

1971

Onel J. Barnett and Evelyn I. Barnett v. State
Automobile & Causalty Underwriters and
Diversified Insurance Agency, and A-1 Agencies
Diversified : Brief of Respondents

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

ONEL J. BARNETT and
EVELYN I. BARNETT,

Plaintiffs and Respondents,

vs.

STATE AUTOMOBILE &
CASUALTY UNDERWRITERS,

Defendant and Appellant,

and

DIVERSIFIED INSURANCE
AGENCY, and A-1 AGENCIES
DIVERSIFIED,

Defendants.

Case No.
12264

BRIEF OF RESPONDENTS

Appeal from the District Court of Salt Lake County
Honorable Bryant H. Croft, District Judge

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FILED
FEB 26 1971

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and

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AGENCY, and A-1 AGENCIES
DIVERSIFIED,

Defendants.

Case No.
12264

BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

The parties will be referred to as in the Court below.

STATEMENT OF THE KIND OF CASE

This is an action brought by Plaintiffs on a fire insurance policy issued by Defendant for a fire loss which occurred in Plaintiffs' home.

DISPOSITION IN THE LOWER COURT

Plaintiffs received judgment based on a jury verdict against Defendants, State Automobile & Casualty Underwriters and Diversified Insurance Agency, in the amount of \$23,484.04. Defendant A-1 Agencies Diversified received a judgment of dismissal of Plaintiffs' complaint.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek to have the judgment of the Trial Court affirmed.

STATEMENT OF FACTS

Since Plaintiffs are entitled to have the facts reviewed in a light most favorable to them and since Defendant's brief fails to so review the facts, we deem it necessary to restate them.

This action arose from a fire loss in Plaintiffs' home at Vernal, Utah on October 19, 1967. Plaintiffs filed suit against State Automobile & Casualty Underwriters, the

insurer, and Diversified Insurance Agency and A-1 Agencies Diversified, the agents, claiming as to the insurer, liability on a fire insurance policy, and as to the agents, liability for negligence and breach of contract. (R. 58-62)

The policy in question was issued and countersigned by Diversified. The insurer was Guarantee Security Insurance Co. Later, the policy was assumed by Defendant State Automobile & Casualty Underwriters. The policy period was from October 1, 1964 to October 1, 1967. The fire occurred on October 19, 1967, some 19 days after the alleged expiration of the policy. The morning following the fire, Plaintiff, Onel J. Barnett, notified Diversified of the fire by telephone and requested them to send an adjuster. (R. 182). Not hearing from Diversified for three or four days, Barnett again called and was informed that his insurance had expired. Plaintiffs mailed a check pre-dated to October 1, 1967, as payment on the policy. (R. 217) The check was returned.

Plaintiffs expected to receive a notice of the expiration of the fire insurance policy and a bill for the renewal premium. They received no notice of any kind and no bill. (R. 183)

Plaintiffs' claim against Defendant insurance company is based on a course of dealing over a period of approximately 18 years. It was adopted by Diversified and State Auto. The course of dealing consisted of notification of expiration and billing for renewal of fire insurance policies.

One Noble Kimball procured fire insurance policies for Plaintiffs for approximately 18 years. On every occasion when a policy was about to expire, Kimball would notify Plaintiffs either by mail or in person and then renew their policy and bill them for the premium. (R. 170) On one occasion when Kimball had failed to see Plaintiffs and was planning to be out of the state, he paid the premium himself and billed Plaintiffs for it. This concerned a fire policy with the Pearl Assurance Co. with a term from July 5, 1961, to July 5, 1964. (Ex. 2P) During these years, Plaintiffs relied entirely on this course of dealing in order to keep themselves continually insured. (R. 169-173)

When the Pearl Assurance Co. policy was about to expire, Kimball brought Richard Salisbury, an officer in Diversified Insurance Agency, to see Barnett. He introduced Salisbury to Barnett and informed Barnett that for reasons of health, he was retiring and that Salisbury would take his place and handle his insurance exactly as it had been handled in the past. Salisbury agreed that he would so perform and then proceeded to obtain the policy in question for the Barnetts. A letter dated November 2, 1964, from Diversified by Salisbury confirmed this arrangement. (Ex. 3P) On being questioned in detail concerning the conversation with Kimball and Salisbury, on cross-examination, Plaintiff, Onel J. Barnett, testified as follows: (R. 189, 190)

“Q. In other words did he ask you specifically? You didn’t tell Mr. Salisbury that you want-

ed notice of a certain number of days before a policy expired did you?

A. I told him I wanted it handled just like it had been handled before. We agreed on it.

Q. And you didn't tell him at that time how Mr. Kimball had been handling it, did you?

A. He said he knew.

Q. But you didn't tell him how Mr. Kimball had been handling the insurance?

A. Yes, I believe I did.

Q. And as far as that is concerned specifically he didn't promise or say he would send you a notice or telephone call and tell you about an expiration date did he?

A. He promised that he would, to the nearest of his ability, he would continue as had been carried on."

and further (R. 191)

"Q. And it's also true that you didn't directly call anybody in the Gurantee Security Insurance Co. and State Auto and ask that they renew the policy either?

A. I always paid by statement and notice, I didn't call nobody, I answered their letters with a check."

Following the issuance of the policy, Diversified continued to service it. On July 19, 1966, Diversified issued a personal articles floater which added a camera to the coverage. (Ex. 13P) On the assumption endorsement attached to the policy in question (Ex. 1P), where-

by as of February 28, 1966, State Auto assumed the policy, the name of Diversified Insurance Agency was typed at the top. On the change and attaching clause endorsement dated June 19, 1966, stating that the policy is reinstated, this document was issued and signed by Diversified Insurance Agency. (Ex. 14P) Also during the course of the policy in question, Plaintiffs submitted a glass claim which was handled by Diversified (R. 199)

Barnett had always relied on Kimball to send him a bill so that he would know how much to pay for the insurance coverage. (R. 203) Barnett intended to renew his policy at such time as it expired and would have paid a bill had it been sent to him. (R. 184)

William H. Slaugh, an insurance agent in the Vernal area for approximately 19 years testified that he is acquainted with a custom and practice which is uniform in this area pertaining to agents who issue policies. He testified that the custom and practice is that the agent sends out bills ahead of time and where necessary issues the policies 15 to 30 days ahead of the expiration date. If the insured hasn't paid it by the time the policy expires, they notify their insured and give him an opportunity to reinstate the policy. (R. 247)

On Cross-examination, Slaugh testified (R. 249) :

“Q. But there is no obligation on the part of the company to renew any policy if he doesn't want it on the expiration date, is there? They can turn it down?

A. There is—I don't know whether it's a set

rule or a general rule but they are notified 30 days ahead of time, and especially if there is a mortgage on the property.”

and again at R. 251:

“Q. Suppose an agent in Salt Lake has a contract and suppose the distance is such from here to Vernal and it’s difficult to inspect and there is no other insurance out there that this agent has, would it be logical for him to just let the policy run out if he didn’t want to have any more business out there?

A. It wouldn’t be logical and it wouldn’t be ethical to just run it out.

Q. It wouldn’t be ethical? Why wouldn’t it be ethical?

A. I just don’t do business that way, I would pay the premiums, and I just don’t drop them, just not even notify them that there is nothing taking place.”

Mr. Ellwood Johnson, the manager of defendant’s Denver branch office testified that defendant cancelled the agency of Diversified on November 28, 1964. The evidence showed, however, that on June 19, 1966 Diversified signed the change and attaching clause endorsement as defendant’s agent. (Ex. 14P) Also on July 12, 1966, Diversified was shown on the Personal Articles Floater as defendant’s agent. (Ex. 13P) Defendant did not explain this inconsistency. (R. 279) Johnson further admitted that State Auto gave no notice of this cancellation to the Plaintiffs. (R. 279)

POINT I.

THE EVIDENCE SUPPORTS THE VERDICT AND JUDGMENT.

The evidence amply supports the verdict rendered by the jury. The jury was properly instructed on the law and, therefore, the verdict and judgment should be affirmed.

A. DIVERSIFIED WAS THE AGENT OF STATE AUTO ON OCTOBER 1, 1967.

1. *As to Plaintiffs, State Auto cannot terminate the agency without giving notice.*

Clearly, pursuant to the statutes and case law, Diversified was the agent of State Auto at all times in issue. 31-17-1 Utah Code Annotated 1953, defines “agent” as follows:

“ ‘Agent’ means any person authorized by an insurer and on its behalf to solicit applications for insurance, to effectuate and counter-sign insurance contracts, except as to life or disability insurances, and to collect premiums on insurances so applied for or effectuated. * * * ”

The evidence in this case was undisputed that Diversified fell within that definition. Also, according to the holding in the case of *Farrington v. Granite State Fire Insurance Co. of Portsmouth, et al.* (1951) 120 Utah 109, 232 P 2d 754, Diversified was clearly the agent of State Auto.

The trial Court correctly instructed the jury in Instruction No. 13 (R. 94) that Diversified was the legal agent of the insurer in whose name the policy in question was issued as of October 1, 1964. The Court further instructed in the same instruction, that such an agency once established is "presumed under the law to continue until parties insured by such agent have been notified of the termination of such agency, and such agent may bind the company by his further acts until notice of the revocation of the agent's authority by the insurer is brought to the attention of persons who have dealt with that agent." The latter part of the instruction just discussed, is clearly in line with the general authority on this subject as stated at 43 Am. Jur. 2d, Insurance, par. 154, at p. 210:

"Where an insurer terminates an agency, the revocation is effective as to all third persons having notice or knowledge of such revocation, and the agent cannot thereafter bind the insurer with respect to such third persons by purporting to act as agent. It is the duty of an insurance company to notify insured persons who have dealt with their agent as the representative of the company of the termination of his authority. If it fails to do so, it is bound by his acts if such a person continues to deal with him as the representative of the company, in ignorance of the termination of the agency. This rule is based on the general principle that the acts of an agent within the apparent scope of his authority are binding on the principal as against one who had formerly dealt with him through the agent and who had no notice of the revocation."

The evidence was undisputed that Defendant did not notify Plaintiffs of the claimed termination of the agency of Diversified. Defendant's manager, Johnson, testified: (R. 279)

“Q. But you didn't tell these people that Diversified was not your agent any more, did you?

A. No, sir.”

B. DIVERSIFIED ADOPTED THE COURSE OF DEALING EXISTING BETWEEN NOBLE KIMBALL AND PLAINTIFFS.

The evidence established a course of dealing of some 18 years between Plaintiffs and Noble Kimball. The course of dealing established the practice of notification of expiration of fire insurance policies and automatic renewal. Plaintiffs came to rely on this course of dealing and merely waited for the notification and the bill before paying the premium. The evidence showed that on one occasion when Noble Kimball had been unable to contact Plaintiffs, he paid the premium himself and sent a bill for reimbursement. The evidence further showed that when Kimball turned over the business to Diversified, he took Richard Salisbury with him and introduced him to Plaintiffs. Salisbury agreed that he would handle the business just as it had been handled in the past. On cross-examination, it was brought out that the matter of notification had been specifically discussed and that Salisbury was told of the practice between Kimball and

Plaintiffs and agreed that he would continue it. Accordingly, Diversified adopted this course of dealing.

C. STATE AUTO ACCEPTED THE COVERAGE AND BECAME BOUND BY THE KNOWLEDGE AND ADOPTION OF THE COURSE OF DEALING BY DIVERSIFIED.

When State Auto accepted the coverage, it adopted the course of dealing. The *Farrington* case is clear authority for this proposition. The Court held that when the insurance company accepted the application and issued the policy, it was charged with the knowledge acquired by the agent in the course of taking the application and forwarding it to the company. The Court states at p. 115:

“It seems quite inconsistent for them to accept the advantages of everything he did for their benefit and yet insist that they are not responsible for the knowledge he acquired about the building within the necessary and ordinary scope of his duties in handling the transaction. From the facts stated, he was their agent and they are charged with his knowledge. It certainly would be casting an unreasonable burden upon a lay person to require him to make inquiry beyond the authority of Mr. Bowman under the circumstances which were present here.”

In that case, the Court, under a similar type of agency transaction, held that the company was charged with the knowledge of the agent concerning the insured building and its condition before issuing the policies.

Just as in that case, Diversified in this case took the application, forwarded it to State Auto, collected the premiums, countersigned the policy, and placed its sticker thereon. Under such a situation, according to the authority of the *Farrington* case, the knowledge of Diversified concerning the course of dealing was imputed to State Auto, and by issuing the policy, State Auto adopted the course of dealing to notify Plaintiffs of the expiration of the policy and to properly renew it.

The *Farrington* case cites with approval the case of *New Brunswick Fire Insurance Co. v. Nichols* (1923) 210 Ala. 63, 97 So. 82. In that case, Plaintiff applied for a fire insurance policy to an agent who represented Hartford Insurance Company and informed the agent of the nature of his interest in the land involved. He had a lease with an option to purchase, the option not having been exercised. The agent issued the policy and collected the premium. Thereafter, Hartford cancelled the policy and returned the premium. This agent then went to an agent of the Defendant and placed the policy with him. The Defendant insurance company issued the policy to its agent, and he forwarded it to the first agent. The first agent placed his sticker on the policy and retained part of the commission. The Court held that the first agent became the agent of the Defendant insurance company and that the company was charged with the knowledge of the facts of ownership which were acquired by this first agent. Accordingly, it was held that the company waived the defense in the policy of the Plaintiff not having fee title. The Court in that case cited the general law

on the subject as stated at 3 Cooley on Insurance, pp. 2529, 2530:

“If an insurance agent, to whom a request for insurance is made, procures all or part of such insurance, through other agents, from a company not represented by him, and receives the policy written by such company for delivery to the applicant, he will generally be regarded as the agent of the company issuing the policy, especially if he receives a part of the premium as commission. The principle underlying this doctrine is that the company issuing the policy ratifies the acts of the first-named agent, and constitutes him its agent for that transaction by accepting the application and by issuing and delivering the policy to him for further delivery to the applicant. Hence, it follows that the company will be charged with knowledge of any information imparted to the agent at the time the insurance is written.”

The above statement on the general law is certainly in keeping with good public policy. Persons such as Plaintiffs in the case at bar have no idea concerning the machinations and exchanges going on between insurance agents and companies. In this case, for instance, State Auto assumed the policy for Guarantee Security Insurance Company. Then we find from State Auto through its Denver manager that Kolob Corporation was its general agent in 1964 and that Kolob had appointed Diversified as a local agent. Then, on November 28, 1964, State Auto cancelled the appointment of Diversified as agent.

To further complicate the situation, it appears that

not only did State Auto fail to notify Plaintiffs of the cancellation, but that Diversified continued to service the Plaintiffs under this insurance policy subsequent to the purported termination. All plaintiffs knew was that they were insured and that the agent had agreed that they would receive notification of the expiration of the policy in time to renew it.

The Court correctly instructed the jury in Instruction No. 15 as to the elements of proof which Plaintiffs must establish by a preponderance of the evidence in order to prevail. These are summarized as follows:

1. That prior to October 1, 1967, a custom existed whereby agents writing fire insurance for Plaintiffs would renew such insurance upon expiration of the term of existing policy and bill Plaintiffs for the premiums then owing without a specific request for such renewal from Plaintiffs.

2. That prior to October 1, 1967, Diversified knew of this custom through its employee, Salisbury, and through him agreed with the Plaintiffs to service their policy in accordance therewith.

3. That on or before October 1, 1967, Defendant State Auto was either (a) then represented by Diversified as its agent, or (b) had failed to give Plaintiffs notice of its termination of Diversified as its agent.

4. That on or before October 1, 1967, State Auto, or its agent, failed to renew the policy in accordance with its custom or to give notice to Plaintiffs that it did not intend to.

5. That Plaintiffs in reasonable reliance upon such custom were damaged as a consequence of such failure.

We submit that this instruction correctly submitted the case to the jury in accordance with the prevailing law. We submit that the *Farrington* case has established the law in Utah to the effect that the knowledge of insurance agents is imputed to their principals. Furthermore, the principal is bound by courses of dealing existing between its agents and their insureds.

There was ample evidence to support the finding of the jury in Plaintiffs' favor under Instruction No. 15.

As far as the law concerning custom and practice of insurance companies is concerned, we cite the following to the Court:

In the case of *Loftis v. Pacific Mutual Life Insurance Co. of California* (1911) 38 Utah 532, 114 P. 134, custom and practice became an issue, and the Court cited 2 Joyce on Insurance, Section 1356 as follows:

"If an insurance company or its authorized agent, by its habits of business, or by its acts or declarations, or by a custom to receive overdue premiums without objection, or by a custom not to exact prompt payment of the same, or, in brief, by any course of conduct, has induced, honest belief, in the mind of the policyholder, which is reasonably founded, that strict compliance with the stipulation for punctual payments of premiums will not be insisted upon, but that the payment may be treated without forfeiture resulting therefrom, it will be deemed to have waived the right to claim

forfeiture, or it will be estopped from enforcing the same, although the policy expressly provides for forfeiture for nonpayment of premiums as stipulated, and even though it is also conditioned that agents cannot waive forfeitures.”

The Court cited with approval the statement of the Loftis case in *Ballard v. Beneficial Life Insurance Co.* (1933) 82 Utah 1, 21 P. 2d 847. The general statement of this principle is stated at 45 C.J.S. Insurance, par. 712, pp. 679, 680:

“An insurance company cannot insist on a forfeiture for failure to pay premiums in accordance with the terms of the policy when its course of dealing has been such as to induce the belief in insured that strict compliance with such provisions will not be insisted on, as where it has been its custom to receive premiums or assessments after they are due. The essence of such a waiver is a course of conduct by insurer reasonably leading insured to believe that lapse will not be exacted, and to bring a case within this rule it must reasonably appear that insurer intended, tacitly or otherwise, to waive the right it initially had to declare the policy forfeited, and that insured was misled into acting on the honest belief that forfeiture would not be insisted upon for failure to pay in compliance with the terms of the policy.”

and again at p. 682:

“If it is the custom of the insurance company to notify insured of the due dates of premiums, as by having its agent bill him or call to collect the same, its failure to do so may excuse prompt payment thereof. Such a custom has been held to

override general policy provisions against waiver by the agent, * * *

See also *National Fidelity Life Insurance Co. v. Henry* (Okla. 1935) 486 P.2d 829; *Minnick v. State Farm Mutual Auto Insurance*, 54 Del. 125, 174 A.2d 706; *Kaepfel v. Mutual Life Insurance Co. of New York* (3d Cir. 1935) 78 F.2d 899, citing May on Insurance, Vol. 2, par. 356, (a) :

“* * * where from the course of dealing between the parties the insured has a right to believe that notice will be given to him of the amount due and the time it is to be paid, the company cannot in the absence of such notice set up the failure to pay.”

Also, see 43 Am. Jur. 2d, Insurance, par. 554, p. 571:

“Indeed, it is said to be the prevailing rule that where an insurer uniformly follows the practice of giving notice of payments for such a time as leads those insured to believe that notice will be given, it cannot declare a forfeiture without notice, or without previously advising those who have relied upon receiving notice that the custom will be or has been discontinued.”

Also, see *Seavey v. Erickson*, 244 Minn. 232, 69 N.W.2d 889.

POINT II.

THE EVIDENCE ON CUSTOM WAS PROPERLY ADMITTED.

Defendant State Auto complains in Point III that the testimony of William Slauch on custom or usage was

improper. The purpose in presenting the evidence of Slaugh on custom and practice in the community of Vernal was not in any way an attempt to vary the terms of an insurance contract. This we have not attempted to do. The purpose for which this evidence was offered had to do with the allegations of negligence as to the two Defendant agents involved in this lawsuit. The Second Amended Complaint charged both Diversified and A-1 Agencies Diversified with negligence in failing to notify the Plaintiffs of the expiration of the policy in question. Accordingly, it became germane to the issue of negligence what the custom and practice of the agents in the community was with regard to giving notice of expiration to their clients. Mr. Slaugh had been an insurance agent in the Vernal area for approximately 19 years. He testified that there was a uniform custom existing as to agents notifying clients of expiration of policies and that through his contact with the various other agents and companies operating in the area that he was familiar with this custom. He then testified that it was the custom to give notice of expiration dates of policies and also to give clients an opportunity to reinstate policies if necessary. This evidence was entirely relevant to the issue of negligence and a more than adequate foundation was laid for the witness testifying as to the custom and practice.

Compare the testimony admitted as to custom and practice in the case of *DeWeese v. J. C. Penney Co.* (1956) 5 U.2d 116, 297 P.2d 898, and *Peterson v. Hansen-Niederhauser Inc.* (1962) 13 U.2d 355, 374 P.2d 513. Also, see *Brigham Young University v. Lillywhite*

(10th Cir., 1941) 118 F.2d 836; *Erickson v. Walgreen Drug Co.* (1951) 120 U. 31, 232 P.2d 210, and *W. T. Grant Co. v. Karen* (10th Cir., 1951) 190 F.2d 710.

POINT III.

THE PAROLE EVIDENCE RULE DOES NOT APPLY IN THIS CASE.

A. STATE AUTO MAKES THIS OBJECTION FOR THE FIRST TIME IN THIS COURT.

No where in the record of this trial was an objection made by Defendant State Auto or anyone else as to any evidence being inadmissible on the ground of a violation of the parole evidence rule. Defendant has waived the right to make that objection in this Court.

B. IN ANY EVENT, WE ARE NOT TRYING TO CHANGE THE CONTRACT.

The parole evidence rule does not apply in this case for the reason that there was no evidence offered or received in any way attempting to vary the terms of an insurance policy. We are not trying to change the terms of the insurance policy. However, we do say that when an insurance company adopts a course of dealing of giving notice and renewing policies to the extent that an insured comes to rely on this, the insurer has waived its right to insist on a strict enforcement of the expiration of the policy on the day of expiration. Accordingly,

Plaintiffs have the right to expect notice of expiration and to be billed for the premium. This right became established by the course of dealing Plaintiffs had for many years with Noble Kimball and which was adopted by Diversified. State Auto, when it accepted the Policy from Diversified and allowed Diversified to counter-sign its policy, adopted that custom and practice and became bound by it. Accordingly, State Auto was obligated to renew the policy and should be held to its terms.

CONCLUSION

We submit that the case was submitted to the jury on correct instructions. The authorities cited herein establish that insurance companies which adopt a custom and practice of giving notice as to expiration dates and renewing policies for customers, cannot insist on prompt payment if they fail to live up to this custom. The evidence establishes that a course of dealing of long duration existed between Plaintiffs and Noble Kimball. The evidence establishes that Diversified accepted and adopted this course of dealing. When Diversified placed this policy with State Auto and counter-signed it, State Auto adopted the course of dealing. State Auto cannot divest itself of responsibility in this matter merely by telling us that they cancelled their agency agreement with Diversified. It admits that it gave no notice of the cancellation to Plaintiffs. The Court correctly instructed the jury that the agency cannot be terminated as to Plaintiffs without such notice.

Accordingly, State Auto is bound, as it should be, by the custom and practice of giving notice and automatically renewing insurance policies. We submit that the judgment of the Trial Court should be affirmed.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief of Respondents, postage prepaid, to Raymond M. Berry of Worsley, Snow & Christensen, 7th Floor, Continental Bank Building, Salt Lake City, Utah, on the 26 day of February, 1971.