

1978

# Mavis Williams v. First Colony Life Insurance Co. : Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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MAVIS WILLIAMS, )

Plaintiff and )  
Appellant, )

vs. )

Case No. 15934

FIRST COLONY LIFE INSURANCE )  
COMPANY, )

Defendant and )  
Respondent. )

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REPLY BRIEF OF APPELLANT

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APPEAL FROM JUDGMENT OF THE SECOND JUDICIAL  
DISTRICT COURT IN AND FOR WEBER COUNTY  
STATE OF UTAH

Honorable Ronald O. Hyde, Judge

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REPLY BRIEF OF APPELLANT

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INTRODUCTION

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The nature of the case and disposition in the lower court are thoroughly discussed in Appellant's initial brief, and will not be repeated here. For convenience, reference to the Respondent's brief will be shown as (R's brief), and the Transcript of Trial as (Tr.).

ARGUMENT

Whether Mr. Meikle was acting as an agent for defendant First Colony or an independent broker is a question of fact to be determined by the trier of fact.

Respondent cites in his brief, Utah Code Annotated § 31-17-2 (1953), which section provides:

"A 'Broker' is any person who, on behalf of the insured, for compensation as an independent contractor, or commission, or fee, and not being an agent of the insurer, solicits, negotiates, or procures insurance or reinsurance or the renewal or continuance thereof . . . ." (Emphasis added).

Respondent cites this Section to support his position that Mr. Meikle was in fact a broker at the time of his solicitation of plaintiff and her husband and not an insurance agent of the defendant. Respondent, however, fails to cite Utah Code Annotated § 31-17-1 (1953), which defines an insurance agent as:

"Any person authorized by an insurer on its behalf to solicit applications for insurance, to effectuate and countersign insurance contracts except as to life or disability insurances, and to collect premiums or insurances so applied for or effectuated . . . ."

An insurance "broker" as defined, *supra*, becomes an agent of an insurance company when he, on behalf of the insurer, "solicits applications" and "collects premiums".

Appellant's brief as filed herein, clearly establishes the fact that Mr. Meikle solicited an application of insurance on behalf of the defendant and with defendant's knowledge and accepted plaintiff's first premium payment on the insurance applied for.

Respondent at page 25 of its brief cites Couch,  
Insurance, 2d §§ 25:92 wherein Couch states:

"Whether a person acts as a broker or an agent is not determined by what he is called but is to be determined from what he does."

Appellant agrees with this statement, and asserts that the following facts support a showing that Mr. Meikle was acting as an agent of defendant First Colony in his negotiations with the plaintiff:

1. Meikle procured from defendant or its agent at least one application form for insurance with the defendant;

2. Meikle approached plaintiff and her husband with defendant's application for insurance;

3. Meikle suggested to plaintiff and her husband that they should buy insurance with defendant;

4. Meikle accepted from plaintiff the first premium payment for insurance with the defendant;

5. Meikle executed the receipt delivered to Mrs. Williams as agent for the defendant and specifically presented himself as agent of defendant on the receipt.

6. Meikle dealt directly with the defendant in the transmittal of said premium payment.

Respondent cites the case of Barnett v. State Automobile and Casualty Underwriters, 26 U.2d 169, P.2d 311 (1971) to support his assertion that this Court adheres to the rule that negotiations between an insurance salesman and a person seeking insurance

coverage create an agency relationship between the two if the salesman is not bound to place the insurance in a company which he normally represents. However, such an assertion is not supported by the Barnett case. In Barnett, the court held that:

"where a soliciting agent promises a customer that he will notify him before the contract of insurance expires, or where, as in this case, he permits a custom or usage to arise which requires him to give the insured notice of the expiration date, he is acting as the agent of the insured and not the insurer, since such an agent may place the next term of insurance with another company if he cares to do so."

Such a holding does not apply to the creation of an insurance contact by an agent authorized to solicit insurance on behalf of the insurance company.

Contrary to respondent's claims, the cases cited in Appellant's brief do support the proposition that Meikle was, in fact, an agent of defendant First Colony. In Imperial Casualty & Indemnity Company v. Carolina Gas Insurance Company, 402 F.2d 41 (8th Cir. 1968), the Iowa court held that under Iowa law:

"any person soliciting insurance or procuring an application therefor shall be held to be the soliciting agent of the insurance company."

In Prassel Enterprises, Inc. v. Allstate Insurance Co., 405 F.2d 616 (5th Cir. 1968), the United States Court of Appeals for the Fifth Circuit held that a soliciting agent, even though he's not a general agent of the insurance company, is an agent of the insurance company up to and including the consummation



Houston Fire & Casualty Co. v. Jones, 315 F.2d 116 (10th Cir. 1963) stands for the proposition that although a salesman of the insurer's policy-writing agent had no specific contractual relationship with the insurer, the salesman, nevertheless, had implied authority to act as soliciting agent for the insurer and to bind the insurer by an insurance binder, when the salesman used approaches and forms supplied him by the insurer to sell insurance. The facts in the Houston Fire case are very similar to the facts of this case. Mr. Meikle was supplied forms by the defendant for the purpose of soliciting insurance for and on behalf of the defendant.

Perhaps the most significant case cited by Appellant's brief is the case of Ferrington v. Granite State Fire Insurance Co., 120 Utah 109, 232 P.2d 754 (1950). While Respondent goes to great length to distinguish the Ferrington case from this case, he fails to recognize the fact that the first question to be determined in this case is whether Mr. Meikle was in fact acting as a broker or an agent of the defendant when he approached plaintiff and plaintiff's husband with defendant's application for insurance. In the Ferrington case this court addressed itself to that very question, when the court stated:

"Defendants insist . . . throughout their brief that in connection with the placement of this insurance that Bowman was in fact the agent for the plaintiff, We deem it unnecessary to set forth a detailed analysis of the various sections of the code because it was enacted primarily for the purpose of

regulating insurance companies, agents, brokers, solicitors and adjustors. It was not intended to change or control the ordinary rules of agency between insurance companies and the public with whom they deal. If Bowman's conduct was in fact that of an agent for defendants, the licensing and regulatory provisions of the statute would not change that relationship so far as the plaintiff was concerned."

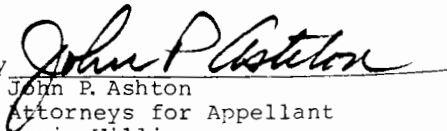
Clearly, this case stands for the proposition that whether Meikle was an agent of the defendant is a question of fact to be determined by the actions of Mr. Meikle and the defendant insurance company and not by the provisions of the Utah code cited by the Respondent.

Based upon the facts of this case and the authorities as cited herein and in Appellant's brief, the trier of fact could easily find that Meikle was an agent of the defendant First Colony. Inasmuch as there is a reasonable basis upon which a trier of fact could determine that fact, this Court should reverse the district court's granting of Summary Judgment and remand this case to the district court for trial upon the merits.

Respectfully submitted this 7<sup>th</sup> day of February, 1979.

PRINCE, YEATES & GELDZAHLER

By

  
John P. Ashton  
Attorneys for Appellant  
Mavis Williams

CERTIFICATE OF MAILING

I hereby certify that I caused two (2) copies of the foregoing REPLY BRIEF OF APPELLANT to be mailed, postage prepaid to Respondent's Counsel, Robert M. McDonald of Jones, Waldo, Holbrook & McDonough, 800 Walker Bank Building, Salt Lake City, Utah 84111 this 7th day of February, 1979.

John P. Ashton