

2008

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

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 AND ACCIDENT INSURANCE  
COMPANY, A CONNECTICUT CORPORATION,

Defendants-Appellees.

**APPELLEE UTAH COUNTY'S  
ANSWER BRIEF**

**Case No. 20080145-CA**

**Oral Argument Requested**

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On Appeal from the Fourth Judicial District Court, Provo Department  
The Honorable Judge James R. Taylor  
Case No. 050402012

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## **STATEMENT OF JURISDICTION**

This appeal comes from the summary judgment order issued by the Fourth Judicial District Court, Provo Department, dated January 22, 2008. The Utah Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(a)(j).

## **ISSUES ON APPEAL**

Whether or not discovery has revealed disputed and material facts to support Plaintiff's claims against Utah County Government.

## **SUMMARY OF THE ARGUMENT**

This case arises out of a dispute concerning the denial of Plaintiff's insurance claim on his ex-wife's dependent life insurance policy. Plaintiff claims that he is entitled to the life insurance proceeds as the former husband of the named insured, Sherrie Ellison. Plaintiff's basis for this claim is that he was not informed by a certain, unidentified Utah County government employee and Hartford Insurance representatives concerning the status of the dependent life insurance policy when he got divorced and the implications for his role as the beneficiary.

The material facts are largely undisputed in this case. At all relevant times, Plaintiff was a full-time employee of Utah County. As a benefit of his employment, he qualified to have life insurance on his dependents, including his wife at the time, Sherrie Ellison. Plaintiff elected to take out a dependent life insurance policy for his wife and the payments were made via deductions from his paycheck. Plaintiff and Ms. Ellison divorced in late August, 2003 and the deductions continued to be withdrawn from his paycheck until shortly after Ms. Ellison's death in late October, 2003.

Approximately a year before his divorce and his ex-wife's death, Plaintiff claims to have spoken with an unknown and unidentified Utah County employee in the hall of

the Utah County Government building. Plaintiff claims that this unidentified County employee informed him that his soon-to-be, ex-wife could continue to have dependent life insurance coverage as long as he continued to pay the premiums, which he could confirm with the insurance carrier, Hartford. Plaintiff claims that he followed up with Hartford and received confirmation that an ex-spouse could continue to have life insurance coverage if the premiums were paid.

Approximately a week after her death, Plaintiff made a claim against Ms. Ellison's dependent life insurance policy. Plaintiff's claim was denied because, after the divorce, Ms. Ellison no longer qualified as a dependent under the definition in the policy. Moreover, his claim was denied because Ms. Ellison, as the named insured, did not go through the conversion process for her dependent policy to ensure Plaintiff's continuation as beneficiary.

After an unsuccessful appeal of the denial of his claim, Plaintiff filed a civil action against Utah County government for the alleged oral misrepresentations made by this unknown and unidentified County employee with respect to keeping a former spouse as a dependent in a supplemental dependent life insurance policy. The trial court granted Utah County's motion for summary judgment in a respects for lack of evidence.

#### **STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. Plaintiff began full-time employment with Utah County in July 1995. See Deposition of Val Ellison ("Ellison Dep.") at p. 7, Record p. 375.



2. As a benefit of his employment, Utah County provided life insurance to Plaintiff as well as supplemental life insurance coverage for his dependents, including his then-wife Sherrie Ellison. Complaint ¶ 11, Record p. 10.

3. At that time, Plaintiff elected to purchase a dependent life insurance policy in the amount of \$200,000 in the name of Sherrie Ellison. Id. at ¶ 12.

4. Plaintiff paid the premiums on Ms. Ellison's supplemental dependent life insurance policy with automatic deductions from his paycheck. Id. at ¶ 14

5. Ms. Ellison was diagnosed with terminal pancreatic cancer in 2001. Id. at ¶ 15.

6. Plaintiff and Ms. Ellison, represented by respective counsel, filed for divorce and this Court subsequently entered a ten-page Decree of Divorce on August 21, 2003. See Decree of Divorce, Record pp. 451-461.

7. The divorce decree ordered Plaintiff to provide health and dental insurance for their minor children and be responsible for the premiums and costs to maintain such insurance. Id. at p. 6, ¶ 8, Record p. 456.

8. The decree also ordered that Ms. Ellison "be entitled to obtain health insurance under the COBRA Plan" through his employment with Utah County. Id. at ¶ 9.

9. With respect to life insurance, the decree also stated that "[i]t is reasonable and proper [for Plaintiff] to maintain a life insurance policy on his life as available through his place of employment at reasonable cost during the children's minority with as

much coverage as possible, with the children as the sole beneficiaries and Wells Fargo Bank designated as the trustee.” Id. at p. 10, ¶ 18, Record p. 452.

10. Nothing in the Decree of Divorce speaks to obtaining or maintaining a life insurance policy on Ms. Ellison’s life, nor the designation of beneficiaries for any life insurance on her. Id.

11. Ms. Ellison died on October 27, 2003. Complaint ¶ 19, Record p. 9.

12. In anticipation of their divorce, but unsure as to the exact time frame, Plaintiff claims to have spoken with an unknown and unidentified employee of the “County’s Human Resources Department” sometime at “the end of 2001, beginning of 2002”, or “end of 2002, beginning 2003,” to “continu[e] his insurance policy on his terminally ill ex-wife after the divorce.” See Complaint ¶ 17, Record p. 9; see also, Ellison Dep., pp. 17-18, 51, Record pp. 364-365, 331.

13. Prior to their divorce, Plaintiff informed Ms. Ellison of the supplemental dependent life insurance policy on her name through his employment. See Ellison Dep., pp. 58-59, Record pp. 323-24.

14. Unsure as to the dates, Plaintiff alleges that this unknown and unidentified employee of Utah County’s Personnel office informed him that Ms. Ellison’s dependent life insurance coverage would continue after their divorce as long as he continued to pay the premiums, but that he should confirm with the insurance carrier, Hartford. Id. at p. 18, Record p. 364.

15. Plaintiff alleges that nobody from Utah County government informed him at any time of a required procedure to convert Ms. Ellison's dependent life insurance policy after their divorce. Id.

16. After his divorce, but before Ms. Ellison's death, Plaintiff was informed by Laura Hammish, a county Personnel department employee, that leaving Ms. Ellison on his health insurance would constitute insurance fraud. Id. at pp. 66-68, Record pp. 314-16; see also 09/16/2003 E-mail, Record p. 447.

17. Plaintiff also testified that he spoke with Peggy Poulsen, Utah County's benefits specialist, "two or three" times concerning a claim for Ms. Ellison's dependent life insurance. See Ellison Dep., p. 33, Record p. 349.

18. Approximately one week after Ms. Ellison's death, Plaintiff e-mailed several Personnel office employees, including Peggy Poulsen, asking if anyone remembered a conversation "about continuing life insurance on my wife even if we got divorced." See 11/16/06 e-mail, Record p. 447.

19. Ms. Poulsen replied that she "[did] not recall having a conversation with [Plaintiff] on anything other than COBRA (which continues health and dental insurance) and the QDRO for retirement issues" and that she "was not even aware [Plaintiff] had a life insurance policy on [Ms. Ellison]." Id.

20. Ms. Poulsen explained in her responsive e-mail to Plaintiff that, as a divorcee herself, she was “quite certain” that she “would not have told [Plaintiff] Sherrie could stay on any of [his] policies once [he was] divorced.” Id.

21. She also informed Plaintiff that she could not recall any county employee making a life insurance claim on an ex-spouse and having been paid. She mentioned that she was confident that she would remember such an occurrence because there were not a lot of life insurance claims handled by the Personnel office. Id.

22. After Ms. Ellison’s death, Ms. Poulsen informed Plaintiff that he “couldn’t file a claim, [because] Sherrie was no longer a dependent.” See Ellison Dep., at p. 34, Record p. 348.

23. Concerning the conversion of a dependent life insurance policy, Ms. Poulsen testified as follows:

Q. What’s your understanding of who would have to fill out that form in order for supplemental life insurance to be provided to an ex-spouse?

A. It’s my understanding that the person losing the coverage because they’ve lost their dependent status needs to request the form and complete it.

See Deposition of Peggy Poulsen (“Poulsen Dep.”), p. 57, Record 443.

24. Ms. Poulsen also explained the employee’s responsibility, if he decided to continue insurance coverage for a spouse after divorce: “[T]he employee needed to tell the spouse they no longer had dependent coverage, and needed to contact the Hartford to

do a conversion, or to contact Personnel to find out the proper procedure.” Id. at 26, Record p. 444.

25. Ms. Poulsen also testified that the employee “need[ed] to provide a copy of the divorce decree within 30 days and apply for a conversion policy.” Id. at 75, Record p. 438.

26. Ms. Poulsen also explained that she did not know that Plaintiff “at any time ever provide[d] Utah County with any written documentation from his ex-spouse that indicated that his ex-spouse wanted to continue life insurance.” Id. at p. 58, Record p. 442.

27. Ms. Poulsen was not aware “of any communication in any form from Sherrie Ellison at any time which informed Utah County that Sherrie Ellison wanted to continue supplemental life insurance after her divorce to Mr. Ellison.” Id.

28. Had Plaintiff informed Ms. Poulsen about dependent life insurance for an ex-spouse, she “would have informed him that the ex-spouse needed to contact Personnel for conversion information, and would apply for conversion through Hartford.” Id. at p. 61, Record p. 441.

29. Copies of the Hartford policy and information packets, which included termination information and information on conversion of a life insurance policy after it terminates, were made available to all employees, which included Plaintiff. Id. at pp. 33, 59-60, Record 188, 162-161. Ms. Poulsen testified that Utah County held a mandatory

Benefits Fair each year in which ample information from each insurance carrier was provided and available to Utah County employees. Id. at 19-22, Record 199-202.

Hartford in particular had a booth, and a representative named Tori at the Benefits Fair in 2002. Id. at 18:16-25, Record p. 203.

30. Prior to the death of Plaintiff's ex-wife, Utah County did not receive a request indicating that Ms. Ellison intended to continue her life insurance through Hartford or needed to convert the dependent life insurance policy. Id. at 73-74, Record pp. 440-439.

31. When asked to produce evidence that his ex-wife would have completed and signed a conversion form to continue supplemental life insurance on her, and that she would have named Plaintiff as the sole beneficiary, Plaintiff clearly testified that he does not have "any written evidence" and only supposed and assumed that he is "quite sure she would have" designated him as the beneficiary simply from "just knowing her." Ellison Dep., pp. 93-94, Record pp. 289-88. There is no other testimony supporting this assumption regarding Ms. Ellison's disposition.

32. "Dependent" is a defined term under the Hartford life insurance policy. The policy contract defines it as being "Your spouse" and "Your unmarried children." See Hartford Memo. p. 4. Record p. 406 (Ex. 2 at 38.).

33. The policy contract provided that dependent coverage ends on the date when “the Dependent no longer meets the definition of Dependent.” Id. In this case, it ended on August 21, 2003—the date this Court entered its Decree of Divorce.

34. Under the “conversion provision” of the dependent life insurance policy, the named insured, Ms. Ellison, “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.” Id.

### **ARGUMENT**

Rule 56(c) of the Utah Rules of Evidence provides that judgment “shall be rendered 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.” (Emphasis added.) 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) (emphasis added). 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) (emphasis added).

In the present case, there are no disputed issues of material fact, indeed, there are very few disputed facts at all. The few facts that are disputed, are not material to the claims and allegations raised by Plaintiff or they are merely bare contentions, unsupported by the evidence. Because there are no genuine issues of material fact, the trial court could and did appropriately render judgment as a matter of law on all of Plaintiff's claims.

The primary purpose of summary judgment "is to pierce the allegations of the pleadings, show that there is no genuine issue of material fact, although an issue may be raised by the pleadings, and that the moving party is entitled to judgment as a matter of law." Dupler v. Yates, 351 P.2d 624, 629 (Utah 1960). The aim of a motion for summary judgment is also to determine whether the "controversy can be settled as a matter of law, that will save the time, trouble and expense of a trial." Rich v. McGovern, 551 P.2d 1266, 1268 (Utah 1976).

**POINT I. PLAINTIFF FAILS TO ESTABLISH A NEGLIGENCE CLAIM FOR LACK OF EVIDENCE OF PRIMA FACIE ELEMENTS.**

To prevail in a negligence claim, a plaintiff has the burden of proving four elements: duty, breach of duty, causation and damages. See Rocky Mountain Thrift



Stores v. Salt Lake City Corp., 887 P.2d 848, 851 (Utah 1994). Plaintiff cannot provide enough evidence to establish these elements at trial.

**A. Utah County Does Not Owe Plaintiff a Duty in this Matter.**

“It is axiomatic that one may not be liable to another in tort absent a duty.”

Loveland v. Orem City Corp., 746 P.2d 763, 765-66 (Utah 1987). A duty of care is “an essential element of a negligence claim.” Owens v. Garfield, 784 P.2d 1187, 1189 (Utah 1989). “Duty is a question of whether the defendant is under any obligation for the benefit of a particular plaintiff” and determining if such duty exists is “entirely a question of law to be determined by the court.” Ferree v. State, 784 P.2d 149, 151 (Utah 1989).

In the present case, extensive discovery has failed to produce any evidence substantiating Plaintiff’s negligence claim because there is no evidence supporting Plaintiff’s allegations that Utah County owed him a duty. Plaintiff asserts that Utah County government owed him a legal duty to instruct him on how and when to convert a supplemental dependent life insurance policy. In so doing, Plaintiff’s negligence claim asserts a heretofore, unknown legal duty owed by an employer to its employee with respect to providing complete and accurate information about his benefits, such as a life insurance policy at issue in this case. In other words, Plaintiff asked the trial court to create a common law duty by Utah County to, not only make a Hartford representative and information packet available to him at a job fair, but to affirmatively detail and communicate the process by which his potential ex-wife may convert her dependent life

insurance policy after divorce. No such duty exists under Utah law and should not be created under the facts of this case.

In Larson v. Wycoff Company, the Utah Supreme Court affirmed summary judgment for an employer who was sued after its employee was denied life insurance benefits for his deceased son. See, 624 P.2d 1151 (Utah 1981). In Larson, the plaintiff began working for Wycoff Co. as a part-time dock worker. Although he did not initially receive benefits, Larson eventually became a full-time employee and obtained benefits that included life insurance and dependent life insurance coverage. Id. at 1153. In addition to his own policy, Larson obtained a \$2,000 dependent life insurance policy on his son. Id.

Approximately one year later, Larson transferred to a different position with Wycoff and his hours were reduced to 25-30 per week. Id. The reduction in hours meant that Larson no longer qualified for benefits under the terms of the policy, which stated that “all active, full-time employees may be included in the company’s group benefit plan the first of the month following completion of thirty (30) days of service, provided they complete an enrollment card as required by the personnel office and they are working as full-time employees 40 or more hours per week.” Id. Because Larson was no longer employed full-time, the insurance carrier denied his claim for benefits. Larson sued his employer claiming they had breached a duty to inform him that his benefits had been terminated. See id.

In affirming summary judgment for the employer, the Utah Supreme Court relied upon the general proposition that an employer need not give notice of a policy lapsing “in the absence of a policy provision or statute requiring notice.” Id. at 1154 (quoting American Western Life Ins. Co. v. Hooker, 622 P.2d 775 (Utah 1980)). The Utah Supreme Court reasoned that Larson was on notice of the terms of the insurance contract, so his employer could not be held liable. See id.

For the same reasons as those elucidated in Larson, the Court should affirm summary judgment in favor of Utah County in the present case. The Hartford policy governed the relationship between Hartford and Plaintiff, and Plaintiff knew or should have known that, “[u]nless continued in accordance with the Exception to Termination section, a covered Dependent’s insurance will terminate on the earliest of: . . . the date you are no longer eligible for dependent coverage [or] the date the dependent no longer meets the definition meets the definition of dependents.” Likewise, there is no policy provision or statute requiring notice of the termination of the dependant life insurance policy in this matter.

Under the definition section of the insuring contract, a dependent is defined as “your spouse.” On August 21, 2003, when Ms. Ellison divorced her husband, she was no longer his spouse and no longer his dependent. As in Larson, Plaintiff was adequately informed of the termination provisions of the insurance coverage, and therefore **he** was responsible for determining his own insurance needs and providing for them when his

circumstances changed. Plaintiff's bare allegations that he stopped some unknown employee of the County to talk about a continuation of his soon to be ex-wife's life insurance is not enough to create a duty in this case.

Because there is no principle of common law, no policy provision and no statute that required Utah County to give Plaintiff notice that Ms. Ellison's dependent life insurance coverage terminated when she no longer qualified as a dependent, Plaintiff's negligence claim against Utah County fails as a matter of law for a lack of duty.

**B. There is no Evidence that Utah County Breached any Duty.**

Assuming for the sake of argument that Utah County owed a duty to maintain complete and orderly files with respect to employee fringe benefits and to affirmatively inform Plaintiff of how to convert a dependent life insurance policy, the documentary evidence and deposition testimony fail to show how Utah County breached this duty.

Plaintiff's own testimony clearly shows that he was told to confirm the status of life insurance coverage for his soon-to-be ex-wife with the insurance carrier, Hartford. Therefore, any duty that Plaintiff alleges was owed him by Utah County, was fulfilled in referring Plaintiff to the insurance carrier for verification and for further instructions as to how to convert and continue to insure his soon-to-be ex-wife.

Furthermore, holding Utah County liable because it referred Plaintiff to Hartford or did not inform him regarding the necessity of converting the policy or continue to insure his ex-wife would essentially mean that Plaintiff did not have a personal

responsibility to educate himself with the insurance policy and any conversion process. It is undisputed that Utah County held a benefits fair every year and that Hartford had a booth with all the information about their policy available in 2002. The County made information and copies of the policy, including the conversion provision, available to Plaintiff. It was the plaintiff's responsibility to read and understand his own policy and Plaintiff should be held responsible for his own lackadaisical approach to ensuring the dependant life insurance continued when he knew that his wife was terminally ill and knew that they would soon be divorced. Indeed, considering these facts, Plaintiff is in a better position than anyone regarding his need to learn about that process for ensuring the dependent policy's continuation after his divorce.<sup>1</sup>

**C. Utah County's Actions Did not Cause Plaintiff's Injury.**

With respect to the prima facie element of causation, "an essential element in a negligence action is that the plaintiff establish the necessary connection between the defendant's negligence and the plaintiff's injury." Weber v. Springville City, 725 P.2d 1360, 1367 (Utah 1986). The Utah Supreme Court explained in detail:

A plaintiff's inability to establish evidence of factual cause is fatal to his or her negligence claim. The classic formulation for determining factual cause is that a defendant's negligent act or omission must be a necessary antecedent to the plaintiff's injury. . . . The plaintiff must introduce evidence which affords a

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<sup>1</sup> There is no evidence that Utah County personnel knew that Plaintiff's wife was ill prior to his divorce. Indeed, Plaintiff cannot testify that he ever fully informed anyone at Utah County of the extent of his wife's illness. (See Ellison Dep. pp. 106-108; Record pp. 276-274.)

reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such, causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

Id.

Assuming, for the purpose of a Motion for Summary Judgment only, that Utah County in fact owed a legal duty to Plaintiff in this matter, the documentary evidence and deposition testimony fail to establish how the comments of an unknown and unidentified Utah County employee, that Ms. Ellison's life could continue to be insured as Plaintiff's dependent after their divorce, was the proximate cause of Plaintiff's alleged damages. As the Supreme Court explained in Weber, Utah County's negligent act or omission must be a necessary antecedent to the denial of Plaintiff's claim for the dependent life insurance policy on his former wife. In this case, there is a complete lack of evidence in support of the causal connection between the comments by the mystery Utah County employee and the denial of the claim.

Without this evidentiary support, Plaintiff's only recourse to prove causation by a series of assumptions, speculations, and personal belief. First, he asks the court to assume that he would have disregarded the mis-information he allegedly got from Hartford about continuing his ex-wife's policy and demanded a conversion form despite the fact that they told him he did not need one. Second, he asks the court to assume that his wife would have elected to convert her dependent life insurance policy and then name him as the

beneficiary after their divorce; despite any evidence to support that she would have done so. Third, he asks the court to believe that Hartford would have approved the claim and he would have received the \$200,000 from the policy. Clearly, Plaintiff's speculation about the way things would have happened and his rank conjecture of his ex-wife's intent is insufficient evidence to conclude that Plaintiff was damaged as a result of Utah County's actions.

In light of the foregoing, judgment as a matter of law is warranted in this case because Plaintiff fails to establish the prima facie elements of negligence. Namely, he fails to establish any alleged legal obligation owed by Utah County to him, breach of the alleged duty, and proof of a causal connection between the denial of his claim and the statements of an unknown Utah County employee that as long as he kept paying the premiums after divorce, he would receive the proceeds of the dependent life insurance after his wife's death.

**POINT II. PLAINTIFF'S CLAIM FOR BREACH OF CONTRACT HAS NO SUPPORT IN THE FACTS OR THE LAW.**

"The elements of a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking performance, (3) breach of the contract by the other party, and (4) damages." Bair v. Axiom Design, LLC, 20 P.3d 388, 392 (Utah 2001).

Plaintiff claims that his employment contract was breached by Utah County when an unidentified county employee allegedly informed him that the dependent life insurance

policy on the name of his soon-to-be ex-wife would continue as long as the premiums were paid. Plaintiff further claims that the breach of contract occurred when he was allegedly not informed of the procedure to convert the life insurance policy on his dependent spouse after the divorce. Plaintiff's claim for breach of contract fails as a matter of law because he cannot establish and prove the essential elements of the claim.

In the first instance, Plaintiff has not produced a written contract between his employer, Utah County, that would detail the scope of the contractual relationship. However, even assuming that Plaintiff is relying on a common law, at-will employment relationship as the underlying contract in his claim, he merely raises the allegation that Utah County was contractually obligated to him to communicate or provide information concerning fringe benefits, including supplemental life insurance on his dependents. Absent evidence of a written contract, or an oral contract, Plaintiff cannot prove the first element of a *prima facie* claim for breach of contract—an actual contract.

The minor disputes over whether Utah County handed Plaintiff a copy of the policy or simply made it available at the annual job fair and whether the mystery employee told him about necessity of conversion after his divorce are immaterial because Plaintiff has not produced a contract indicating that such action or inaction would be a breach.

Plaintiff alleges that Utah County failed to perform its part of the employment agreement, yet he can only produce his own bare allegations that the erroneous, out-of-



court comments of an unknown and unidentified employee concerning the status of his soon-to-be ex-wife's dependent life insurance was a breach of the employment contract. Plaintiff claims that he was misinformed by the mystery Personnel employee and that he relied on the oral representations made to him prior to divorcing and prior to the death of Ms. Ellison. However, Plaintiff fails to provide any information regarding the identity of the employee, asking this Court only to take his word at face value that her actions were a breach of the contract. Therefore, not only is there no proof of an actual contract, there is no evidentiary support for the performance of either party.

Plaintiff's breach of contract also fails because he has failed to produce evidence in support of his damages. Breach of contract damages are necessary to place the aggrieved party in the same economic position the party would have been in if the contract was not breached. See Mahmood v. Ross, 990 P.2d 933, 937 (Utah 1999).

The Utah Supreme Court has offered the following explanation concerning damages arising out of a breach of contract claim:

Typically, there are two types of damages a non-breaching party can recover in an action for breach of contract: "general damages, which flow naturally from the breach, and consequential damages, which, while not an invariable result of breach, were reasonably foreseeable by the parties at the time the contract was entered into." Id. (citing Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985)).

To recover consequential damages, a non-breaching party must prove (1) that consequential damages were caused by the contract breach; (2) that consequential damages ought to be allowed because they were foreseeable at the time the parties contracted; and (3) the amount of consequential

damages within a reasonable certainty.

Mahmood, 990 P.2d at 937-38. In Billings v. Union Bankers Ins. Co., 918 P.2d 461, 466 (Utah 1996), the Court ruled that consequential damages are limited to those reasonably foreseeable or contemplated by the parties when contract was entered into.

Assuming, only for the purposes of this appeal, that Plaintiff has evidentiary support of an employment contract, Plaintiff fails to show any general or consequential damages resulting from the alleged breach of the contract by Utah County. It is well-established that the purpose of breach of contract damages is to place the plaintiff in an economic position that he would have been in had the breach not occurred.

Plaintiff cannot prove general damages because no evidence exists that he incurred any damages as a result of his reliance on the comments of an unknown Utah County employee on an unknown date. Plaintiff argues that he is entitled to \$200,000 for the life of his ex-wife after they divorced because his claim was denied by Hartford due to Ms. Ellison's failure to convert the dependent life insurance policy after their divorce. However, Plaintiff does not provide any evidence that Ms. Ellison's failure to convert the policy was due to the comments of the unidentified personnel employee—the court is to simply assume that she would have converted it had Plaintiff been told about the conversion by the personnel employee.

Regardless, Plaintiff was advised by the employee that he should confirm with the insurance company what steps must be taken to change the status of a dependent policy

after he and his spouse divorced. Thus, the onus was on the plaintiff to educate himself and arrange his own affairs in anticipation of his divorce; the same way he did for his own health, dental, and life insurance and for the benefit of his minor children in the divorce decree. Plaintiff cannot show that he would have asked his wife to convert the policy (despite the information given him by Hartford), that she indeed would have converted it and that Hartford would have processed and paid the claim.

With regard to the recovery of consequential damages, Plaintiff fails to prove that his alleged consequential damages were caused by the breach of his employment contract by Utah County. Specifically, Plaintiff fails to establish that he incurred any consequential damages because no such damages were foreseeable at the inception of his employment in 1995. As the court explained in Mahmood, to recover consequential damages, the plaintiff must prove “that consequential damages ought to be allowed because they were foreseeable at the time the parties contracted.” 990 P.2d at 938. Because the damages were not reasonably foreseeable or contemplated by Plaintiff and/or Utah County in 1995, Plaintiff’s claim for breach of contract fails as a matter of law.

**POINT III. PLAINTIFF FAILS TO PROVIDE EVIDENCE OF FRAUD  
ON THE PART OF UTAH COUNTY GOVERNMENT.**

Rule 9(b) of the Utah Rules of Civil Procedure provides that “in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” In Taylor v. Gasor, 607 P.2d 293, 294-95 (Utah 1990), the Supreme Court

noted the following:

A finding of fraud must be based on the existence of all its essential elements, i.e., the making of a false representation concerning a presently existing material fact which the representor either knew to be false or made recklessly without sufficient knowledge, or the omission of a material fact when there is a duty to disclose, for the purpose of inducing action on the part of the other party, with actual, justifiable reliance resulting in damage to that party. . . . As stated in Lundstrom v. Radio Corporation of America, 405 P.2d 339, 341 (1965), “fraud is a wrong of such nature that it must be shown by clear and convincing proof and will not lie in mere suspicion or innuendo.”

Accordingly, the law requires that averments of fraud be pled with particularity. See id.

In this case, Plaintiff’s fraud claim fails for lack of evidentiary support.

Specifically, Plaintiff has failed to establish the identity of the Utah County Personnel employee whom he claims misinformed him; Plaintiff has failed to establish by clear and convincing evidence that the oral representations made by this mystery personnel employee were actually made; and Plaintiff cannot show that the (unidentified) misrepresentor knew the comments she made were false and/or reckless. Absent more specific or concrete evidence supporting these essential elements of fraud, Plaintiff’s claim for fraud fails as a matter of law.

Even assuming, for the sake of argument, that the Plaintiff’s allegations are true and he was told by Utah County that his es-wife’s life insurance would continue if he simply paid his premiums, he admits to also being informed by the mystery employee to confirm the information directly with the insurance carrier, Hartford. This fact is critical because it shows that there was no intent to deceive Plaintiff and that the comments were

not recklessly made; the mystery employee told Plaintiff what she believed to be the truth, but advised him to confirm her comments with the insurance carrier.<sup>2</sup> Therefore, under Plaintiff's version of the facts, there still can be no fraud.

Plaintiff spends many pages of his appeal brief arguing that whether he acted with reasonable diligence or reasonably relied upon the representations by Utah County are questions of fact. While that may or may not be true, it is wholly irrelevant in this matter because Plaintiff has failed to show that a representation was actually made- a requirement under Utah law. See Franco v. Church of Jesus Christ of Latter-Day Saints, 21 P.3d 198, 207-08 (Utah 2001). Because Plaintiff relies solely on his own unsubstantiated testimony that a Utah County employee made an erroneous comment about the conversion of his wife's supplemental dependent life insurance policy, he cannot show by clear and convincing evidence that the statement upon which he bases his fraud claim was actually made and cannot succeed at trial.

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<sup>2</sup>It is worth noting that a Divorce Decree was entered after deliberations and negotiations between each parties' legal counsel. The Divorce Decree is specific in the obligations and responsibilities of each party with respect to the allocation of assets and debts, visitation rights, and including several provisions concerning insurance. In particular, the Divorce Decree is detailed and explicit with respect to Plaintiff's responsibility to have health and dental coverage for the minor children **as well as to insure his own life** through his employment. Noticeably absent however, is any information concerning a life insurance policy on Ms. Ellison. A detailed divorce decree, negotiated with the assistance of counsel, would also have mentioned Ms. Ellison's dependent life insurance policy and her intent to leave Plaintiff as the beneficiary if there was indeed such an agreement.

Discovery has failed to produce any evidence that the statement was made in the first place, but even if the statement was made, no evidence exists as to who made it. Without knowledge of, or the ability to establish, the identity of the person Plaintiff blames for misinforming him, plaintiff cannot prove to a jury the comment was made. Simply stated, Plaintiff's allegations must be substantiated by the evidence, and none has been produced and discovered in this case. See Winter v. Northwest Pipeline Corp., 820 P.2d 916, 919 (Utah 1991) ("allegations of a pleading or factual conclusion of an affidavit are insufficient to raise a general issue of fact.").

To establish a fraud claim, Franco also requires a misrepresentation to be made with "insufficient knowledge upon which to base such representation," which Plaintiff also fails to prove with clear and convincing evidence. Id. In particular, plaintiff testified that was informed by the mystery county personnel employee to contact the insurance company "to make sure or to have any other questions answered." (Ellison Dep., p. 106; Record p. 276.) Clearly, plaintiff was referred to Hartford for substantiation and clarification. Therefore, Plaintiff's own testimony shows that the county employee did not have an intent to deceive or made her comment with insufficient knowledge, rather referred him to the insurance company for clarification and confirmation. Plaintiff acted on the statement and called Hartford, who allegedly informed him that as long as premiums were paid, his wife's life would be covered after the divorce. Thus, any alleged damage plaintiff incurred was not the result of any actions or statements by the

county employee.

Considering the undisputed evidence, plaintiff fails to establish a cause of action for fraud against Utah County because he admittedly has no clear and convincing evidence he can present to the jury to support his claim.

**POINT IV. PLAINTIFF LACKS STANDING TO SUE FOR THE  
DEPENDENT LIFE INSURANCE PROCEEDS.**

“As a general rule, a person can sustain a cause of action only where he has sustained some injury to his legal, personal or property rights, the injury and the cause of action being contemporaneous.” Haymond v. Bonneville Billing & Collections, Inc., 89 P.3d 171, 173 (Utah 2004). In order to determine if a plaintiff has standing to sue, courts “first apply traditional standing criteria, which require that (a) the interests of the parties be adverse, and (b) the parties seeking relief have a legally protectable interest in the controversy. Plaintiff must be able to show that he has suffered some distinct and palpable injury that gives him a personal stake in the outcome of the legal dispute.” Kennecott Corp. v. Salt Lake County, 702 P.2d 451, 454 (Utah 1985).

Plaintiff has no standing to sue because he cannot demonstrate that he suffered a “distinct and palpable injury” by Utah County from the denial of the insurance claim by Hartford. Plaintiff has not, and cannot, prove that, had his late ex-wife opted to convert the policy and done the conversion process, he would have been named the beneficiary. Indeed, the only evidence offered by Plaintiff to show that his ex-wife would have named

him as the named beneficiary, is his testimony that she would, “just knowing her.” This pure speculation is clearly insufficient evidence of Ms. Ellison’s intent.<sup>3</sup>

Further, in order for Plaintiff to have standing to sue for the proceeds of Ms. Ellison’s life insurance policy, he needs to claim a property right to that policy. It is undisputed that Ms. Ellison’s dependent life insurance policy lapsed on August 21, 2003 when the Decree of Divorce was entered by this Court. On that date, Ms. Ellison’s policy lapsed, and Plaintiff’s property rights as a beneficiary ceased, thereby terminating any

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<sup>3</sup>Plaintiff may claim that an alleged conversation with his wife, in which she told him to use the life insurance proceeds for the kids’ “missions and schooling and so forth” (see Record; p. 287), is evidence of her intent to convert the policy and name him as the beneficiary. However, this assertion is without merit for two reasons. First, it is not evidence of an intent that Ms. Ellison, had she been given the chance **after their divorce**, would have simply named him as the beneficiary to do with the money as he saw fit. Second, this conversation is clearly hearsay. This statement does not fall under the 804(b)(2) “imminent death” exception because there is no evidence that death was imminent. Before a proponent may offer hearsay under the dying declaration exception, sufficient evidence must be laid that the declarant had a sense of impending death. See e.g. *United States v. Lawrence*, 349 F.3d 109, 117 (3rd Cir. 2003).

Moreover, it is not excepted from hearsay as a statement against interest under Utah Rule of Evidence, 804(b)(3) because it does not fulfill the elements. A statement against interest is a “statement which was at the time of its making 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 declarant’s position would not have made the statement unless believing it to be true.” Even a “statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.” Ms. Ellison allegedly made these comments while she was still married to Plaintiff (see Ellison Dep. p. 95; Record p. 287) when she first got ill and it was not “so far contrary” to her pecuniary or proprietary interest at that time.



right for Plaintiff to claim the insurance proceeds. In other words, when Ms. Ellison (through divorce) failed to be defined as Plaintiff's dependent according to the definitions of the policy contract and Plaintiff's rights terminated along with Ms. Ellison's insurance coverage. As a result of this change in status as the beneficiary, Plaintiff lacks the necessary standing to sue and collect Ms. Ellison's life insurance proceeds. In other words, Plaintiff did not sustain an injury to his legal or property rights because none existed when this court entered the Decree of Divorce and effectively terminated the marriage and any dependent status.

Lastly, Plaintiff fails to show that he suffered a distinct and palpable injury as a result of Hartford's denial of his claim because, again, he cannot show that, had his ex-wife elected to convert the policy she would have named him, her ex-husband, as the sole beneficiary. Plaintiff cannot escape the fact that his claims are founded on the pure assumption that Ms. Ellison would have opted to give him the proceeds over her adult children or a trustee as the beneficiary for all the children, including the minors, as it was done in the Divorce Decree. (See Decree of Divorce, ¶ 18; Record p. 111.) The trial court was warranted in refusing to "take his word for it" that his ex-wife would have wanted the \$200,000.00 to go to him, as the ex-husband, instead of being distributed directly to the children.

**POINT V. PLAINTIFF MAY NOT RELY ON ASSUMPTIONS AND  
SUPPOSITIONS THAT HIS DECEASED EX-WIFE WOULD  
HAVE NAMED HIM AS THE BENEFICIARY ON HER LIFE  
INSURANCE POLICY AFTER THEIR DIVORCE.**

It is well-established that the plaintiff has the burden of proving his claims for negligence and breach of contract by a preponderance of the evidence. See Ahlstrom v. Salt Lake City Corp., 73 P.3d 315, 317 (Utah 2003); Braddock v. Pacific Woodman Life Ass'n, 58 P.2d 765 (Utah 1936). Moreover, Plaintiff has the burden of proving his claims fo fraud by clear and convincing evidence. Republic Group, Inc. vs. Won-door Corp., 883 P.2d 285, 292 (Utah Ct. App. 1994).

In this case, discovery has failed to produce evidence that substantiate and prove Plaintiff's claims by their respective burdens of proof. Indeed, much or Plaintiff's case rests on convincing a jury that an unknown and unidentified Utah County employee told him that as long as he paid the premiums for his wife's dependent life insurance policy, he would be entitled to the insurance proceeds. Even if Plaintiff could convince a jury that this were true, he still rests his case on his self-serving, subjective belief that, had his former wife had an opportunity to convert the dependent policy, she would have named him, the ex-husband, as the beneficiary of the life insurance policy and given him the money instead of naming her children or a third-party trustee as the beneficiary on the life insurance policy. Plaintiff assumes, and would have this court to join him in the assumption, that "just knowing" Ms. Ellison, she would have named him as the sole beneficiary. This is simply not enough evidence to get Plaintiff before a jury in this

matter.

Clearly, Plaintiff fails to establish any evidence that would support Ms. Ellison's intent as to whom she would have named as beneficiary in the policy. Thus, his allegations of negligence, breach of contract, and fraud would be moot, because he cannot prove, as a matter of fact or with any evidentiary support, that following the divorce, Ms. Ellison was willing and intended to name him as the beneficiary. Thus, summary judgment was timely and warranted in this case.

**POINT VI. PLAINTIFF INAPPROPRIATELY RELIES UPON BARE ALLEGATIONS AND IMMATERIAL FACTS.**

Plaintiff claims that it is disputed whether Utah County provided him with a copy of the subject policy and that an unidentified, Utah County employee told him that his divorce would not affect his wife's life insurance policy. While these facts are disputed, they did not foreclose summary judgment for three reasons. First, even if Plaintiff's allegations are true, his negligence, fraud and breach of contract claims fail as a matter of law, as pointed out above. Second, these facts that Plaintiff claims are disputed are nothing more than his bare contentions with absolutely no support in the record. Third, the fact that Utah County may or may not have failed to tell Plaintiff about the conversion process or give him a copy of the policy is immaterial to the question of law before the court.

Plaintiff alleges that neither party "provided" him with a copy of the Hartford

insurance policy. However, it is undisputed that Utah County held a mandatory job fair each year, that Tori, a representative of Hartford was at the 2002 fair and that information regarding the Hartford life insurance policy was available to Plaintiff at the job fair. The fact that Utah County did not make Plaintiff take a copy of the policy, did not send him a copy of the new policy, did not call him in and read the policy to him when he got divorced or when his ex-wife died is simply immaterial to the question before the court. The facts show that the information was available to Plaintiff and he refused to adequately research the issue and just let the matter slide.

Based only upon his own allegations, Plaintiff claims that he was told by some Utah County Employee that his divorce would not affect his wife's life insurance policy. Even if Utah County had a duty to tell him that he needed to do more than simply pay the premiums, Plaintiff can point to no material evidence supporting the occurrence of this conversation. “[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) (emphasis added).

Plaintiff claims that the fact that he told Linda Daly at Hartford that he spoke with a Utah County Employee, tends to prove that he did, yet, he is still relying on a bare allegation that he has made. It does not matter that Plaintiff told somebody else that he had a conversation with a Utah County Employee, there is still nothing but his own statement to indicate that he did have this conversation—which is simply not enough to get

before a jury.

Plaintiff also claims that the fact that he did not take any actions to convert his ex-wife's policy tends to show that he was told he did not have to do so. Again, this is a self-serving and conclusory argument. It is akin to claiming the fact that a driver failed to stop at a stop sign, tends to prove that his statement that he did not see the stop sign is true. Plaintiff is inappropriately using the conclusion to prove the facts. There are hundreds of explanations to explain why Plaintiff did not convert his ex-wife's policy, the most plausible being, that she never would have agreed to make him the beneficiary.

### **CONCLUSION**

Based on the foregoing, Utah County's Motion for Summary Judgment should be granted. To rule otherwise would be contrary to the explicit and unambiguous language of the policy contract and adverse to well-established law.

DATED this 30 day of October, 2008.

**STRONG & HANNI**

By: 

Kristin A. VanOrman

Jeremy G. Knight

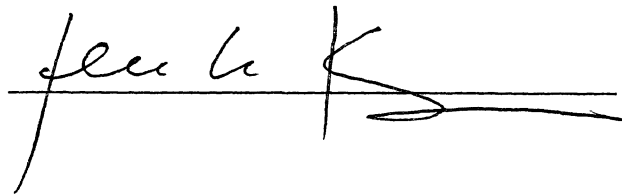
Attorneys for Defendants-Appellees

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 30 day of October, true and correct copies of the foregoing APPELLEES' ANSWER BRIEF in hard copy and electronic (pdf.) format were served by mail, postage fully prepaid, upon the following:

Kenneth Parkinson  
Howard, Lewis & Petersen  
120 East 300 North  
P.O. Box 1248  
Provo, UT 84603

James T. Blanch  
Parsons, Behle & Latimer  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "James T. Blanch", written over a horizontal line.