

1971

# Thomas R. Broadbent v. United St Ates Fidelity and Guaranty Company : Respondent's Brief

Utah Supreme Court

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## Recommended Citation

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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THOMAS R. BROADBENT,  
*Plaintiff and Appellant,*

vs.

UNITED STATES FIDELITY AND  
GUARANTY COMPANY,  
*Defendant and Respondent.*

Case No.  
12263

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RESPONDENT'S BRIEF

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Appeal by Plaintiff from Adverse Summary Judgment  
Granted by Third Judicial District Court, in and for  
Salt Lake County, Stewart M. Hanson Presiding

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**FILED**

JAN 26 1971

*Clerk, Supreme Court, Utah*

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*Defendant and Respondent.*

} Case No.  
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---

RESPONDENT'S BRIEF

---

NATURE OF THE CASE

This is an action by plaintiff doctor for indemnity from his alleged professional liability insurance carrier as the result of a settlement of a malpractice claim against the plaintiff.

DISPOSITION IN THE LOWER COURT

The District Court of Salt Lake County granted defendant's motion for summary judgment and entered judgment thereon in favor of the defendant, no cause of action, on the ground that as a matter of law, plaintiff had failed to comply with the notice provisions of his policy.

## RELIEF SOUGHT ON APPEAL

Defendant seeks an affirmance of the judgment below.

## STATEMENT OF FACTS

The statement of facts contained in appellant's brief is incomplete, and we, therefore, deem it necessary to restate the facts.

Plaintiff asserts that defendant afforded professional liability insurance coverage to him during the period May 1954 and for a period of two years thereafter. The policy allegedly issued by defendant contained the following provision:

"2. Notice of Injury, Claim or Suit.

Upon the insured becoming *aware of any alleged injury covered hereby*, written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents *as soon as practicable*, together with the fullest information obtainable. . . ." (Emphasis ours.) (R. 7)

The same policy also provided:

"No action shall lie against the company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy. . . ."

It may be noted here that defendant does not admit the issuance of the purported policy. However, for purposes of this appeal, it may be considered by the court that such a policy was in fact issued.

On June 30, 1954, defendant implanted radon seeds into the mouth of Adrienne Gyr. (Plaintiff's deposition, page 14). These contained radio-active material, the effect of which was almost completely spent within a period of about thirty days. (Plaintiff's deposition, page 12). Even before the thirty day period expired, plaintiff experienced effects of a greater degree than had been anticipated. On July 16, 1954, she was noted to have "severe salivation and mucositis" and "more reaction" than had really been expected. (Plaintiff's deposition, pages 13, 14).

A copy of plaintiff's office chart relative to Miss Gyr is attached to his deposition. It reveals that on July 21, 1954, he was sufficiently concerned to have x-rays taken to calculate the gamma roentgens. (See also plaintiff's deposition, page 62). At the same time, plaintiff also checked with the radium company which had furnished the radon seeds, for the purpose of checking the dosage. (Plaintiff's deposition, pages 62 and 63). Both of these checks were "initiated by reason of the greater than anticipated response." (Plaintiff's deposition, page 63).

The doctor's office chart reflects that plaintiff followed a steady downhill course. On practically every office visit, new findings are noted or old ones are noted to be aggravated.

His office record of July 25, 1954, describes the area of the cheek as, "a little less frightening." On August 3, 1954, the inside of the mouth is described as, "seems to



be worse." On September 13, 1954, she was noted to develop edema of her feet and to look a little anemic. On September 27, 1954, she was noted to continue to have considerable discomfort in the tongue. This was again noted on November 8, 1954. On November 22, 1954, she had contamination in the mouth and a little lymphangitis. On January 5, 1955, she was beginning to have some toothache and some retraction of the gums. By February of 1955, plaintiff was definitely concerned about her response to therapy. (Plaintiff's deposition, page 22).

Office notes of May 3, 1955, indicate that she had areas of erosion, with bone exposure. This was not anticipated and increased plaintiff's concern for his patient. (Plaintiff's deposition, page 23).

On January 3, 1956, it was noted that she might lose a tooth and a piece of bone in the jaw. By June 7, 1956, it was decided to refer her to Dr. Robinson, a plastic surgeon, for consultation. Office notes of July 27, 1956, indicate that it was explained to her that in the future, she would probably lose some bone, and this warning was repeated on August 28, 1956.

On January 11, 1957, plaintiff became aware for the first time that his patient had had prior radium treatment. At that time, she was told that she would probably lose some teeth and part of the mandible. The doctor commented in his notes that it was likely, "that she now has a cumulative dose of the radon plus the radium giving her this problem" and "also, that a second

factor might well be *that there was not as much tumor tissue as thought when calculated for the average and minimal dose.*' (Emphasis ours.) Dr. Broadbent was then concerned about what the previous treatment might mean in her course. (Plaintiff's deposition, page 32). No later than this date, plaintiff was aware both that his patient had sustained adverse effects far beyond anything that had been anticipated, ("injury") *and* that he might have miscalculated the dosage, and that this might be a factor in her condition. ("Malpractice," "errors" or "mistakes")

On May 31, 1957, plaintiff consulted with his patient and her father. His notes reflect that he advised them "that there was possibly some over-treatment" and that there had "been an over-effect with some untoward results."

Notwithstanding the patient's continued downhill course, progressive increase in problems and his final conclusion that he may have over-treated her, or that her condition may have been complicated by reason of previous radium therapy, Dr. Broadbent never notified defendant of the possible claim until approximately June 1967, about the time he received a demand letter from his patient's attorney, and only a few weeks before suit was filed against him on her behalf. (Deposition, page 49).

Plaintiff was not unaware of the requirement or importance of giving notice to his liability carrier. In another instance where plaintiff had a patient who was

unhappy with the result of his treatment, he gave notice to his professional liability carrier because, "there was at least a possibility that the patient might make a claim against him." This occurred in the early 1960s. (Plaintiff's deposition, pages 9 and 10).

## ARGUMENT

### POINT I

#### PLAINTIFF DID NOT COMPLY WITH THE NOTICE PROVISIONS OF HIS PURPORTED POLICY OF INSURANCE.

Under the terms of the policy allegedly issued to plaintiff, he was required to give notice "as soon as practicable" to his liability insurance carrier upon "becoming aware of any alleged injury" covered by his policy. Counsel for the plaintiff apparently takes the position that plaintiff was the sole judge, both of whether he had committed any malpractice, mistake or error, and also whether there would probably be a claim arising therefrom. A similar contention was made by the insured in the case of *Hartford Accident and Indemnity Company vs. Lloyd*, 137 F.Supp. 7. In disposing of that argument the court said:

"He [insured] seeks here to require his insurer to defend what he claims to be a wholly unfounded action, and at the same time justifies his failure to notify his insurer on the ground that, in his opinion, any action against him would be without merit. He may not on the one hand require the defense provided for in the policy for an unfounded action and, at the same time, refuse to notify his insurance company on the ground

that it was unfounded. If the company is required to defend an unfounded action — which it is — it is equally entitled to the notice required in the policy regardless of its insured's own personal notions of what his legal liability was."

We agree wholeheartedly with the reasons for the notice provision as set forth in the quotation from 8 *Appleman, Insurance Law and Practice*, Section 4731, as quoted in appellant's brief, pages 5 and 6. Other authorities to the same effect are: 13 *Couch on Insurance* 2d, pages 634 and 635, Section 49:2, and page 659, Section 49:37; 18 ALR2d 443, at 447 and 451; *Oregon Farm Bureau Insurance Company vs. Safeco Insurance Company of America*, (Ore.), 438 P.2d 1018; *Arthur v. London Guarantee & Accident Company*, (Cal.App.), 177 P.2d 625.

What is notice as soon as practicable depends upon the facts of each particular case. There are innumerable cases in the annotation in 18 ALR 2d, cited and relied upon by plaintiff, wherein notices ranging from approximately 70 days up to three and one-half years have been held as a matter of law to be late and a breach of the notice provisions of the policy. We cite as illustrative, but by no means exhaustive: *Certified Indemnity Company vs. Thun*, (Col.), 439 P.2d 28 (73 days); *Johnson vs. Universal Underwriters*, (7th Cir.), 283 F.2d 316 (74 days); *Coolidge v. Standard Accident Insurance Company*, (Cal.App.), 300 P. 885 (three and one-half months); *Burbank v. National Casualty Company*, (Cal. App.), 59 P.2d 589 (91 days); *Hartford Accident &*

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*Indemnity Company vs. Lloyd*, 137 F.Supp. 7 (8 months); *Oregon Farm Bureau Insurance Company vs. Safeco Insurance Company of America*, (Ore.), 438 P.2d 1018 (two years); *Hartford Accident and Indemnity Company vs. Lochmandy Buick Sales, Inc.*, (7th Cir.), 302 F.2d 565 (two years); *Boyer vs. American Casualty Company*, (2nd Cir.), 332 F.2d 709 (two years); and *Purefoy v. Pacific Automobile Indemnity Exchange*, (Cal.), 53 P.2d 155 (Three and one-half years).

Our research has disclosed only three cases involving the problem of late notice in a professional liability insurance policy. The first of these in *Sohm vs. U.S.F. & G. Company*, (6th Cir.), 352 F.2d 65. The case is cited in appellant's brief at page ten. In that case, the doctor performed an operation in August of 1962. He observed a second operation performed on his patient in October of 1962. At that time, he became aware and admitted that he had placed a suture in the patient's femoral nerve and thus caused injury of which the patient complained. However, he did not notify his insurer until March 11, 1963, two days after receiving notice from his patient's attorney. It was held as a matter of law that he did not give notice as soon as practicable and that the insurer was not liable for the amount of the recovery against him. Said the court:

"In the present case, although Mrs. Wilson complained of pain to the appellant the day following the first operation on August 10, 1962, and continued to complain of pain until September 12, 1962, no action was taken by appellant to notify

the appellee. At this point it might be understandable that some doubt would exist in the appellant's mind as to the cause of injury. However, this doubt was, or should have been, completely removed on October 1, 1962, when appellant observed the second operation by Dr. Saunders, readily admitted that he placed the suture through the edge of the femoral nerve, and this caused the injury of which Mrs. Wilson complained. Further, appellant admits he knew Mrs. Wilson had a right to bring a lawsuit against him. No action was taken by appellant to give notice to the appellee until March 11, 1963, two days after receiving a letter from Mrs. Wilson's attorney. The court is unable to find any circumstances beyond the control of appellant which would excuse appellant from giving the required notice 'as soon as practicable.'

\* \* \*

"As stated previously, the court is of the opinion *that when the appellant knew on October 1, 1962, that he caused the injury of which Mrs. Wilson complained, and at that time also knew she had a right to bring a lawsuit, he was aware of an alleged injury covered under his liability policy. This provision does not mean that the appellant could wait until he was sued.*

"It is the finding of the court that the delay on the part of the appellant, in absence of circumstances beyond his control, in complying with the terms of the policy to furnish written notice to the appellee 'as soon as practicable' was a breach of the policy provisions requiring such written notice to be furnished. . . ." (Emphasis ours.)

The second case is *Bergh vs. Canadian Universal Insurance Company*, (Fla.App.), 197 So.2d 847. In that

case, the doctor performed a surgical procedure on his patient in January 1964, which was followed by complications. A second procedure was done in June of 1964, also followed by substantial complications. On October 26, 1964, the patient's attorney wrote the doctor a demand letter. However, the doctor did not report the incident to his insurance company until April 1, 1965, after suit had been commenced. Said the court:

"Failure to give notice as soon as practicable has been held to be a material breach of an insurance policy in this state in numerous reported cases. . . .

"In the case at bar, the claim as to which insurance coverage is contested involves alleged medical malpractice. *The patient contends that she had suffered substantial damages, the severity of which dictated the need for early and thorough investigation concerning the cause and extent thereof.* Under the circumstances appearing in this case, the appellant has not made it appear that the able trial judge erroneously held that the insured had not given notice of the accident as soon as practicable in conformance with the policy requirements." (Emphasis ours.)

The third case is *Falk vs. Sul America Terrestres Maritimos E. Accidentes Companhia De Seguros*, (Ore.), 465 P.2d 714. In that case, the doctor learned of the apparent existence of an injury and of the potential existence of a claim some two years before a malpractice action was filed against him. However, he did not report the matter to his insurance carrier until after suit was filed. The trial court held that he had sufficient

knowledge to cause him to believe that a potential claim existed and which required that he notify his insurer of the facts of which he was aware, and that he breached the notice provision of his policy. The Supreme Court affirmed the judgment of the court below.

In no case cited by the plaintiff has a delay of notice of more than about three years been held to comply with the policy requirement of a notice "as soon as practicable" or equivalent language. It appears to us that earlier decisions of this court are fully determinative of the issues here and compel an affirmance of the judgment below.

In *Amundson vs. Mutual Benefit Health and Accident Association*, 13 Utah 2d 407, 375 P.2d 463, defendant's policy required notice to be given as soon as reasonably possible. Notice was not given until after a lapse of 32 years. This court there adopted the six year statute of limitations on actions on written instruments as the very maximum limit of time that could be held to comply with a policy provision requiring notice as soon as reasonably possible. This court there said:

*"... In this case the insurer pleads inability to determine even the fact whether it issued the policy under which plaintiff makes her claim. In addition, witnesses may have died, memories have faded and the claim has grown stale indeed. The extended lapse of time has materially increased the risk of the insurer to a degree clearly not contemplated by the provision for notice and proof of loss as soon as 'reasonably possible.' ...*



“To favor certainty rather than uncertainty in the determination of the period of time after which prejudice to the insurer demands the claim be barred, and in view of the fact the legislature has seen fit to bar claims based upon written contract after six years has elapsed, *we shall adopt this period, and hold that as applied to this particular policy, proof of loss should have been filed within six years after the loss. . . .*” (Emphasis ours.)

Although the policy in question requires notice “as soon as practicable,” rather than “as soon as reasonably possible,” the meaning of the two phrases is essentially the same, and the same result should follow.

See also *Dunn vs. Metropolitan Life Insurance Company*, (Utah), 110 P.2d 561, where a policy required notice within twenty days and a notice given after six months was held as a matter of law to be a failure of compliance and to bar recovery on the policy.

In *Anderson vs. Beneficial Fire and Casualty Company*, 21 Utah 2d 173, 442 P.2d 933, this court inferred by way of dictum that failure to give a written notice within sixty days as required by the policy would be justification for the insurer to deny coverage.

## POINT II

### LATE NOTICE IS NOT EXCUSED.

#### A. THIS WAS NOT A TRIVIAL OCCURRENCE.

Plaintiff seeks to justify his belated notice under the doctrine of trivial occurrence, as illustrated in the case of *Johnson Ready-Mix Concrete Company vs.*

*United Pacific Insurance Company*, 11 U.2d 279, 358 P.2d 337. The doctrine of that case has no application here. That involved an incident where, at the time of the accident, the injury to the claimant was apparently trivial in nature, and not the type of thing likely to give rise to a claim or suit. The facts of this case are not of that category. From the outset, the patient experienced problems far in excess of those anticipated. By January of 1957, it was clear to plaintiff that his patient was going to lose all or a part of her mandible and many of her teeth. She also required extensive dental care. It would take a callous individual indeed to say that the loss of a jawbone to a female patient is a trivial occurrence. As said in *Century Indemnity Company vs. Serafine*, 311 F.2d 676, at 680:

“It was Mr. Serafine’s duty to report to Century any occurrence which a reasonably prudent man would have had reason to believe was covered by the provisions of the policy and upon which a claim could reasonably be urged. *Hoffman & Klemperer Co. v. Ocean Accident and Guarantee Corporation Ltd.*, 7 Cir., 1961, 292 F.2d 324; Cf. *Hartford Accident & Indemnity Co. v. Lochmandy Buick Sales, Inc.*, 7 Cir., 1962, 302 F.2d 565. . . .”

B. THE DOCTRINE OF TRIVIAL OCCURRENCE  
COULD NOT IN ANY EVENT EXTEND THE NOTICE TIME  
BEYOND THE PERIOD OF LIMITATIONS ON AN ACTION  
FOR WRITTEN CONTRACT.

It does not appear to us that there is any conflict between the holdings of this court in *Johnson Ready-Mix*

*Concrete Company v. United Pacific Insurance Company*, supra, and *Amundson vs. Mutual Benefit Health and Accident Association*, supra. In the latter case, this court circumscribed the limits beyond which notice could not go, that is the period of limitations for action on a written contract, which is six years. No later than January 1957, plaintiff was aware that his patient was in serious difficulty, would certainly sustain a serious loss, and that it might very well have resulted from his miscalculation of the dosage. At the very latest, notice should have been given to his liability carrier at that time. In fact, notice was deferred more than ten years thereafter and not given until June 1967, after an attorney had intervened.

### POINT III

#### DEFENDANT IS NOT OBLIGATED TO ESTABLISH PREJUDICE TO ITSELF BY REASON OF LATE NOTICE.

While there are cases that support plaintiff's contention that an insurer must show prejudice in order to defeat recovery on the grounds of late notice, the great weight of authority and the better reasoned decisions hold to the contrary. Particularly is this true where, as here, the provisions of the policy make compliance with the notice requirement a condition precedent to suit on the policy.

One of the leading and most oft quoted cases on this subject is *State Farm Mutual Automobile Insurance*

*Company vs. Cassinelli*, (Nev.), 216 P.2d 606, 18 ALR2d 431. The Nevada court there said:

“We may say frankly that upon our first reading of the briefs prior to argument and at the conclusion of the argument, we were strongly impressed with the cases presented to the effect that right of recovery under the policy would not be barred by failure to give timely notice, unless the insurer had been prejudiced by such failure. The arguments in favor of such rule seemed plausible and the rule itself appeared neither unfair nor inequitable, especially if it were coupled with the rule adopted in some jurisdictions that prejudice would be presumed and that burden of proof be upon the insured to overcome such presumption by a proper showing. As we have seen however, a careful consideration of the cases shows that in no case so holding did the policy contain a clause to the effect that the compliance with the requirements for notice was a condition precedent to recovery. It would be presumptuous on our part to establish a rule of law in this state which departs from the overwhelming majority of decisions throughout the United States.”

The court also quoted from 76 ALR 183 as follows:

“‘In insurance of this character it is a matter of the first importance to the insurer, who may be forced to become the real defendant in a law suit against the insured, . . . to be speedily informed of all the facts and witnesses concerning a possible litigation. In a very little time the facts may in a great measure fade out of memory, or become distorted, witnesses may go beyond reach, physical conditions may change, and, more dangerous than all, fraud and cupidity may have

had opportunity to perfect their work. Therefore, this stipulation is vital to the contract.’”

Following the report of that case in 18 ALR 2d is an annotation commencing at page 443. At page 449 of the annotation, it is said:

“... Generally speaking it has been held that an insurer need not show that its rights had been prejudiced by the insured’s delay in giving notice or in forwarding the suit papers where the liability policy made the requirement as to notice and forwarding suit papers expressly a condition precedent to any liability on the part of the insurer.”

and at page 452 of the same annotation, it is said:

“It appears to be well settled that if a liability policy expressly makes the insured’s failure to give timely notice a ground of forfeiture, or compliance a condition precedent to liability, no recovery can be had where timely notice has not been given. . . .”

and at page 480 in the same annotation, it is said:

“The general rule to the effect that the insurer need not show that its rights had been prejudiced by the insured’s delay in giving notice or in forwarding the suit papers has been said to apply particularly in those cases in which the liability policy contained a provision making compliance with the requirement as to notice in forwarding suit papers expressly a condition precedent to any liability on the part of the insurer.”

See also the previously cited case of *Sohm v. U.S.F. & G. Company*, 352 F.2d 65:

“... The inquiry into whether the appellee was prejudiced by the delay is irrelevant ‘for if the giving of notice was a condition precedent to the right of recovery, the failure to give it prevented any liability from attaching.’ *Phoenix Cotton Oil Co. vs. Royal Indemnity Co.*, supra.”

For other authorities to the same effect, see: *Couch on Insurance* 2nd, Sections 49:50 and 49:338; *Hoffman vs. Employer's Liability Assurance Corporation*, (Ore.), 29 P.2d 557 followed in the recent case of *Bonney v. Jones*, (Ore.), 439 P.2d 881; *Sears, Roebuck & Company v. Hartford Accident and Indemnity Company*, (Wash.), 313 P.2d 347. We also invite attention to a line of cases represented by *Artukovich vs. St. Paul-Mercury Indemnity Company*, (Cal.), 310 P.2d 461, and holding that prejudice is presumed from late notice.

Even if this court were to elect to follow the minority view, the present record discloses that defendant has been prejudiced in the following particulars:

1. That it has not even been able to determine from its own records whether it ever issued a policy to the plaintiff, its records that far back having been destroyed. See *Amundson vs. Mutual Benefit Health and Accident Association*, 13 Utah 2d 407, 375 P.2d 463.

2. Defendant lost the opportunity to obtain information concerning the facts of the matter from the plaintiff while the facts of the matter were still fresh in his mind and to preserve said facts by appropriate narrative statements or depositions.

3. It lost the opportunity to obtain an independent medical evaluation of the plaintiff and to determine at an early state in the proceedings whether this was a proper claim of liability.

4. It lost the opportunity to negotiate directly with the plaintiff for settlement of her claim on personal injury values as they existed in the 1950s, rather than on today's inflationary values, and it also lost the opportunity to attempt to negotiate a settlement without the intervention of an attorney and the expense of litigation. The very purposes of the notice requirement as set forth in appellant's brief sufficiently identify the prejudice which defendant has sustained by reason of the late notice in this case.

#### POINT IV

#### PLAINTIFF IS BOUND BY THE CLEAR AND UNEQUIVOCAL PROVISIONS OF THE POLICY OF INSURANCE.

In his desperation to find a tenable theory upon which he might prevail, plaintiff has argued to this court the adoption of a strange new breed of law called "Adhesion Contracts." This contention is based solely upon a single case from the State of California, unsupported by any other judicial authority and in violent conflict with well established contract and insurance law, both in this state and generally. The general rule for the construction of an insurance contract is as set forth in 43 Am.Jur.2d, pages 318 and 319, Insurance, Section 260, as follows:



“As in the case of contracts generally, the cardinal principle pertaining to the construction and interpretation of insurance contracts is that the intention of the parties should control. If the intention of the parties can be clearly discovered, the court will give effect to that intention within the sphere of its proper and legal operation and will construe accordingly the terms used in the policy, no matter how inapt, ungrammatical, or inaccurate they may appear when viewed strictly or legally. The rule is that once the intention of the parties is clearly ascertained, a policy of insurance is to be liberally construed in order to carry out that intention, especially where a liberal construction is the reasonable one and a literal construction would lead to manifest injustice. However, if not ambiguous or uncertain, the express terms and language the parties have used should be given effect and their intention must be derived from the language employed. *If the intention of the parties is clear, the courts have no authority to change the contract in any particular; they can construe but not make contracts of insurance for the parties, and they cannot disregard the express language the parties have used* when such language is capable of reasonable interpretation.” (Emphasis ours.)

The case of *Gray v. Zurich Insurance Company*, upon which plaintiff relies, is a relatively simple case, standing for a simple proposition. In the Court of Appeals it was held as follows:

“The obligation of the insurer to defend an action brought against the insured is determined by reference to (1) the terms of the insurance policy, and (2) the language of the complaint in the



action brought against the insured." *Gray vs. Zurich Insurance Company*, 49 Cal. Repr. 271.

This holding was based upon the earlier decision of *Lamb vs. Belt Casualty Company*, 40 P.2d 311. It is in accord with generally accepted insurance law. On appeal, the Supreme Court of California reversed. The essential holding of the Court on appeal is as set forth in the following quotation:

"Since modern procedural rules focus on the facts of a case rather than the theory of recovery in the complaint, the duty to defend should be fixed by the facts which the insurer learns from the complaint, the insured, or other sources. An insurer, therefore, bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. In the instant case the complaint itself, as well as the facts known to the insurer, sufficiently apprised the insurer of these possibilities; hence we need not set out when and upon what other occasions the duty of the insurer to ascertain such possibilities otherwise arises." 419 P.2d 168, 177.

This represents an extension of the earlier rule, which has found favor in some courts. Under this view, the insurer has a duty to defend, not only if the allegations of the complaint are within the coverage of the policy, but also if the insurer has information which might bring the accident or incident within the coverage of the policy. All that is said in the opinion of the Supreme Court in *Gray vs. Zurich Insurance Company* about adhesion contracts is sheer dictum. It will be noted from an examination of the opinion that the author has indulged

himself in a considerable amount of ivory tower thinking, and that his views are supported only by the ivory tower thinking of professors as represented in Law Review articles, but not by the judicial thinking of any other court of this country.

Plaintiff cites not a single other case or text to support this doctrine. Our research has failed to discover any other case which would support it, nor do we find it discussed in any of the standard texts, either on contract law or on insurance law. The purported doctrine has no place in our law, and certainly, even if it is recognized to exist, would have no application here. The policy provisions here involved are standard forms and have been in common use for decades. They are clear and unequivocal, and their meaning is well known and understood throughout the industry. The provisions have been construed by many courts and have never been found to be ambiguous nor susceptible of construction.

It may be further observed that as a protection to the insurance buying public, all insurance policy forms are subject to the scrutiny and approval of the Insurance Commissioner of this state before they may be used. Section 31-19-9, U.C.A. 1953.

Nor can the plain language of the policy be disregarded out of sheer sympathy for the injured victim. The better rule is as set forth in the case of *Bonney vs. Jones, et al.*, (Ore.), 439 P.2d 881, at 882:

“While there is a diversity of legal opinion upon the strictness with which the notice provisions of insurance contracts should be enforced in actions by tort victims against insurance carriers, Oregon has followed the rule that the rights of the tort victim against the insurance carrier are generally no greater than the rights of the insured. . . .”

#### POINT V

#### THE CASE IS RIPE FOR SUMMARY JUDGMENT.

The general rule is set forth in *6 Moore's Federal Practice*, Section 56.04, p. 2028, as follows:

“The summary judgment procedure prescribed in Rule 56 is a procedural device for promptly disposing of actions in which there is no genuine issue as to any material fact. In many cases there is no genuine issue of fact, although such an issue is raised by the formal pleadings. The purpose of Rule 56 is to eliminate a trial in such cases, since a trial is unnecessary and results in delay and expense which may operate to defeat in whole or in part the recovery of a just claim or the expeditious termination of an action because of a meritorious defense that is factually indisputable. ‘The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter, may subject a suitor to the burden of a trial.’

“To attain this end, the rule permits a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, and admissions on file show there are no genuine issues of material fact to be tried.”

This court, in the case of *Henry vs. Washiki Club Incorporated*, 11 Utah 2d 138, 355 P.2d 973, said:

“We recognize the validity of the plaintiff’s argument that doubts should be resolved in favor of permitting one who has a grievance to present his claim to a court or jury, and that a summary judgment, which deprives him of that privilege, should be granted with reluctance. However, it does have a useful and salutary purpose. *When the evidence as contended by the plaintiff, and every reasonable inference that fairly could be drawn therefrom, are considered in the light most favorable to him, and it nevertheless appears that he could establish no right to recovery, the motion should be granted to save the time, trouble and expense involved in a trial.*” (Emphasis ours.)

To the same effect is the language of this court in *Raymond v. Union Pacific Railroad Company*, 113 Utah 26, 191 P.2d 137. Although that case involved a non-suit rather than a motion for summary judgment, the following language would appear to be equally applicable here:

“It has been strenuously argued by plaintiff that this decision has deprived him of his constitutional right to a jury trial. That contention has been urged upon this court in almost every case of nonsuit and directed verdict brought before us. This court is charged with the duty of protecting all of the rights of all litigants. This is especially true of those fundamental rights guaranteed by the State and Federal Constitutions. But *the right to have a jury pass upon issues of fact does not include the right to have a cause submitted to a jury in the hope of a verdict where the facts*

*undisputably show that the plaintiff is not entitled to relief."* (Emphasis ours.)

To like effect are *Matievitch v. Hercules Powder Co.*, 3 Utah 2d 283, 282 P.2d 1044, and *Abdulkadir v. Western Pacific R. Co.*, 7 Utah 2d 53, 318 P.2d 339.

Plaintiff contends that there are three issues of fact remaining to be determined as follows:

1. *A factual question as to whether plaintiff gave timely notice under the policy.* There is no dispute on this issue. Plaintiff's own testimony was that he did not give notice to the defendant until June of 1967, after he had received a demand letter from his patient's attorney. The evidence also shows without dispute and from plaintiff's own office records, that he had knowledge more than ten years earlier that his patient was experiencing severe and unanticipated results from the treatment and that these would ultimately result in serious injury, including the loss of a jawbone and many teeth. Plaintiff's own office records further establish that plaintiff was aware that his patient may have received an excessive dosage of x-ray, either by reason of a cumulative effect from prior radio-therapy or by reason of his own miscalculation of the proper dosage. The order granting summary judgment was based solely upon the plaintiff's own version of the matter, as established on his deposition and by his own office records. He has made no effort to rebut, dispute or explain them.

2. Plaintiff contends *that there is a question as to whether notice would be excused under the circumstances*

of *this case*. Under the facts of this case, that is not an issue of fact but an issue of law. It is fully discussed under our Point II of this brief.

3. Plaintiff also contends that there is *an issue of fact as to whether defendant has been prejudiced by any late notice*. Again, this is an issue of law and not a question of fact. It is fully discussed under our Point III of this brief.

While we recognize that in most cases and under most circumstances, the question of whether the notice was reasonably given to satisfy the requirements of the policy is a question of fact, where the delay has been as great as it was here, the courts hold unanimously that as a matter of law the notice does not comply with the policy requirements. The rule is stated in *Couch on Insurance Second*, Section 49:46, as follows:

“Where the facts are clear, the question as to whether notice was reasonably given so as to satisfy the requirement of immediate notice is for the courts, or as declared in some cases, where the delay has been so great that the court may rule it a matter of law.”

Utah cases which have held to this effect are *Amundson vs. Mutual Benefit Health and Accident Association*, 13 Utah 2d 407, 375 P.2d 463; *Anderson vs. Beneficial Fire and Casualty Company*, 21 Utah 2d 173, 442 P.2d 933; and *Dunn vs. Metropolitan Life Insurance Company*, (Utah), 110 P.2d 561.

## CONCLUSION

On the plaintiff's own testimony and on his own office records, he utterly and completely failed to comply with the requirement of his alleged policy that notice be given as soon as reasonably practicable. He has offered no justification or excuse. As a matter of law, under the rules laid down by this court in earlier decisions, plaintiff is not entitled to prevail and the judgment of the trial court should be affirmed.

Respectfully submitted,

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