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Virgin Redmond v. Petty Motor Co. : Brief of Respondent

Utah Supreme Court

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Case No. 7562

In the Supreme Court of the State of Utah

VIRGIL REDMOND,

Appellant and Plaintiff,

vs.

PETTY MOTOR COMPANY,
a corporation,

Respondent and Defendant.

Case No. 7562

RESPONDENT'S BRIEF

FILED

JAN 27 1951

Utah Supreme Court, Utah

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I N D E X

	Page
STATEMENT OF FACTS	3
STATEMENT OF POINTS RELIED UPON BY RESPONDENT....	9
ARGUMENT	9
The Court Ruled Correctly in Granting Respondent's Motion For Judgment Notwithstanding the Verdict Upon the Appellant's First Cause of Action.....	9
The Court Ruled Correctly in Directing a Verdict in Favor of The Respondent on Appellant's Second Cause of Action	21
CONCLUSION	23

C A S E S C I T E D

LANDES & CO. vs. FALLOWS, ET AL, 81 Utah 432, 19 Pacific 2nd 389 (1933)	22
MIDDLETON vs. NORTH AMERICAN PROTECTIVE ASSO- CIATION, 260 Illinois Appellate Courts 288 (1931).....	14
SCHUBACH vs. AMERICAN SURETY COMPANY OF NEW YORK, 73 Utah 332, 273 Pacific 974 (1929).....	14

A U T H O R I T I E S C I T E D

AMERICAN JURISPRUDENCE "Insurance" Vol. 29, Sec. 281, P. 261	13
AMERICAN JURISPRUDENCE "Insurance" Vol. 29, Sec. 107, P. 129	19
AMERICAN JURISPRUDENCE "Insurance" Vol. 29, Sec. 108....	20
APPLEMAN "Insurance Law and Practice" Vol. 12, Sec. 7124..	14
APPLEMAN "Insurance Law and Practice" Vol. 3, Sec. 1811.....	12

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of the State of Utah

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Appellant and Plaintiff,

vs.

PETTY MOTOR COMPANY,

a corporation,

Respondent and Defendant.

Case No. 7562

RESPONDENT'S BRIEF

STATEMENT OF FACTS

The respondent is not satisfied with the statement of facts contained in the appellant's brief and desires to set out herein a statement of the facts more accurately and in more detail.

This cause went to trial upon the second amended complaint of the appellant (R 15) in which were alleged three causes of action, only the first two of which are involved herein. The first cause of action alleges in substance that appellant entered into a conditional sales contract with the respondent at Salt Lake City for the purchase of a 1946 Stake Body Ford truck

for a stated price and that, as a part of the transaction, it was orally agreed by respondent's agent that respondent would obtain insurance covering loss by collision or upset under a type of policy commonly known as a \$100.00 deductible policy. The premium for such insurance was added to the purchase price for the truck and included in the total amount due under the conditional sales contract after an allowance had been made for a truck turned in by the appellant at the time of the purchase.

This transaction occurred on March 28, 1949 and on April 6, 1949, near Boise, Idaho, the truck was overturned, causing damage of approximately \$665.00. Appellant alleged that the defendant "wholly neglected" to obtain collision insurance as agreed and that this fact was concealed from him for a period of 60 days, during which time he was without the use of his truck, and in addition, he was required to pay all the damage occasioned by the accident inasmuch as no insurance policy had been obtained.

Appellant, in his first cause of action, prayed judgment for the amount of the insurance premium, for the cost of repair of the truck, and for loss of use of the truck for the 60 day period during which it was claimed the truck sat idle without being repaired because of the concealment by the respondent of the alleged fact that no policy of insurance had been obtained.

By its answer, the respondent denied that it had failed to obtain an insurance policy, and upon trial there was introduced as Defendant's Exhibit 4 a policy of insurance covering the truck under a \$100.00 deductible plan. Appellant never attempted to assail the validity of the insurance policy. No evidence was produced indicating that the policy was invalid or void during the 75 day period following the original insurance carrier had been denied by the carrier. This was done through the testimony of the appellant and the witness Imhoff. No agent or authorized employee of the American Aviation & General Insurance Company was ever called to testify concerning the policy. Imhoff was admittedly not an agent of the insurance company; rather, he was an independent adjuster who adjusts claims for the company in question and for other companies (R 223). He was allowed to recite, over timely objection, (R 224, 225) that he had been informed that the company rejected the claim filed transaction. To the contrary, appellant introduced by his Exhibit D a Notice of Cancellation from the insurance carrier which indicates that the insurance carrier cancelled the policy on June 20, 1949, 75 days after its effective date of issue, from which it may be inferentially stated, upon the authorities hereinafter set forth, that the policy was in force from the date shown upon it until such time as it was cancelled. Appellant attempted to escape the force of the insurance policy by introducing evidence that a claim presented to the

by Redmond because the company "believed there was no policy of insurance, any valid policy of insurance at the time of this loss." Evidence was also introduced by the plaintiff of conversations between the plaintiff, the respondent's agent, Mr. Petty, and Mr. Vander, an insurance broker in Salt Lake City. This evidence revealed that there had been a conflict between Petty and Vander as to the date of the application which was made by respondent for the insurance. Mr. Petty testified that he saw the application in Vander's office and it bore a date stamp indicating it was received by Vander on April 5th (R 216), which was prior to the accident. This evidence is uncontradicted. Neither Vander, nor any representative of his office, was called to testify, nor was the application produced, and it is fair to presume, from this, that the missing evidence would have corroborated Mr. Petty's testimony.

At the conclusion of the evidence the respondent moved the court for a directed verdict on the ground, among others, that respondent, by its oral contract, had agreed to obtain an insurance policy and that such contract had been fulfilled by reason of the existence of the insurance policy, Exhibit 4. This policy shows that the truck was covered from the date of the conditional sales contract, to wit, March 28, 1949. The respondent urged upon its motion that it was not required, under the terms of its oral contract,

to guarantee that any claim brought under the terms of the policy would be paid by the insurance company. Since a policy was obtained and it was good upon its face we argued to the court that the appellant's first cause of action could not be successfully maintained until and unless appellant had shown that this insurance policy was invalid either because of fraud, misrepresentation, or some other matter which would give the insurance company a valid reason for dishonoring its policy. The court denied the motion, remarking: "we have gone this far in this matter" and ruling that the matter would be submitted to the jury, but the court clearly indicated its belief that the appellant could not maintain the action without a showing that the insurance policy in evidence was invalid, stating:

"I am going to submit it to the jury but I will consider, take under advisement, the question of whether I may have to undo whatever they do because I think you should first, as a part of this action, adjudicate that you do not have a good policy." (R 264, 265)

It was on this ground, among others, that the court, after verdict, granted respondent's motion for judgment notwithstanding the verdict.

As to the second cause of action, appellant, in his complaint, alleged that respondent had made a statement to the appellant that the truck would be

warranted to be in good condition of repair for a period of 90 days and that the warranty was breached because a "wrist wrench" (Exhibit C) was in the pan of the truck at the time of the purchase and the wrench "caused the truck to be and become out of repair and the motor to become defective" (R 17). This cause of action was destroyed by appellant's own testimony upon cross-examination, (R 123) when he admitted that there was neither a written warranty nor an oral warranty for any period of time whatever, and that he had purchased the truck upon an "as is" basis as revealed by the purchase order, Exhibit A. Over objection by respondent, evidence was allowed of some sort of trade usage or custom by which an implied warranty was claimed to have controlled the transaction. Such implied warranty was never pleaded and was not within the issues framed in the pleadings, and further was in contradiction to the terms of the contract agreed upon by the parties as evidenced by the purchase order, Exhibit A, and the contract, Exhibit B. These latter factors, in addition to plaintiff's admissions (R 123), were the factors recognized by the court when it granted the defendant's motion for directed verdict as to this second cause of action.

The appellant, by his brief, indicates that the only considerations to be decided upon this appeal are the questions of whether or not the court committed error

in granting respondent's motion for judgment notwithstanding the verdict as to the first cause of action, and in directing a verdict for the respondent on the appellant's second cause of action. Respondent's argument will be devoted to a consideration of the following points:

STATEMENT OF POINTS RELIED UPON BY RESPONDENT

- (A) THE COURT RULED CORRECTLY IN GRANTING RESPONDENT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT UPON THE APPELLANT'S FIRST CAUSE OF ACTION.
- (B) THE COURT RULED CORRECTLY IN DIRECTING A VERDICT IN FAVOR OF THE RESPONDENT ON APPELLANT'S SECOND CAUSE OF ACTION.

ARGUMENT

THE COURT RULED CORRECTLY IN GRANTING RESPONDENT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT UPON THE APPELLANT'S FIRST CAUSE OF ACTION.

Respondent's Exhibit 4, the insurance policy in question, was introduced in evidence and received by the court without objection by the appellant. Examination reveals it to be the ordinary automobile insurance policy covering the truck in question from March 28, 1949. The policy was prepared some time in the first part of April, 1949 and was countersigned, as required

by Utah law, on April 12, 1949. The evidence is without dispute that it is a common practice in the insurance business for policies to be back-dated to cover a vehicle from the date of a conditional sales contract for its purchase (R 236). It is also without dispute in the evidence that this policy was ordered in the ordinary course of business by the respondent company and that the policy was back-dated in accordance with the ordinary course of business among automobile dealers, finance companies, and insurance companies, Exhibit A (R 235, 236).

It is significant that although the appellant was confronted with the policy of insurance at an early stage in the proceedings on this cause, no effort was ever made to call for testimony any agent or employee of the insurance company which wrote the policy or of the agency which accepted the risk at the time the respondent ordered the insurance. The appellant produced no evidence of any kind to challenge the validity of the insurance policy, but concentrated his attack upon the proposition that the respondent should be held liable because a claim had been presented on an insurance policy and had been denied by the insurance company because it believed there was no valid policy in existence at the time of the loss, which belief was based upon a dispute as to the time the application for the insurance was filed. No other reason for the denial of the claim appears in the record.

There is no evidence in the record of fraud or misrepresentation and this is for the very good reason that there was no fraud or misrepresentation. The appellant made no attempt to enforce the provisions of the insurance policy although he knew of its existence. He had no correspondence with the insurance company or with its local representatives. The policy stood from the date of its issuance until June 20, 1949 without being challenged by the insurance company (R 118-120). The insurance company took no action in the weeks intervening between the proof of loss and the notice of cancellation to invalidate the policy or to exercise any option it might have had to void the policy, which option is claimed by appellant to have existed, in law.

By the terms of the oral agreement between the appellant and the respondent company, respondent company agreed to obtain insurance and when the insurance policy in evidence was obtained, its contract was fulfilled. This agreement could not be extended by any stretch of the imagination to include an agreement by the respondent to guarantee that any loss or claim under the policy would be honored by the insurance company. Respondent could do no more than obtain a policy and hold it in trust for the appellant, as is the practice with a conditional vendor, and exert such effort and such pressure as it might have by reason of prior dealings with the local insurance agent to

see that the assured under the policy received fair treatment. This respondent attempted to do repeatedly. Mr. Petty, having applied for the insurance, and believing the insurance to be in force, took appellant to the insurance adjuster as soon as appellant returned to Salt Lake City on or about April 11th or 12th, 1949 (R 240). He accompanied appellant to various repair shops to arrange for repairs (R 238). He made appointments to get repairs made and used his influence to make the appointments earlier than ordinarily would have been the case. A clear indication of the lack of good faith of appellant, to which further reference will be made, is found in the fact that appellant failed to keep such an appointment at the Diamond T Truck Company, although this was a long time before any dispute had arisen about the insurance policy (R 189, 190).

The very nature of the claimed cause of action set forth by the appellant as his first cause of action can be no more than this: Respondent agreed to obtain an insurance policy; appellant claims the policy was never obtained and the contract was thus violated; respondent produced the insurance policy to show its contract was not violated. Clearly, then, unless the appellant can show that the policy thus obtained was a mere scrap of paper, the appellant must fail. As pointed out by Appleman, in "*Insurance Law & Practice*", Volume 3, Sec. 1811, et seq., an

insurance policy, good and valid upon its face, is a good, valid and subsisting contract between the insurance company and the assured until such time as one of the following things occurs:

1. A court of competent jurisdiction adjudicates that the policy is void.

2. The insurance company terminates the contract in accordance with the provisions of the policy relating to termination or cancellation.

3. The insured terminates the contract by following the procedures set forth in the policy for terminating or cancelling the policy.

None of these alternative measures had occurred prior to the institution of this law suit by appellant. If either of the latter two alternatives had been commenced prior to the institution of the law suit, neither could affect the rights of any person under the policy as it existed prior to such occurrence. The law in this connection is well stated in 29 *American Jurisprudence, Insurance*, Sec. 281, page 261, wherein it is stated:

“The cancellation of an insurance policy does not affect the rights which have already accrued under the policy in favor of the insured or of a third person, and consequently, notice of the insurer’s previous election to terminate the policy, given the insured after a loss has

occurred, is manifestly insufficient to avoid liability under the policy for such loss.”

This doctrine was referred to favorably by the Supreme Court of Utah in the case of *Schubach v. American Surety Company of New York*, 1929, 73 Utah 332, 273 Pac. 974, at page 354 of the Utah Reports.

It is extremely doubtful that a court would have relieved the insurance company of its obligation under this policy even if an action had been commenced against the company on the policy, because the company, by its lack of action in the period from early April until June 15, 1949, indicated its belief that the policy was in existence and was in full force and effect. This is further emphasized by the fact that the notice of cancellation sent by the company to the appellant, Exhibit D, follows the provisions of the policy relating to cancellation by giving notice to the insured that the policy would be cancelled five days following the date of the notice, namely, on June 20, 1949. Such a notice of cancellation by the insurance company is said to be an admission that the policy is in force as of the date of the notice of cancellation. Appleman “*Insurance Law and Practice*”, Volume 12, Sec. 7124. *Middleton vs. North American Protective Association*, 1931, 260 Ill. Appellate Courts 288.

Whether or not the insurance company would have been relieved of its policy had an action been instituted

against it cannot be determined in this law suit for the reason that the question was not explored by the appellant and no evidence was brought to bear by him in his attack upon this policy. Appellant claims that the jury passed on the questions herein involved adversely to the respondent and the instructions of the court presented the matters to the jury and were based upon competent evidence. A mere cursory reading of this record reveals the fallacy of this statement. All of the evidence in the record relating to the insurance policy may be summarized as follows: That the contract between the parties hereto was made March 28, 1949; that the insurance was applied for by employees of the respondent company on March 30, 1949; that in the next few days a request was received from the insurance agency for two items of additional information about the appellant, namely, his age and previous driving record; that the records of the insurance agency showed an application received by that office and date stamped in the ordinary course of business on April 5, 1949; that an accident occurred to the truck April 6, 1949, which fact was made known to the respondent on April 7 or 8, 1949; that appellant returned to Salt Lake City on April 11 or 12, 1949, with the truck; that the necessary proofs of loss and other notices to the insurance company were presented personally to the adjuster, Imhoff, on or about April 14, 1949; that two weeks later a conversation was had between Mr. Petty, representing the respondent, and Mr. Redmond,

for himself, and a Mr. Vander, the insurance agent, at which time a dispute arose between Petty and Vander as to the date of the application received by Vander's office; that the claim was later denied by the company because of its belief that no valid policy existed at the time of the loss.

It is submitted that none of the foregoing evidence even bears remotely on the question of whether or not the respondent obtained a valid insurance policy. The policy was in evidence. It was good and valid upon its face. No evidence was brought into court showing it was not valid and not good upon its face, and no evidence was produced from any competent person who could speak for the insurance company that the insurance company did not consider the policy in full force and effect until after the institution of this action. Obviously such evidence would have been easy for the appellant to obtain had it been in existence, because such evidence would have aided the insurance company in getting "off the risk". It was the appellant who had the burden of successfully assailing the insurance policy. Equally obvious is the fact that the respondent could not have obtained such evidence even if it had been available because the insurance company, at the time of trial, had taken the position that its policy was of no force and effect from the date of June 20, 1949 and forward, and it would be extremely difficult for the respondent to find willing testimony

contradicting a decision which had been made by the responsible company.

It was because of this lack of competent evidence impugning the validity of the policy that the trial court correctly ruled that the appellant had the burden of showing that the insurance policy was invalid before it could successfully maintain its first cause of action. Of course, respondent, after its motion for directed verdict was denied before submission to the jury, was required to submit such requests for instructions as would tend to mitigate the damages which might be returned by the jury in a situation such as this, but it did so without abandoning its position that the entire matter was not a question for the jury.

In addition to all of the foregoing, however, there is another factor which, it seems to us, is conclusive of this phase of this appeal. The question of whether or not this contract was breached by the respondent is a question primarily of law. The question of the validity of the insurance policy is primarily a question of law. Particularly is this true when, as here, there is a complete lack of competent evidence relating to the insurance policy and only a hodgepodge of inconclusive evidence about matters leading up to the existence of the policy. It is the familiar rule on appeal in cases of this kind that the trial court's action will not be disturbed unless there is a substantial showing

by the appellant of error or abuse of discretion. It is submitted that the appellant in his brief, has done little more than quote testimony favorable to himself and favorable to his construction of the problem presented, and that a fair examination of the entire record reveals that the trial court had no alternative but to remove the legal question of the validity of a document from jury consideration. It is difficult to see how the trial court could have done otherwise, particularly in view of the fact that the insurance company, whose policy was attempted to be destroyed by its own insured, was never present in court, either as a party or by competent agents or employees as witnesses.

Our research has not revealed a case in this jurisdiction or elsewhere which could be said to be in point on the problem presented on this appeal. Most of the cases which have arisen in this branch of insurance law have been actions between an insured and a broker or other insurance agent for failure to obtain or procure insurance for the benefit of the insured. Such recoveries as have been allowed have usually been upon the proposition that the broker failed to exercise that degree of professional skill or judgment required of him when he assumed to act for the insured. The facts which were produced in these cases to show a breach of the contract have usually revealed that the broker placed the insurance in an insolvent insurance company or in a foreign insurance company not au-

thorized to do business in the state where the transaction occurred, so that when the insured attempted to enforce the provisions of his policy he found no process agent or other person on whom service of process could be had, and thus his policy was little more than a scrap of paper. We have found no case where a person has agreed to obtain insurance for an insured and has obtained the insurance and has later been held responsible to the insured because of the refusal of the insurance company to honor a claim under its policy. To require the broker to stand in the shoes of the insurance company so far as the insured is concerned is to make the broker an insurer, which should not be done unless the broker, by his own conduct, or by the lack of due care or failure to take reasonable steps to obtain insurance, has visited such liability upon his own shoulders. We believe the rule applicable to brokers is equally applicable to the situation which presents itself here. The only exception to that statement may arise in the event a statutory provision creates special duties and requirements for persons acting as brokers, with which contingency we are not concerned in this case.

The general rule is summarized in 29 *American Jurisprudence*, Insurance, Sec. 107, page 129, as follows: The broker or agent "must exercise such reasonable skill and ordinary diligence as may fairly be expected from a person in his situation in doing what is

necessary to effect an insurance policy, in seeing that it effectually covers the property to be insured in selecting the insurer and ascertaining that it is of good credit and standing and in obtaining as good terms as are reasonably possible." Section 108 of the same volume states the general rule to be that "one who undertakes to procure insurance on the property of another and, unjustifiably and through his fault or neglect, fails to do so will be held liable for any damage resulting therefrom." In this connection it is interesting, in view of the amounts claimed by appellant, to note the measure of damages applied under the general rule just quoted. The measure of damages, according to *American Jurisprudence*, is "the amount that would have been due under the insurance policy provided it had been obtained."

From the foregoing rules it is apparent that no showing was made by the appellant which entitles him to recover from this respondent for the alleged failure to obtain the insurance policy in question. There was never a showing of neglect or fault on the part of the respondent. Indeed, it is difficult to see what the respondent could have done that it did not do. Appellant confines himself to a showing simply of a dispute which arose between an adjuster, (not employed by the insurance company involved) and the appellant and respondent, which culminated in information being received by the appellant from the insurance adjuster to the effect that the claim under the insurance policy had

been denied. The appellant could furnish no additional evidence that the insurance company was ever requested to honor its policy or ever requested to explain in detail its apparent refusal to pay the claim as presented to it through the adjuster, Imhoff.

We submit that the insurance company, on the basis of this record, could not successfully defend an action against it on this policy, particularly when the records of its own general agent show the application was commenced on March 30 and completed on April 5, both dates being before the loss occurred. This policy was a good and valid policy and, by obtaining it, respondent fully and completely performed its contract with appellant.

THE COURT RULED CORRECTLY IN DIRECTING A VERDICT IN FAVOR OF THE RESPONDENT ON APPELLANT'S SECOND CAUSE OF ACTION.

The second cause of action set forth in appellant's second amended complaint (R 15) alleged an agreement by which the respondent warranted the condition of the instant truck for a 90 day period. This alleged warranty was denied by the respondent's answer. When the appellant on cross-examination (R 123) admitted that he had never been given a written warranty or an oral warranty of any kind, and admitted further that he had purchased the truck on an "as is" basis, this cause of action was effectively destroyed. However, appellant

thereafter produced a string of witnesses attempting to show some sort of implied warranty by trade usage. This evidence was received by the court over respondent's repeated and timely objections. The objections went to the proposition, first, that such issues were not framed by the pleadings and had never been claimed by the appellant until that moment of the trial, and, secondly, that the written contracts and purchase order documents which had been received in evidence effectively eliminated the possibility of a warranty, and appellant, by his own testimony, had admitted that the purchase had been made by the use of these documents and that no agreement outside the documents had been made. Even after the admission of such evidence of a trade useage, it was quite clear that there was no substantial evidence upon which this cause of action could have been submitted to the jury. Respondent cited to the court below, upon the occasion of the argument and presentment of its motion for directed verdict on the second cause of action, the case of *Landes & Co., vs. Fallows, et al*, 81 Utah 432, 19 Pac. 2nd 389 (1933), which case involved a similar contract to the contract at bar, and which case was decided adversely to the position now asserted by the appellant.

The appellant's testimony concerning the alleged warranty was in direct conflict to the claim set forth in his complaint, and in addition to this fact, the appellant admitted that the truck had been examined by

him and the engine had sounded all right to him at the time of the purchase. He admitted he had been told that the truck was not new and he knew he was buying a used vehicle. Although the truck was fully loaded, no difficulty was encountered in its operation for many hundreds of miles.

It is also significant that, when this lawsuit was instituted, appellant's only claim of breach of warranty was grounded upon the claim that the wrist wrench in the pan of the truck caused the defective condition of the engine. No other claim was ever made by appellant until the day of trial, when he apparently abandoned the wrist wrench, after his "expert" witnesses, Lake (R 162) and Moulton (R 174) both admitted the wrist wrench could not have caused the trouble. Then, appellant began to rely on a claim that the engine was worn out at the time of purchase, and even this evidence was sharply contradicted. This latter claim could only be "afterthought" and was entitled to little or no consideration by the trial court, in view of all the circumstances.

CONCLUSION

This case presents the rather unusual situation of a purchaser of a truck turning in an old truck as down payment on a newer truck and entering upon a written contract providing for regular monthly payments and, even though not one cent has been paid by the pur-

chaser under this arrangement, and even though the seller did everything within its power to assist the purchaser when misfortune occurred and the truck was wrecked, the purchaser nevertheless brings action against the seller for breach of the contract to obtain insurance. Further than that, the purchaser appears not to be content to seek merely what he would have had had the insurance company honored his claim under his policy, but instead seeks to recover the sum of \$417.00 insurance premium, which sum he has never paid and seeks to recover for loss of use of the truck for a 60 day period when, by his own testimony, it would not have taken more than two weeks to repair the truck, (R 121) particularly had he kept the appointments and complied with the arrangements that had been made by Mr. Petty of the respondent company to see to it that the repairs were accomplished within the fastest possible time. If the appellant, who is the purchaser here, was desirous simply of being restored to the position in which he would have been had no difficulty arisen in connection with this policy, it seems reasonable to suppose that he would have combined his efforts with those of the respondent company for the purpose of repairing his truck and getting it back on the road and in service in the fastest possible time. We submit, however, that this has not been his intention at any time. The record is without contradiction that he has willfully withheld permission for respondent to examine the truck or to inspect it (R 239), all as pro-

vided by the terms of the contract. He failed to keep the appointments made for him by the respondent and did absolutely nothing toward remedying the difficulties with which he was faced, and finally brought suit against the respondent prior to the time when the insurance policy was cancelled and at a time when respondent was still attempting to help the appellant.

These factors, which bear upon the good faith of the appellant, colored his entire case and, when considered with the fact that the insurance policy, Exhibit 4, stands unchallenged and when coupled further with the fact that the appellant's exorbitant claim of a breach of warranty crumbled by his own testimony on cross-examination, there can be no doubt that the action of the trial court in directing a verdict for the respondent on the second cause of action and reversing the judgment and verdict of the jury on the first cause of action, was eminently proper and amply supported by the record, and should be sustained by this court.

Respectfully submitted,

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