

1979

# State of Utah v. Jamshid Mardanlou : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

STATE OF UTAH, :  
Plaintiff and Respondent, :  
vs. : Case No. 16126  
JAMSHID MARDANLOU, :  
Defendant and Appellant. :

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APPELLANT'S BRIEF

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Appeal from the judgment of  
the Third Judicial District for Salt Lake County  
Honorable James S. Sawaya

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Clerk, Supreme Court, Utah

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## STATEMENT OF KIND OF CASE

This an appeal from a decision of the Third District Court against the Defendant-Appellant on Plaintiff-Respondent's Declaratory Judgment Action seeking to rescind a apartment Dweller's Insurance Policy based on material misrepresentations provided in the preparation of the application. The Court dismissed the Appellant's counterclaim.

## DIPOSITION IN LOWER COURT

At a non-jury trial in Third District Court for Salt Lake County, Judge James S. Sawaya granted a Declaratory Judgment in favor of Plaintiff-Respondent and against Defendant-Appellant, thereby voiding an insurance policy issued to the appellant on the ground of material misrepresentations in the application for said policy.

## RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Lower Court's decision, ordering the lower court to rule that the Plaintiff-Respondent did not meet the burden of proof as a matter of law, or, in the alternative, granting a new trial to have the proper standard applied in determining "material misrepresentation".

## FACTS

On October 6, 1976, The appellant applied for Insurance with the Respondent Company by providing information to Lloyd D. Ferguson, an agent for the Respondent, (Exhibit P-1). The coverage was to cover Appellant's property at an apartment located at 938 East Third South, Salt Lake City, Utah. In the process of filling the application, several mistakes were made either through oversight of one or both the agent and the appellant or through deliberate omissions.

The agent admits to mistakes in writing the effective date of the policy and duration (T-53), the length of anticipated vacancy each year (T-57), the coverage for additional living expenses (T-58), and on the appellant's name (T-72).

The crucial issues, however, were in conflict. The Respondent sought to prove that the Appellant had intentionally withheld information required regarding prior insurance history and prior losses, (Exhibit 1, lines 8A and 8B),

On October 2, 1975, the Appelant had been covered by a binder of homeowner's policy with Aetna Insurance Company by their Agent, Ed D. Smith and Sons Insurance (T-28, Exhibit P-5) and a second binder for a "valuable items policy" was prepared on the Appellant's behalf on October 7, 1975, (T-32, Exhibit P-5). On October 9, 1975, the appellant filed a claim for a loss due to a burglary at the covered premises in an amount of approxiamtely \$8,600.0 (T-17, Exhibit P-5) and was paid a compromised amount.

(Exhibit P-5 , T-157). On about October 17, 1975, Aetna cancelled his policy in a rather vague fashion. (Exhibit P-5). The adjuster for Aetna didn't know why, at the time of Depositions in this case (T-144) and Linda Messerly, the only Aetna witness who testified at the trial didn't know the basis for the cancellation (T-35, 36, 43, Exhibit 5). Bill Zimmerman seems to indicate that the Respondent Company, for which he is a Regional Associate Underwriter, considers cancellation for non-payment of premium is an "underwriting reason", but not to refuse insurance. (T-132-133). The alleged misrepresentation here had to give rise to a probable rejection of the Appellant's application only if the Aetna Policy was cancelled for an underwriting reason. (Exhibits P-1, P-6, T-83, 84, T-133). The Appellant had never paid a premium to Aetna. (T-167, T-33, Exhibit P-5).

Linda Messerly and Exhibit P-5 both indicate that all correspondence was mailed to the Appellant at 422 South Twelfth East, Apartment 19, in Salt Lake City, Utah, (T-32,33, Exhibit P-5). The Appellant testified that he lived at that address, Apartment 9 (T-149, T-163) and the deposition of Osowski indicated the loss took place at Apartment 9 of that address. (T-146, Exhibit P-5).

The appellant only received one item, the binder from Aetna, mailed to the wrong address. (T-163 to 166). Aetna correctly addressed the releases and the checks for his claim. (Exhibit



P-5, T-163). Therefore the record would indicate no notice of cancellation was effectively mailed to the Appellant. He stated his first written notice of cancellation was when he was preparing for a deposition with the Respondent. (T-164). Even then the only cancellation information was for the policy itself and not the valuable items rider, which was unexplained at court. (T-39, 145, 193, 194).

The Appellant maintained at trial he had informed the agent for Respondent of the dimensions of the prior loss (T-177, 181, T 183-189, 193-196, 16) and the mixed nature of this cancellation. The only information he would have had was an oral notice, not binding at all, from Osowski, Aetna Adjuster. (T-167, 168, 13, 14,). The Prudential Agent denied receiving information on the loss or the Aetna history. (T55-62).

After the Respondent bound coverage for the Appellant on his premises, the Appellant suffered a loss as a result of a fire on the premises. One or two days after the fire, October 20, 1976, Appellant sought recovery under the terms of his policy. The Respondent sought this action for a Declaratory Judgment Rescinding the Insurance Contract with Prudential based on alleged misrepresentations provided on the application by the Appellant regarding his history with Aetna. The trial court found for the Respondent and the Appellant appeals.

The Appellant is an Iranian Citizen who has English language difficulties (T-17, 169-170).

THERE WAS INSUFFICIENT EVIDENCE FROM WHICH THE COURT COULD INFER THAT THERE WAS ANY INTENTIONAL OR WILLFUL MISREPRESENTATION MADE ON THE APPLICATION TO PRUDENTIAL INSURANCE COMPANY OR THAT ANY MISREPRESENTATION WAS MATERIAL TO THE ACCEPTANCE OF THE RISK OR TO THE HAZARD ASSUMED.

Section 31-19-8 Utah Code Annotated (1953 as amended) states as follows:

1. All statements and descriptions in any application for an insurance policy or annuity contract, or for the reinstatement or renewal thereof, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless:
    - a. fraudulent; or
    - b. material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
    - c. the insurer in good faith either would not have issued the policy or contract, or would not have issued reinstated or renewed it as the same premium rate, or would not have issued, reinstated or renewed a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.
- ....

While the language does not specify that the misrepresentation, omission or concealing of facts must be willful, with the intent to deceive, the contract of insurance does.

Furthermore, case law in Utah construing that Section of the statute also requires an willful act done with the intent to deceive.

In Wootton v. Combined Insurance Company of America 395 P.2d

724 (1964) at Page 725, the Court said:

Unless the misrepresentations in the negotiation for an insurance policy are made with the intent to deceive and "materially affect either the acceptance of the risk or the hazard assumed by the insurer" The insurance contract cannot be avoided by an insurance company. Mere falsity of answers to questions propounded are insufficient if not knowingly made with the intent to deceive and defraud.

Likewise, are the cases of Marks v. Continental Casualty Co., 427 P.2d 387 (Utah 1967) and Burnham v. Banker's Life and Casualty 470 P.2d 261 (Utah,        ).

The Appellant here testified at trial that not only did he not make any misrepresentations willfully, he made none at all. Even if the court concluded he made misrepresentations, there was not sufficient evidence before it to infer an intent to deceive. The Appellant stated he gave the agent for Respondent all the information he had available including having had prior insurance and a burglary. The burglary was listed on Exhibit 5, the application. Respondent's witness, Bill Zimmerman, testified the agent was deficient in not listing the items lost by the prior burglary on the new application. (T-135, 136). There was no reason not to conclude that other information was likewise omitted through agent error.

More importantly, however, is the point that the Appellant could only provide information regarding his prior coverage to

the extent that he was aware of it. If he was not informed of the cancellation of the Aetna Policy, then no inference may be drawn that he intended to keep the information from Prudential.

Again, the Appellant testified he had nothing more than a vague rumor from Martin Osowski, an adjuster for Aetna, that his policy was cancelled. He didn't receive actual notice until preparing for the claim which resulted in this action, after he had signed the application for the coverage at issue here.

The District Court erred in assuming he had notice of the cancellation. The purported oral statement was from a man who did not have the power to cancel insurance with Aetna or did he know the reason the insurance had been cancelled. For example, was the insurance cancelled for non-payment of premium? (Tl44, 145, 198, 199). Linda Messerly, the person who sold the Aetna policy also gave no testimony regarding the reason for the cancellation. Apparently while not discussed, the court accepted the dubious evidence of mailing of the cancellation notice. No witness could testify that the notice was, in fact, placed in a mailbox. But even if we assume that, the notice was clearly sent to the wrong address. The notice of cancellation, as the copy in Exhibit 5 shows it was sent to 422 South Twelfth East, apartment 19. The Appellant testified that there is only 12 apartments at 422 south Twelfth East and that he lived in apartment 9. In the case of Walker Bank and Trust Company v. First Security Corporation, 341 P.2d 944 (Utah, 1959) at Page 945,

the court stated:

"There is, of course, no presumption that a letter, even though mailed in regular course, was received by her when it was not addressed where she was living."

In that case the notice of cancellation of an insurance polciy was mailed to a person in Texas when she lived in Salt Lake City, Utah. But the rule is the same if it's next door or across the Country. Here the un rebuttable testimony was that the appellant did not recieve notice of cancellation from Aetna or its' agents and there is no competent evidence to the contrary.

Consequently, the Appellant was not shown to have made any misrepresentations to the agent of Respondent, if there was a misrepresentation made at all. Furthermore, if there is no showing the appellant had not burden to prove lack of that there was a misrepresentation, the Appellant had no burden to prove lack of intent. But, again, he testified that he had no such intent. A burden foisted upon him through the utilization of assumptions not supported by evidence or law.

There was insufficient evidence of intent to decieve or defraud. There was no showing that the appellant knew that a prior burglary would affect his insurability for a future loss from a fire. The previously cited cases all deal with issues surrounding health or life insurance policies. The questions all involved representations or misrepresentations regarding the health of the insured. There was no competent evidence at our trial to indicate that the appellant would not have been insured

if the true facts had been known, only that no binder would have been issued. An inquiry form could have been submitted to Prudential for their consideration. (T-100).

Bill Zimmerman testified that the only event proved at trial, i.e. a loss in excess of \$8,000.00, would not have prevented the Agent from binding the insurance (T-118). He said if connected with a prior cancellation, there could be no binding power in the agent. (T-118, 122). We have shown there was no evidence presented at trial to show the Appellant had knowlege of a cancellation.

Both Bill Zimmerman and Lloyd Ferguson stated that if non-payment of a premium was the reason for the cancellation, Mr. Ferguson could have bound coverage, as he did, for the Appellant. The record is devoid of the basis for the cancellation. Consequently there was no showing that a misrepresentation, if any, was:

- a. material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
- b. the insurer in good faith either would not have issued the policy, or contract, or would not have issued, reinstated or renewed it at the same premium rate, or would not have issued, reinstated, or renewed a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts have been made known to the insurer as required either by the application for the policy or contract or otherwise.

31-19-8 (1)(b),(c)  
Utah Code Annotated (1953).

This case should be reversed and remanded to the District Court with instruction to enter judgment in favor of the Appellant.

## II.

THE DISTRICT COURT REFUSED TO APPLY AN INDUSTRY STANDARD IN DETERMINING THE MATERIALITY OF ANY MISREPRESENTATIONS.

Appellant sought and the Respondent proffered evidence on the Industry Standard on the issue of materiality. In other words is the requirement of "Materiality" to be determined from the particular Insurance Company's good faith interpretations or on a broader, more objective standard. The District Court chose the more narrow standard. (T-107, 108, 119, 120, 141, 142, 147).

In Burnham v. Bankers Life and Casualty Company 470 P.2d 261 (Utah) this court spelled out the standard by which the materiality of a misstatement is to be measured.

They said:

First, unless the misrepresentations in the negotiation for an insurance policy are made with intent to deceive and materially affect either the acceptance of the risk or the hazard assumed by the insurer, the insurance contract cannot be avoided by an insurance company. Mere falsity of answers to questions propounded are insufficient if not knowingly made with intent to deceive and defraud. Second, whether or not a misstatement in an application is material to the risk, while it is

for the jury to determine, depends not upon what the insurer or the insured may think about materiality or the importance of the false information given or the true information withheld, but upon what those engaged in the insurance business, acting reasonably and naturally in accordance with the usual practice among insurance companies under such circumstances, would have done had they known the truth: that is, whether reasonably careful and intelligent men would have regarded the facts stated as substantially increasing the chances of the happening of the event insured against so as to cause a rejection of the application.

id. at P. 263

The only evidence tendered on this point was the testimony of Bill Zimmerman, a Regional office of the Respondent Company. He testified he had worked for two prior insurance companies and had been an underwriter at a company level for nine and a half years (T-113-115). He was with one company only a few months. The rest of his knowledge of Industry Standards came by rather informal means. e.g. an occasional review of a competitor's policy (T-121), discussion at conventions (T-129), and gossip in general. (T-130)

Those qualifications certainly did not give adequate foundation to qualify Mr. Zimmerman as an expert witness on the Industry Standard as to what representations are material. Three insurance companies do not adequately represent the Myriad of Insurance companies doing business in Utah.



Even According to the Respondent's position in this matter, that is, where the terms forbidding misrepresentation are a part of the application or policy, the company's rules prevail, the issue of materiality is not covered. Because of the flexibility needed, what is material and what isn't becomes subjective to a large degree. The decision will almost always arise after a loss.

The issuing Company has a bias that may be reflected in the determination of whether a past representation is material or not. To save an immediate payment, they are likely to stretch the issue of materiality as far as is necessary. Where they have controlled the terms of the contract up to the point, there should be a more objective way of protecting an insured who has made misrepresentations, willfully or not. The grounds upon which a misrepresentation may be used to void a policy may be set, consistent with Utah Law, by the issuing company. But a more objective standard is necessary to determine whether a statement is material. Only then can the purchasing public be assured of fair treatment over issues that cannot be bargained or shopped for. The issue of material misrepresentations will only arise when the claim is sought to be paid.

The case should be reversed and remanded with instructions to either judgment for the Appellant or, in th alternative, ordering a new trial to be consistent with the law in Utah.

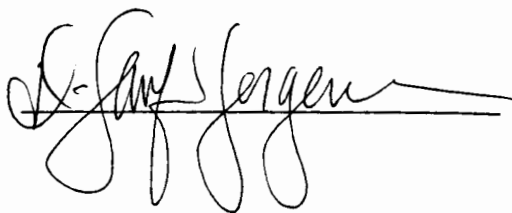
## CONCLUSION

The lower court failed to apply the proper standard in determining the materiality of any misrepresentations on the application for insurance. Had the court applied the proper rule of law, the Respondent did not present sufficient evidence on the Industry Standard to show that any misrepresentation was material.

If any event, the evidence was insufficient to show an intentional misrepresentation and the court erred in assuming the Appellant was sufficiently informed to make a material misrepresentation on the issue of past insurance coverage.

HAND DELIVERY CERTIFICATE

I do hereby certify that a true and correct copy of the foregoing Brief was hand delivered to Allen Larsen, Snow, Christensen & Martineau, Seventh Floor Continental Bank Building, Salt Lake City, Utah, on this 10<sup>th</sup> day of July, 1979.

A handwritten signature in black ink, appearing to read "D. Gary Jensen", written over a horizontal line.