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IN THE SUPREME COURT FOR THE STATE OF UTAH

ROSE MITCHELL, Plaintiff and Appellant, vs. HILLHAVEN CORPORATION VOLUNTARY PARTICIPANT BENEFIT TRUST, Defendant and Respondent.	Case No. 20665

APPELLANT'S REPLY BRIEF
Case No. 20665

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PROCEDURAL HISTORY

Defendant seeks to have eliminated from the case the allegations asserted in plaintiff's Amended Complaint, which include fraud, lack of consideration, and bad faith. (Record at 65-76.) Defendant bases this on an entirely procedural argument.

The procedural record in this case is somewhat confusing, but a resort to the relevant hearing transcript and minute entry is illuminating. Plaintiff's Motion for Amended Complaint came on for hearing on March 1, 1985. (Record at 75.) The merits of plaintiff's amended allegations were fully discussed at the hearing. Based on that hearing, Judge Daniels made the following minute entry:

> After giving this matter further consideration and after considering the proposed Amended Complaint, I am still of the view that the Motion for Summary Judgment should be granted.
> (Record at 77.)

In other words, Judge Daniels considered the evidence in light of the amended complaint, and granted summary judgment for the defendant.

After the hearing, defendant prepared a proposed order which basically stated the same thing as the cited minute entry. (See Record at 78.) Judge Daniels signed this Order. (Record at 80.) But a few days later, defen-

dant apparently decided to take a bigger bite and submitted a second proposed order that not only granted summary judgment for the defendant, but also stated that plaintiff's Motion to Amend had been denied. (Record at 81.)

At the hearing on plaintiff's Objection to the Form of the Order, confusion abounded. It became apparent that Judge Daniels didn't realize that defendant had submitted two separate proposed orders. (Transcript at 104.) It also appears that Judge Daniels thought he had only signed the first order, because when he referred to the order he thought he signed, he said:

> "Well, I don't know if I denied it or granted it. [i.e., Plaintiff's Motion to Amend] It doesn't say. It doesn't affect the right to appeal."
> (Transcript at 103.)

But then he looked at the second proposed order and, contrary to what he had thought, it did have the language about denying the motion to amend. (Transcript at 103.) Hence, he had signed the second order, thinking it was the first.

Finally, he decided to amend the order by hand to read, ". . .on the basis that even amended allegations there is no triable issue of fact." (Record at 82.)

All of these facts indicate that Judge Daniels actually allowed the complaint to be amended, and considered the amended allegations, but decided to grant summary judgment for defendant anyway.

POINT I

MODERN PLEADING PRINCIPLES ALLOW PLAINTIFF'S AMENDED ALLEGATIONS

The pleading rules have been liberalized. This Court in Williams v. State Farm Insurance Company, 656 P.2d 966 stated this about the Rules of Civil Procedure:

> "They must be looked at in light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of whatever legitimate contentions pertaining to their dispute. What they are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required.
> [Emphasis in original.]

Defendant can hardly claim surprise or lack of notice. Plaintiff made her motion to amend on February 14, 1985 (Record at 75) and the hearing was not held until March 1, 1985. So defendant had at least two weeks to evaluate these issues. All of the facts were agreed upon. It merely required looking at the two documents in question and formulating a response. Nor has defendant made any claim of prejudice or lack of preparation time.

POINT II

PLAINTIFF DID NOT NEED TO FILE AFFIDAVITS TO AVOID AN ADVERSE SUMMARY JUDGMENT

Defendant now asserts that under Rule 56(e), Utah Rules of Civil Procedure, the lower court had to grant

defendant's motion for summary judgment because plaintiff didn't file any affidavits.

But affidavits are not the only evidence upon which summary judgment may be based. Rule 56 says that a party may not "rest upon the mere allegations or denials of his pleadings," but his response must set forth his case "by affidavits or otherwise provided in this Rule."

The evidence to be considered was before the Court--the insurance policy and the waiver. Anything more would have been surplus. The plaintiff was not relying on the "mere allegations" of her pleadings. The facts were before the Court, i.e., the documents in question.

The very cases cited by the defendant illustrate defendant's misstatement of the effect of Rule 56. In Olwell v. Clark, 658 P.2d 585, 586 (Ut., 1982), this Court said:

> ". . . it is not always required that a party proffer affidavits in opposition to a motion for summary judgment in order to avoid judgment against him. . ."

The Court noted that the parties basically agreed as to the facts and that the essential issues could be resolved as a matter of law, so no affidavits were needed. The Court also said that even if no documents were proffered, summary judgment should only be granted "if appropriate, that is, if he is entitled to it as a matter of law." Id.

In our case, the essential facts are agreed on by the parties, and the documents are before the court. Only a legal determination is needed from the court. Hence, defendant's procedural argument based on Rule 56 is unfounded.

POINT III

THE PLAINTIFF SHOULD PREVAIL EVEN ON THE BASIS OF HER ORIGINAL COMPLAINT

In her original complaint, plaintiff basically discussed the insurance policy and what kind of reimbursement it required, concluding that the insurance policy did not require reimbursement from an out-of-court settlement with a third-party tortfeasor. (See Record at 29-36.)

The defendant bases its case on the assignment signed by the plaintiff. But the assignment states, in the last paragraph, that the assignment is the one contemplated by the policy. (See Record at 55.)

The defendant's assignment should be taken at its word. The assignment shouldn't grant the defendant any more rights than that granted by the insurance policy. This is especially true since insurance contracts should be generally construed against the insurance company (see Appellant's Brief at 8).

In other words, this Court should only look at what the insurance policy itself requires of the plaintiff.

Plaintiff's original complaint covers this issue in detail. Summary judgment should be granted to the plaintiff, Rose Mitchell.

POINT IV

PLAINTIFF HAS ESTABLISHED A CASE OF FRAUD

Defendant places great emphasis on a line of Utah cases dealing with the issue of how fraud is to be pleaded. (See Defendants's and Respondent's Brief at 9-11.) Defendant asserts that to prove fraud, a party must plead and prove nine specific elements.

But it has failed to cite or discuss the most recent case in this line, Union Bank v. Swenson, 707 P.2d 663 (Utah 1985). In this case, the Utah Supreme Court stated that pursuant to the "fundamental purpose of our liberalized pleading rules," the requirement that fraud be pleaded with particularity is "a requirement that we have construed to require allegation of the substance of the acts constituting the alleged wrong" (Id. at 668, emphasis in original.) The Court also said that waiver should not apply because the party seeking to block the fraud defense had not made any representation of surprise or disadvantage.

These same considerations apply in our case. The issue of fraud was presented in plaintiff's amended complaint and discussed at length in the March 1, 1985 hearing. (Record at 65-70). Defendant did not allege surprise or

disadvantage. Plaintiff has easily met the Union Bank v. Swenson stand and of "alleging the substance of the acts constituting the alleged wrong."

Defendant asserts that plaintiff cannot claim misrepresentation, since she had the insurance policy before her to read. But, plaintiff cannot be expected to comb through complex jargon, especially since the assignment reassured the plaintiff that it was merely the assignment required by the policy.

We are not dealing here with concrete figures that can be easily verified, such as square footage or per month income, as in the cases cited by the defendant. We are dealing with abstract wording.

Defendant also asserts that plaintiff's fraud claim is not actionable on the grounds that it claims misrepresentation as to the legal effect of a contract. But plaintiff doesn't allege misrepresentation as to the effect of the assignment. The misrepresentation is as to what the document is--a fact question. The assignment is, in effect, "Document X," while on its face it reassuringly states "this is Document Y." In other words, it is not an opinion about the effect of the document, but a factual statement as to what the document is.

Even applying the "fact/legal effect" distinction, a harsh result of denying plaintiff's fraud claim is not warranted. In the case of Adamson v. Brockbank, 185 P.2d, 264, 276 (Ut., 1947) this Court stated that while it is the

general rule that misrepresentation about the legal effect of contracts is not actionable fraud, "[t]here are exceptions to this rule or rather circumstances or conditions rendering it inapplicable. . ."

In our case, such circumstances exist. First, the misrepresentations is on the face of the assignment. The contract was written by an insurance company, with obviously superior expertise. Also, the misrepresentation was, as stated above, more in the nature of a blatant fact statement of what the document was, as opposed to an opinion as to its legal effect.

Finally, commentators have criticized the "fact/legal effect" distinction in fraud cases. This distinction has been called a "logical absurdity." (See Calamari & Perillo, Contracts, at 285-286.)

POINT V

THERE WAS NO CONSIDERATION FOR THE ASSIGNMENT

Defendant asserts that there was separate consideration for the expansive assignment. Defendant's argument is that it could have waited and not paid, and that paying when it did constituted consideration. Alternatively, defendant argues that plaintiff induced defendant to pay by signing the assignment and that, therefore, the assignment should be enforced under promissory estoppel.

But neither of these arguments holds water. Each argument assumes that defendant had a legal right not to pay. This assumption is false. Plaintiff had complied with each and every requirement under the policy. Defendant had a legal duty to pay. And, as we discussed in our Appellant's Brief, doing something you are legally bound to do is not consideration. (See Appellant's Brief at 10.)

POINT VI

A VALID CLAIM FOR BAD FAITH EXISTS

In Beck v. Farmers Insurance Exchange, 701 P.2d 795 (Utah 1985), this Court described the implied covenant of good faith that an insurer makes with an insured. In describing this implied covenant, this Court said:

> "The duty of good faith also requires the insurer to 'deal with the laymen as laymen and not as experts in the subtleties of law and underwriting' and to refrain from actions that will injure the insured's ability to obtain the benefits of the contract."
> Id. at 801.

In causing plaintiff to sign an assignment that expands defendant's rights and then at the bottom saying, "the policy requires you to sign this," the defendant has committed a classic breach of the implied covenant of good faith.

DATED this 10th day of February, 1986.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Rose Mitchell

By: [signature]

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF (Mitchell v. Hillhaven Corporation Voluntary Participant Benefit Trust, Case No. 20665) was mailed, U.S. Mail, postage prepaid, this 10th day of February, 1986, to the following:

Terrie T. McIntosh
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