

2008

# Val M. Ellison v. Utah County Government and Hartford Life & Accident Insurance Company : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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VAL M. ELLISON,

Plaintiff-Appellant,

vs.

UTAH COUNTY GOVERNMENT, and  
HARTFORD LIFE & ACCIDENT  
INSURANCE COMPANY,

Defendants-Appellees.

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Case No. 20080145-CA

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BRIEF OF THE APPELLANT

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APPEAL FROM THE RULING OF THE HONORABLE JAMES R. TAYLOR,  
FOURTH DISTRICT COURT, PROVO, UTAH COUNTY, UTAH

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Case No. 20080145-CA

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BRIEF OF THE APPELLANT

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**JURISDICTIONAL STATEMENT**

This Court has pour-over jurisdiction under section 78A-4-103(2)(j) of the Utah Code. The Utah Supreme Court had jurisdiction under section 78A-3-102(3)(j) of the Utah Code. The order appealed from was entered January 23, 2008.<sup>1</sup> The plaintiff-appellant filed his Notice of Appeal on February 8, 2008, which was timely under rule 4(a) of the Utah Rules of Appellate Procedure.

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<sup>1</sup>R. 647-657.

## **ISSUES PRESENTED AND STANDARDS OF REVIEW**

1. Was summary judgment precluded by genuine issues of material fact? “An appellate court reviews a trial court’s legal conclusions and ultimate grant or denial of summary judgment for correctness, and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.”<sup>2</sup>

## **DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS**

There are not any specific constitutional provisions, statutes, ordinances, rules, or regulations whose interpretation alone is determinative of this appeal or of central importance to it.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case.**

This is an appeal from a final order of dismissal entered on summary judgment in a civil case.

### **B. Course of Proceedings and Disposition Below.**

The plaintiff-appellant, Val M. Ellison, filed his complaint on June 30, 2005.<sup>3</sup> Hartford Life and Accident Insurance Co. (“Hartford”), a defendant-appellee, filed a motion

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<sup>2</sup>Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600 (citations and internal quotation marks omitted).

<sup>3</sup>R. 2-12.

for summary judgment on December 1, 2006.<sup>4</sup> Later, Utah County Government (“the County”), also a defendant-appellee, filed a motion for summary judgment on January 26, 2007.<sup>5</sup> Mr. Ellison filed a response to Hartford’s motion on January 5, 2007,<sup>6</sup> and a response to the County’s motion on March 27, 2007.<sup>7</sup>

Oral arguments on the defendants’ motions were held July 20, 2007.<sup>8</sup> At the conclusion of oral arguments, the trial court ruled from the bench in favor of the defendants.<sup>9</sup> Soon thereafter, Hartford prepared and filed a proposed order granting the defendants’ motions for summary judgment, and Mr. Ellison filed a written objection to it on October 4, 2007.<sup>10</sup> In a minute entry dated January 22, 2008, the trial court acknowledged that Hartford’s proposed order “does, indeed, extend substantially beyond the rationale and findings expressed by the Court at the time of the hearing.”<sup>11</sup> Nevertheless, after deleting only part of a single paragraph of the proposed order, the trial court went ahead and caused

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<sup>4</sup>R. 73-76.

<sup>5</sup>R. 502-504.

<sup>6</sup>R. 416-435.

<sup>7</sup>R. 539-612

<sup>8</sup>R. 641-644.

<sup>9</sup>R. 644.

<sup>10</sup>R. 645-657.

<sup>11</sup>For some reason, this Minute Entry does not appear in the record. Mr. Ellison is in the process of filing a motion to correct this error in the record.

Hartford's proposed order to be entered anyway on January 23, 2008.<sup>12</sup> On February 8, 2008, Mr. Ellison filed a Notice of Appeal.<sup>13</sup>

**C. Statement of Facts.**

Because this appeal asserts that there are disputed issues of material fact, such facts are discussed in greater detail in the argument section of this brief. The following, however, is a brief overview of the relevant facts.

Val Ellison entered into an employment contract with the County, pursuant to which he began working for the County in July 1995.<sup>14</sup> As part of this employment contract, the County agreed to provide life insurance for Mr. Ellison and supplemental life-insurance coverage for his dependents.<sup>15</sup> Sometime thereafter, Mr. Ellison purchased a supplemental life-insurance policy on his wife, Sherrie Ellison, through Hartford ("the Policy").<sup>16</sup> Neither the County or Hartford ever provided Mr. Ellison or his wife with a copy of the Policy.<sup>17</sup>

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<sup>12</sup>R. 647-657.

<sup>13</sup>See R. 658-659.

<sup>14</sup>R. 408, 598, 606.

<sup>15</sup>R. 408, 598, 605.

<sup>16</sup>R. 408, 431, 598, 605.

<sup>17</sup>R. 555-556, 595.

Among other things, the Policy states that the County’s “responsibilities include: . . . Notifying employees of their right to exercise the Conversion Privilege” in situations where, for example, a dependent may be excluded from coverage under the Policy by divorce.<sup>18</sup>

Although Mr. Ellison and his wife eventually divorced, they had “an agreement” that the Policy would be used to “help the kids with education and things like that.”<sup>19</sup> Mr. Ellison’s wife specially told him “to use the insurance to help the kids with missions and schooling and so forth.”<sup>20</sup> Due to the existence of this agreement, neither Mr. Ellison or his wife thought it was necessary to subsequently address the Policy in their divorce decree.<sup>21</sup>

Given the fact that Mr. Ellison and his wife were preparing for divorce, as well as the fact that Mr. Ellison’s wife suffered from terminal cancer, Mr. Ellison contacted the County’s human-resource department to learn what he needed to do to maintain the Policy after divorce.<sup>22</sup> An unidentified representative from the County’s human-resource department told Mr. Ellison that he only needed to “continue to make the premium payments in order to continue life insurance coverage.”<sup>23</sup> This County representative did not tell Mr. Ellison that

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<sup>18</sup>R. 406-407, 542, 595.

<sup>19</sup>R. 323, 431, 597.

<sup>20</sup>R. 287, 431, 548, 597.

<sup>21</sup>R. 287, 431, 548, 597.

<sup>22</sup>R. 271-272, 276-277, 282, 405, 597, 604-605.

<sup>23</sup>R. 271, 276-277, 320, 404-405, 558, 597.



he needed to fill out any additional paperwork or take any further action to ensure coverage after divorce.<sup>24</sup>

During this conversation with the County representative in question, Mr. Ellison asked for “something in writing” to confirm what the representative had told him.<sup>25</sup> In response, the representative gave Mr. Ellison Hartford’s telephone number and told him to call it to obtain the written confirmation he desired.<sup>26</sup> Consequently, on January 30, 2003, Mr. Ellison contacted Hartford by telephone at the number the County representative had given to him.<sup>27</sup>

During Mr. Ellison’s telephone call to Hartford, he spoke with Hartford employee Linda Daly.<sup>28</sup> Mr. Ellison told Ms. Daly that the County “told me that you can continue insurance on your spouse even if you get divorced.”<sup>29</sup> Ms. Daly confirmed the County’s representations regarding the Policy and said, “[Y]es. . . . I think that’s your option if you want to and you continue to . . . they’re going to be payroll deducting for her[,] so if you want to keep her on there, that’s fine.”<sup>30</sup> Ms. Daly did not, however, ever tell Mr. Ellison that he

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<sup>24</sup>R. 271, 276-277, 363-364, 405, 431, 558, 597, 603.

<sup>25</sup>R. 430, 573, 597, 603.

<sup>26</sup>R. 405, 430, 573-574, 597, 603.

<sup>27</sup>R. 430, 553, 552, 596.

<sup>28</sup>R. 404, 430, 573-574, 596.

<sup>29</sup>R. 430, 573-574, 596.

<sup>30</sup>R. 320, 336, 430, 573-574, 596.

needed to fill out any additional paperwork or take any further action in order to ensure coverage after divorce.<sup>31</sup>

As Mr. Ellison's conversation with Ms. Daly came to a close, Ms. Daly told Mr. Ellison that she would transfer his call to a different Hartford employee so that he could obtain any additional verification that he might desire.<sup>32</sup> As a result, Mr. Ellison then spoke with a second, albeit unidentified, Hartford employee about the continuation of the Policy following divorce.<sup>33</sup> This Hartford employee also told Mr. Ellison that the *only* thing he needed to do to continue coverage under the Policy after his divorce was to continue paying the required premiums.<sup>34</sup> Whether Mr. Ellison's conversation with this second Hartford employee was recorded is unknown, but Mr. Ellison has not been given a copy of any such recording.<sup>35</sup>

Due to the multiple representations that the defendants' employees made to Mr. Ellison about the continuation of the Policy following divorce, Mr. Ellison simply continued to pay the Policy premiums following his divorce.<sup>36</sup> He did not complete any additional

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<sup>31</sup>R. 331, 430, 573-574.

<sup>32</sup>R. 335, 573-574.

<sup>33</sup>R. 334-335, 337, 430.

<sup>34</sup>R. 334, 430.

<sup>35</sup>R. 403.

<sup>36</sup>R. 296-297, 333.

paperwork or take any further action.<sup>37</sup> Instead, he simply followed the County and Hartford employees' instructions: i.e., he just continued to pay the premiums.<sup>38</sup>

Mr. Ellison's divorce was finalized on August 21, 2003.<sup>39</sup> Soon thereafter, on October 27, 2003, his former wife, Sherrie Ellison, passed away following a long bout with cancer.<sup>40</sup> However, during the period of time between their divorce and Ms. Ellison's subsequent death, the County continued to deduct from Mr. Ellison's income to pay the premiums on the Policy, and Hartford continued to accept these payments.<sup>41</sup> Nevertheless, when Mr. Ellison later filed a claim for benefits under the Policy as a result of Ms. Ellison's passing, the defendants denied his claim and refused to honor either the Policy or the multiple representations that they had made to him about the Policy.<sup>42</sup> The defendants' stated reason for denying Mr. Ellison's claim was that neither he or Ms. Ellison ever completed the necessary steps to have the Policy "converted" after their divorce.<sup>43</sup>

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<sup>37</sup>R. 333.

<sup>38</sup>R. 296-298, 333.

<sup>39</sup>R. 405, 605.

<sup>40</sup>R. 405, 604-605.

<sup>41</sup>R. 296-297.

<sup>42</sup>R. 402, 601.

<sup>43</sup>R. 300-301, 401-402, 598.

## **SUMMARY OF THE ARGUMENT**

This case is about whether or not the trial court erred by granting the defendants' motions for summary judgment when there are genuine issues of material fact. For example, there are disputed issues of material fact as to whether the defendants made misrepresentations, either knowingly or recklessly, to Mr. Ellison upon which he reasonably relied to his detriment. There are disputed issues of material fact as to whether the defendants acted unfairly and in bad faith in various respects. And there are disputed issues of material fact as to whether Mr. Ellison's conduct was reasonable under the circumstances.

It is Mr. Ellison's contention that, by either discrediting or disregarding the admissible evidence giving rise to these disputed material facts, and by otherwise ignoring various reasonable inferences in Mr. Ellison's favor, the trial court erred. Consequently, the trial court's grant of summary judgment for the defendants should be reversed, and this matter should be remanded so that the parties may continue to prepare for trial.

## **ARGUMENT**

### **SUMMARY JUDGMENT WAS PRECLUDED BY GENUINE ISSUES OF MATERIAL FACT**

The defendants' motions for summary judgment should have been denied because there were genuine issues of material fact. "A summary judgment movant must show both that there is no material issue of fact and that the movant is entitled to judgment as a matter

of law.”<sup>44</sup> Summary judgment is appropriate only “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.”<sup>45</sup> The “facts and all reasonable inferences drawn therefrom” must be viewed “in the light most favorable to the nonmoving party.”<sup>46</sup> Indeed, even where the parties are “not in complete conflict as to certain facts,” but “the understanding, intention, and consequences of those facts [are] vigorously disputed,” the matter is not proper for summary judgment and “can only be resolved by a trial.”<sup>47</sup>

Given that there are disputed issues of material fact in this case, it was improper for the trial court to grant the defendants’ motions for summary judgment.

**I. THERE IS ADMISSIBLE EVIDENCE OF MISREPRESENTATIONS THAT CREATE GENUINE ISSUES OF MATERIAL FACT.**

In anticipation of his divorce, Mr. Ellison acted with reasonable diligence to determine whether and how coverage under the Policy might be affected in the event of divorce. Because neither of the defendants had ever provided Mr. Ellison with a copy of the Policy, he contacted at least one County employee and two Hartford employees in order to make this

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<sup>44</sup>Orvis v. Johnson, 2008 UT 2, ¶ 12, 177 P.3d 600.

<sup>45</sup>Utah R. Civ. P. 56(c).

<sup>46</sup>Orvis, 2008 UT 2, ¶ 6.

<sup>47</sup>Sandberg v. Klein, 576 P.2d 1291, 1292 (Utah 1978).

determination.<sup>48</sup> All three of these individuals, in succession and without exception, informed Mr. Ellison that his anticipated divorce would in no way affect coverage if he simply continued to pay the premiums.<sup>49</sup> None of these three individuals told Mr. Ellison that he needed to take additional action, beyond simply paying the premiums, to secure coverage.<sup>50</sup> In reliance upon these representations, Mr. Ellison stopped investigating the matter any further and instead simply continued to pay the necessary premiums, as he had been advised.<sup>51</sup> Nevertheless, when he subsequently filed a claim for benefits under the Policy, his claim was denied because he had failed, according to the defendants, to properly “convert” his Policy at the time of divorce.<sup>52</sup>

Due to the defendants’ failure to honor Mr. Ellison’s insurance claim, Mr. Ellison filed the present lawsuit against them, alleging fraud, estoppel, negligence, breach of contract, and breach of the covenant of good faith and fair dealing.<sup>53</sup> In opposition to this lawsuit, the defendants filed motions for summary judgment seeking to have this matter

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<sup>48</sup>R. 271-272, 276-277, 282, 334-335, 337, 404-405, 430, 573-574, 596-597, 604-605.

<sup>49</sup>R. 271, 276-277, 320, 331, 334, 336, 363-364, 404-405, 430-431, 558, 573-574, 596-597, 603.

<sup>50</sup>R. 271, 276-277, 331, 363-364, 405, 430-431, 558, 573-574, 597, 603.

<sup>51</sup>R. 296-298, 333.

<sup>52</sup>R. 300-301, 401-402, 598, 601.

<sup>53</sup>R. 2-12.

dismissed with prejudice.<sup>54</sup> The trial court granted both of these motions in favor of the defendants.<sup>55</sup> One of the main reasons why the trial court granted these motions was because, in the court's opinion, there was no admissible evidence that Mr. Ellison had a conversation with any County or Hartford employee (other than with Linda Daly) regarding continuation of the Policy after divorce.<sup>56</sup> This opinion, however, is incorrect. In particular, Mr. Ellison has presented admissible evidence of representations that the defendants' employees made to him about the continuation of the Policy after divorce, and, as explained below, this evidence creates genuine issues of material fact.

**A. Credibility.**

Mr. Ellison presented evidence to the trial court of conversations he had with (1) at least one unidentified County employee from the County's human-resource department; (2) Linda Daly, a Hartford employee; and (3) another, albeit unidentified, Hartford employee. The trial court purported to make findings of fact with respect to this evidence and found that

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<sup>54</sup>R. 73-76, 502-504.

<sup>55</sup>R. 641-644.

<sup>56</sup>R. 648, 651.

it was not either “credible”<sup>57</sup> or “reliable.”<sup>58</sup> Concerns over the credibility of evidence, however, are issues of fact that should only be resolved at trial—*not* by summary judgment.<sup>59</sup>

Regarding the credibility of the evidence Mr. Ellison presented about his conversation with a representative of the County’s human-resource department and with the unidentified Hartford representative, the trial court apparently discredited and disregarded this evidence because, according to the trial court, the evidence is “self-serving.”<sup>60</sup> But, self-serving or not, credibility is a question of fact that should be reserved for trial.<sup>61</sup> “The fact finder may or may not find such self-serving testimony credible.”<sup>62</sup> The decision belongs to the fact finder.<sup>63</sup> It was, therefore, improper to decide these credibility issues on summary judgment.

**B. Reasonable Inferences.**

Not only is the credibility of evidence an issue of fact that should be decided at trial, but to the extent any inferences reasonably arising out of such evidence create disputed issues

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<sup>57</sup>Transcript, at 60.

<sup>58</sup>R. 7.

<sup>59</sup>van der Heyde v. First Colony Life Ins. Co., 845 P.2d 275, 280 (Utah Ct. App. 1993).

<sup>60</sup>Transcript, at 61.

<sup>61</sup>Larsen v. Exclusive Cars, Inc., 2004 UT App. 259, ¶ 11 n.2, 297 P.3d 714.

<sup>62</sup>van der Heyde, 845 P.2d at 280.

<sup>63</sup>Id.



of material fact, then summary judgment should be denied.<sup>64</sup> In the present case, there are various reasonable inferences which, viewed in the light most favorable to Mr. Ellison, create genuine issues of material fact sufficient to preclude summary judgment. Many of such inferences are a product of Mr. Ellison's recorded and subsequently-transcribed telephone conversation with Hartford employee Linda Daly.<sup>65</sup>

Given that Mr. Ellison's telephone conversation with Ms. Daly was recorded, the fact that Mr. Ellison had a telephone conversation with Ms. Daly about the Policy is undisputed.<sup>66</sup> The admissibility of the transcript of this conversation is also undisputed.<sup>67</sup> What is disputed, however, is the interpretation and meaning of this conversation, as well as any inferences arising therefrom. This dispute is, alone, a sufficient basis for reversing the trial court's grant of summary judgment for the defendants.

During their telephone conversation, Mr. Ellison informed Ms. Daly that he had obtained her telephone number from the County, that the County had told him that he only needed to continue paying the premiums to maintain coverage, and that he wanted verification from Hartford confirming the County's representations.<sup>68</sup> Ms. Daly affirmed the

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<sup>64</sup>Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600 (citations and internal quotation marks omitted).

<sup>65</sup>R. 573-574.

<sup>66</sup>R. 404, 430, 573-574, 596; Transcript, at 51:10-12.

<sup>67</sup>Transcript, at 51:11-12.

<sup>68</sup>R. 573-574.

County's representations and stated: "[Y]es. . . . I think that's your option if you want to [continue coverage after divorce;] when you continue to, they are going to be payroll deducting for [Sherrie Ellison], so if you want to keep her on there, that's fine."<sup>69</sup>

As Mr. Ellison's conversation with Ms. Daly came to a close, Ms. Daly told Mr. Ellison that, if he wished, she would have his call transferred to a second Hartford employee so that he could obtain any additional verification that he might desire.<sup>70</sup> Consequently, Mr. Ellison's call was transferred to a different Hartford employee.<sup>71</sup> According to Mr. Ellison's sworn testimony, this second Hartford employee again confirmed that the Policy would not be affected by divorce so long as the premiums were paid.<sup>72</sup>

This telephone conversation between Mr. Ellison and Ms. Daly creates various reasonable inferences which, when viewed in the light most favorable to Mr. Ellison as the nonmoving party, create genuine issues of material fact that should have been preserved for trial, such as the following:

First, given that Mr. Ellison obtained Ms. Daly's telephone number from the County, it may be reasonably inferred that Mr. Ellison did in fact speak with the County representative that gave him Ms. Daly's number. This inference tends to corroborate Mr.

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<sup>69</sup>R. 320, 336, 430, 573-574, 596.

<sup>70</sup>R. 335, 573-574.

<sup>71</sup>R. 334-335, 337, 430.

<sup>72</sup>R. 334, 430.

Ellison's testimony that he spoke with a representative of the County's human-resource department, and that this representative told Mr. Ellison that he did not need to do anything except continue to pay the premiums in order to maintain coverage following divorce.

Second, given that Ms. Daly told Mr. Ellison that she would transfer his call to a different Hartford employee so that he could obtain any additional assurances that he might desire, it can be reasonably inferred that Mr. Ellison's call was in fact transferred to a different Hartford employee. It can also be reasonably inferred that Mr. Ellison spoke with this second Hartford employee about the Policy. These reasonable inferences, when viewed in the light most favorable to Mr. Ellison, corroborate Mr. Ellison's testimony that he spoke with a second Hartford employee, and that this employee agreed with the representations that had been previously made to him concerning continuation of the Policy.

Third, given that, after speaking with the defendants' employees, Mr. Ellison apparently took no action (other than to continue paying the premiums) to secure coverage under the Policy, it can be reasonably inferred that these employees did in fact tell Mr. Ellison that he only needed to continue to pay the premiums to maintain coverage. Among other things, this inference creates a genuine issue of material fact as to whether Mr. Ellison reasonably relied upon the representations that the defendants' employees made to him.

These reasonable inferences, and the facts giving rise to them, when viewed in the light most favorable to Mr. Ellison, create genuine issues of material fact that should have been preserved for trial.<sup>73</sup>

**C. Admissibility.**

As has already been noted, the evidence of Mr. Ellison's telephone call with Ms. Daly is undisputed. Whether the evidence of Mr. Ellison's conversation with the representative of the County's human-resource department is admissible, however, is disputed, as is also the evidence of Mr. Ellison's conversation with the unidentified Hartford employee to whom Ms. Daly transferred his call.<sup>74</sup> The trial court apparently believed such evidence was inadmissible hearsay, and therefore did not consider it, because the identities of these two employees are unknown.<sup>75</sup> Although the identities of these employees may be unknown, however, does not mean that the evidence in question must be inadmissible hearsay.

First, this evidence is not hearsay because it is not being "offered . . . to prove the truth of the matter asserted";<sup>76</sup> that is, it is not being offered to prove that the statements made to Mr. Ellison were true. Indeed, this case arises because "the matter asserted" is *false*. Rather, the statements were offered merely to show that the defendants did in fact make

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<sup>73</sup>Orvis, 2008 UT 2, ¶ 6.

<sup>74</sup>R. 648, 651.

<sup>75</sup>Transcript, at 36-37, 50-52. See Utah R. Evid. 801(c).

<sup>76</sup>Id.

representations to Mr. Ellison upon which he reasonably relied to his detriment. By definition, this evidence is not hearsay.<sup>77</sup>

Second, this evidence cannot be hearsay because any statement in it “is offered against a party and is . . . the party’s own statement, in either an individual or a representative capacity.”<sup>78</sup> As the defendants’ agents, having at least apparent authority from their respective principals, the unidentified County and Hartford employees acted for their principals, thereby binding the defendants, when they made the representations at issue to Mr. Ellison.<sup>79</sup> As a result, such statements are not hearsay because they constitute admissions by a party-opponent.<sup>80</sup>

Third, the hearsay rule does not exclude this evidence because it is composed of “statements against interest.”<sup>81</sup> A statement may be excepted from the hearsay rule if, “at the time of its making,” it was

so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the

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<sup>77</sup>Id.

<sup>78</sup>Id. 801(d)(2).

<sup>79</sup>See Farrington v. Granite State Fire Ins. Co., 232 P.2d 754, 757 (Utah 1951); see also S. W. Bridges & Co. v. Candland, 54 P.2d 842, 848 (Utah 1936); Vadner v. Rozzelle, 45 P.2d 561, 564 (Utah 1935).

<sup>80</sup>Utah R. Evid. 801(d)(2).

<sup>81</sup>Id. 804(b)(3).

declarant's position would not have made the statement unless believing it to be true.<sup>82</sup>

The statements were against the declarant's interest because, if true, they would subject the defendants to liability for insurance benefits for Mr. Ellison's wife. A reasonable person in the position of the defendants' employees would not have made such statements unless they believed them to be true. The statements, therefore, are not inadmissible hearsay, and the trial court should have considered such evidence.

## **II. THE MISREPRESENTATIONS CONCERN PRESENTLY EXISTING MATERIAL FACTS.**

The misrepresentations that the defendants' employees made to Mr. Ellison concerned facts then in existence. The misrepresentations were about whether the Policy, at that specific moment in time, provided that coverage for dependents continued, even after divorce, so long as the premiums continued to be paid. In other words, the misrepresentations concerned the provisions and procedures of the Policy in their then-existing form. As such, the misrepresentations concerned material facts which were then in existence. Indeed, even the trial court and opposing counsel recognized the plausibility and reasonableness of this inference during oral arguments.<sup>83</sup> Consequently, given that all reasonable inferences should be construed in the light most favorable to the nonmoving party, this inference should have

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<sup>82</sup>Id.

<sup>83</sup>Transcript, at 22:7-14.

been made, and, as a result, the defendants' motions for summary judgment should have been denied.<sup>84</sup>

### **III. WHETHER THE MISREPRESENTATIONS WERE MADE KNOWINGLY OR RECKLESSLY IS A GENUINE ISSUE OF MATERIAL FACT.**

Liability for fraud can be found where a misrepresentation is made either knowingly or recklessly.<sup>85</sup> Whether a person made a misrepresentation knowingly or recklessly, however, is a question of fact.<sup>86</sup> Indeed, fraud may exist even where a party "knew nothing about the matter and . . . recklessly affirm[ed] as a fact something of which [he was] entirely ignorant."<sup>87</sup> Nevertheless, the trial court dismissed Mr. Ellison's fraud claims because, according to the trial court, "no reasonable fact-finder could conclude that the transcript of the recording of the Daly call manifests an intent by Ms. Daly to deceive or misrepresent a fact."<sup>88</sup> The trial court's dismissal of Mr. Ellison's fraud claims on this basis is improper for

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<sup>84</sup>Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600 (citations and internal quotation marks omitted).

<sup>85</sup>Franco v. The Church of Jesus Christ of Latter-day Saints, 2001 UT 25, ¶ 33, 21 P.3d 198.

<sup>86</sup>State v. Barzee, 2007 UT 95, ¶ 81, 177 P.3d 48 ("Issues such as reasonableness, knowledge, and proximate cause are fact questions to be resolved by the fact finder . . .").

<sup>87</sup>Stuck v. Delta Land & Water Co., 227 P. 791, 804 (Utah 1924).

<sup>88</sup>R. 650.

at least the following reasons:

First, as already noted, whether a person makes a misrepresentation knowingly or recklessly, is a question of fact.<sup>89</sup> The trial court, therefore, should not have made factual findings regarding this issue at the summary-judgment stage.

Second, as has also already been noted, fraud can be found where a misrepresentation is made *either* knowingly *or* recklessly.<sup>90</sup> Even though a person may not have knowingly made a misrepresentation, that person can still be liable for fraud if she did it recklessly.<sup>91</sup> It was, therefore, error for the trial court to dismiss Mr. Ellison's fraud claims simply because the trial court did not find a "knowing" misrepresentation;<sup>92</sup> the trial court should have also considered whether there was a "reckless" misrepresentation.<sup>93</sup>

And, third, simply because *Ms. Daly* may not have made a misrepresentation either knowingly or recklessly does not mean that *the other Hartford employee* Mr. Ellison spoke with was similarly innocent. Nor does it mean that *the County employee* Mr. Ellison spoke with was innocent. In other words, the trial court erred by dismissing Mr. Ellison's fraud

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<sup>89</sup>State v. Barzee, 2007 UT 95, ¶ 81.

<sup>90</sup>Franco, 2001 UT 25, ¶ 33.

<sup>91</sup>Id.

<sup>92</sup>R. 650.

<sup>93</sup>Franco, 2001 UT 25, ¶ 33.



claims against the defendants simply because *one* of the three individuals who made misrepresentations to Mr. Ellison may not have done so knowingly.

**IV. WHETHER MR. ELLISON ACTED WITH REASONABLE DILIGENCE AND REASONABLY RELIED UPON THE MISREPRESENTATIONS IS A GENUINE ISSUE OF MATERIAL FACT.**

Despite the evidence of the defendants' misrepresentations, the trial court dismissed all of Mr. Ellison's claims because it did not believe that Mr. Ellison acted with reasonable diligence or that he reasonably relied upon the representations made to him.<sup>94</sup> In particular, the trial court dismissed Mr. Ellison's negligence claim against the County because, according to the court, Mr. Ellison did not act with reasonable diligence to determine the Policy's provisions and procedures.<sup>95</sup> Likewise, the trial court dismissed Mr. Ellison's fraud and estoppel claims because the court did not consider Mr. Ellison's reliance upon the defendants' misrepresentations as having been reasonable.<sup>96</sup>

Whether Mr. Ellison acted with reasonable diligence and reasonably relied upon the representations that the defendants made to him, however, is a genuine issue of material fact that should have been preserved for trial. As a result, the trial court's grant of summary judgment for the defendants was in error.

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<sup>94</sup>R. 647-651.

<sup>95</sup>R. 647-648.

<sup>96</sup>R. 648-651.

**A. Reasonable Diligence.**

In Utah, reasonableness must generally “be considered *with reference to the facts* of each case, and is *usually a question for the jury* to determine.”<sup>97</sup> Despite this principle, the trial court dismissed Mr. Ellison’s negligence claim against the County because, in the court’s opinion, Mr. Ellison failed to act with reasonable diligence to “inform[] himself regarding the Policy’s provisions and procedures.”<sup>98</sup> But this conclusion, when considered “with reference to the facts,” is erroneous because it is premised upon disputed issues of material fact.<sup>99</sup>

The evidence before the trial court showed, among other things, that the County never provided Mr. Ellison with a copy of the Policy.<sup>100</sup> Likewise, the County never notified Mr. Ellison of his “right to exercise the Conversion Privilege,” despite the County’s contractual duty to do so. When, however, Mr. Ellison later tried to inform himself of the Policy’s provisions and procedures by contacting the County’s human-resource department, at least one representative from that department provided Mr. Ellison with incorrect information about the Policy. Based upon this incorrect information, as well as the incorrect information

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<sup>97</sup>Conder v. A.L. Williams & Assocs., 739 P.2d 634, 638 (Utah Ct. App. 1987) (emphases added) see EDSA/Cloward, LLC v. Klibanoff, 2005 UT App. 367, ¶ 21, 122 P.3d 646.

<sup>98</sup>R. 647-648.

<sup>99</sup>Conder, 739 P.2d at 638.

<sup>100</sup>R. 555-556, 595.

that he subsequently received from Hartford, Mr. Ellison reasonably believed that no additional action was required to maintain coverage so long as he continued to pay the premiums. As a result, he simply continued to pay the premiums, believing all the while that he was in strict compliance with the Policy's provisions and procedures.

When viewing these facts, and all reasonable inferences arising therefrom, in the light most favorable to Mr. Ellison, the question as to whether Mr. Ellison acted with reasonable diligence to determine the Policy's provisions and procedures becomes a genuine issue of material fact, which should be preserved for trial. In any event, the trial court should have refrained from dismissing Mr. Ellison's negligence claim because, "[a]s a general proposition, summary judgment is inappropriate to resolve a negligence claim on its merits, and should be employed 'only in the most clear-cut case.'"<sup>101</sup> Indeed, "[o]rdinarily the question of negligence . . . may not be settled on a motion for summary judgment."<sup>102</sup> "[S]ummary judgment is rarely an appropriate remedy for resolving negligence actions."<sup>103</sup> For these additional reasons, Mr. Ellison's negligence claim should also have never been dismissed.

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<sup>101</sup>Wycalis v. Guardian Title, 780 P.2d 821 (Utah Ct. App. 1989) (citations omitted).

<sup>102</sup>Preston v. Lamb, 436 P.2d 1021, 1023 (Utah 1968); see Butler v. Sports Haven Int'l, 563 P.2d 1245, 1246 (Utah 1977).

<sup>103</sup>Williams v. Melby, 699 P.2d 723, 728 (Utah 1985).

**B. Reasonable Reliance.**

Likewise, Mr. Ellison's other claims, such as those for fraud and estoppel, were not properly subject to dismissal on summary judgment because whether Mr. Ellison reasonably relied upon the defendants' misrepresentations is a disputed issue of material fact.<sup>104</sup> Based upon language from Perkins v. Great-West Life Assurance Co.,<sup>105</sup> however, the trial court determined otherwise.<sup>106</sup> This determination was incorrect.

Perkins involved a situation where an insured made material misrepresentations in her life-insurance application.<sup>107</sup> After the insured died, and her misrepresentations were discovered, the insurer refused to honor the insurance policy that it had previously issued on the insured's life, even though the insurer had collected premiums from the insured in connection with the policy.<sup>108</sup> The insured's husband sued the insurer, claiming that the insurer should be estopped from voiding the policy because the insurer had collected premiums from the insured in connection with the policy.<sup>109</sup> The Utah Supreme Court affirmed the dismissal of the husband's estoppel claim because his wife "had the means by

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<sup>104</sup>EDSA/Cloward, LLC, 2005 UT App. 367, ¶ 21.

<sup>105</sup>Perkins v. Great-West Life Assurance Co., 814 P.2d 1125 (Utah Ct. App. 1991).

<sup>106</sup>Transcript, at 62:19 to 63:4.

<sup>107</sup>Perkins, 814 P.2d at 1127-28.

<sup>108</sup>Id.

<sup>109</sup>Id. at 1130-31.

which she could have ascertained the contents of [the] policy,” but she did not put forth any effort “to learn the terms of her insurance policy.”<sup>110</sup> Consequently, the court declared that “her reliance . . . was not reasonable.”<sup>111</sup>

Perkins is readily distinguishable from the facts at issue in the present case. First, unlike Perkins, there are no allegations that *the insured* (Mr. Ellison) made any misrepresentations to his insurer (the defendants) at the time the policy was issued. Second, unlike Perkins, there is evidence that *the insurer* (the defendants) made misrepresentations to the insured (Mr. Ellison) about the policy. Third, unlike Perkins, there is evidence that the misrepresentations that were made to the insured were about *the perpetuation* of the policy: they were not mere misrepresentations about the Policy’s contents, but they were instead affirmative misrepresentations about what Mr. Ellison needed to do to perpetuate coverage prospectively. Fourth, unlike Perkins, there is evidence that the insured actually put forth effort to try to discover the policy’s provisions and procedures: in fact, the evidence shows that Mr. Ellison made *multiple* attempts to obtain information about the Policy from the defendants. Fifth, unlike Perkins, the estoppel claim in the present matter is not based solely on the insurer’s acceptance of the premiums: although Hartford’s acceptance of the premiums is relevant, the primary basis of Mr. Ellison’s estoppel claim is that the defendants made multiple misrepresentations to him upon which he reasonably relied to his detriment.

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<sup>110</sup>Id. at 1131.

<sup>111</sup>Id.

And, sixth, unlike Perkins, Mr. Ellison has not only brought an estoppel claim against the defendants, but a fraud claim as well: Perkins only dealt with estoppel; it did not address fraud. Consequently, Perkins does not apply to the facts at issue in this case.

In any event, the trial court failed to properly consider the Youngblood line of cases.<sup>112</sup> (Youngblood II was decided after briefing had been completed but before oral arguments in this case. Mr. Ellison provided the trial court with a copy of Youngblood II during oral arguments.<sup>113</sup>) The Youngblood cases arose out of a situation where an insurer made misrepresentations about the scope of an insurance policy, thereby inducing the plaintiff to purchase the policy.<sup>114</sup> These misrepresentations were made before the plaintiff actually purchased the policy.<sup>115</sup> When the plaintiff was subsequently injured, however, he discovered that his injury was not actually covered by his policy, even though the insurer had made representations to him to the contrary at the time of purchase.<sup>116</sup> As a result, the plaintiff sued his insurer, alleging, among other things, estoppel.<sup>117</sup> Although the trial court dismissed the

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<sup>112</sup>See Youngblood v. Auto-Owners Ins. Co., 2005 UT App. 154, 111 P.3d 829 [hereinafter Youngblood I]; Youngblood v. Auto-Owners Ins. Co., 2007 UT 28, 158 P.3d 1088 [hereinafter Youngblood II].

<sup>113</sup>Transcript, at 30:3-6.

<sup>114</sup>Youngblood I, 2005 UT App. 154, ¶¶ 4-5.

<sup>115</sup>Id.

<sup>116</sup>Id. ¶¶ 8-9.

<sup>117</sup>Id. ¶¶ 9, 11.

plaintiff's estoppel claim by summary judgment, the appellate courts in Youngblood I and Youngblood II eventually reversed the trial court's decision.<sup>118</sup>

In Youngblood II, the Utah Supreme Court noted that "the question of whether or not" an insured's "reliance on [an] agent's misrepresentations of the scope of coverage under [an insurance] policy [is] reasonable . . . *is one of fact*."<sup>119</sup> Consequently, the Youngblood II court held that "[r]eliance upon an agent's material misrepresentations regarding coverage may or may not be reasonable, *depending upon the facts* of the individual case."<sup>120</sup> This holding is consistent with the Youngblood I court's previously-issued opinion: "Reasonable reliance must be considered *with reference to the facts* of each case, and is *usually a question for the jury* to determine."<sup>121</sup> For this reason, the court in Youngblood I also concluded that, "based on [the plaintiff's] deposition testimony and affidavit, there [was] again at least a disputed issue of material fact as to whether [the plaintiff] reasonably relied on the representations made by [the insurance] agent."<sup>122</sup>

Although the misrepresentations that the defendants made to Mr. Ellison were made after the Policy was issued, rather than before Mr. Ellison purchased it, these

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<sup>118</sup>Id. ¶ 11; Youngblood II, 2007 UT 28, ¶ 2.

<sup>119</sup>Youngblood II, 2007 UT 28, ¶ 38 (emphasis added).

<sup>120</sup>Id. ¶ 35 (emphasis added).

<sup>121</sup>Youngblood I, 2005 UT App. 154, ¶ 23 (quoting Conder, 739 P.2d at 638) (emphases added).

<sup>122</sup>Id. ¶ 26.

misrepresentations concerned the continued perpetuation and preservation of the Policy. As such, they are similar to those made to the plaintiff in the Youngblood cases, in that the misrepresentations in question were made in order to persuade Mr. Ellison to make additional payments toward the Policy. In other words, these misrepresentations were made *before* Mr. Ellison got divorced and *before* he paid any premiums on the Policy as a newly-divorced individual. They were also made *before* Mr. Ellison concluded that he had successfully maintained coverage under the Policy following his divorce.

Like the plaintiff in the Youngblood cases, Mr. Ellison has provided sworn testimony sufficient to create a genuine issue of material fact as to whether he acted in reasonable reliance upon the misrepresentations that were made to him during his conversations with defendants' employees. Indeed, the trial court has itself recognized that "Mr. Ellison's understanding of the existence of those conversations might be relevant to the reasonableness of his conduct."<sup>123</sup> Consequently, the trial court's complete reliance upon the Policy's express language was improper, inasmuch as there are genuine issues of material fact as to whether Mr. Ellison reasonably relied upon the defendants' misrepresentations, and all inferences should be construed in Mr. Ellison's favor.<sup>124</sup>

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<sup>123</sup>Transcript, at 61:3-5.

<sup>124</sup>See Larsen v. Exclusive Cars, Inc., 2004 UT App. 259, ¶¶ 10-11, 297 P.3d 714 ("The trial court erred when it looked chiefly to the sales documents to determine that [the plaintiff's] reliance on [the defendant's] oral representations was unreasonable as a matter of law. . . . Viewing the totality of the alleged facts in the light most favorable to [the plaintiff], a jury could find that he acted reasonably.").



**V. WHETHER MR. ELLISON SUFFERED DAMAGES IS A GENUINE ISSUE OF MATERIAL FACT.**

The trial court dismissed all of Mr. Ellison's claims because it did not believe that Mr. Ellison had suffered any damages.<sup>125</sup> In the court's own words:

There is no admissible evidence from which the fact-finder can reasonably infer that Sherrie Ellison would have converted her group insurance policy into an individual policy, and there is no evidence that Mr. Ellison, rather than Sherrie Ellison's estate or heirs, would have been the beneficiaries of that conversion policy.<sup>126</sup>

For at least the following reasons, the trial court's conclusions regarding Mr. Ellison's damages are erroneous:

First, Mr. Ellison never had a reasonable opportunity to have the Policy converted prior to his divorce due to the defendants' improper conduct. By making misrepresentations to Mr. Ellison about what was necessary to maintain the Policy, the defendants thereby prevented Mr. Ellison from converting the Policy because he had no reason to know or believe that such was necessary. The defendants' misrepresentations, in effect, stopped Mr. Ellison from conducting any additional research or seeking further information because he believed, based upon the defendants' misrepresentations, that he was alright so long as he continued to pay the premiums.

Second, Mr. Ellison provided the trial court with sworn testimony showing that, after his wife was diagnosed with cancer, she specifically told Mr. Ellison that she wanted him to

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<sup>125</sup>R. 648-649.

<sup>126</sup>R. 649.

continue the Policy and use it for the benefit of their children. Simply because the trial court may not have considered such testimony as being sufficiently credible does not change the fact that this issue remains disputed. Credibility is a question of fact.<sup>127</sup>

Third, Sherrie Ellison's desire to have the Policy remain in effect for the benefit of the Ellisons' children is admissible evidence. Statements by an unavailable declarant, such as Sherrie Ellison, are not always excluded by the hearsay rule.<sup>128</sup> For example, "a statement made by a declarant while believing that the declarant's death was imminent" may be admissible.<sup>129</sup> Likewise, certain "statements against interest" are also admissible, as explained earlier.<sup>130</sup> The statements at issue by Sherrie Ellison are admissible under both of these scenarios.

And, fourth, Mr. Ellison suffered damages as a result of the defendants' breach of contract and breach of the covenant of good faith and fair dealing, as discussed in the following section.

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<sup>127</sup>van der Heyde v. First Colony Life Ins. Co., 845 P.2d 275, 280 (Utah Ct. App. 1993).

<sup>128</sup>Utah R. Evid. 804(b).

<sup>129</sup>Id. 804(b)(2).

<sup>130</sup>Id. 804(b)(3).

**VI. GENUINE ISSUES OF MATERIAL FACT PRECLUDED SUMMARY JUDGMENT FOR THE DEFENDANTS ON MR. ELLISON’S CLAIMS FOR BREACH OF CONTRACT AND BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING.**

**A. Breach of Contract.**

As reflected in paragraph 13 of the trial court’s order, the trial court dismissed Mr. Ellison’s breach of contract claims because, according to the court, “[t]here’s no credible evidence that the contract provisions were expanded by a, a statement or an action of an agent of the insurance company.”<sup>131</sup> As explained earlier, however, questions concerning the credibility of evidence are issues of fact that should be resolved at trial.<sup>132</sup> As also explained earlier, the evidence Mr. Ellison has submitted is admissible. The trial court, therefore, erred by dismissing Mr. Ellison’s breach of contract claims.

The trial court’s dismissal of Mr. Ellison’s breach of contract claims was also erroneous because there are multiple, disputed issues of material fact regarding these claims.

For example:

i. There is a disputed issue of material fact as to whether the defendants are in breach of contract by failing to provide Mr. Ellison with a copy of the Policy.

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<sup>131</sup>Transcript, at 62:12-14.

<sup>132</sup>van der Heyde v. First Colony Life Ins. Co., 845 P.2d 275, 280 (Utah Ct. App. 1993).

ii. There is a disputed issue of material fact as to whether the County is in breach of contract by failing to inform Mr. Ellison of his “right to exercise the Conversion Privilege.”<sup>133</sup>

iii. There is a disputed issue of material fact as to whether the defendants are in breach of contract by making misrepresentations to Mr. Ellison and providing him with erroneous instructions regarding the Policy, as explained earlier.

Based upon these disputed issues of material fact, summary judgment should not have been granted. Instead, the matter should have proceeded to trial so that a jury could have considered all of the relevant facts and circumstances in order to determine whether there was a breach of contract and/or of a modified contract between the parties.

**B. Breach of the Covenant of Good Faith and Fair Dealing.**

“A violation of the covenant” of good faith and fair dealing “gives rise to a claim for breach of contract.”<sup>134</sup> To determine whether there has been a violation of this covenant, courts consider “the contract language *and* the course of dealings between and conduct of the parties.”<sup>135</sup> In the present case, the course of dealings between and conduct of the parties suggest that the defendants’ actions were neither fair or in good faith.

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<sup>133</sup>R. 406-407, 542, 595.

<sup>134</sup>PDQ Lube Ctr., Inc. v. Huber, 949 P.2d 792, 797-98 (Utah Ct. App. 1997) (quoting St. Benedict’s Dev. Co. v. St. Benedict’s Hosp., 811 P.2d 194, 199-200 (Utah 1991)).

<sup>135</sup>Id. (emphasis in original).

“Good faith and fair dealing are fact sensitive concepts, and whether there has been a breach of good faith and fair dealing is a factual issue, generally inappropriate for decision as a matter of law.”<sup>136</sup> Despite this, however, the trial court dismissed Mr. Ellison’s claim against Hartford for breach of the covenant of good faith and fair dealing because, according to the trial court, Mr. Ellison’s insurance claim was “fairly debatable.”<sup>137</sup> But whether Mr. Ellison’s insurance claim was “fairly debatable” ignores the fact that Hartford may have acted in bad faith and unfairly in ways other than simply denying Mr. Ellison’s claim for benefits.<sup>138</sup> Indeed, Hartford’s denial of Mr. Ellison’s insurance claim is only one of the many ways that Hartford could have, and did in fact, violate its duty of good faith and fair dealing. For example, Hartford violated this duty when it made misrepresentations to Mr. Ellison about the Policy’s provisions and procedures. Likewise, Hartford also violated its duty of good faith and fair dealing by continuing to collect premiums on the Policy from Mr. Ellison after his divorce. Consequently, the trial court erred by only considering whether Mr. Ellison’s claim for benefits was “fairly debatable.” Instead, the trial court should have also considered whether the facts, together with any reasonable inferences arising therefrom,

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<sup>136</sup>The Republic Group, Inc. v. Won-Door Corp., 883 P.2d 285, 291 (Utah Ct. App. 1994).

<sup>137</sup>R. 652 (citing Prince v. Bear River Mut. Ins. Co., 2002 UT 68, 56 P.3d 524).

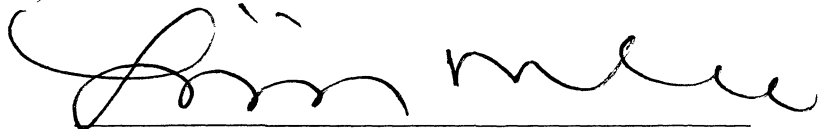
<sup>138</sup>PDQ Lube Ctr., Inc. v. Huber, 949 P.2d 792, 797-98 (Utah Ct. App. 1997).

when viewed in the light most favorable to Mr. Ellison, suggest that Hartford may have violated its duty of good faith and fair dealing in any other ways.<sup>139</sup>

### CONCLUSION

Because the trial court erred by making improper findings of fact, by not considering all of the admissible evidence, and by ignoring numerous disputed issues of material fact, the trial court's order granting summary judgment for the defendants should be reversed, and this matter should be remanded to the trial court so that the parties may continue preparing for trial.

DATED this 25 day of August, 2008.

A handwritten signature in black ink, appearing to read 'Ken Parkinson', written over a horizontal line.

KENNETH PARKINSON, and  
ELIJAH L. MILNE, for:  
HOWARD, LEWIS & PETERSEN, P.C.  
Attorneys for Val M. Ellison

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<sup>139</sup>Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600 (citations and internal quotation marks omitted).

### **ADDENDUM**

Copies of the following materials are attached as appendices to this brief:

- A. Transcript of July 20, 2007 Oral Argument
- B. Signed January 22, 2008 Order Granting Summary Judgment in Favor of Defendants
- C. Ellison Phone Call with Hartford Insurance

**APPENDIX A**

**TRANSCRIPT OF ORAL ARGUMENTS  
DATED JULY 20, 2007**



1 IN THE FOURTH JUDICIAL DISTRICT - PROVO COURT

2 UTAH COUNTY, STATE OF UTAH

3 FILED

4 VAL M. ELLISON,

5 PLAINTIFF,

6 vs.

7 UTAH COUNTY GOVERNMENT, et al,

8 DEFENDANT.

) ORAL Filing  
) Fourth Judicial District Court  
) of Utah County, State of Utah

) 5-27-08 *CH* Deputy

) CASE 050402012  
) APPEAL 20080145-SC

) JUDGE JAMES R. TAYLOR  
)

10  
11 BE IT REMEMBERED that this matter came on for hearing  
12 before the above-named court on July 20, 2007.

13 WHEREUPON, the parties appearing and represented by  
14 counsel, the following proceedings were held:

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16  
17 OFFICIAL CERTIFIED TRANSCRIPT

18 (From CD Recording)

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22 ORIGINAL

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A-P-P-E-A-R-A-N-C-E-S

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P-R-O-C-E-E-D-I-N-G-S

(July 20, 2007)

THE JUDGE: All right. Let's, let's turn to Ellison versus Utah County.

MS. VAN ORMAN: Your Honor, we have--

MR. CHRISTIANSEN: That's okay.

MS. VAN ORMAN: We have two motions that are pending, both defendants have filed motions so just--

THE JUDGE: We do. How do you want to proceed?

MR. CHRISTIANSEN: Go ahead, Kristin. I'll be (short, unable to decipher).

MS. VAN ORMAN: Thank you, appreciate it.

THE JUDGE: All right.

MS. VAN ORMAN: Your Honor, Kristin Van Orman on behalf of Utah County.

MR. PARKINSON: Your Honor, just so I'm clear are we going to, are we going to let both of them argue or are we going to argue both motions separately--

THE JUDGE: However... I've read all the briefing. It's kind of similar arguments. Are you more comfortable addressing them one at a time or do you want to a, let them both argue and then you respond? How do you want to do it?

MR. PARKINSON: I'm happy to let them both argue and then a, let me respond.

1           THE JUDGE:    Let's do it that way.

2           MS. VAN ORMAN:   That's fine.

3           THE JUDGE:    Okay.

4                        ARGUMENT BY MS. VAN ORMAN

5           MS. VAN ORMAN:   And, Your Honor, I know you've  
6 read extensive briefing so I'm going to be pretty short on  
7 this.

8                        This a, matter arises out of a claim for life  
9 insurance benefits essentially. Mr. Ellison, the plaintiff  
10 is, and was a full-time employee of Utah County and had been  
11 for a number of years. He was married to a woman named  
12 Sherry Ellison who has since deceased.

13                      At the time a, before they divorced, they had been  
14 married for some time, he apparently had a life insurance  
15 policy, spousal policy on her. Under that policy there is a  
16 provision, basically it's the kind of policy that you get  
17 through your employees (sic?) where you can get extra life  
18 insurance for dependents, the key being they have to be a  
19 dependent. And once a person gets divorced they are no  
20 longer a dependent, they don't qualify for that under the  
21 policy. And what you have to do is you have to get a  
22 conversion policy. It's a completely separate process.  
23 And it's not the employee who has the right to get a  
24 conversion policy, it's the, or the spouse, it's their policy  
25 to get.

1           THE JUDGE:   From the time that they became  
2 divorced until she became deceased how much time passed?

3           MS. VAN ORMAN:   A month?

4           MR. CHRISTIANSEN:   It was, it was, the divorce was  
5 finalized in August of 2003 and she passed away on October  
6 19th, 2003 so a little over a month and a half.

7           THE JUDGE:   Were there premiums collected from  
8 Mr. Ellison during that period of time by Utah County?

9           MS. VAN ORMAN:   I believe that there was a  
10 deduction through his a, payroll and the payroll deductions  
11 did continue.

12          THE JUDGE:   Okay.

13          MS. VAN ORMAN:   Okay.   Basically what happened  
14 is, well, there is a dispute.   And I don't think this is a  
15 material fact.   Mr. Ellison contends that one day prior to  
16 the divorce, doesn't know what day, that he goes to Utah  
17 County HR Department and says if I'm going to get a divorce  
18 can I keep my life insurance on some, on my, on my wife.  
19 He doesn't know who he spoke with.   Nobody from Utah County  
20 recalls speaking with him.   They would have directed him to  
21 the person in charge of the life insurance.   She absolutely  
22 never spoke with him.   He cannot--

23          THE JUDGE:   Well it's, well it's undisputed that  
24 there was a conversation with was it Mrs. Bird or someone  
25 from the, I'm trying to remember the name--

1 MS. VAN ORMAN: That's, that's with the  
2 insurance--

3 THE JUDGE: So she called the insurance company--

4 MS. VAN ORMAN: -- the insurance company.  
5 Correct.

6 THE JUDGE: -- and had the conversation, which  
7 we've had transcribed.

8 MS. VAN ORMAN: Right.

9 THE JUDGE: We also know that the deductions  
10 continued. So from his perspective payment was being made.  
11 Okay.

12 MS. VAN ORMAN: But you have a situation here  
13 where number one, Utah County says we were never put on  
14 notice of any of this, we don't know anything about this kind  
15 of conversation. He has a copy of the, the policy. The  
16 policy clearly says that you can't continue on a former  
17 spouse.

18 Under Utah law, as I'm sure the court is aware,  
19 you have to rely on what is written in the policy. And he  
20 is expected to know what is written in the policy. So he  
21 goes--

22 THE JUDGE: Well, I assume he was worried about it  
23 or he wouldn't have made the contacts and the calls. We know  
24 he was talking to somebody, at least one person he talked to  
25 and said can I insure her or not.

1 MS. VAN ORMAN: Right. He talks to somebody at  
2 least at the insurance company--

3 THE JUDGE: Which makes sense. He must, surely  
4 must have known she was ill.

5 MS. VAN ORMAN: He did. He knew he was, he knew  
6 that she was terminally ill and he wanted to get a divorce.  
7 I mean, the divorce wasn't even final. So you've got that  
8 situation.

9 There is absolutely no evidence other than his own  
10 testimony that he spoke with somebody at Utah County. We  
11 don't know if he even talked to a county employee. It might  
12 have been somebody in the hallway, it might... He doesn't  
13 know who he spoke with. Nobody at Utah County recalls any  
14 of that. So to hold the county responsible a, I just  
15 don't--

16 THE JUDGE: Well what, what do I make of the  
17 county, of, I mean, the inescapable fact the county  
18 (inaudible word). The county manages his paycheck, the  
19 county continued the deductions. The county is the, the  
20 managing agent for this insurance. Isn't that the way it  
21 works?

22 MS. VAN ORMAN: I believe so.

23 THE JUDGE: The HR Department puts it out. So  
24 they continue to collect the premiums. What difference does  
25 that make?

1 MS. VAN ORMAN: They did return the premiums once  
2 they were aware of the situation.

3 See what happens, here's, here's how it works. You  
4 get the automatic deductions, okay. It runs through the  
5 system. They remember... It was never even brought to  
6 their attention that look, there's a divorce and goes what I  
7 have a life insurance policy on my former spouse, we need to  
8 change this around, don't take any--

9 THE JUDGE: What's the--

10 MS. VAN ORMAN: -- deductions out.

11 THE JUDGE: -- what's the policy about that kind  
12 of notification? If an employee becomes divorced a, is  
13 there a policy that specifies how and when the county should  
14 be notified to modify the deductions?

15 MS. VAN ORMAN: I don't believe that there is a  
16 set policy. The county was aware of a divorce but the  
17 county was not...

18 Basically what happened is the HR Department became  
19 aware that there was a divorce that was pending, but they  
20 weren't aware--

21 THE JUDGE: Well, a divorce pending is a lot  
22 different than a divorce granted.

23 MS. VAN ORMAN: Correct. And then you also have  
24 to go with the divorce and say all right now, let's pull all  
25 of his policies and let's see if it qualifies and if it



1 fits. And if he happened to have this other policy on this  
2 spouse.

3 THE JUDGE: Well--

4 MS. VAN ORMAN: I mean, this is something that he  
5 would need to come to the county with and say look, I have  
6 this problem, I have this issue how do we resolved it.  
7 There's--

8 THE JUDGE: You're, you're saying because he would  
9 have knowledge the burden logically should be on him.

10 MS. VAN ORMAN: Correct. And further than that,  
11 Your Honor, it would be Sherry, it would be the spouse  
12 because that is her policy. He did not even... And, and  
13 that's probably our greatest argument is I don't believe he  
14 has standing in this case. This is not his policy to  
15 dispute. This is not... This is something that Sherry  
16 after the divorce would have to come to Utah County and say  
17 I have this policy, it's for me to convert, it's for me to  
18 make the premium payments, it's for me to apply for it in  
19 the first place, then to make the premiums, and then to  
20 name a beneficiary. Those are all things that Sherry had to  
21 do. It could not be done by Mr. Ellison, he didn't have the  
22 right to do it, it wasn't his policy to do it. It was  
23 hers. And she didn't do that.

24 And the problem we have here is there is no  
25 evidence and especially my a, co-defense counsel here has

1 pointed out I thought very clearly in his brief that there's  
2 no admissible evidence, it's all hearsay that she would have  
3 done any of this. Mr. Ellison says well, I knew her and I  
4 knew she would have done that. But the problem is is when  
5 you look at the evidence that's available, in other words,  
6 the divorce decree that is a very very specific lengthy  
7 divorce decree, that decree specifies that Ms. Ellison has to  
8 maintain health insurance, he has to maintain his life  
9 insurance policies for his children. It says nothing about  
10 the policy on his wife.

11 THE JUDGE: Your position is that even, even if  
12 she had not passed away if a couple, one of whom is an  
13 employee of the county has life insurance, they get divorced,  
14 they say nothing, they continue to pay the premiums for a  
15 month, a week, a day, a year or 10 years. At some point the  
16 spouse who was not an employee passes away, at that point  
17 you're saying that under the contract life insurance doesn't  
18 continue, what you would do, what you would have to do is  
19 refund the premiums but not, not recognize life insurance  
20 because the divorce had happened?

21 MS. VAN ORMAN: No. What I'm saying, Your Honor,  
22 is that you're getting a divorce from somebody and you say  
23 wait a minute, I, I know what kind of life insurance policies  
24 I have and I know what policies my spouse--

25 THE JUDGE: Yes. But let's, let's--

1           MR. CHRISTIANSEN:     -- my spouse has.

2           THE JUDGE:     But let's assume they don't do that.  
3     What's the consequence of that?

4           MS. VAN ORMAN:     Well, what they need to do is they  
5     need to be aware of that.

6           THE JUDGE:     Okay.

7           MS. VAN ORMAN:     Because under the policy that,  
8     that they know that they have they have to look at the policy  
9     and say okay, she's not going to be a dependent anymore, I  
10    need to find out what we need to do.

11          THE JUDGE:     Understood.     But let's assume, let's  
12    assume for my hypothetical that they don't, they just let it  
13    ride, they let the deductions continue.     The employee  
14    continues to work for the county, continues to pay every  
15    month for a policy of life insurance.     Then the insured  
16    dies.

17                 And your position is that because the insured is no  
18    longer a spouse and, and hasn't been a spouse for some time  
19    you can't honor that life insurance policy, you would at that  
20    point refund the premiums because that's when you would find  
21    out--

22          MS. VAN ORMAN:     That's when--

23          THE JUDGE:     -- (short inaudible).

24          MS. VAN ORMAN:     -- there's notification.

25    Absolutely.     And the burden is on the individual or

1 individuals who have the policy to provide that kind of  
2 notification. That's what the policy requires, that's what  
3 they are bound by. And if nobody knows what's going on how  
4 can they change anything. I mean, if the county is notified  
5 look, there's a divorce and guess what I've got this life  
6 insurance, I don't want to continue it anymore, or I do want  
7 to continue it what do we need to do here, then that can set  
8 things in motion.

9 But there's no evidence that that happened. And  
10 that's the problem. We're stuck in a position, as is the  
11 life insurance company, that there was no notification  
12 given. They have to do something, they have to notify.

13 And this is Sherry's burden to do that a, because  
14 it's her policy. She's the one--

15 THE JUDGE: Uh-huh (affirmative)--

16 MS. VAN ORMAN: -- who would have to apply for the  
17 conversion policy. I don't think it's even an automatic  
18 conversion, I think you have to apply for it. Then she's  
19 got to affirmatively make the payments, then she's got to  
20 name the beneficiary.

21 And here's, here's the rub on this is you look at a  
22 divorce decree, and I believe there was a restraining order  
23 put in place between these folks. This was not an amicable  
24 divorce. We're jumping to a whole other leap here where  
25 we're going to now assume that this woman who had a

1   restraining order against the plaintiff is going to continue  
2   on with this insurance policy and name him as a  
3   beneficiary?   That is just such speculation.   There's no  
4   evidence as to that except from Mr. Ellison's own testimony  
5   that well, I knew her and I think that's what she would do.  
6   Maybe she would name the children directly.   Maybe she would  
7   name her parents or a brother or a sister.   We don't know.  
8   But certainly to give him the power to bring this kind of an  
9   action there's just no evidence to support that.

10           And so, Your Honor, I think that's the county's  
11   position.   I think that there's no evidence as to that he  
12   even spoke to anybody at Utah County with authority to alert  
13   them of this type of position.   If they were alerted then  
14   there would be some kind of a change in deducting the  
15   payroll.   Once they were alerted then they rectified the  
16   problem and at least gave them the, the money back.

17           But this isn't his case to bring, this would have  
18   been Sherry's, these was her decisions.   And now he's in a  
19   position where he can't bring any evidence and so that's why  
20   we believe we're entitled to summary judgment.

21           **THE JUDGE:**   Okay.   Thank you.

22                   **ARGUMENT BY MR. CHRISTIANSEN**

23           **MR. CHRISTIANSEN:**   Good morning, Your Honor.   It's  
24   nice to see you again.

25           My name is Erik Christiansen and I represent

1 Hartford Life.

2 I'm going to do this a little bit differently.  
3 I'm going to kind of run through each of the specific claims  
4 that have been made against Hartford and talk about why we  
5 believe Hartford is entitled to summary judgment on each  
6 claim.

7 And as a remainder there are four claims pled  
8 against Hartford here. There's a claim for breach of  
9 contract being the insurance contract, there's a claim for  
10 breach of the implied covenant of good faith and fair  
11 dealing, there's a claim for fraud and a claim for  
12 estoppel. So those are the four claims that have been made  
13 against Hartford by the plaintiff.

14 The... Let me talk a little bit about what the  
15 policy terms are. This is a group life insurance policy.  
16 What Hartford does is issues a policy to Utah County, and  
17 Utah County then allows people to pay into that and become a  
18 part of that policy or not. And each month what happens is  
19 Utah County sends a bulk check to us and they administer the  
20 policy. We handle the claims handling.

21 The policy term says that it covers dependents, and  
22 a dependent is defined in the policy as a spouse or an  
23 unmarried child. So in order to be a dependent covered by  
24 the policy you have to be a spouse or an unmarried child.

25 It's undisputed that under the terms of the policy

1 once Sherry Ellison was no longer a spouse she was no longer  
2 a dependent and, therefore, not covered under the terms of  
3 the policy.

4           There is a provision in the policy that allows  
5 conversion. And that's that magic word here in the, in the  
6 policy. And what that says is that if you're going to  
7 become a non-dependent, if you're a spouse that becomes an  
8 ex-spouse, you can convert and have your own policy in your  
9 own name provided you do a couple of things. First is the  
10 policy provides you have to provide written application to  
11 Hartford, second you have to provide that written  
12 application within 31 days of the date that you become an  
13 ex-spouse. So under the unambiguous terms of the insurance  
14 policy if Sherry Ellison wanted to have a life insurance  
15 policy with Hartford she would have to fill out an  
16 application, submit it to Hartford, and do that within 31  
17 days of the day of her divorce. There's no dispute in the  
18 record that that wasn't done. So just from a contractual  
19 standpoint there's no dispute that those terms of the  
20 contract were not complied with. So Hartford had no  
21 contractual obligation to honor a claim that there was life  
22 insurance on Sherry Ellison.

23           The theory that plaintiffs have come up with to try  
24 to get around that is really the heart of where we are in the  
25 case. They're, they've come up with a couple different

1 theories. The first theory is that there was some kind of a  
2 modification of this contract, that somehow the conversation  
3 that took place between Mr. Ellison and Ms. Daly, the  
4 Hartford customer representative person--

5 THE JUDGE: I said Bird. But that's what it is,  
6 it's Ms. Daly.

7 MR. CHRISTIANSEN: Ms. Daly. That somehow that  
8 modified the written contract. And we've set forth in our  
9 brief a number of reasons why that modification theory  
10 fails.

11 First of all, there's no evidence in the record  
12 anywhere that Hartford knowingly was modifying the terms of  
13 that contract. Look very carefully at that transcript, I  
14 think you'll conclude that's not a knowing modification of a  
15 written policy term life insurance contract with Utah  
16 County.

17 And the second point on that is really important.  
18 That contract exists between Hartford and Utah County. The  
19 only people who can bargain to modify that contract would be  
20 Hartford and Utah County. And there's no evidence anywhere  
21 in the record that Utah County bargained with Hartford to  
22 modify the terms of that contract.

23 Mr. Ellison is not a party to that contract. He's  
24 a participant in a plan but he's not a contracting party.

25 Thus there is no evidence of any meeting of the



1 minds of the contracting parties to modify that written  
2 contract. So we think the modification theory fails as a  
3 matter of law given the position of the parties with respect  
4 to that insurance contract.

5           The, a couple other little arguments we make in our  
6 brief on the modification theory are that any modification of  
7 a written agreement must be spelled out with sufficient  
8 definiteness to be enforceable. I submit there's not  
9 evidence here that that standard which is found in the Pack  
10 versus Case case has been satisfied.

11           Moreover, there was no consideration for the  
12 modification a, Hartford wasn't paid anything in addition  
13 to--

14           **THE JUDGE:** I recognize Hartford says that. But  
15 the one thing we do know, or one of the few things we do know  
16 is that money was taken out of his check for the premiums.

17           **MR. CHRISTIANSEN:** By Utah County. And we don't,  
18 we don't have visibility to that. Because they are the  
19 administrator of the policy and we just get one bulk check,  
20 we don't know who is not covered--

21           **THE JUDGE:** Well--

22           **MR. CHRISTIANSEN:** It's their obligation to do  
23 that.

24           **THE JUDGE:** Well, not knowing you got  
25 consideration is different than not getting any

1 ability to go get the policy and through reasonable  
2 diligence can read the policy and see what it says. Very  
3 important here. Because plaintiff never asked Hartford for  
4 a copy of the policy, the plaintiff did not ask Utah County  
5 for a copy of the policy. The only time he did ask anybody,  
6 and it was Utah County, for a copy of the policy was after  
7 his ex-wife had already passed away. All he had to do in  
8 order to learn what the terms of the policy were was to call  
9 up Utah County or walk in their, their office and say I'd  
10 like to look at the policy to see what I do in this  
11 situation.

12 The Utah Supreme Court in Perkins versus Great  
13 West Life has held in that circumstance he cannot claim  
14 fraud.

15 Now, there's another case that the court, the Utah  
16 Supreme Court issued which makes that clear again. It's  
17 called the Youngblood versus Auto Owners case. And it draws  
18 a distinction. It says if representations are made before  
19 the policy is obtained those can give rise to fraud claims,  
20 if it's a fraud in the inducement about what's going to be  
21 covered by the policy and it turns out the policy is  
22 different than how it was represented when it was sold that  
23 can give rise to a fraud and inducement claim. The  
24 representations made after the issuance of the policy are not  
25 actionable as fraud. And those two cases together make that

1 very clear that that's the law in Utah.

2           The next point on fraud is there's no  
3 representation made by Hartford of a presently existing fact  
4 which is a requirement for a fraud claim. At best giving  
5 the plaintiff the benefit of the doubt of Ms. Daly's  
6 representations, all she's saying is she thinks in the  
7 future that insurance can be obtained if premiums are paid on  
8 it. That's giving them every benefit of the doubt of that  
9 transcript, which I don't think that's what that transcript  
10 says. But that's a representation about the future, it's -  
11 not about today and what's happening today.

12           And the Republic Group versus (inaudible) case  
13 and a lot of other cases say that you have to have  
14 representation of a presently existing fact to give rise to a  
15 fraud claim.

16           **THE JUDGE:** Yes. And I guess the, the point in  
17 fact that I'm struggling with the most and, and was reflected  
18 I think in my area of questions as that you read the Daly  
19 conversation and a, and if I construe inferences against the  
20 moving parties here, then I say what was Mr. Ellison  
21 thinking, what was going on this his head, what, what  
22 conclusions would a layperson engaging in that conversation  
23 come away with. Here's a guy who has insurance on an  
24 existing spouse, it's been going along, the money is being  
25 taken out. He calls and says can the insurance continue,

1 sure if you pay the premiums, and you've got to fill out a  
2 paper, better call somebody. Well that's in response just to  
3 well I need something in writing for the court. Well,  
4 you've got to call somebody. Okay. Continues to get his  
5 paycheck, it's coming out. Well, they said we could continue  
6 if I keep paying the payments, must be still going.

7 I mean, isn't that an existing fact that the, the,  
8 the fact being the existence of a contractual relationship,  
9 the existence of an ongoing policy doesn't, couldn't we infer  
10 that he drew from that conversation that there was in fact an  
11 ongoing policy of insurance to cover his now divorced  
12 ex-wife?

13 MR. CHRISTIANSEN: I think you could make that  
14 argument. But I think it was really the statements were  
15 about in the future, can I continue it, can I continue it  
16 when we get divorced. The divorce hadn't happened yet. And  
17 I don't think that's disputed that there wasn't a divorce  
18 yet.

19 THE JUDGE: At the time of that call.

20 MR. CHRISTIANSEN: At the time of that call. So  
21 I think that's, that's the distinction there.

22 THE JUDGE: Okay.

23 MR. CHRISTIANSEN: The other really important  
24 part of the fraud argument is there's no scienter here.  
25 There's no evidence anywhere in this case of fraudulent

1 intent. They don't even make an effort to marshal any  
2 evidence of fraudulent intent.

3 All they say really is that well, premiums were  
4 paid so they must have been motivated to collect the premiums  
5 by saying, you know, the statements about what could happen  
6 when they get divorced. That's not enough to satisfy the  
7 high hurdle of scienter.

8 And I think it's really important to go back and  
9 look at two very important pieces of evidence that are before  
10 the court on how this issue is administered. The  
11 administration policy of Utah County, their own policy which  
12 is before the court says in it, and I quote:

13 That your responsibilities...  
14 You being Utah County,  
15 ... include notifying employees of  
16 their right to exercise the conversion  
17 privilege.

18 It's Utah County's obligation to do that. It's not  
19 Hartford's. We don't administer it, they administer the  
20 policy. So it's not our burden to have any conversations  
21 with the plaintiff about this. It's Utah County's  
22 obligation, duty according to the administration policy.

23 Secondly, Peggy Poulsen's (phonetic) own testimony,  
24 and she's a Utah County person in charge of this, she  
25 admitted that it was Utah County's duty to discuss

1 conversion with employees. Again, the administration of the  
2 policy is Utah County's obligation, it's not Hartford.

3 THE JUDGE: Well, what's the consequence if Utah  
4 County failed in either or both of those duties? Does that,  
5 does the, does the consequence of that failure fall upon the  
6 employee or does it fall upon the county? Wouldn't then,  
7 wouldn't there, shouldn't the court in that circumstance find  
8 coverage but then allow you a cause of action against the  
9 county saying you didn't do your job and this is what it cost  
10 us? I mean, isn't that a contract dispute between you and  
11 the county? Why does the employee enter in there?

12 MR. CHRISTIANSEN: No. I don't think there's, I  
13 don't think that's how it works. I think that a, I think  
14 that how it works is that the relationship for administration  
15 of the plan is between the county and that person, and so  
16 there's no duty on our part, there's no relationship on our  
17 part.

18 And I'll let Ms. Van Orman discuss her arguments of  
19 why that doesn't cause a cause of action between the county  
20 and the plaintiff.

21 THE JUDGE: I, what I'm, what I'm struggling with  
22 is that you're saying you escape a duty--

23 MR. CHRISTIANSEN: By contract.

24 THE JUDGE: -- because the county failed in the  
25 duty you, you escape an obligation to Ellison if there is

1 one, you, you escape your obligation to Ellison because the  
2 county failed in their obligation to Ellison. I'm not sure I  
3 follow the logic of that.

4 MR. CHRISTIANSEN: Well, I'm not sure that  
5 Ms. Van Orman would say they failed.

6 THE JUDGE: Well, I--

7 MR. CHRISTIANSEN: I think she would say they  
8 didn't have notice of, that they didn't have--

9 THE JUDGE: I appreciate that.

10 MR. CHRISTIANSEN: -- the opportunity to discuss  
11 conversion.

12 THE JUDGE: But you're, you're saying gee it's  
13 their duty to tell him. And they, and apparently they  
14 didn't.

15 MR. CHRISTIANSEN: Well if they, they--

16 THE JUDGE: Why does it matter?

17 MR. CHRISTIANSEN: -- had the opportunity to do  
18 so it was their duty and--

19 THE JUDGE: And the only reason it could be  
20 relevant in your argument is if it didn't happen.

21 MR. CHRISTIANSEN: Right. Right.

22 THE JUDGE: Okay.

23 MR. CHRISTIANSEN: Okay. Finally on the fraud  
24 argument, and I'm going to try and move this along, is that  
25 there are no damages here for Mr. Ellison. And that's what

1 Ms. Van Orman referred to as his lack of standing.

2 THE JUDGE: Yes.

3 MR. CHRISTIANSEN: And that's because a converted  
4 policy belongs to Sherry Ellison. Under the clear  
5 unambiguous terms of the group policy here, the only person  
6 who contractually can get that policy would be Sherry. And  
7 it's undisputed that she didn't convert the policy. It's  
8 undisputed that there's no admissible evidence that even if  
9 she had converted the policy that she would have named  
10 Mr. Ellison as the beneficiary of that. No evidence  
11 whatsoever. No response even in our brief to the  
12 evidentiary objections we made to the self-serving  
13 statements made by Mr. Ellison on that.

14 And so I agree if, if there would be any potential  
15 claim here, and I don't think there is, it potentially might  
16 belong to the estate of Sherry Ellison. But it wouldn't  
17 belong to her husband. He doesn't have standing, he hasn't  
18 suffered the damages. Okay?

19 Finally, just keep in mind that the burden here for  
20 plaintiffs on fraud is clear and convincing evidence. I  
21 don't think they've come anywhere close to satisfying that  
22 high burden that existed for (short inaudible).

23 The real heart of this case really comes down to  
24 the estoppel claim. I think that's where the plaintiff  
25 spends the most of their time in their opposition briefs, and



1 I think that's really where the court has to dig into both  
2 the Perkins case and the Youngblood case to decide that  
3 claim. I think that's the claim where the real fight is.  
4 And the Perkins case makes it very clear that in Utah  
5 estoppel, that doctrine, cannot be used to expand coverage  
6 beyond the policy terms. In other words, you can't rewrite  
7 the terms of a policy under Utah law using the doctrine of  
8 estoppel. And the Perkins court says in the insurance  
9 context quote:

10           The doctrine of estoppel cannot be used  
11           to bring risks which were not covered by  
12           the terms of the policy within coverage  
13           of the policy. Close quote.

14           And again, the Youngblood and Perkins cases make  
15 the same distinction I talked about before and that is that  
16 estoppel can be used for representations that are preissuance  
17 of the policy but not representations made after the policy  
18 is in place. And again, the representations here are  
19 clearly made after the Hartford Utah County policy is in  
20 place.

21           There's also case law we've given again which says  
22 that to give rise to estoppel the alleged representations  
23 must be very definite and very specific. That comes from a  
24 Rodawes (phonetic) case out of Massachusetts.

25           And finally we make an argument a, I just wanted

1 to bring it to the court's attention, that Ms. Daly's  
2 (phonetic) statements cannot be reasonably held to have bound  
3 Hartford because she made it very clear in her statement that  
4 this wasn't her area, it wasn't her department and she  
5 referred him elsewhere.

6 THE JUDGE: What's the difference between that  
7 argument about Ms. Daly's (phonetic) conversation in the  
8 context of estoppel and that argument in the context of  
9 fraud? Burden of proof?

10 MR. CHRISTIANSEN: Yes, I agree.

11 Finally, the last claim that's pled against  
12 Hartford is a breach of the covenant of good faith and fair  
13 dealing. Again--

14 THE JUDGE: Well, before you move to that.

15 MR. CHRISTIANSEN: Yes.

16 THE JUDGE: What's the relationship of damages to  
17 the estoppel claim? It seems to me that a,--

18 MR. CHRISTIANSEN: They want the--

19 THE JUDGE: -- necessary proof for, for, to  
20 recover on estoppel?

21 MR. CHRISTIANSEN: It is, it is. It is as well,  
22 Your Honor. Thank you for reminding me of that.

23 THE JUDGE: All right.

24 MR. CHRISTIANSEN: Yes. And so I meant that  
25 damages argument to apply to all of the claims.

1           THE JUDGE:   All right.

2           MR. CHRISTIANSEN:   The last claim that's pled is  
3 the breach of the implied covenant of good faith and fair  
4 dealing. And as Your Honor knows Utah law on that interprets  
5 that as not a tort claim but a contract claim that follows  
6 from the insurance contract. Utah has a defense that  
7 insurance companies invoke which applies here, and that is  
8 where the claim is fairly debatable, in other words, where  
9 like mind could say well, I could see where Hartford has an  
10 argument and I can say where the plaintiff has an argument  
11 there's no breach of the implied covenant of good faith and  
12 fair dealing. We submit not only is there, is the claim  
13 fairly debatable but it's barred by the unambiguous terms of  
14 the policy, so it's not even fairly debatable, it's crystal  
15 clear that there's no contract claim.

16           So with those arguments in mind we really believe  
17 that under the facts and circumstances here Hartford is  
18 entitled to a summary judgment and we would request that be  
19 entered.

20                           **ARGUMENT BY MR. PARKINSON**

21           MR. PARKINSON:   Your Honor, if I might I think I'm  
22 a, of course, by accepting this I get hit by all sides and  
23 have a lot of things, a lot of issues to cover. But I think  
24 if I, if I, if I can I'd like to maybe start with a, the  
25 Perkins Youngblood analysis.

1           And the court should be aware that the Youngblood  
2 case and the Perkins case were both Court of Appeals cases.  
3 Since the initial briefing of this case the Supreme Court has  
4 weighed in in the Youngblood case and I think it  
5 substantially turns the analysis on the Perkins Youngblood  
6 cases. I have a copy of that case here.

7           **THE JUDGE:** When was it decided?

8           **MR. PARKINSON:** It was decided on March 23rd.

9           The Youngblood case, by the way, was a case where  
10 a fellow went to go apply for automobile insurance, he was  
11 doing it under the name of his company, he had a  
12 conversations with a, a person who was selling him the  
13 policy, they had discussions about the policy. And in that  
14 he was a, told that he should get this underinsured motorist  
15 coverage because that would protect him if he were crossing  
16 the street and he got ran over by someone.

17           By a reading of the policy a, if you read the  
18 policy, and I think both sides eventually conceded this, if  
19 you read the policy they a, he wouldn't be covered because  
20 he was buying it as a, as a company and it would only apply  
21 to him if he purchased it as an individual if he was crossing  
22 the street and got ran over by someone. Well what, of  
23 course, is going to happen that brings us to the court is he  
24 was in a parking lot and got run over by someone and then  
25 we're here before the court.

1           And I think it was agreed, like I say, that the  
2 plan language of the insurance policy didn't extend  
3 protection to him under these circumstances.

4           And then there was raised the issue of equitable  
5 estoppel and, and the estoppel line of cases, Perkins was  
6 discussed, the Youngblood a, case was discussed. And the  
7 court makes a distinction between equitable estoppel and  
8 promissory estoppel and there's a lot of discussion about  
9 that, about how equitable estoppel tends to be more of a  
10 shield. And the court acknowledged that the Supreme Court  
11 cases had been, had been muddled about their decisions on  
12 this, or the appellate cases had been muddled on their  
13 decisions about this, and promissory estoppel was more of a  
14 sword. And there was a lot of discussion about the  
15 differences in a promissory estoppel about whether it's a  
16 presently existing fact or a promise on a, on a future  
17 existing fact.

18           **THE JUDGE:** Well it's clear isn't it that the  
19 Youngblood case in, in either court was essentially an  
20 allegation that a misrepresentation was made to the client so  
21 that they would purchase the insurance, and that was the  
22 circumstance.

23           **MR. PARKINSON:** Yes.

24           **THE JUDGE:** And, and the summary judgment for the  
25 a, was affirmed because?

1           MR. PARKINSON: Summary judgment was, summary  
2 judgment by the appellate court in Youngblood was  
3 overturned. They sent, they sent it back and then it was--

4           THE JUDGE: This was, this was summary judgment in  
5 favor of?

6           MR. PARKINSON: The a, the company brought, the  
7 insurance company brought a, a motion for summary judgment--

8           THE JUDGE: The trial court says--

9           MR. PARKINSON: The trial court grants that.

10          THE JUDGE: -- insurance company wins.

11          MR. PARKINSON: It goes to the Court of Appeals.

12          THE JUDGE: Court of Appeals says overturned.

13          MR. PARKINSON: Overturned.

14          THE JUDGE: Supreme Court says no, the insurance  
15 company wins.

16          MR. PARKINSON: No. The Supreme Court says it's  
17 still overturned--

18          THE JUDGE: Okay.

19          MR. PARKINSON: -- but they use a different  
20 analysis. And maybe I've taken too long to get to that.  
21 But just what they've done is they've eliminated the  
22 difference between promissory estoppel and equitable  
23 estoppel.

24          THE JUDGE: Okay.

25          MR. PARKINSON: And the elements of estoppel, now

1 particularly now this might not apply in a non-insurance  
2 context, that's a little fuzzy in here.

3 THE JUDGE: All right.

4 MR. PARKINSON: But in paragraph 25 page five a,  
5 it describes what the elements are that courts should  
6 consider after, after the second Youngblood case. It says,

7 When an agent makes a material  
8 representation to the prospective insured  
9 as to the scope of coverage or other  
10 important policy benefits--

11 THE JUDGE: Stop right there. Do we have a  
12 prospective insured here? Do we have an agent? I mean  
13 who, who is the agent and who is the prospective insured?  
14 I mean the representation that's here is as to whether  
15 there's ongoing insurance so how does this, how does this  
16 case apply?

17 MR. PARKINSON: Well this, first this is the line  
18 of cases that they are relying on to get, to a say that it  
19 overcomes our, our decision here. But I think he, it is a,  
20 and I think when you read the whole case I think it's clear  
21 that they are saying that it doesn't matter where in this  
22 process that these statements are made, that if there are  
23 material representations made by someone with authority to do  
24 so a, and you reasonably rely on those representations, then  
25 you can enforce that contract.

1 THE JUDGE: Okay. Well, well let's--

2 MR. PARKINSON: You can enforce that claim.

3 THE JUDGE: Who was the person in a position to  
4 make the representations and what was the reliance here?

5 MR. PARKINSON: Okay. There are, and if I can I  
6 want to go over this factual aspect and include the county in  
7 it as well. There are three separate representations made  
8 here.

9 THE JUDGE: Okay.

10 MR. PARKINSON: And I think it's easy to get lost  
11 and forget that.

12 First, in both of the a, there's one that's  
13 confirmed in writing that we have the transcript of, and the  
14 other two representations a, are supported by the  
15 transcript.

16 The first statement was from the county.  
17 Mr. Ellison testified that he went to the county and talked  
18 with someone in personnel and asked what he needed to do.  
19 They said all you need to do is keep paying a, keep paying on  
20 your policy and you'll continue to have coverage.

21 THE JUDGE: And, and the only evidence we have  
22 of that is Ellison's as statement that somebody told him  
23 that.

24 MR. PARKINSON: That's, that's not correct  
25 actually.



1           THE JUDGE:    What else do we have?

2           MR. PARKINSON:   Because we have this transcript of  
3 the insurance telephone call that he made afterwards.   So he  
4 has a the first conversation with the person from Utah  
5 County.

6           THE JUDGE:    Okay.

7           MR. PARKINSON:   And this is all long before, this  
8 is a, long before Ms. Ellison dies, had the first  
9 conversation--

10          THE JUDGE:    Before--

11          MR. PARKINSON:   -- and what does he say--

12          THE JUDGE:    And indeed it's before they are  
13 divorced.

14          MR. PARKINSON:   Indeed it's before they are  
15 divorced.

16          THE JUDGE:    All right.

17          MR. PARKINSON:   And what does he say?   Okay.   I  
18 guess I work for Utah County government and so you guys  
19 apparently have taken over our life insurance here.   And my  
20 wife and I are getting a divorce.   But the personnel told me  
21 that you can continue the insurance on your spouse even if  
22 you get divorced.   Is this accurate?   So--

23          THE JUDGE:    How does that corroborate?

24          MR. PARKINSON:   And he tells them when he has no  
25 reason to do so that he got this information from Utah County

1 and that he's spoken with the personnel people and that he  
2 was given this number and told to call them and talk with  
3 them about his insurance policy issue.

4 THE JUDGE: Did, maybe that he had the phone, I  
5 mean, it's the same source so same source can't corroborate  
6 itself. So I'm, I'm reaching for what in that, what part of  
7 the Daly (phonetic) call corroborates Ellison's claim that he  
8 talked to someone at the county?

9 MR. PARKINSON: Well he said, he said that  
10 personnel told me that you can continue insurance--

11 THE JUDGE: Well, he said it twice.

12 MR. PARKINSON: -- insurance on your spouse.

13 THE JUDGE: He said it twice. But what I'm  
14 looking for is what is there that, that independently  
15 corroborates that statement that he's making?

16 MR. PARKINSON: Well I, I think it independently  
17 corroborates it by virtue of the time in which he makes the  
18 statement, which he would have no incentive to make something  
19 up or to, he's just trying to find out what to do on  
20 insurance. He tells them I talked with the county and a,  
21 and--

22 THE JUDGE: So hearsay becomes reliable because  
23 the hearsay declarant a, is a reliable person? Aren't we  
24 looking for something outside the bearer of the hearsay that  
25 would corroborate? Isn't that the nature of

1     corroboration?

2             MR. PARKINSON:   Well, in my mind this is helpful  
3     in a, in understanding that he did talk to the personnel,  
4     I'm--

5             THE JUDGE:    Okay.    All right.

6             MR. PARKINSON:   I'm not sure if I'm, if I'm--

7             THE JUDGE:    So you've got, you've got--

8             MR. PARKINSON:   -- missing your thinking  
9     process.    He, he talks with them, he's testified that he's  
10    talked with them.   And then there's another source that talks  
11    about how he's talked with them, admittedly that is his, that  
12    is himself but it's before he has any incentive to--

13            THE JUDGE:    You said, you said--

14            MR. PARKINSON:   -- to make anything up.

15            THE JUDGE:    You said there were three  
16    representations.    The third is?

17            MR. PARKINSON:   The third, the third is that as a,  
18    was discussed a, in the end she gives him another number,  
19    another person to talk to and transfers him over to that  
20    person.   And he testifies that he talked to this other person  
21    and received a, a third corroboration that that is the  
22    policy.   So he--

23            THE JUDGE:    Is this a person that we've been able  
24    to identify or find?

25            MR. PARKINSON:   We don't, we don't know who that

1 person is. We don't have any evidence other than the  
2 conversation here and Mr. Ellison's testimony that he talked  
3 with a third person and those, and that other person at  
4 Hartford also stated that all he needed to do was to continue  
5 paying on the policy.

6           **THE JUDGE:** If it occurred, all three of these  
7 representations were at a time when a, his wife was alive and  
8 still his wife.

9           **MR. PARKINSON:** Correct.

10          **THE JUDGE:** Okay.

11          **MR. PARKINSON:** Correct.

12          **THE JUDGE:** And, and these representations induced  
13 him to do what?

14          **MR. PARKINSON:** Those representations, by virtue  
15 of those representations he was induced to continue to pay  
16 premiums because that was all that was necessary for him to  
17 recover under the insurance policy. And that's what he  
18 did.

19               Now, the Youngblood court kind of goes through the  
20 analysis said, the analysis of this, and it says on the one  
21 hand a, determined in paragraph 34--

22          **THE JUDGE:** Uh-huh (affirmative).

23          **MR. PARKINSON:** ... a determination of  
24 reasonableness is not based on the  
25 subjective state of mind of the person

1           claiming he was misled, but rather it is  
2           based on an objective test what would a  
3           reasonable person conclude under these  
4           circumstances.

5           **THE JUDGE:**    Okay.

6           **MR. PARKINSON:**   It's our contention that with that  
7           type of standard it definitely becomes a question of fact for  
8           a jury to decide what would a reasonable person do.   In  
9           paragraph 35 it says reliant upon--

10           **THE JUDGE:**    So, so you can never have summary  
11           judgment on a reasonable person issue?

12           **MR. PARKINSON:**   Well, no.  I, I think you probably  
13           could.  In paragraph 35 I think it makes it clear that in  
14           this case that would be inappropriate.  Reliance upon an  
15           agent's material misrepresentations regarding coverage may or  
16           may not be reasonable depending upon the facts of the  
17           individual case.

18           **THE JUDGE:**    Well, and what they've told me is that  
19           in, in a situation where it isn't the victim of the  
20           misrepresentation being, entering into insurance contract  
21           (inaudible word, away from mic) the inducement, it's where  
22           the person has or has clear and ready access to the, to the  
23           terms of the policy and the representation is as to what  
24           that policy says when it's, it's as a matter of law under  
25           Utah precedent, Perkins specifically, it's not reasonable for

1 that person to have relied on what the agent said instead of  
2 reading the contract that's available to them.

3 MR. PARKINSON: That was--

4 THE JUDGE: That's what Perkins says. Does  
5 Youngblood overturn Perkins?

6 MR. PARKINSON: That's what, that's what happened  
7 in Youngblood.

8 THE JUDGE: But--

9 MR. PARKINSON: In Youngblood he had the policy  
10 available to him. He had a copy of the policy. In this  
11 case a, Mr. Ellison did not have a copy of the policy  
12 contrary to prior representations, he didn't have a copy of  
13 the policy. Youngblood had a copy of the policy. A clear  
14 reading of the policy acknowledged by both sides provided  
15 that he had no coverage under the circumstances.

16 THE JUDGE: You don't think that makes a  
17 difference that in Youngblood they specifically say,

18 ... the party who reasonably relied on  
19 the misrepresentations in buying the  
20 coverage.

21 I'm looking at paragraph 39. Isn't, isn't that  
22 quite different than this circumstance?

23 MR. PARKINSON: I don't think so. First, he's  
24 buying the coverage every time he continues to pay that  
25 policy, every time he continues to pay on that policy he's

1 buying that coverage. He's getting that coverage. He a,  
2 he knows about it. And this is a case where a. a, the  
3 person had that policy and looked at it and, and/or I  
4 shouldn't say he looked at it, he didn't, he acknowledged  
5 that he didn't look at it.

6 THE JUDGE: Well, what do you claim for damages?

7 MR. PARKINSON: With respect to damages a,  
8 Mr. Ellison paid for a particular coverage, he worked for  
9 that coverage, a, he a, he relied on statements that were  
10 made to him, and he should be entitled to receive that  
11 coverage.

12 THE JUDGE: Well it's not cover... The policy,  
13 after the divorce the policy is hers, it's not his, is it?

14 MR. PARKINSON: We go to the, we go to the  
15 statements that they are talking about.

16 THE JUDGE: Uh-huh (affirmative).

17 MR. PARKINSON: They're saying all those should  
18 not be a, that those statement should not be admitted--

19 THE JUDGE: Even, even--

20 MR. PARKINSON: -- they say there's no--

21 THE JUDGE: Even if we say that there was a policy  
22 that continued and he paid the premiums, what could he  
23 recover in this lawsuit? He wouldn't be entitled to the  
24 proceeds from the insurance. He's, he's not related to the  
25 decedent, he's not, she's not his dependent, he's not a

1 beneficiary to the policy. What does he get?

2 MR. PARKINSON: Well, and I think that's where the  
3 estoppel argument is particularly a, important here because  
4 they should be estopped from denying him the benefits of the  
5 coverage because they made representations that he reasonably  
6 relied on or that there is at least a factual issue about  
7 whether he reasonably relied on those, on those  
8 representations.

9 THE JUDGE: Well, so the representations is not  
10 only that, that the coverage could continue but that the  
11 beneficiary relationship would continue as if there had been  
12 no divorce?

13 MR. PARKINSON: Yes. He wanted, that's what he  
14 was calling about. He wanted to know--

15 THE JUDGE: Gosh, I didn't see that in the  
16 conversation. Can you, can you direct me to that? I--

17 MR. PARKINSON: All right.

18 THE JUDGE: It's exhibit, which one--

19 MR. PARKINSON: I don't know the exhibit number.

20 THE JUDGE: We'll find it. They are all nicely  
21 tabbed, nicely tabbed exhibits.

22 MR. CHRISTIANSEN: I think it's Tab 8,  
23 Your Honor.

24 THE JUDGE: Eight?

25 MR. CHRISTIANSEN: Yes.



1 THE JUDGE: Okay. Very well. Okay.

2 MR. PARKINSON: All right. A--

3 THE JUDGE: I am (short inaudible) calling from  
4 Utah. Now what I'm looking for is a representation not only  
5 that the insurance policy continued, can continue but that in  
6 spite of the divorce Mr. Ellison would continue to be a  
7 beneficiary, which is contrary to the clear terms of the  
8 policy. So if he's going to be estopped it seems to me that  
9 there's got to be representation that that's going to  
10 happen. And I did not see it. But if you can--

11 MR. PARKINSON: Well I think it's, at first near  
12 the top half the paragraph that starts with okay seems to be  
13 a, kind of the important paragraph here.

14 THE JUDGE: I'm sorry. Where are we?

15 MR. PARKINSON: The paragraph that starts with  
16 okay under the paragraph that starts, that is the word ya.

17 THE JUDGE: (Inaudible word), let me find it.  
18 About the middle of the first page?

19 MR. PARKINSON: Yes.

20 THE JUDGE: You guys apparently have  
21 taken over our life insurance. My wife  
22 and I are getting a divorce. Personnel  
23 told me that--

24 MR. PARKINSON: Yes, this is the paragraph.

25 THE JUDGE: -- you can continue insurance

1           on your spouse even if you get divorced.

2           MR. PARKINSON:    Yes.

3           THE JUDGE:    I believe so, yes.  I

4           haven't heard anything as to why.  I

5           think that's your option if you want to,

6           if you want to, they're going to do

7           payroll deducting for her so if you want

8           to keep her on there that's fine.

9           Okay.  And reading all of the inferences so if you  
10          want to keep deducting and paying the premiums it can  
11          continue.  Now why there isn't a letter stating so for the  
12          court.

13                 You filled out a health statement?

14                 We did it a long time ago.

15                 We don't administer the plan.

16                 You know what, I'm going to transfer  
17          you to another number that may be able to  
18          help you and hopefully they can.  If  
19          they can't, you know, feel free to call  
20          be back and we'll research it further to  
21          see if we can help you.

22                 Takes a name, takes a number, that's the end.

23                 I just, I'm not seeing what you're telling me is  
24          there.  I'm sorry.

25           MR. PARKINSON:   Well, I think that when you a

1 construe all of the facts in the light most favorable to the  
2 non-moving party when you read that first paragraph that you  
3 started on--

4           **THE JUDGE:**    Uh-huh (affirmative)--

5           **MR. PARKINSON:**    -- where he says but personnel  
6 told me that you can continue insurance on your spouse even  
7 if you get divorced, he's putting himself in the place of you  
8 when he's stating that. I think that's, I think that's clear  
9 from the, from the context, and at least it meets the  
10 requirement of creating an issue of fact. If they want to  
11 argue that he's talking about her continuing the, that she's  
12 the you here a, that's continuing the policy after the  
13 divorce, and I think that a, they can make that argument.  
14 But it's a factual argument, it's not a matter of law. I  
15 think the, that it creates issues of fact that need to be  
16 decided by the fact-finder.

17           **THE JUDGE:**    Well, do you think Perkins to that  
18 extent was overturned by Youngblood? Do you think Perkins  
19 tells me a, that the Youngblood principle, or excuse me, do  
20 you think the Youngblood tells me that the Perkins principle  
21 that a, a representation about a contract not, not a  
22 contract being purchased, but a contract in existence which  
23 is either in the position of or readily available to the  
24 insured, that the terms of that contract can actually be  
25 modified by the representations of an agent? That's it's

1 reasonable for an insured to rely upon the statements of the  
2 agent when that contract is in existence and is readily  
3 available, and your position is that Youngblood changes  
4 that?

5 MR. PARKINSON: Paragraph 35 and 36,.36--

6 THE JUDGE: Okay.

7 MR. PARKINSON: -- says in the second Youngblood  
8 that,

9 The law holds insurance agents to  
10 accurately representing policy provisions  
11 and honestly answering consumer  
12 questions.

13 THE JUDGE: Uh-huh (affirmative).

14 MR. PARKINSON: Agents who are not  
15 trained to act in complete honesty and  
16 integrity in their interactions with a  
17 consumer, or who simply refuse to do so,  
18 place themselves and their principals at  
19 risk.

20 THE JUDGE: Yes, and--

21 MR. PARKINSON: The law will hold both  
22 principal and agent liable for  
23 misrepresentations upon which consumers  
24 reasonably rely.

25 THE JUDGE: I guess the concern I have here is I

1 think you have to take that paragraph in the context of the  
2 Youngblood case. When it says agent, the agent in the  
3 Youngblood case was an agent who was selling the insurance  
4 and was causing the insured to become insured. That's  
5 really a different person than Mrs. Daly (phonetic).  
6 Ms. Daly (phonetic) isn't a person that's selling insurance,  
7 isn't trying to convince him to join up, isn't telling him  
8 what he will get if he pays, she's not creating the contract  
9 on behalf of the company. It's really a different  
10 relationship, isn't it?

11           **MR. PARKINSON:** I don't think so. Because this is  
12 really he wants to know what do I do to a, to preserve this  
13 policy after a divorce, and he talks to the county who has  
14 never provided him with a policy who has, who according to  
15 the contract has a duty to tell him of the conversion  
16 privilege and the, and the testimony is that they haven't  
17 informed him of the conversion privilege. Who a... And  
18 then he, he calls Hartford and talks to two separate  
19 individuals about what he's supposed to do a, and he's  
20 told all you need to do is continue paying on the policy.  
21 And, and it is really in effect an entirely new policy.

22           And I, and the court in Youngblood, the Supreme  
23 Court in Youngblood did take away that distinction between  
24 the equitable estoppel and the promissory estoppel and  
25 there's just estoppel.

1           **THE JUDGE:**   Now, it seems to me, and if I  
2 remember the facts incorrectly please correct me, but the  
3 representation is that the county has a written policy a,  
4 regarding these insurance contracts that they are available  
5 upon request.   And I, as I recall there's no testimony,  
6 there's no evidence from anyone that Mr. Ellison every asked  
7 for or made an attempt to look at that written policy.   Is  
8 that accurate?

9           **MR. PARKINSON:**   I have no recollection, and I, I  
10 do not believe that the county had a policy that they're, had  
11 a written policy that they're available upon request.   If  
12 they do maybe Ms. Van Orman can show you that.   I do not  
13 recall that.

14           I do know that he didn't have a policy.   This was  
15 a fairly recent changeover from Company A to Company B within  
16 at least the last year.

17           I do know that they do have these benefit fairs  
18 that county employees can go to a, where they can wander  
19 through and, and pick up things that are available, so to  
20 that extent a, there may have been a benefit there at which  
21 he could have wandered through and picked up something.   But  
22 I don't believe there's any testimony that a policy was  
23 available at that benefits fair or that he was informed that  
24 he had the right to ask for the policy at any time.

25           He went and called the county, asked what he

1 should do, he wanted to get further a, he wanted to  
2 strengthen that, he called Hartford and talked with two  
3 separate people. And he got the number that he got from  
4 Hartford. Now they're, Hartford is claiming this is the  
5 wrong department. Again that kind of, again it just shows  
6 how this whole thing is so intertwined and you, I really  
7 think the county and Hartford both need to stay in this  
8 because they, they are so at this timely intertwined in this  
9 case that a, letting go one of them where they're kind of  
10 pointing fingers at the other, the county is saying, you  
11 know, Hartford is the one that makes these decisions, not us,  
12 and a, Hartford is saying the county is the one who is  
13 responsible for sharing this information.

14           **THE JUDGE:** So to recap, your theory of damages is  
15 that not only was there a contract created by the, by the  
16 conduct of the both county and Hartford agents, it was a  
17 contract that continued the insurance coverage and  
18 transferred and created a designation of beneficiary to be  
19 Mr. Ellison.

20           **MR. PARKINSON:** That's correct. That's  
21 correct.

22           And the information with respect to the discussion  
23 with Ms. Ellison is admissible. It would be, and I don't  
24 know if I've talked about this or not, it would certainly be  
25 a statement against her, her pecuniary interests and would be

1 the type of a, would meet one of the exceptions to the  
2 hearsay rule and is admissible in this case.

3 THE JUDGE: Well, and you think that those facts  
4 would satisfy the clear and convincing standard for fraud?

5 MR. PARKINSON: I think those facts at the very  
6 least present a question of fact. I think when you talk with  
7 a, a layperson about this case, somebody who has gone to  
8 three separate people in authority and he had reasons to  
9 believe, I believe that applying this Youngblood case they'll  
10 say that he did what was reasonable in the case. I believe  
11 that a jury--

12 THE JUDGE: Well, I mean, you've got a two step  
13 problem with the two, at least two of those  
14 representations. If we're going to look at the  
15 reasonableness of Mr. Ellison's actions then what he heard or  
16 what he thought he heard is relevant to how he acted. But  
17 you've also got to prove that the representations were in  
18 fact made. And you have to prove that by competent  
19 evidence. And it can't be hearsay.

20 So what have you got outside Mr. Ellison's hearsay  
21 declarations that somebody told me that to establish that in  
22 fact those other two representations were made?

23 MR. PARKINSON: Statements of the party, party  
24 opponent in both cases. Statements against interest in both  
25 cases.



1           THE JUDGE:   By whom?

2           MR. PARKINSON:   By the county personnel and a, by

3 Ms. Daly (phonetic) and by the other person at Hartford that

4 a--

5           THE JUDGE:   Well, they deny that they ever

6 occurred.

7           MR. PARKINSON:   -- he spoke with.   And this is

8 a... And also Ms. Daly's (phonetic) conversation is a

9 business record kept in the ordinary--

10          THE JUDGE:   Ms. Daly's (phonetic) conversation

11 we've got a transcript of that, you know, I don't have a

12 problem with--

13          MR. PARKINSON:   Kept in the ordinary course of

14 business.

15          THE JUDGE:   Yes.   I'm talking about the

16 conversation with the unidentified person at the county and

17 the telephone conversation, the subsequent telephone

18 conversation with the unidentified person at Hartford--

19          MR. PARKINSON:   Uh-huh (affirmative).

20          THE JUDGE:   -- both of which Mr. Ellison is the

21 only, only person who can tell us about it.   And so isn't

22 that an 804 because the a, the witness, the declarant is

23 unavailable.

24          MR. PARKINSON:   Yes.

25          THE JUDGE:   Yes.

1           MR. PARKINSON:     And it's statements against their  
2 interest and it's a,--

3           THE JUDGE:     It's not former testimony, statements.

4           MR. PARKINSON:     And their admissions of a, of a  
5 party.

6           THE JUDGE:     Well, the statement which at the time  
7 of its making was so far contrary to the defendant's  
8 pecuniary or proprietary interest or so far tended to subject  
9 the declarant to civil liability, or to render invalid a  
10 claim that a reasonable person would have not have made the  
11 statement unless believing it to be true.

12          MR. PARKINSON:     Well isn't that, I mean, it's so  
13 far that they've a, that they've certainly fought this case  
14 thus far and they a plan to continue fighting it, if the  
15 court denies their motions for summary judgment, it seems--

16          THE JUDGE:     What's, what's the statement that,  
17 that you can, that it's possible to continue insurance?  
18 They don't deny that.

19          MR. PARKINSON:     I don't think the statement is...  
20 I think if you look at it again the plain reading of what a,  
21 of what people say, you know, they say, you know, if you keep  
22 her on there that's fine. I think that the plain  
23 understanding is as long as you keep paying her, paying for  
24 her you're able to a, keep her on the contract, you're able  
25 to keep her on the insurance, and you're able to recover it.

1 I mean, they were not, there is no, it's not a formalized  
2 contract, you know, with a wherefor, couple of wherefor  
3 clauses at the beginning and that sort of thing. But I think  
4 they are the types of statements that are, that a layperson  
5 would reasonably rely on.

6 I should state that the county did, did know prior  
7 to the passing of this period that a, that Mr. Ellison had,  
8 had filed for divorce. I think also just kind of on a, clean  
9 up issues a,--

10 THE JUDGE: Well I can, I can take judicial notice  
11 that all kinds of people file for divorce and don't get a  
12 divorce. So knowing that they filed for divorce doesn't  
13 really get us anywhere, does it?

14 MR. PARKINSON: Yes. But there was a, there was  
15 an email about the continuation of health insurance policy  
16 after the divorce so I think it was more than just knowing  
17 that--

18 THE JUDGE: He clearly knew--

19 MR. PARKINSON: -- they filed for divorce.

20 THE JUDGE: -- there was a problem or he wouldn't  
21 have made the calls.

22 MR. PARKINSON: Yes. He made, he made the calls  
23 to try to figure out what to do. And I think that was  
24 reasonable for him to do during the a, during the process.

25 I think Ms. Daly's (phonetic) statement of that,

1 that's fine is a reasonable ratification statement for a  
2 layperson. The other statements a, I've mentioned.

3 And I think, you know, the idea that they can make  
4 these deceptively half true statements and then hide behind  
5 the other aspect of the truth I don't, I don't think that's  
6 fair in this context.

7 THE JUDGE: You think what Ms. Daly (phonetic)  
8 said was deceptive, how--

9 MR. PARKINSON: Well if... I don't think it was,  
10 no. I don't think it was deceptively half true. I think  
11 they are trying to turn it to be deceptively half true.  
12 Yes, you can continue it. And then the unspoken part of the  
13 statement is that a, if you go ahead and fill out all these  
14 papers and, and complete this process. And they are trying  
15 to say that that is--

16 THE JUDGE: Didn't she send him on to somebody to  
17 get that done and say if it doesn't work out call me back?

18 MR. PARKINSON: She sent him on not to get that  
19 done, she just sent him on to get another confirmation. I  
20 mean, that's not what she's saying I'm sending you on to a--

21 THE JUDGE: Okay.

22 MR. PARKINSON: -- get some paperwork to fill  
23 out.

24 Thank you.

25 THE JUDGE: Okay.

1                   FURTHER ARGUMENT BY MS. VAN ORMAN

2                   MS. VAN ORMAN:    I'll be very brief, Your Honor.  
3   There's two issues that I think would be helpful for a  
4   clarification to the court.

5                   Regarding the alleged conversation with a, the  
6   county one thing counsel has mentioned he keeps referring to  
7   as a telephone conversation. I don't think that was the  
8   testimony. He said that he went to the offices and spoke to  
9   somebody. We don't know where that was, we don't know if it  
10  was in the hall. It was not a direct phone call--

11                  THE JUDGE:    Uh-huh (affirmative).

12                  MS. VAN ORMAN:   -- to the personnel department.  
13  But I thought it would be helpful for the court to--

14                  THE JUDGE:    Yes. I thought, I thought the second  
15  of the two conversations to the anonymous person was  
16  telephone.

17                  MS. VAN ORMAN:   Correct. And that was to  
18  Hartford.

19                  THE JUDGE:    Hartford.

20                  MS. VAN ORMAN:   Right. What might be helpful for  
21  the court is a little bit of a time frame on this.

22                  THE JUDGE:    Uh-huh (affirmative).

23                  MS. VAN ORMAN:   The first conversation with  
24  Ms. Daly (phonetic) a, according to an affidavit from Nancy  
25  Burlindy (phonetic) at Hartford, and I believe that was

1 submitted as an exhibit, that conversation occurred  
2 January 30th, 2002. The divorce occurred October of 2003,  
3 or excuse me, August of 2003. And Ms. Ellison passed away  
4 October of 2003. So we're not talking about a situation  
5 where Mr. Ellison came to the county. And apparently if he  
6 had some kind of a conversation at the county with whomever  
7 he had that conversation with, this was not anywhere near in  
8 time to when the divorce occurred.

9 This, there, there is no evidence, there's no  
10 allegation, there's nothing that Mr. Ellison ever came to the  
11 county and said I've had a divorce, or I've filed for  
12 divorce, it's pending, I have a life insurance policy, what  
13 do I do, let's sit down, who do I talk to, who is the person  
14 that I can talk to see what we can do. There's no  
15 allegations that anything like that ever occurred.

16 What he alleges, and this is just so farfetched,  
17 but somehow some time prior to January 30th of 2002, so we're  
18 talking about over a year and a half prior, he somehow goes  
19 to the county, talks to somebody, we don't know what date, we  
20 don't know who he spoke with, and he says whatever he says  
21 that somehow they told him yes, all you have to do is  
22 continue paying your premiums. But the notice that he  
23 needed to provide to the county was look, here's my divorce  
24 decree, or I've filed for divorce or something. But there's  
25 no allegations that anything like that ever happened. This

1 is just some kind of a conversation somewhere.

2 And I think it, Your Honor, you were very  
3 perceptive when you talked about a, what exception to the  
4 hearsay rule are we talking about here. 804 with the  
5 declarant unavailable. Who is the declarant? That's the  
6 thing. We need an identity, we need something other than  
7 some conversation with somebody who happened to be in the  
8 Utah County personnel building a year and a half prior. I  
9 mean, that is so far off I just don't see where there's any  
10 evidence to, to substantiate any kind of a conversation to  
11 prove that to therefore trigger the duty on the part of the  
12 county.

13 I thought the other information, Your Honor, that  
14 would be a, informative for Your Honor is a, the fact  
15 regarding the insurance policy being made available to  
16 Mr. Ellison. In Mr. Ellison's deposition, and I believe this  
17 was provided, on page 13 of his deposition he was asked,

18 Is it possible that at one of the  
19 benefit fairs you attended at the county  
20 that there were written materials  
21 available on the Hartford life insurance  
22 policy?

23 His answer: There may have been.

24 He says: Yes, I suppose it's  
25 possible.

1           Question: Is it also possible that at  
2           one of those benefits fair you were  
3           provided a copy of the Hartford life  
4           insurance policy?

5           He says: No.

6           How do you know that?

7           Well, if I would have received a copy I  
8           would have had it in my files.

9           So you keep all the copies of all of  
10          the health insurance information and the  
11          other information provided to you at the  
12          benefits fair?

13          Yes.

14          And you currently have that for as long  
15          as you've been employed?

16          He said: They give you new materials  
17          each year.

18          So you throw away the old ones?

19          He said: Except for life insurance.

20          He said: I do keep several years of  
21          health insurance.

22          And he was asked: Do you believe you  
23          would have asked anyone at Utah County in  
24          the personal department for a copy of the  
25          Hartford life insurance policy that they



1           would have given you a copy?

2           And he said: Yes.

3           He says: You don't know if they would  
4           or wouldn't?

5           He says: I don't know, ya.

6           We asked: Do you have any evidence  
7           that we could objectively look at that  
8           would say to a reasonable person that the  
9           county would not have given you a copy of  
10          the policy?

11          He says: No.

12          They that, they had the insurance fairs, the health  
13          fairs, the policy materials were made available there. I  
14          think that the county people have testified to that. If he  
15          would have ever asked he would have been provided a copy.  
16          Also those fairs are mandatory that the employees have to  
17          attend, they can't get out of attending those fairs. So I  
18          think that any kind of argument that he wasn't given a copy  
19          of the policy, there's never been any kind of an allegation  
20          that he ask for one and wasn't given it.

21          THE JUDGE: Okay. Thank you.

22          MS. VAN ORMAN: Thank you.

23          FURTHER ARGUMENT BY MR. CHRISTIANSEN

24          MR. CHRISTIANSEN: One last tiny point, because I  
25          think we've covered the ground.

1 I just wanted to remind you of two cases,  
2 Your Honor. The Pack versus Case case and the Rodowitz  
3 (phonetic) versus Massachusetts case. And both of those  
4 cases say that for estoppel or modification the alleged  
5 representation must be a specific and definite statement.

6 And the reason I think that's important is because  
7 of the line of questioning Your Honor was doing which was  
8 show me the representation where he can continue as a  
9 beneficiary. There's no representation in the record that  
10 he would continue as a beneficiary of the converted policy.  
11 And I think taking the Pack versus Case case and the Rodowitz  
12 (phonetic) versus Massachusetts case which requires a  
13 specific and definite statement it's not here, it's a missing  
14 piece of evidence.

15 Thanks, Your Honor.

16 COURT'S RULING

17 THE JUDGE: I, I think I know how I want to rule  
18 and a, candidly I'm inclined to rule now. I'm out of the  
19 office next week. If I wait two weeks to write this I'm  
20 going to have to refigure this all out again. So here  
21 goes.

22 First of all, I do not find that there's credible  
23 evidence to support either the first conversation with an  
24 unidentified county employee or a second conversation with  
25 someone at the Hartford company. The only evidence to

1 here. I don't think it would have been reasonable for  
2 Mr. Ellison to ignore the plain language of the contract in  
3 favor of whatever he thought he had heard from Ms. Daly  
4 (phonetic).

5 There's no, there's no evidence of fraud because  
6 there was no evidence of a misrepresentation to an existing  
7 fact, there's no evidence that there was reasonable reliance  
8 and there's no evidence of damages.

9 And similarly with regard to estoppel there's no  
10 evidence of reasonable reliance, there's no evidence of a  
11 misrepresentation by an appropriate agent, and most  
12 critically there's no evidence of damages.

13 So I'm going to grant the summary judgment for both  
14 the county and for the insurance company on those bases.

15 MR. CHRISTIANSEN: Would you like that, us to  
16 prepare that?

17 THE JUDGE: Yes. I think it would be very helpful  
18 if you would.

19 MR. CHRISTIANSEN: Thank you.

20 THE JUDGE: Thank you very much. Very well  
21 briefed, very well argued. Thanks to all of you.

22 WHEREUPON, the hearing was concluded.

23 =====

24

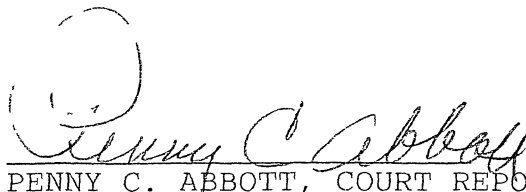
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REPORTER'S CERTIFICATION

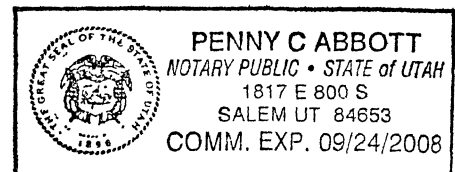
STATE OF UTAH )  
 ) SS.  
COUNTY OF UTAH )

I, Penny C. Abbott, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, do hereby certify that I received the electronically recorded CD #07-30-402 in the matter of Ellison vs. Utah County, et al, hearing date July 20, 2007, and that I transcribed it into typewriting and that a full, true and correct transcription of said hearing so recorded and transcribed is set forth in the foregoing pages numbered 1 through 64, inclusive except where it is indicated that the tape recording was inaudible.

WITNESS my hand and official seal this 20th day of May, 2008.



PENNY C. ABBOTT, COURT REPORTER/NOTARY  
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Notary Public, Comm Exp 9-24-08



**APPENDIX B**

**SIGNED ORDER GRANTING SUMMARY JUDGMENT  
IN FAVOR OF DEFENDANTS DATED  
JANUARY 22, 2008**

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Insurance Company

FILED

JAN 23 2008  
4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

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VAL M. ELLISON,  
  
Plaintiff,

vs.

UTAH COUNTY GOVERNMENT and  
HARTFORD LIFE AND ACCIDENT  
INSURANCE COMPANY, a Connecticut  
Corporation,

Defendant.

**[PROPOSED] ORDER GRANTING  
SUMMARY JUDGMENT IN FAVOR  
OF DEFENDANTS**

Case No. 050402012

Judge: Hon. James R. Taylor  
Division #7

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**INTRODUCTION**

1. On July 20, 2007, the Court heard oral argument on Defendant Hartford Life and Accident Insurance Company's ("Hartford") Motion for Summary Judgment and on Defendant Utah County Government's ("Utah County") Motion for Summary Judgment. Plaintiff Val M. Ellison was represented by Kenneth Parkinson of Howard Lewis & Petersen. Defendant Hartford was represented by Erik A. Christiansen of Parsons Behle & Latimer. Defendant Utah

County was represented by Kristin A. VanOrman of Strong and Hanni. After careful review of the briefs, all admissible evidence and oral argument, the Court hereby rules and orders as follows:

### **FACTUAL BACKGROUND**

2. Mr. Ellison's claims center around his contention that he is entitled to life insurance proceeds under an employee life insurance plan offered by Utah County ("the Plan"), his employer. The undisputed facts are that the Plan was offered by Utah County to its eligible employees and was funded by a group life insurance policy issued by Hartford to Utah County. The Plan permitted eligible Utah County employees to elect dependent life insurance coverage for their dependents. The Policy defines "Dependent" as "Your spouse" and "Your unmarried child." The Policy also states that dependent coverage terminates on the date when, "the Dependent no longer meets the definition of Dependent." A dependent whose coverage ends because he/she ceases to meet the definition of "Dependent" has the option under the Policy to convert his/her dependent coverage into a conversion policy. The Policy explains,

#### **How does an individual convert coverage?**

To convert life insurance, the individual must, within 31 days of the date group coverage terminates, make written application to Us and pay the premium for his age and class of risk.

3. It is undisputed that in about 1998, Mr. Ellison elected dependent life insurance coverage for Sherrie Ellison, his wife at that time. In 2001, Sherrie Ellison was diagnosed with pancreatic cancer, a condition that was terminal. During the period of her illness, Sherrie Ellison initiated divorce proceedings against Mr. Ellison. On August 21, 2003, the divorce was

finalized. Sherrie Ellison died on October 19, 2003. She never converted her group dependent life insurance coverage into an individual policy.

4. It also is undisputed that after Sherrie Ellison's death, Mr. Ellison made a claim for life insurance proceeds to Hartford. Hartford denied the claim on the grounds that Sherrie Ellison ceased to be eligible for dependent life insurance coverage after her divorce from Mr. Ellison, because she no longer met the definition of "Dependent."

5. Mr. Ellison claims, however, that prior to his and Sherrie Ellison's divorce, he had a conversation with someone at Utah County and that he believed that he spoke with two Hartford representatives wherein he was told that life insurance coverage for Sherrie Ellison could continue subsequent to their divorce. Mr. Ellison specifically identified in his interrogatory responses a call on January 30, 2003, and testified during his deposition that he was transferred to a second Hartford representative during that call. Mr. Ellison does not know the identity of the alleged other employee with whom he claims he spoke. Hartford has produced in discovery a recording of a single telephone conversation Mr. Ellison had with one of its representatives, Linda Daly.

6. Both plaintiffs and defendant's phone records revealed only one telephone call from plaintiff to Hartford. During that recorded phone call, Ellison spoke with Ms. Daly of Hartford's Medical Underwriting area. In that phone call with Ms. Daly, Ellison stated that Utah County informed him that he could continue insurance on his spouse, even if he and his wife divorced. He asked Ms. Daly if this was accurate. Ms. Daly responded,



I *believe* so yes. . . . I don't . . . I haven't heard anything as to why, I think that's your option if you want to . . . They're going to be payroll deducting for her so if you want to keep her on there, that's fine.

7. Ellison next told Ms. Daly that he needed a letter for the court. Ms. Daly asked if he had filled out a personal health statement, and he said that he had. Ms. Daly then responded:

I'm trying to think who would be . . . we're in the medical underwriting area and what we do is we simply underwrite the application, we really, *we don't administer the plan*. . . . Did your benefits or HR department tell you to call us?

8. Ellison responded his HR department had told him to call Hartford and said again that he needed something *in writing*. At that point, Ms. Daly responded:

You know what, I'm going to transfer you to another number that may be able to help you and hopefully they can, if they cannot, you know, feel free to call me back and we'll research it further to see who can help you.

At this point, Mr. Ellison asked for Ms. Daly's name to write down. She spelled her name for him and gave him another number to call.

9. According to the transcript, the call then terminated. There is no evidence on the transcript that Mr. Ellison was transferred to another person or number. The transcript also reveals that Mr. Ellison did not ask Ms. Daly what he needed to do, e.g. complete paperwork or otherwise, in order to effect the continuation of coverage on his ex-wife.

10. Neither Hartford, Utah County, nor Ellison has any documentary record or recording of any second phone call to Hartford.

11. At no time, as admitted by Mr. Ellison, did Mr. Ellison ask for or obtain a copy of the Policy.

## CONCLUSIONS OF LAW

12. Summary judgment under Rule 56 of the Utah Rules of Civil Procedure is appropriate when the pleadings, depositions, and affidavits on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Utah R. Civ. Pro. 56(b). All inferences that reasonably can be drawn from the facts should be drawn in favor of the nonmoving party. *See Ho v. Jim's Enter., Inc.*, 29 P.3d 633, 634 (Utah 2001); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The party opposing summary judgment has the duty to "set forth specific facts showing there is a genuine issue for trial." *DLB Collection Trust by Helgesen & Waterfall v. Harris*, 893 P.2d 593 (Utah Ct. App. 1995) (quoting Utah R.Civ.P. 56(e)). "[B]are contentions unsupported by any specification of facts in support thereof, raise no material questions of fact as will preclude entry of summary judgment." *Massey v. Utah Power & Light*, 609 P.2d 937, 938 (Utah 1980). Moreover, a party opposing summary judgment must do so with admissible evidence. *Gary Porter Constr. v. Fox Constr., Inc.*, 101 P.3d 371, 377 (Utah App. 2004).

13. As set forth in the pleadings and the undisputed admissible evidence before the Court, the Court holds that Mr. Ellison's claim for breach of contract against Hartford and Utah County fails as a matter of law because Sherrie Ellison was not covered by the Policy's unambiguous dependent coverage provisions once she divorced Mr. Ellison and no longer met the Policy's definition of "Dependent." *See Perkins v. Great-West Life Assurance Co.*, 814 P.2d 1125, 1129 (Utah Ct. App. 1991) (citing *Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989) and *Draughon v. CUNA Mutual Ins. Soc'y*, 771 P.2d 1105,

1108 (Utah Ct. App. 1989)) (stating that when interpreting an insurance policy, Utah courts look to the “four corners of the agreement” to determine the intent of the parties, and if that intent is clear and unambiguous, the court will give effect to it).

14. As set forth in the pleadings and undisputed admissible evidence before the Court, the Court also holds that Ellison’s breach of the covenant of good faith and fair dealing claim against Hartford fails as a matter of law because, in the insurance context, such a claim cannot be maintained if the insurer denied a claim that was “fairly debatable.” *Prince v. Bear River Mut. Ins. Co.*, 56 P.3d 524, 533 (Utah 2002) (citing *Morris v. Health Net of Calif., Inc.*, 988 P.2d 940 (Utah 1999); *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 465 (Utah 1996); *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 842 (Utah Ct. App. 1987)). The Policy states that dependent life insurance coverage ends on the date a dependent ceases to meet the Policy’s definition of “Dependent.” Sherrie Ellison ceased to meet the Policy’s definition of “Dependent” when her divorce from Mr. Ellison became final. For this reason, the Court concludes that Hartford’s denial of Mr. Ellison’s claim on these grounds is “fairly debatable.”

15. Based on the pleadings before the Court and the undisputed admissible facts before the Court, the Court concludes that Mr. Ellison’s fraud claim against Utah County and Hartford fails as a matter of law for multiple and independent reasons as set forth herein:

16. A party asserting a fraud claim bears the burden of proving each of the elements of that claim by clear and convincing evidence. *Prince v. Bear River Mut. Ins. Co.*, 56 P.3d 524, 536 (Utah 2002) (quoting *Franco v. Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198 (2001)).

17. Mr. Ellison's fraud claim fails because there is no admissible evidence that he reasonably relied upon the statements of Ms. Daly. The Court concludes, as a matter of law, that any reasonable person, after speaking to Ms. Daly, would have investigated further, obtained further paperwork, including a copy of the policy, and/or come back to Ms. Daly for more information. A reasonable person would not have done nothing, as Mr. Ellison admitted he did in this case.

18. Based on the undisputed facts and admissible evidence before the Court, the Court further concludes that there is no admissible evidence to support Mr. Ellison's assertion of a conversation with an unknown and unidentifiable Utah County employee regarding the continuation of life insurance benefits for Sherrie Ellison. Similarly, there is no admissible evidence to support Mr. Ellison's assertion of a separate conversation with an unknown and unidentifiable employee at Hartford.

19. The Court finds that, in the absence of any admissible evidence, Mr. Ellison's representations regarding his alleged communications with Hartford and Utah County are unreliable, inadmissible, and cannot be taken as a sufficient evidentiary and factual basis to establish the fact of or the content of those alleged conversations with unknown and unidentifiable persons.

20. Further, the only conversation that is documented, Mr. Ellison's January 30, 2002 conversation with Linda Daly of Hartford, is insufficient to establish reasonable reliance and extend the express terms of the life insurance policy.

21. The Court also concludes separately and independently that there was no reasonable reliance by Mr. Ellison as a matter of law because *Perkins v. Great-West Life Assurance Co.*, 814 P.2d 1125, 1129 (Utah Ct. App. 1991) controls the analysis of this issue. In *Perkins*, the Utah Court of Appeals held that an insured's reliance upon the post-contract representations of the insurers agent is not reasonable when those representations contradict the plain terms of the insurance policy and the insured has access to that policy. *Id.* at 1130; *see also Internet Law Library, Inc. v. Southridge Capital Management, LLC*, 223 F. Supp.2d 474, 485 (S.D.N.Y. 2002) (stating that reliance is unreasonable "as a matter of law" "where the statements relied upon are explicitly contradicted by a written agreement between the parties involved."); *Govt. Computer Sales, Inc. v. Dell Marketing, L.P.*, No. F04-0030 CV (RRB), 2005 WL 1713182 \*3 (Alaska 2005) ("Plaintiff could not reasonably have relied on representations so clearly inconsistent with its written contract and agreements."); *Jim Walter Homes, Inc. v Spraggins*, 853 So.2d 913, 916 (Ala. 2002) ("[A] party cannot reasonably rely on such a statement when the written . . . agreement signed by them clearly contradicts any such alleged statement." (citations omitted)). Because Mr. Ellison, with reasonable diligence, could have obtained a copy of his policy and discovered the requirements of the conversion provisions, his reliance on post-contract representations, if any, was unreasonable as a matter of law.

22. The Court also finds that no reasonable fact-finder could conclude that the transcript of the recording of the Daly call manifests an intent by Ms. Daly to deceive or misrepresent a fact. Thus, Mr. Ellison's fraud claim fails for this separate and independent reason as well.

23. The Court also finds that there was no misrepresentation regarding in existing material fact in this case, and that Mr. Ellison's fraud claim also fails for this separate and independent reason. ~~"[A] misrepresentation of intended future performance is not a representation concerning a 'presently existing fact' upon which a claim for fraud can be based unless [the plaintiff] can prove that [the defendant], at the time of the representation, did not intend to perform the promise and made the representation for the purpose of deceiving [the plaintiff]."~~ *Republic Group, Inc. v. Won Door Corp.*, 883 P.2d 285, 292 (Utah Ct. App. 1994) ~~(citing *Cerritos Trucking Co. v. Utah Venture No. 1*, 645 P.2d 608, 611 (Utah 1982)).~~ The representations alleged by Mr. Ellison in this case were all representations of future performance and, for this reason, cannot support Mr. Ellison's fraud claim.

24. The Court finds that Mr. Ellison's fraud claim fails separately and independently as a matter of law because there is no admissible evidence of damages. Specifically, there is no connection between Mr. Ellison's alleged loss and his claimed damages in this case. There is no admissible evidence from which the fact-finder can reasonably infer that Sherrie Ellison would have converted her group insurance policy into an individual policy, and there is no evidence that Mr. Ellison, rather than Sherrie Ellison's estate or heirs, would have been the beneficiaries of that conversion policy.

25. Mr. Ellison's estoppel claim against Hartford fails for many of the same reasons that his fraud claim fails as set forth herein:

26. First, to establish a claim of estoppel, a plaintiff must demonstrate reasonable reliance. As discussed above, Mr. Ellison's reliance was not reasonable as a matter of

undisputed fact or law. *See Perkins*, 814 P.2d 1125; *Internet Law Library*, 223 F. Supp. 2d 474; *Govt. Computer Sales*, No. F04-0030 CV (RRB), 2005 WL 1713182; *Jim Walter Homes*, 853 So. 2d 913.

27. Second, for the reasons set forth above, there is no admissible evidence of any misrepresentation by an employee of Hartford. Similarly, there is no admissible evidence of any misrepresentation by an employee of Hartford who had legal authority to bind Hartford. The representations of an employee are not binding upon a company unless those representations concern a matter made within the scope of the employee's agency. *See Wayment v. Clear Channel Broadcasting, Inc.*, 116 P.3d 271, 287 (Utah 2005). Based on the undisputed admissible facts before the Court, that is not the case here.

28. Finally, and most of all, for the reasons set forth above, there is no admissible evidence of damages to give rise to a claim of estoppel.

29. Mr. Ellison's negligence claim against Utah County fails as a matter of law because, as discussed above, there is no admissible evidence of any conversation between Mr. Ellison and Utah County wherein the County negligently represented to Mr. Ellison that life insurance coverage for Sherrie Ellison would continue after their divorce.

30. Mr. Ellison's negligence claim also fails because it is premised primarily upon Utah County's alleged failure to inform him of the Policy provisions and procedures, particularly the Policy's conversion procedures. However, Mr. Ellison could have, with reasonable diligence, obtained a copy of the Policy and informed himself regarding the Policy's provisions

and procedures Mr. Ellison, however, admits that he took no steps to obtain a copy of the Policy during the relevant time period.

### GRANTING OF MOTION FOR SUMMARY JUDGMENT

31. For all of the reasons set forth above, the Court concludes that Mr. Ellison has failed to present any genuine factual disputes sufficient to forestall summary judgment in favor of Defendants under Rule 56 of the Utah Rules of Civil Procedure. The Court therefore finds that all of Plaintiff's claims fail as a matter of law, and are hereby dismissed, with prejudice.

32. The Court hereby grants summary judgment in favor of Hartford and Utah County on all of Plaintiff's claims, all of which are hereby dismissed, with prejudice.

DATED this 22 day of Jan, 2008

  
  
JUDGE JAMES R. TAYLOR

Approved as to form:

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Kenneth Parkinson  
Counsel for Plaintiff

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Counsel for Utah County Government



## **APPENDIX C**

### **TELEPHONE TRANSCRIPT OF ELLISON PHONE CALL WITH HARTFORD INSURANCE**

## TRANSCRIPTION OF ELLISON PHONE CALL

Daly: Medical Underwriting, this is Linda, how can I help you?

Ellison: Hi Linda, Val Ellison calling, from uh Utah.

Daly: Okay.

Ellison: Where are you guys at?

Daley: Connecticut.

Ellison: Connecticut? Okay, I guess so, Hartford, right?

Daly: Yeah.

Ellison: Um, I guess, uh, I work for Utah County Government.

Daly: Okay.

Ellison: And so you guys apparently have taken over for our life insurance, for this year. And My wife and I are getting a divorce, but personnel told me that you can continue insurance on your spouse even if you get divorced, is this accurate?

Daly: I believe so yes. I don't ... I haven't heard anything as to why. I think that's your option if you want to and you continue to ... they're going to be payroll deducting for her so if you want to keep her on there, that's fine.

Ellison: Now, uh, what I will need then is just a letter stating so for the court, saying that it is possible and then I will tell them that I will continue it.

Daly: What did ... Have you filled out a personal health statement yet, or no?

Ellison: Well, yeah, from way back, ya know. I've been with the County for a long time so it's just been coming out of my payroll forever but it changes life insurance company from year to year ... or maybe every couple years ... so yeah, we did, a long time ago.

Daly: I'm trying to think who would be ... we're in the medical underwriting area and what we do is we simply underwrite the application – we really, we don't administer the plan.

Ellison: Okay.

Daly: So, did your benefits or you HR department tell you to call us?

Ellison: They did. They gave me your phone number, they said, yes it is true that it can continue, but I said I needed something in writing, and they said, well, call the insurance company.

Daly: You know what, I'm going to transfer you to another number that may be able to help you, um, and hopefully they can. If they cannot, you know, feel free to call me back and we'll research it further to see who can help you ...

Ellison: Okay, let me write down your name again ...

Daly: Okay.

Ellison: What was it ...

Daly: Linda and my last name is Daly, D-A-L-Y. The number I'm going to give you, I'm not sure if anybody's going to be there because it's 6:00 here and you came in right before the phones get shut off.

Ellison: Gotcha, okay.

Daley So the number is 1-800-523-2233 and they're more on the administrative side of it, the billing side, so they may be able to help you. If they can't, you can call me back and my number is 1-800-331-7234 and I'll give you my extension, which is 39642, and I'll try to research it here and see what I can find out if they're unable to help you. And again, the same thing stands for here, though our phone gets shut off at 6:00, so I don't know if you'll be able to get back in.

Ellison: Good.

Daly: Okay.

Ellison Thank you Linda.

Daly: You're welcome.

Ellison: Bye.

Daly: Bye, bye.

**MAILING CERTIFICATE**

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 25 day of August, 2008.

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SECRETARY