

1986

Canyon Country Store v. Bracey : Unknown

Utah Supreme Court

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April 11, 1988

FILED

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Geoffrey J. Butler, Clerk
Utah Supreme Court
332 State Capitol Building
Salt Lake City, Utah 84111

RE: Canyon Country Store vs. Norton Edward Bracey, et al
(Appeal No. 20194 Oral Argument Set For April 14, 1988)
Citation of Supplemental Authority

Dear Mr. Butler:

Pursuant to Rule 24(j) of the Rules of the Utah Supreme Court, the Respondent and Cross-Appellant, Canyon Country Store, would like to cite as a Supplemental Authority the case of Zions First National Bank, N.A. v. National American Title Insurance Company, 74 Utah Adv. Rpt. 12 (1988).

This case cites an earlier Utah Supreme Court case of Beck v. Farmers Insurance Exchange, 701 P.2d 795, 800-01 (Utah 1985) and interprets Beck to allow attorney's fees as consequential damages for breach of the implied covenant to contract fairly and in good faith in a first-party insurance claim. The case states: "Attorney's fees incurred by an insured in suing its insurer because of such a breach would be recoverable consequential damages because they plainly are reasonably foreseeable by the parties at the time the contract is made. See *id.* Although Zions did not proceed against Northern American on this theory, it would arguably be available to others similarly situated, despite the language and the standard form contract, because the implied covenant announced in Beck cannot be contractually waived. *Id.* at 801 n.4."

Zions also holds that a "proof-of-loss or damage" provision in an insurance policy does not need to be strictly complied with, and a letter was found to be sufficient, even though it was not sworn to and even though it did not set out the amount of the loss sustained by Zions. This Court held, "The purpose of the proof-of-loss provision is to give the insurer an adequate opportunity to investigate, to prevent fraud, and to form an estimate of its rights and liabilities before it is required to pay."

The Respondent and Cross-Appellant submits this case impacts on several points raised by the Appellants in their appeal to this Court.

In POINT IV on pages 29-31 of the Appellants' Brief, the Appellants discuss their argument, "THE INSURERS HAD NO OBLIGATION TO MAKE PAYMENT BECAUSE NO PROOF OF LOSS WAS FILED." This case also

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impacts on POINT 5 on pages 16-20 of the Respondent's Brief, which POINT 5 discusses the "proof-of-loss" issue. On page 19 of the Respondent's Brief, a citation from Margaret Price's deposition acknowledges Mrs. Price's testimony [while she was working as the Chief Claims Manager for Fidelity General Agency, an acknowledged agent of the Appellants and the agency which obtained the insurance policies for the plaintiff], that she had already obtained within sixty days after the accident all the information that would have been needed or contained on a formal proof-of-loss form, to enable Fidelity to conduct its investigation into the accident. She further testified an independent insurance adjusting company was formally retained by Fidelity the day following the accident. Thus the purpose of the proof-of-loss as stated in Zions was completely fulfilled.

Zions also impacts on the Appellants' Brief, pages 54-61, "THE ATTORNEY'S FEES WERE UNWARRANTED AND EXCESSIVE" and also on the discussion of attorney's fees in the Respondent's Brief, POINT 15 on pages 64-74. Zions is authority for holding that attorney's fees are authorized as consequential damages in a "bad-faith" action, and are in the contemplation of the parties at the time the contract is entered into. This holding disposes of the Appellant's argument that attorney's fees were not within the contemplation of the parties and in any event cannot be awarded, since there is no statutory or contractual basis for them.

We are enclosing nine (9) copies of this letter per your instructions, so they may be circulated among the judges prior to the oral argument which is presently scheduled for Thursday, April 14, 1988, commencing at 10:00 A.M. I called David Nuffer at 9:00 A.M. on Friday, April 8, 1988, to discuss the contents of this letter with him, in the event he wanted to respond.

If you have any questions regarding the matters raised in this letter, please advise.

Thank you for your cooperation herein.

Best Regards,

JAMES A. MCINTOSH & ASSOCIATES P.C.


JAMES A. MCINTOSH

JAM/tm
Enclosures
cc: David Nuffer