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Patricia M. Burnham v. Bankers Life & Casualty Company, and Illinois Corporation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PATRICIA M. BURNHAM,
Plaintiff and Appellant,

vs.

BANKERS LIFE & CASUALTY
COMPANY, an Illinois corporation
Defendant and Respondent

BRIEF OF APPEAL

Appeal From Order of the
of the Third Judicial District
Salt Lake County, State of Utah
Honorable Marcellus

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IN THE SUPREME COURT OF THE STATE OF UTAH

PATRICIA M. BURNHAM,
Plaintiff and Appellant,

vs.

BANKERS LIFE & CASUALTY
COMPANY, an Illinois corporation,
Defendant and Respondent.

Case No.
12261

BRIEF OF APPELLANT

NATURE OF THE CASE

This is an action by Mrs. Patricia M. Burnham seeking recovery as beneficiary under a life insurance policy issued by defendant company to her husband, Dr. Preston Burnham, deceased.

DISPOSITION IN THE LOWER COURT

The court below initially granted defendant's motion for summary judgment, stating that the deceased had failed to disclose certain information on his reinstatement application and that "this failure to disclose was a misrepresentation by omission and a fraud upon the insurer." Plaintiff appealed to this court and by unani-

mous opinion filed June 2, 1970, (R. 73-74) reported at 470 P.2d 261 (1970) this court reversed the trial court holding that both the suicide clause and the contestability clause in the policy had, by their own terms, expired and there were no grounds upon which to predicate a revival of either. Defendant's petition for rehearing was denied by this court on July 16, 1970. (R. 72) Plaintiff after remand, (R. 78) moved for a summary judgment based upon the opinion of this court. (R. 79) The trial court denied plaintiff's motion. (R. 95) From this denial plaintiff petitioned this court for an interlocutory appeal which petition was granted on December 21, 1970. (R. 106)

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the trial court and a remand with instructions to enter a summary judgment for plaintiff in accordance with plaintiff's motion in the lower court. (R. 79)

STATEMENT OF FACTS

On January 1, 1962, defendant Bankers Life & Casualty Company issued a life insurance policy to Dr. Preston J. Burnham. The basic policy was a whole-life policy in the principal sum of \$10,000. Attached to the policy for an additional premium was a rider providing a supplemental decreasing term benefit in the initial amount of \$40,000 for a fifteen year term. (R. 3-6) The basic policy, along with the rider, continued in force until April 1, 1967, at which time the rider was deemed lapsed for failure to pay premiums and the basic policy contin-

ued for a certain period, premium payments being made from the cash reserves.

On June 28, 1967, Dr. Burnham made application for reinstatement of the policy and the rider. At that time Dr. Burnham completed an application for reinstatement (R. 26) wherein he answered certain questions concerning the state of his health.

On July 21, 1967, defendant accepted the premiums and reinstated the insurance policies. On February 20, 1968, Dr. Burnham died of apparent suicide. On January 9, 1969, formal demand for payment was made upon the insurance company, and it refused to pay the amount due under the decreasing term rider. The whole life policy was paid and the premiums for the decreasing term rider were tendered back. Defendant refused to pay the amount claimed under the rider alleging fraud or misrepresentation in the reinstatement application: to-wit, failure to list Dr. Herbert B. Fowler as a "physician" consulted by Dr. Burnham.

Between February 13, 1963, and November 9, 1965, Dr. Burnham and his wife, the plaintiff, sought professional marriage counseling from Dr. Herbert B. Fowler, a doctor of psychiatry at the University Medical School. The deposition of Dr. Fowler indicates that he consulted Dr. and Mrs. Burnham on many occasions, but only in the capacity of a marriage counselor. He stated that he did not give any treatment to Dr. Burnham or consult with him at all except with respect to his marital difficulties. There was no psychotherapy given and there was

no medication administered. (Deposition of Dr. Fowler, pp. 18-19). Dr. Fowler stated that the counseling he gave could have as easily been given by someone who was not an M.D. (Deposition of Dr. Fowler, p. 35) and that Dr. Burnham came to him for counseling because, in Dr. Fowler's opinion, medical doctors with marital problems tend to seek out other medical doctors for advice. (Deposition of Dr. Fowler, p. 33).

Dr. Fowler further stated that, although at times Dr. Burnham had expressed to him ideas such as that he wished he were dead, he (Dr. Fowler) did not consider these expressions serious; rather, he considered that they were quite normal for persons in the marital situation of Dr. Burnham. (Deposition of Dr. Fowler, pp. 24-27) Dr. Fowler stated that had he considered such expressions serious, he would have hospitalized Dr. Burnham. (Deposition of Dr. Fowler, p. 26). Dr. Fowler never gave Dr. Burnham a physical examination or anything of that nature. (Deposition of Dr. Fowler, p. 17)

Dr. Burnham although listing or physicians did not list Dr. Fowler as a "physician or practitioner" whom he had consulted on his application for reinstatement of the policy. Defendant moved for a summary judgment based upon that fact, and the trial court granted the motion. This court reversed the trial court in *Burnham v. Bankers Life*, 470 P.2d 261 (1970).

In its amended answer filed on July 31, 1969, (R. 14-15) defendant admitted that the policy and rider were initially issued on January 1, 1962, that the policy lapsed

on April 1, 1967, and was reinstated on July 21, 1967. Defendant further admitted that the insured, Preston J. Burnham, died in Salt Lake City, Utah, on the 25th day of February, 1968, and that at the time of death all premiums accrued upon the policy were fully paid.

The only defense alleged by defendant was the following:

As a separate and affirmative defense, defendant alleges that the insurance policy described in plaintiff's complaint lapsed on April 1, 1967, except for the provision providing for the payment of \$10,000 and was reinstated on July 21, 1967, pursuant to an application from the deceased, Preston J. Burnham, *in which it was agreed by and between the deceased and the defendant that the policy should be contestable on the account of fraud or misrepresentation in the material facts stated in said application within two years from the date of reinstatement of said policy.* Defendant further alleges that at said time and place the deceased made *a material misrepresentation of material facts* and that if said facts had been known to defendant at said time, said policy would not have been reinstated. (R. 15). (Emphasis added.)

Based upon the opinion of this court (R. 73-74) reported in 470 P.2d 261 (1970), plaintiff moved for a summary judgment on the ground that the opinion of this court disposed of every alleged defense of defendant.

ISSUES ON APPEAL

The overriding issue on the appeal is whether the trial court should have granted plaintiff's motion for sum-

mary judgment based upon the previous opinion of this court in this case. Inherent in the resolution of this issue are the following questions:

- A. Whether, under the law as laid down by this court in this case, *Burnham v. Bankers Life*, 470 P.2d 261 (1970), the alleged defenses of defendant herein are foreclosed.
- B. Whether under the law as laid down by this court in this case, *Burnham v. Bankers Life*, 470 P.2d 261 (1970), there remain any issues to be tried at the trial level.

ARGUMENT

POINT I

DEFENDANTS ALLEGED DEFENSES HAVE BEEN FORECLOSED BY THIS COURT IN ITS PRIOR OPINION, *BURNHAM V. BANKERS LIFE*, 470 P.2d 261 (1970).

The only defense to payment relied upon by defendant was its attempt to revive the contestability clause in the initial policy by means of a provision in the reinstatement application. (R. 15) A reading of this court's prior opinion in this case, *Burnham v. Bankers Life*, 470 P.2d 261 (1970) clearly discloses the intent of this court to foreclose such a defense.

After discussing the facts of the case this court, in its prior opinion, first stated that ". . . although not dispositive of the issues of this action . . . a summary judg-

ment was inappropriate because there were disputed issues of material facts." *Burnham, supra* at 263.

This court found that under the issues raised by the complaint and answer, those disputed material facts were: First, this court held with respect to misrepresentations in an application for an insurance policy that such misrepresentations in order to be relevant must "materially affect either the acceptance of the risk or the hazard assumed by the insurer." The mere falsity of answers to questions propounded, this court reasoned, is insufficient if not knowingly made with an intent to deceive. Thus, even if defendant had been allowed to raise the issue of fraud, or misrepresentation, there was a question of intent which was a material issue of fact. Secondly, the court held that whether a misstatement in an application was material to the risk was a jury question dependent upon what a "reasonably careful and intelligent" insurer would have done had he known the allegedly misrepresented facts. So again, even assuming the question of the materiality of a misrepresentation could be raised, there was a question of fact as to the materiality or importance of the allegedly false information. Both issues of fact referred to by the court are issues raised by defendant's alleged defense of fraud or misrepresentation of material facts in the reinstatement application and thus are now immaterial because defendant is precluded from raising that defense.

Next, in its prior opinion this court discussed the questions of law raised by defendant's alleged defense.

The provisions of the insurance contract relevant to a discussion of the law were found by this court to be:

"Incontestability

This policy shall be incontestable after it has been in force during the lifetime of the Insured for two years from its date of issue, except for nonpayment of premiums, * * *

Suicide

If within two years from the date of issue of this policy the Insured shall die by suicide, while sane or insane, the liability of the Company shall be limited to an amount equal to the premiums which have been paid for this policy.

Reinstatement

This policy may be reinstated (unless previously surrendered for its cash value) at any time within 5 years after default in premium payment, upon furnishing evidence of insurability satisfactory to the Company, and the payment of all past due premiums with interest compounded at 5% per annum* * *

With respect to the foregoing provisions of the insurance contract as affected by reinstatement this court, cited *Gressler v. New York Life Insurance Company*, 108 Utah 173, 156 P.2d 212, modified on rehearing 108 Utah 182, 163 P.2d 324 (1945) as sustaining the proposition that in Utah an application for reinstatement is

neither an offer to enter into a new contract of insurance nor an offer to enter into a contract to reinstate the old policy; rather it is the first step taken to comply with the conditions of reinstatement. *Burnham, supra* at 264.

Thus, this court held, the suicide clause by its own terms had expired, since time, in that case, was to be reckoned "from the date of issue of this policy" and not from the date of reinstatement. *Burnham, supra* at 264.

With respect to the incontestability clause, this court held that since Utah is firmly committed to a doctrine "that a reinstated policy is a continuation of the original contract" subsequent legislative enactments could not alter the terms of the reinstatement clause and ingraft upon that clause terms not contained therein. Thus, the provisions of Utah Code Annotated, §31-22-18(2) did not apply to this contract.

Further, the court held that the attempt by the insurance company to insert a new contestability period into the policy by way of the reinstatement application was null and void. The court held that such language was in effect an attempt on the part of the insurer to make a contract of reinstatement. This court held that under *Gressler* reinstatement was not a contractual arrangement but merely a step in compliance with the condition specified in the original reinstatement clause of the contract. *Burnham, supra* at 265.

This court then held that the provisions of Utah Code Annotated, §31-22-18(1) did not start anew the contestability period upon reinstatement since the statute was enacted subsequent to the issuance of the original policy. *Burnham, supra* at 265.

The court then summarized its holding in the following language:

In the instant action, since the reinstatement was not, in contemplation of law, a new contract, but a continuation of the original policy, there is no ground upon which to predicate the revival of the contestability period after it has expired under the terms of the contract. Under the reinstatement clause the insurer was accorded the right to require whatever evidence of insurability it deemed satisfactory and a fair opportunity to make a complete investigation as to reinstatement. When the insurer finally determined that the conditions for reinstatement had been fulfilled, the original policy was again in full force and effect as if there had been no prior lapse. *Burnham, supra* at 265.

This court held that the suicide clause had expired, having commenced running on the date the policy was issued, and that the contestability clause had also expired, having commenced running on the issue date of the policy and not having been recommenced upon reinstatement. Thus, the only issues conceivably raised by the pleadings on file in this case, whether there was material fraud in the reinstatement application, were disposed of by this court in its prior opinion with the holding that such issues were barred by the terms of the original policy.

Based upon these facts and this law, plaintiff moved for a summary judgment in the court below and her motion was denied. This court should reverse the trial court, remand the case and order summary judgment to be entered for plaintiff in accordance with her motion (R. 79).

POINT II

THERE ARE NO TRIABLE ISSUES REMAINING IN THIS CASE AND NOTHING BUT DELAY AND CONTINUED HARASSMENT OF PLAINTIFF CAN BE ACCOMPLISHED BY REMANDING THIS CASE FOR TRIAL.

Based upon the opinion of this court in *Burnham, supra*, there are no triable issues in the case. Defendant admitted issuing the policy, and reinstating the same. The amounts due under the policy rider are easily calculable from the policy and the amounts claimed by plaintiff in her motion (R. 79) were not objected to by defendant. Thus, since defendant cannot argue that there was material fraud in the reinstatement, defendant can do nothing but pay on the policy. This court in its prior opinion ordered that the case be remanded to the trial court "for the disposition in accordance with this opinion." That opinion required in effect a striking of all of defendant's defenses and upon motion of plaintiff for a summary judgment or a judgment on the pleadings, such a judgment should have been granted. This court should reverse the trial court and order summary judgment entered for plaintiff, as prayed in her motion (R. 79) together with costs of the action.

CONCLUSION

Based upon the prior opinion of this court in *Burnham v. Bankers Life*, 470 P. 2d 261 (1970), there are no triable issues left in the case and defendant has been precluded by law from asserting its alleged defenses. Therefore, this court should reverse the trial court's refusal to grant summary judgment for plaintiff and order the case remanded and summary judgment entered in favor of plaintiff as prayed by her motion.

Respectfully submitted,

MULLINER, PRINCE &
MANGUM

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