

1987

# Henry G. Clarke v. American Concept Insurance Company : Brief of Appellant

Utah Court of Appeals

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Jan P. Malmberg; Christensen, Jensen, and Powell, P.C.; Attorney for Respondent.

John Walsh; Attorney for Appellants.

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COURT OF APPEALS  
BRIEF

UTAH  
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DOCKET NO. 870193-CA IN THE UTAH COURT OF APPEALS

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HENRY G. CLARKE, JR.  
and JANICE CLARKE,

Plaintiffs  
Appellants,

vs.

AMERICAN CONCEPT  
INSURANCE COMPANY,

Defendant,  
Respondent.

;

;

;

COURT OF APPEALS NO. 870193-CA

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;

;

ARGUMENT CLASSIFICATION #14(b)

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BRIEF OF THE APPELLANT

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APPEAL FROM THE FIFTH CIRCUIT COURT  
IN AND FOR SALT LAKE COUNTY  
STATE OF UTAH  
JUDGE MAURICE D. JONES  
PRESIDING

---

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510 CLARK LEAMING BUILDING  
175 SOUTH WEST TEMPLE  
SALT LAKE CITY, UTAH  
84101

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SEP 25 1987  
87-0193-CA  
COURT OF APPEALS

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	-i-
STATEMENT OF JURISDICTION . . . . .	1
NATURE OF PROCEEDINGS . . . . .	1
STATEMENT OF THE ISSUES . . . . .	1
DETERMINATIVE RULE . . . . .	1
STATEMENT OF THE CASE . . . . .	2
NATURE OF THE CASE . . . . .	2
COURSE OF PROCEEDINGS . . . . .	2
DISPOSITION OF TRIAL COURT . . . . .	2
STATEMENT OF THE FACTS . . . . .	2
SUMMARY OF THE ARGUMENT . . . . .	4
ARGUMENT . . . . .	4
CONCLUSION . . . . .	6
CERTIFICATE OF MAILING . . . . .	7
ADDENDUM . . . . .	8

## TABLE OF AUTHORITIES

Rule 56, Utah Rules of Civil Procedure . . . . .	1, 4 and 6
<u>Allens Products. Co. vs. Glover</u> , 414 P.2d 93, (Utah, 1966)	4
<u>Brandt vs. Springville Banking Co.</u> , 353 P.2d 460, (Utah, 1960)	5
<u>Durham vs. Margetts</u> , 571 P.2d 1332, (Utah, 1977)	4
<u>Frederick May &amp; Co. vs. Dunn</u> , 368 P.2d 266, (Utah, 1962)	5
<u>Judkins vs. Toone</u> , 492 P.2d 980, (Utah, 1972)	5
<u>Lockhart Co. vs. Anderson</u> , 646 P.2d 678, (Utah, 1982)	5
<u>Securities Credit Corp vs. Willey</u> , 265 P.2d 422, (Utah, 1953)	6
<u>Snyder vs. Merkley</u> , 693 P.2d 65, (Utah, 1984)	5
<u>Tanner vs. Utah Poultry &amp; Farmers Coop</u> , 359 P.2d 18 (Utah, 1961)	5
<u>Thompson vs. Ford Motor Co.</u> 359 P.2d 62 (Utah, 1964)	5

### STATEMENT OF JURISDICTION

This is an appeal from the Fifth Judicial Circuit Court in and for Salt Lake County, State of Utah, Salt Lake Department to the Utah Court of Appeals, and is authorized pursuant to 78-2a-3(2)(c) of the Utah Code Annotated, as amended in 1986.

### NATURE OF PROCEEDINGS

This is an appeal from a Summary Judgment, entered by the Honorable Maurice D. Jones, on or about April 13, 1987.

### STATEMENT OF THE ISSUES

Can the Defendant insurance company deny coverage, when they have established a policy of accepting payments of premiums which are mailed on the date that the same are due?

Are premiums received on the day that they same are placed in the mails?

Was it error for the Circuit Court Judge to grant summary judgment, when the Plaintiff had plead breach of contract, estoppel and waiver?

### DETERMINATIVE RULE

Rule 56(c) of the Utah Rules of Civil Procedure reads in part as follows:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

## STATEMENT OF THE CASE

### NATURE OF THE CASE

This is an appeal to the Utah Court of Appeals from a Summary Judgment entered by the Honorable Maurice D. Jones, Circuit Court Judge. Judgment was granted to the Defendant as to the effect that there was no insurance in force at the time of the accident in question.

### COURSE OF PROCEEDINGS

The civil action was filed in the Fifth Circuit Court in and for Salt Lake County, State of Utah, Salt Lake Department. The matter was never heard on the merits, as the court entered summary judgment in behalf of the Defendants, from which the Plaintiff/Appellants appeal to this court.

### DISPOSITON OF TRIAL COURT

Pursuant to Rule 56 of the Utah Rules of Civil Procedure, the Circuit Court Judge felt that there was no genuine issue as to any material fact and that the Defendant was entitleld to judgment as a matter of law. Plaintiff/Appellant, of course, respectfully disagrees, and hence this appeal.

### STATEMENT OF THE FACTS

Plaintiffs filed their complaint on or about February 10, 1986, asserting three basic theories: (1) breach of contract (2) estoppel and (3) waiver.

In the Affidavit filed by the Plaintiff, Janice Clark, on or about February 24, 1987, in opposition to the Defendant/Respondent's Motion for Summary Judgment is the following:

1. Affiant is the Plaintiff in the above entitled action, and was the one who was involved in the facts and circumstances of the subject matter which has given rise to this action, and therefore has first hand knowledge of the following facts.

2. Affiant was the person who prepared and mailed the insurance premium, each time that the same occurred.

3. The Plaintiffs first engaged the Defendant as their insurance company in September, 1984, and had made their payments for the same regularly, and each were accepted by the Defendant as timely.

4. In April of 1985, Affiant mailed to the Defendant her premium which was to be paid April 23, 1985, and the same was mailed on the date that it was due.

5. Defendant accepted the check for the premium, which was received, in their office according to the stamp on the check (note the exhibit) by the insurance company on or about April 26, 1985, some three (3) days after the alleged due date.

6. After defendant received the said payment in April, 1985, Defendant made no denial of coverage, indorsed and cashed the check for the premium, and made no refund.

7. In September of 1985, Affiant again mailed out the premium on the date that the same was due, Defendant however



learned of the accident on September 14, 1985, some two days after the premium was mailed and then rejected the premium, and now claims that there was no coverage.

8. Affiant submits that the Defendant has established a policy of continuing coverage when the premium is mailed on or before the day that the premium is due, and therefore there is coverage for the automobile accident which is the subject of this action.

Dated this 24th day of February, 1987.

/S/ (Janice Clark)

JANICE CLARKE

The accident that is the subject of this action actually occurred on September 14, 1985, and was reported the day of the accident.

#### SUMMARY OF THE ARGUMENT

Plaintiffs/Appellants respectfully submit that under Rule 56 of the Utah Rules of Civil Procedure, there is no question that the Motion for Summary Judgment should have been denied.

#### ARGUMENT

This Court is to review the granting of the summary judgment by applying the same standard as that applied by the trial court. Durham vs. Margetts, 571 P.2d 1332, (Utah, 1977). Therefore this Court is to review the record in the light most favorable to the Plaintiffs/Appellants. Allens Prods. Co. vs. Glover, 414 P.2d 93, (Utah, 1966).

All inferences that can be fairly drawn, are to be drawn in favor of the Plaintiffs/Appellants. Thompson vs. Ford Motor Co. 395 P.2d 62 (Utah, 1964).

Courts are, and should be reluctant to invoke summary judgment, because it precludes the parties from their day in court, and short circuits a full hearing on the merits. Brandt vs. Springville Banking Co., 353, P.2d 460 (Utah, 1960).

Summary Judgment should be granted only when it clearly appears that there is no reasonable probability that the Plaintiffs/Appellants could prevail. Snyder v. Merkley, 693 P.2d 65 (Utah, 1984).

Even when there is no genuine issue of material fact, Summary Judgment should be denied, unless the moving party can show that he is entitled to judgment as a matter of law. Lockhart Co. v. Anderson, 646 P.2d 678, (Utah, 1982.)

Defendant/Respondent would have to establish that the Plaintiffs/Appellants were entitled to no relief as a matter of law. Tanner vs. Utah Poultry & Farmers Coop., 11 Utah 2d 353, 359 P.2d 18 (Utah, 1961).

To sustain a summary judgment, the pleadings, evidence, admissions and inferences therefrom, viewed most favorably to the Appellants, must show that there is no genuine issue of material fact, and that the Respondent is entitled to judgment as a matter of law. Such a showing must conclude, as a matter of law, all reasonable possibility that the Appellant could win if given a trial. Frederick May & Co. vs. Dunn, 368 P.2d 266, (Utah, 1962) and Judkins vs. Toone, 492 P.2d 980 (Utah, 1972).

Further, it must appear to a certainty that the Appellant would not be entitled to relief under any state of facts which could be proved in support of its claim. Securities Credit Corp. vs. Willey, 265 P.2d 422, (Utah, 1953)

In applying the facts to the above standard, Appellants submit that there can be no question that they could clearly prevail on a waiver or an estoppel theory, not to mention the breach of contract theory.

Here, the Appellant submitted his premium check in the Spring of 1985, under conditions exactly like they had in the fall, ie: mailed it out on the day that it was due.

On the former occasion, the Respondent, takes the total amount paid, makes no refund, and continues coverage like nothing had happened.

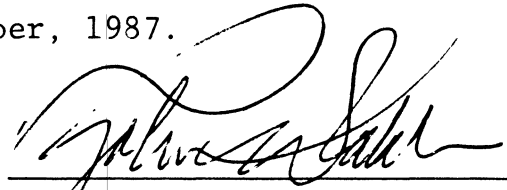
However, on the second occasion, when they learn of the claim being filed, they then reject the premium, and claim that there is no coverage, in stark contradiction to the course of dealing they have established.

#### CONCLUSION

Appellant respectfully submits that the lower court failed to properly apply Rule 56 of the Utah Rules of Civil Procedure, and while everyone agrees that the premium was mailed under the exact terms of the payment arrangement in the Spring of 1985, still the court has ruled that under no conditions could the Appellant prevail under a breach of contract theory, estoppel theory or waiver theory.

Appellants submit that the matter be reversed and remanded to the Circuit Court for a trial on the merits.

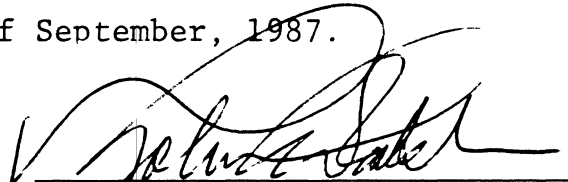
Dated this 18th day of September, 1987.

A handwritten signature in dark ink, appearing to read 'John Walsh', written over a horizontal line.

JOHN WALSH  
ATTORNEY FOR APPELLANTS

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing BRIEF OF APPELLANTS to the Defendant, by mailing the same to JAN P. MALMBERG, of CHRISTENSEN, JENSON & POWELL, ATTORNEYS FOR RESPONDENT, 510 Clark Leaming Building, 175 South West Temple, Salt Lake City, Utah, 84101, this 18th day of September, 1987.

A handwritten signature in dark ink, appearing to read 'John Walsh', written over a horizontal line.  
JOHN WALSH

## ADDENDUM

## **Rule 56. Summary Judgment.**

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.