent of the named insured or while a pedestrian if he is injured in an accident occurring in Utah involving the described motor vehicle.

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Utah Statutes

- 📁 Utah Statutes
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- 📁 CHAPTER 22 CONTRACTS IN SPECIFIC LINES
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31A-22-309. Limitations, exclusions, and conditions to personal injury protection.

(1)(a) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:

- (i) death;
- (ii) dismemberment;
- (iii) permanent disability or permanent impairment based upon objective findings;
- (iv) permanent disfigurement; or
- (v) medical expenses to a person in excess of \$3,000.

(b) Subsection (1)(a) does not apply to a person making an uninsured motorist claim.

(2)(a) Any insurer issuing personal injury protection coverage under this part may only exclude from this coverage benefits:

(i) for any injury sustained by the insured while occupying another motor vehicle owned by or furnished for the regular use of the insured or a resident family member of the insured and not insured under the policy;

(ii) for any injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle;

(iii) to any injured person, if the person's conduct contributed to his injury:

- (A) by intentionally causing injury to himself; or
- (B) while committing a felony;

(iv) for any injury sustained by any person arising out of the use of any motor vehicle while located for use as a residence or premises;

(v) for any injury due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing; or

(vi) for any injury resulting from the radioactive, toxic, explosive,

or other hazardous properties of nuclear materials.

(b) The provisions of this subsection do not limit the exclusions which may be contained in other types of coverage.

(3) The benefits payable to any injured person under Section 31A-22-307 are reduced by:

(a) any benefits which that person receives or is entitled to receive as a result of an accident covered in this code under any workers' compensation or 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 that person is on active duty in the military service.

(4) When a person injured is also an insured party under any other policy, including those policies complying with this part, primary coverage is given by the policy insuring the motor vehicle in use during the accident.

(5)(a) Payment of the benefits provided for in Section 31A-22-307 shall be made on a monthly basis as expenses are incurred.

(b) 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. Any part or all of the remainder of the claim that is later supported by reasonable proof is also overdue if not paid within 30 days after the proof is received by the insurer.

(c) If the insurer fails to pay the expenses when due, these expenses shall bear interest at the rate of 1-1/2% per month after the due date.

(d) 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 insurer is also required to pay a reasonable attorney's fee to the claimant.

(6) Every policy providing personal injury protection coverage is subject to the following:

(a) that where the insured under the policy is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under personal injury protection have been paid by another insurer, including the Workers' Compensation Fund created under Chapter 33, the insurer of the person who would be held legally liable shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable; and

(b) that the issue of liability for that reimbursement and its amount shall be decided by mandatory, binding arbitration between the insurers.