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Thomas R. Broadbent v. United States Fidelity and Guaranty Company : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THOMAS R. BROADBENT

Plaintiff

UNITED STATES FIDELITY AND
GUARANTY COMPANY

Defendant

RECEIVED

Appeal By Plaintiff

Granted By Court

For Salt Lake County

RAY R. CHRISTENSEN
CHRISTENSEN AND ASSOCIATES

Attorneys for Defendant

1205 Continental Building
Salt Lake City, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

THOMAS R. BROADBENT,
Plaintiff and Appellant,

vs.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,
Defendant and Respondent.

Case No.
12263

REPLY BRIEF

RE-STATEMENT OF THE FACTS

The statement of facts contained in respondent's brief is incomplete in several particulars, and it is therefore necessary to add the following facts to be considered in conjunction with the statement of facts made in appellant's brief. At pages 4 and 5 of respondent's brief, respondent points to comments made by Dr. Broadbent to the effect that Dr. Broadbent miscalculated the radium dosage and the size of the tumor. Respondent also points to statements of plaintiff that at the time the Radon seeds were implanted he was not aware that his patient had had prior radium treatment in Europe. Based on this discovery respondent notes that plaintiff wondered if his

patient had received a cumulative dosage of Radon which caused the adverse effects. Respondent failed to mention, however, that Dr. Broadbent made all these observations as part of his diagnostic attempt to isolate the cause of the greater than anticipated effects; and that investigation into the above matters all indicated no miscalculations or over-dosages. In the first place, Dr. Broadbent did not become aware of the prior radium treatment until January 11, 1957, several years after the implantation of the Radon seeds. (Broadbent depo. p. 31). Upon investigation, Dr. Broadbent ascertained that the dosage in the prior radium treatment had been trivial and that even if he had known of the prior radium treatment, the dosage which he had prescribed for his patient would have been the same. (Broadbent depo. pp. 34-35). There was no cumulative effect considering both radium treatments. (Broadbent depo. p. 35). The dosage actually given to the patient was very conservative. (Broadbent depo. p. 58). Dr. Broadbent recomputed the dosage given with respect to the size of the tumor and ascertained that there had been no miscalculation as to either the dosage or the size of the tumor. (Broadbent depo. pp. 35-38).

Respondent also failed to mention that the patient's side effects were caused only partially by the radium treatment: the tumor itself and infection contributed significantly to the deterioration. (Broadbent depo. p. 36).

STATEMENT OF POINTS

POINT I

THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, ERRED IN ENTERING SUMMARY JUDGMENT FOR DEFENDANT AND RESPONDENT UNITED STATES FIDELITY AND GUARANTY COMPANY.

ARGUMENT

POINT I

A. PLAINTIFF GAVE TIMELY NOTICE.

In countering plaintiff's cases respondent has cited several cases involving professional liability insurance policies which respondent asserts support his position that proper notice was not given. Both appellant and respondent rely on *Sohm vs. United States Fid. & Guar.*, 352 F.2d 65 (6th Cir. 1965). The facts of *Sohm*, as noted in appellant's brief, are clearly distinguishable from the instant case. In that case, another physician showed Dr. Sohм the surgical error that had been made and Dr. Sohм still failed to notify his insurance carrier. As noted in appellant's brief, the case clearly stands for the proposition which is supportive of plaintiff's position, that notice need only be given when the physician actually becomes aware of the injury arising out of error, negligence or malpractice.

Respondent also cites the cases of *Falk vs. Sul America Terrestres Maritimos E. Accidentes Companhia De Seguros*, 465 P.2d 714 (Ore. 1970), and *Bergh vs.*

Canadian Universal Ins. Co., 197 So.2d 847 (Fla. App. 1967). Those cases are also clearly distinguishable on their facts. In the Bergh case plaintiff had received a letter from his patient's attorney which recited a claim for negligence against him, and had also been sued by the patient prior to the time when notice was forwarded to the company. In the Falk case, Dr. Falk received a letter from another physician who informed him that Falk had not detected an injury while treating the patient. As can be noted in both of these cases, a definite claim for negligence was made and the doctors were unquestionably aware that a claim was or might be made against them for malpractice. In the case at hand, Dr. Broadbent received no complaints whatsoever during the entire period of treatment. He verified the dosage, both with the company and with other specialists. No miscalculations, errors or omissions were detected or brought to his attention by anyone. Only when he received the letter from his patient's attorney was he aware that any claim would be made against him for negligence, malpractice, or error.

Respondent also cites the Utah cases of *Amundson v. Mutual Benefit, Health & Acc. Assoc.*, 13 U.2d 407, 375 P.2d 463 (1962); *Dunn v. Metropolitan Life Ins. Co.*, 100 Utah 111, 110 P.2d 561, (1941), and *Anderson v. Beneficial Fire & Cas. Co.*, 21 U.2d 173, 442 P.2d 933 (1968). These three cases are distinguishable either factually or legally from the instant case. In the first place all three deal either with life or accident insurance policies and involve situations where a beneficiary or an insured

did not make proper notice from some clearly ascertainable date, such as the date of death or the date of a fire loss. In the case at hand, there is no such clearly ascertainable date when it became clear to Dr. Broadbent or anyone else that a claim could or would be made. The date when plaintiff received notice from his patient's attorney is the only clear ascertainable date in this case which could be used as a guideline for setting a period within which notice must be rendered. And, of course, plaintiff rendered notice immediately after being informed of the claim. From this standpoint defendant's cases have no bearing on the instant case. Simply because the court found improper notice in those cases does not make those cases dispositive of the case at hand.

Respondent makes particular reference to the *Amundson* case primarily for the purpose of establishing the six-year period of limitation applicable to written instruments as the outside limitation for the filing of notice under a professional liability policy. Assuming *Amundsen* would have application to the instant case, Dr. Broadbent complied. Once Dr. Broadbent received notice from his patient's attorney, he immediately notified his insurance company. That date is the only date from which the time computation could be made. As noted above, there was no prior definite time or event which could be relied upon for the basis of the computation of the six-year period. The most that can be said is that there was a continuum of activity from the time the Radon seeds were implanted until actual written claim was made. Any

estimate as to a date or event prior to the date that the written complaint was received from which the six-year period of time could be said to run, would be based exclusively on conjecture and surmise.

In considering the impact of the Amundson case, it must be realized that no subsequent Utah case has adopted or expanded upon the rule of the six-year limitation. Moreover, it must be recognized that the approach taken by the court in that case is indeed novel and not supported by any other decision or line of reasoning found by plaintiff or by defendant. It seems quite clear the holding in *Amundson* must be confined to its facts and not extended to other factual situations such as the one at hand where there is no logic or reason to support the application of such a limitation.

B. LATE NOTICE, IF ANY, IS EXCUSED SINCE PLAINTIFF REASONABLY BELIEVED NO CLAIM FOR INJURIES WOULD RESULT.

Respondent seems to believe that appellants are relying exclusively on the doctrine of trivial occurrence to excuse late notice as that doctrine is set forth in the case of *Johnson Ready-Mix Concrete Co. v. United Pac. Ins. Co.*, 11 U.2d 279, 358 P.2d 337 (1961). Respondent mistakes appellant's position. The argument and cases cited in appellant's brief stand for the proposition that one need only report an injury the circumstances of which would cause a reasonable and prudent man to suspect that a claim might arise therefrom. Appellant's position is that the events surrounding the treatment of Miss Gyr at no time

indicated to a reasonable and prudent man that a claim for malpractice would be made.

C. LATE NOTICE, IF ANY, IS EXCUSED SINCE
DEFENDANT WAS NOT PREJUDICED THEREBY.

Respondent contends that the great weight of authority in the United States is to the effect that the insurance carrier need not establish prejudice. As primary support for that proposition, respondent cites *State Farm Mutual Auto Ins. Co. vs. Cassinelli*, 67 Nev. 156, 216 P.2d 606 (1950), *Annot.* 76 A.L.R. 23, 183 (1932); and *Annot.* 18 A.L.R. 2d 443 (1951). As is obvious, the latest cited authority is 1951. Clearly, since 1951 the law in this particular area and the weight of authority has shifted drastically. Appellant would invite consideration of supplements to 18 A.L.R.2d 443 and the cases cited therein to the effect that the courts in at least 15 states where the proposition has been presented have adopted the rule that the insurer, in order to be relieved of liability, must show that it has suffered prejudice because of the insured's non-compliance with provision as to notice. These states include most of the jurisdictions adjoining Utah as indicated in appellant's brief.

Respondent further states that the insurer need not prove prejudice especially in those cases where notice is a condition precedent to suit on the policy. Respondent cites only the *Cassinelli* case and various general propositions in the above referenced annotations which are presently out of date. The more current view is that the in-

surer must establish prejudice even if notice is set as a condition precedent to suit on the policy. For example, in the case of *Cooper v. Government Employees Ins. Co.*, 51 N. J. 86, 237 A.2d 870 (1968), notice was made a condition precedent to a suit on the policy. In that case the court held that in spite of the provisions in the policy the insurer had to prove appreciable prejudice. The burden of persuasion was explicitly placed on the insurer. *Cooper v. Government Employees Ins. Co.*, *supra*, at 874. In the case of *Lindus v. Northern Ins. Co.*, 103 Ariz. 160, 438 P.2d 311 (1968) the Arizona Supreme Court held that the insurer is not relieved of responsibility of proving actual prejudice even where the policy makes notice an express condition precedent to suit. See *Lindus v. Northern Ins. Co.*, *supra*, at 315. Attention is invited to the multitude of cases cited at that particular page supporting the court's decision. Further attention is called to the Pennsylvania case of *Frank v. Nash*, 166 Pa. Super. 476, 71 A.2d 835 (1950), wherein the Pennsylvania court held that the failure to furnish the suit papers to the insured did not of itself avoid the policy in the absence of prejudice to the insurer even where the policy expressly made compliance with the notice provision a condition precedent to the insurer's liability. For additional support, see *Joyce v. United Ins. Co.*, 21 Cal. Rptr. 361 (1962). Based on the foregoing cases, the current trend is clearly away from the proposition stated by respondent. The courts are understandably recognizing that there is no necessity of relieving the insurer from liability unless there is prejudice; if the insurer is not disadvantaged, no harm results in not relieving it from liability.

**D. PLAINTIFF'S REASONABLE EXPECTATIONS
AS A LAY PURCHASER OF LIABILITY INSUR-
ANCE SHOULD BE REWARDED.**

Respondent objects to the underlying insurance contract being treated as an adhesion contract and asserts that the current judicial method of interpreting such contracts has no place in our law. Respondent further objects to the case of *Gray v. Zurich Ins. Co.*, 54 Cal. Rptr. 104, 409 P.2d 168 (1966), stating that the referenced sections in appellant's brief are sheer dictum. The case and the quotations therefrom are cited not for the holding but for the method used in interpreting the underlying contract. Whether one refers to standardized contracts as adhesion contracts or by some other name, the fact nevertheless exists that a considerable body of law has developed over the years interpreting these standardized contracts between individuals of disparate bargaining power which are given to the individual on a "take it or leave it" basis. Respondent asserts that both parties are bound by the clear and unequivocal terms of a contract regardless of the background of the negotiations and other circumstances surrounding the execution of the contract. The courts have traditionally exercised wide discretion in enforcing strictly the terms of a contract when strict compliance would result in an injustice. As Justice Frankfurter stated in his dissent in *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 326 (1942):

It is said that familiar principles would be outraged if Bethlehem were denied recovery on these contracts. But is there any principle which is

more familiar or firmly embedded in the history of Anglo-American Law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantages of the necessities of the other?

These principles are not foreign to the law of contracts. Fraud and physical duress are not the only grounds upon which courts refuse to enforce contracts. The law is not so primitive that it sanctions every injustice except brute force and downright fraud. More specifically, the courts generally refuse to lend themselves to the enforcement of a "bargain" in which one party has unjustly taken advantage of the economic necessities of the other. . . .

Respondent states that he has been unable to find any law involving adhesion contracts. By statute in Utah the court may refuse to enforce a contract or a clause therein if it is unconscionable. §70A-2-302 Utah Code Ann. (Repl. Vol. 1953). In the area of express disclaimers of warranties in standardized contracts and the refusal of courts to enforce the same, appellant would refer the court to the well-known case of *Henningson v. Bloomfield Motors*, 32 N. J. 358, 161 A.2d 69 (1960). In that particular case the court refused to give effect to a disclaimer of implied warranty of merchantability. In denying effect to that part of the contract, the court stated as follows:

The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other

on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole. But in present day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. . . . Such standardized contracts have been described as those in which one predominate party will dictate its law to an undetermined multiple rather than to an individual. They are said to resemble a law rather than a meeting of the minds. *Henningson v. Bloomfield Motors, supra*, at 86.

The court continued as follows:

The task of the judiciary is to administer the spirit as well as the letter of the law. On issues such as the present one, part of the burden is to protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer. *Henningson v. Bloomfield Motors, supra*, at 94.

The strict method of interpreting standardized contracts can be found in cases dealing with contracts involving baggage checks containing clauses restricting liability of common carriers for loss or damage in transit; See *S. S. Ansaldo San Giorgio I. v. Rheimstrom Bros. Co.*, 294 U. S. 494 (1935); limitations on parcel checkroom tickets; see *Jones v. Great Northern Railway Co.*, 68 Mont. 231, 217 P. 673 (1923); on storage warehouse receipts; *French v. Bekins Moving & Storage Co.*, 118 Colo. 424, 195 P.2d 968 (1948); on automobile parking lot or garage tickets or claim checks, *Hoel v. Flower City Fuel & Transfer Co.*, 144 Minn. 280, 175 N.W. 300 (1919); and also excul-

patory clauses in leases releasing landlords of apartments from liability for negligence, see *Annot.* 175 A.L.R. 8 (1948). The same general principle has been applied to the standardized bank passbook. See *Los Angeles Inv. Co. v. Home Savings Bank*, 180 Cal. 601, 182 P. 293 (1919).

Based on the foregoing authorities, it is clear that the strong interpretative stance taken by the courts against the standardized contract is not new in the law. The case of *Gray v. Zurich Ins. Co.*, *supra*, was cited only for the proposition that the same method of interpreting adhesion contracts has been applied to insurance contracts. For additional support see *Steven v. Fidelity & Cas. Co. of New York*, 27 Cal. Rptr. 172, 377 P.2d 284 (1962), with particular emphasis on pages 294-97, and the footnotes attached thereto.

Appellant again maintains that the standardized contract under question must be considered and interpreted according to the guidelines set down by the courts, taking into consideration the method of execution, and the expectations of the parties concerned. Dr. Broadbent as a layman would reasonably expect that he should give notice under the terms of his policy once he himself became aware of any claim against him. This he in fact did. One would not reasonably expect the doctor to make claim for an injury not caused by negligence, malpractice or error on his part and about which he had received no complaint.

E. THIS CASE IS NOT RIPE FOR SUMMARY JUDGMENT.

In the first place there is a factual issue as to whether plaintiff gave timely notice under the policy. As is noted in both appellant's and respondent's briefs, whether notice was timely given or not depends upon the facts and circumstances of each individual case. The facts and circumstances can only be fully explored and developed at trial. This appellant has not had the opportunity of doing. Witnesses and records need to be consulted which are not now in the record. Respondent claims that the mere fact that the reactions developed as they did is sufficient to warrant affirming the summary judgment. Appellant denies this. Moreover, there is a factual question as to whether notice would be excused under the circumstances of the case. Respondent alleges this is merely a question of law. To the contrary, this is an issue of fact, since the excuse, if any, would be predicated on a factual finding that a reasonable and prudent doctor acting in Dr. Broadbent's place would or would not have had sufficient facts at his disposal to cause him to tender notice. This determination can only be made after full exploration of all facts, witnesses and evidence, some of which has not been placed in the record and cannot be fully explored until trial. Appellant also contends there is an issue of fact remaining as to whether defendant has been prejudiced by any late notice. Again, this is a factual issue depending upon when the duty to notify arose, and what actions defendant could have taken, if any, to reduce any alleged prejudice. This is a matter which can only be explored fully at trial after full disclosure of all evidence. Based on the author-

ities set forth in appellant's brief, it is again submitted that there are genuine issues of material facts which remain in this case and which must be submitted to a jury.

CONCLUSION

Appellant again respectfully submits that no duty devolved upon Dr. Broadbent to render notice until the actual complaint was made against him. If a duty devolved at an earlier time, the failure to render notice is either excused as being not sufficient to indicate to a reasonable and prudent man that a claim would be made or is excused because of lack of prejudice to the insurer. Appellant submits that the contract in question must be interpreted most strongly against insurer and the reasonable expectations of the doctor should be rewarded. Material issues of fact remain in this case, and it is therefore requested that the court vacate the summary judgment entered by the lower court and remand this matter for further proceedings including trial.

Respectfully submitted,

HANSON, BALDWIN,
BRANDT & WADSWORTH

By
REX J. HANSON
*Attorneys for Plaintiff and
Appellant*
702 Kearns Building
Salt Lake City, Utah 84101