

1979

Prudential Property & Casualty Insurance Company v. Jamshid Mardanolou : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

PRUDENTIAL PROPERTY & CASUALTY
INSURANCE COMPANY,

Plaintiff-Respondent,

vs.

No. 16126

JAMSHID MARDANLOU,

Defendant-Appellant.

BRIEF OF RESPONDENT

Appeal from the Third Judicial District Court,
Salt Lake County, State of Utah
The Honorable James S. Sawaya, Judge

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IN THE SUPREME COURT
OF THE STATE OF UTAH

PRUDENTIAL PROPERTY & CASUALTY
INSURANCE COMPANY,

Plaintiff-Respondent,

vs.

No. 16126

JAMSHID MARDANLOU,

Defendant-Appellant.

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action brought by Prudential Property & Casualty Insurance Company for declaratory relief pursuant to §78-33-1 et seq., Utah Code Annotated (1953) seeking to rescind a renter's (homeowner's) policy because of material misrepresentations made by the defendant when applying for said insurance.

DISPOSITION IN LOWER COURT

After a non-jury trial, the District Court of Salt Lake County, James S. Sawaya, Judge, determined that the policy of insurance was void, rescinded the policy, and entered a

judgment providing that plaintiff was relieved from any further obligation to defendant.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks affirmance of the trial court's decision.

FACTS

Respondent disagrees with appellant's statement of the facts. Appellant states the facts in a light favorable to appellant and contrary to the findings of the trial court; appellant's recitation of the facts is argumentative. Accordingly, respondent will set forth a detailed chronological statement of the facts. References are to Exhibit Numbers, pages of depositions or statements, to the record, and in referring to the trial transcript, the transcript page designated "T".

The argumentative nature of appellant's statement of facts is well illustrated on page 4 of Appellant's Brief wherein it is stated that "the appellant is an Iranian citizen who has English language difficulties". Reference is made to three pages of the Transcript wherein the appellant made self-serving statements to the effect that he did not understand the questions being asked of him. The clear weight of the evidence, however, was to the contrary. The Aetna adjuster (Mr. Osowski) who negotiated the first

burglary loss testified (T-145) that he had several face-to-face meetings with the defendant and that while there were some language difficulties "he spoke relatively good English. I think we were basically able to communicate". Prudential's agent (Mr. Ferguson) testified that he had no difficulty communicating with the defendant (T-66). A year before, when defendant applied for the Aetna policy he discussed the matter over the telephone with Linda Messerly, an employee of Ed D. Smith & Sons which was the local agent for Aetna. She had no problem in communicating with him (T-37). It should be observed that the defendant had been in the United States for six years (at the time of the trial). had a Ph.D. in physical education from the University of Utah, and had taught classes at the University (T-3-4). Defendant admitted that when he was discussing the insurance with Prudential's agent that there was no confusion (T-171) and that he recalls no language difficulties nor the need for an interpreter (although one was available) at the time his statement was taken in April, 1977 (T-191). Further, the trial court made a specific finding that the defendant was conversant in the English language and could speak, write and understand same (R-84).

The crucial facts of this case may be summarized as follows:

(1) In October, 1975 the defendant applied for and received a binder of homeowner's insurance from Aetna Insurance Company.

(2) A few days later he reported a suspicious burglary and the loss of \$8,600.00 of personal property.

(3) That he made claim against Aetna Insurance Company, which was disputed; defendant complained at one time to the State Insurance Commissioner regarding Aetna's handling of the claim.

(4) Aetna cancelled his insurance policy and later compromised his claim for approximately \$5,000.00

(5) That defendant knew he had been cancelled by Aetna.

(6) Less than one year later, on October 6, 1976, defendant applied for a similar policy of insurance with the appellant. Appellant's agent, Lloyd D. Ferguson, asked him certain questions and based upon defendant's responses completed an application which the defendant signed.

(7) That appellant's agent asked him about prior losses, prior insurance, and whether he had ever been cancelled.

(8) That defendant did not disclose to the agent that he had been insured by and/or cancelled by Aetna, nor did he disclose another prior loss.

(9) That defendant had ample opportunity to review the application and in fact later pointed out to the agent an error in the inception date of the policy, however, defendant did not advise the agent of the inaccuracy of the statements regarding prior insurance or prior losses.

(10) That in reliance upon the information furnished by defendant the agent bound coverage and subsequently a policy was issued by the Prudential Insurance Company.

(11) Approximately ten days later defendant sustained a loss on account of a mysterious fire and made claim against the respondent.

(12) That respondent's general underwriting policies and guidelines, and particularly those written instructions given to agents, prohibit an agent from binding coverage when the applicant had been cancelled within the last year. That if the true facts had been known to respondent, it would not have insured the defendant.

THE AETNA CLAIM

On October 2, 1975, the defendant called the Ed D. Smith Insurance Agency and talked with Linda Messerly (T-7,24-26). He requested coverage on certain unscheduled personal property and she prepared a binder. The binder was sent to the defendant at the address he gave her on October 2, 1975 (T-32). On October 7, 1975, the defendant called Ed D. Smith Agency

a second time and asked if two Persian rugs would also be covered under the policy and when informed that they would not in absence of a separate binder, he ordered the additional coverage (T-7-8). Both binders were mailed to him on October 2 and October 7, 1975, respectively, and he received both binders in the mail (T-7, 8, 32).

On the evening of October 8, the defendant allegedly sustained a burglary loss and reported that loss to the agency the next day, October 9 (T-8,9). Thereafter, the defendant dealt with a Mr. Osowski, a claims adjuster for Aetna, and met with him on several occasions attempting to negotiate the claim (T-9, 11; Deposition of Mr. Osowski, page 8-10).

Exhibit P-5 consists of a folder containing miscellaneous documents prepared by the Ed D. Smith Agency. Copies of the binders were mailed in the ordinary course of business and so far as the Agency's records show, were received by the defendant. The defendant did not pay the agreed premium and Ed D. Smith sent out nine separate billings (before writing off the account), all of which were apparently received with one exception (the billing of October 9, 1975), which may have been returned because the complete address was not visible through the window in the envelope.

On October 17, 1975, Linda Messerly sent a letter to Mr. Mardanlou advising him that the insurance policy had

been cancelled by Aetna for underwriting reasons. Miss Messerly had been instructed to cancel the policy by Aetna. At that time, the defendant was not overdue in payment of the premium (T-34-36).

Appellant contends that the cancellation letter was mailed to the wrong address and denies receiving it. The cancellation letter, however, was sent to 422 South 1200 East, Apartment No. 19, which was the address that he first gave to Miss Messerly over the telephone. Appellant claimed at the trial that he was living at Apartment No. 9. However, he admits that he received both the original homeowner's policy binder and also the "valuable items policy" binder (T-7, 8) both of which show his address as Apartment 19. The nine billings were all mailed to Apartment 19 and, as above indicated, only one was ever returned by the post office. Significantly, the cancellation letter was never returned (T-33).

The defendant's negotiations with Osowski regarding the first burglary went on for several months. In fact, defendant complained to the insurance commissioner regarding Aetna's handling of his claim (T-12-13). Defendant executed a proof of loss on November 18, 1975 (Exhibit P-2) making claim for \$8,604.00. On January 29, 1976, defendant executed two releases (Exhibit P-3) and received two checks totaling \$5,485.00 (Exhibit P-4).

Defendant admits that the Aetna claims adjuster, Mr. Osowski, told him sometime between mid-October and the end of January that he was cancelled (T-13, 14, 167, 189, 190). Defendant also submitted an affidavit in connection with the instant lawsuit wherein he stated that he heard a "oral rumor" that part of the policy had been cancelled (R-68).

Homeowner's policies are written normally for a minimum of three months and most commonly for a period of one year (Deposition of Mr. Osowski, pages 13-14). Defendant admitted that when he applied for the Aetna policy he intended to be insured for one year (T-15). However, the proof of loss which he admittedly signed (P-2) and the checks which he admitted he cashed (P-4) reflected on their face that both the homeowner's policy and the endorsement expired prior to the end of October, 1975.

While Mr. Osowski did not know the exact reason why the Aetna underwriting office instructed the agent to cancel the policies, there would usually be only two reasons therefor. First, nonpayment of premium, or secondly, the suspicious nature of the loss and general underwriting considerations (Deposition of Mr. Osowski, pages 29-30). As indicated, however, Linda Messerly testified that defendant was not overdue in payment of premiums as of October 17, the date of the cancellation letter (T-36).

THE APPLICATION WITH PRUDENTIAL

Lloyd Ferguson was the insurance salesman for Prudential. On October 6, 1976, he met the defendant at the physical education department at the University of Utah (T-5, 49). The defendant was first interested in obtaining automobile insurance but when Mr. Ferguson learned that the defendant had not had any automobile insurance for the last 30 days, he told him that Prudential would not consider issuing him a policy. Thereafter, they discussed homeowner's or renter's insurance. The defendant was interested in such insurance because he had some valuable Persian rugs, and wanted them insured for a total of \$15,000.00 (T-58). Mr. Ferguson then started completing the "application for homeowner's policy" (Exhibit P-1). The application requires information regarding past addresses, marital status, employer, etc. The significant items for the purposes of this litigation are as set forth in paragraphs 8A and 8B, which make inquiry regarding prior homeowner's insurance history and prior losses. Mr. Ferguson specifically asked the defendant whether any insurance company had cancelled, refused to renew or declined acceptance during the last three years; the defendant answered "no" to each question (T-55). When Mr. Ferguson asked him about prior losses, the defendant first stated no, and then admitted that he had a

loss at his prior address a year before but that he had lost only some "minor items" such as gloves, goggles and ski poles. At no time did the defendant give any indication of the magnitude of the prior loss nor did he ever give any indication that he had had a policy of insurance with Aetna (T-56, 61-62, 81).

The defendant identified Exhibit P-1 and acknowledged that he had signed it up at the University (T-4-5). He was furnished a copy of the application which he took home with him. A few days later, while reading over the application, he noticed that Mr. Ferguson had inadvertently written in 12-01-76 as the inception date of the policy, when the inception date should have been 10-06-76 (T-15, 159, 178). He called Mr. Ferguson and told him about the error and told him to change it otherwise he was going to cancel the policy (T-178). At no time, however, did defendant ever advise Mr. Ferguson or any other agent of Prudential that in fact he had been previously insured with Aetna and that he had been cancelled (T-61, 178).

Defendant admitted to the burglary loss in October, 1975, and that admission is reflected in paragraph 8B of the application. However, as above indicated, the defendant did not disclose the magnitude of that loss. It further appears that defendant failed to advise the agent of yet another

loss which occurred in California some time within the prior three years (T-18, 157).

Thereafter, Mr. Ferguson corrected the application form and delivered a corrected copy to Mr. Mardanlou and then submitted the application to Prudential for the issuance of a policy (T-61, 66). Shortly thereafter the defendant's apartment was badly damaged by a fire of mysterious origin on October 19, 1976, and he made claim against Prudential (T-19-20).

MATERIALITY OF THE MISREPRESENTATION

Prudential's agent, Lloyd Ferguson, was delegated a certain amount of "binding authority", which meant that under some circumstances he could bind coverage without approval from the regional office of Prudential (which in this case was in Phoenix, Arizona) (T-46). However, there were several restrictions upon his binding authority and he was not authorized to bind coverage if the applicant had been declined, refused renewal or cancelled within 12 months by any other company or if there had been more than two losses during the last three years (T-47, 48, 62-64).

Mr. Ferguson identified and explained the contents of an 11-page folder referred to in the industry as an "HR-10", "selection of homeowner's risks", which was admitted as plaintiff's Exhibits P-6. That document was in effect in

October of 1976 and governed the agent's binding authority. It specifically provides that "coverage may not be bound when one of the following conditions exist". The document then lists seven restrictions including value and amount of insurance, the nature of the structure, the location of the structure, the nature of the ownership or occupancy, the amount of scheduled personal property and whether outboard motors and boats are involved. Specifically, under subsection E entitled "insurance history", it is provided that coverage may not be bound when "there have been more than two losses of any kind within the last 36 months . . ." and "during the last 12 months an insurance company has declined, cancelled or refused to renew similar insurance for underwriting reasons . . .". Exhibit P-6 further provides that a certain amount of flexibility is permitted, even if an applicant had been cancelled within the last 12 months; it is provided, however, that such an applicant may not be bound but that the agent may send an inquiry form to the regional office of Prudential where a decision will be made whether to issue a policy. Mr. Ferguson testified, however, that if he had known that the defendant had been cancelled for underwriting reasons, that he wouldn't even have taken an application (T-84). Exhibit P-6 further provides that any such inquiry form, even if sent, would have to be mailed

to the regional service office of Prudential in Phoenix 30 days prior to the date coverage is desired.

Bill Zimmerman is the Associate Underwriting Manager at the Western Regional Service Office in Phoenix, Arizona. In his position he makes the rules regarding underwriting decisions and is not bound by the HR-10 (Exhibit P-6), and he can make exceptions to the rules (T-110-111). Agents or salesmen such as Mr. Ferguson, however, are bound by the rules set forth in the HR-10 (T-111). He confirmed that if the applicant had admitted to the prior cancellation by Aetna that Mr. Ferguson could not have bound coverage (T-117-118). If an inquiry had been made, and Mr. Zimmerman had known of the prior cancellation, he would have had the authority to nevertheless issue a policy, but he would not have done so (T-118-119). He also confirmed that based upon his knowledge of the industry in general that a standard line insurance company such as Prudential would not have insured the defendant if they had known of his prior cancellation by Aetna and that a high-risk or substandard company would probably not have written such insurance, or that if they did, the rate would have been perhaps 10 or 20 times as great as the premium quoted by a standard company (T-122-123).

In summary, it was clearly established without dispute at the time of trial that Prudential Insurance Company would

not have insured the defendant if he had disclosed the prior cancellation by Aetna.

CREDIBILITY OF DEFENDANT

Appellant argues that he did not know that he had been cancelled, that he never received any written communications from Aetna advising him of that fact, that he had English language difficulties, that he made full disclosure to Mr. Ferguson and that he did not intend to defraud or mislead Prudential or its agent. The argument is thus made that the trial court should have believed the defendant and not the other witnesses.

Respondent suggests that the following factors, among others, justified the court in believing the other witnesses and discounting the credibility of the defendant.

The trial judge had ample opportunity to evaluate the demeanor of the defendant and the substance of his testimony both on direct and cross examination. In addition, a reported statement, under oath, was taken of the defendant on April 21, 1977, said statement admitted into evidence as plaintiff's Exhibit P-10. In addition, defendant filed an affidavit in connection with this lawsuit found at page 65 of the record. Various discrepancies and inconsistencies appear therefrom including, but not limited to, the following.

At page 74-75 of his statement, he denies making any claims of any type to any insurance company since 1972, with

the exception of a workmen's compensation claim in California. On page 78 of the statement, on the other hand, he admits that he made a claim against Aetna.

At page 80 of his statement, he stated that he knew that Aetna had cancelled, and that they did it like Prudential Insurance Company and "the same way the insurance companies do". At the trial he testified that Mr. Oslowski, the Aetna claims adjuster, had told him verbally that "you do not have any more insurance" (T-13-14). In his affidavit, however, he claims that he had only heard an oral rumor that "part of the policy had been cancelled" (R-68).

At page 22 of his statement (P-10), he stated that Ferguson had asked him if he had had a prior homeowner's policy but did not recall whether Ferguson asked if a policy had been cancelled. He testified at the time of trial that Ferguson did not ask him about prior insurance companies or whether he had been cancelled (T-156), contrary to his testimony and his statement of April 21, 1977 (P-10), and at variance with other testimony which he gave at the time of trial, for example where he testified that he had told Ferguson that Aetna had cancelled his policy "half and half" (T-18).

Without belaboring the point, a careful reading of the Defendant's Affidavit, his statement (P-10) and his

testimony at the time of trial indicates that he gave several different versions of the critical events. First, that he knew that he had been cancelled by Aetna, or that he did not know that he had been cancelled by Aetna, or that he thought he had been cancelled "half and half". Second, that Ferguson asked him about prior cancellations and that defendant made full disclosure of the Aetna cancellation, or that Ferguson did not ask, and the defendant told him anyway, or that Ferguson did ask and defendant told him but that Ferguson did not care, or that Ferguson did not ask and that defendant did not tell him.

The trial judge could have been influenced by defendant's claims that he only received those documents in the mail which were beneficial to his position, and denied receiving other documents, sent to the same address, which were not helpful. His claim of English language difficulty is rebutted by the testimony of other witnesses and, of course, the trial court was in the best position to evaluate the defendant's language ability.

ARGUMENT

I

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS.

In reviewing the evidence in this case, certain basic principles of appellate review are applicable:

1. Disputed facts must be reviewed in the light most favorable to the judgment entered in the trial court, Smith v. Gallegos, 400 P.2d 570, 16 Utah 2d 344.

2. The judgment of the trial court is presumed to be correct, Robinson v. Hreinson, 409 P.2d 121, 17 Utah 2d 261.

3. It is the prerogative of the trial court to determine what aspects of the evidence he will believe and the court may be selective and choose those portions of the testimony of any witness which it thinks has the greater probability of being true. The trial court is the exclusive judge of the credibility of witnesses and is not obliged to believe testimony in which there is any inherent frailty, including self-interest, Cannon v. Wright, 531 P.2d 1290 (Utah 1975); People's Finance v. Doman, 497 P.2d 17 (Utah 1972).

4. On review, findings and judgment of the trial court will be sustained if supported by any substantial evidence and reasonable inferences to be drawn therefrom. In order to reverse a trial court, the evidence must be such that all reasonable minds would not have found as the trial court found, Centurion Corp. v. Fiberchem, Inc., 562 P.2d 1252 (Utah 1977); Jensen v. Eddy, 514 P.2d 1142 (Utah 1973).

5. The Supreme Court will not disturb findings of the trial court unless the trial court has misapplied proven facts or made findings of fact clearly contrary to the weight of the evidence. The trial court's determination of findings of fact should normally stand, even though the Supreme Court might disagree. The advantaged position of the trial court, that is, close proximity to witnesses and the trial, should be given substantial consideration, De Vas v. Noble, 369 P.2d 290 (Utah 1962); Valley Bank v. First Security Bank, 538 P.2d 298 (Utah 1975); First Security Bank v. Hall, 504 P.2d 995 (Utah 1972).

Respondent respectfully submits that each of the trial court's findings were based on substantial, competent and admissible evidence. The trial court's findings of fact are found at R-79 and for convenience are restated herein, with brief reference to the evidence supporting the findings:

(1) That on October 6, 1976, the defendant applied for a policy of homeowner's (renter's) insurance through plaintiff's agent, Lloyd Ferguson. That the plaintiff's agent asked the defendant certain questions necessary to complete the application including, inter alia, questions relating to defendant's past loss and past insurance history.

Both the defendant and Ferguson so testified, the only conflict being defendant's on-again, off-again claim that Ferguson did not ask him about prior insurance. The

trial court, however, believed Mr. Ferguson's version of the events.

(2) Plaintiff's agent, based upon facts given to him by defendant, completed the application form and included therein the information that (a) the defendant had not been cancelled, declined acceptance, nor refused to renew by any company within the last three years, and (b) defendant had no prior losses except a burglary of a few items of nominal value from his residence at 422 South 1200 East, Salt Lake City, in October, 1975, and (c) defendant had no previous homeowner's insurance and had made no previous claims.

The testimony of both the defendant and Mr. Ferguson, and the application itself (Exhibit P-1) support this finding.

(3) That thereafter, the defendant signed the application certifying that the declarations and statements therein were complete and true to the best of his knowledge and belief and that the company (plaintiff) could rely upon them in the issuance of any policy based upon said application.

Defendant admits that he signed Exhibit P-1; the certification that the statements made in the application are true is printed on the application form immediately over defendant's signature.

(4) That a copy of the application was delivered to and furnished to the defendant. That within a few days after October 6, 1976, the defendant read over the application in detail and noted an error in the application relating to the effective date of the policy, and that defendant called the existence of the error to the attention of plaintiff's agent who thereafter, at the request of defendant, corrected the application in the particular complained of and delivered a corrected copy to defendant. That at no

time did defendant advise the plaintiff or any of plaintiff's agents of any errors, misrepresentations, omissions, concealment of facts or incorrect statements contained in said application at any time prior to the subsequent fire of October 19, 1976.

Defendant admitted that he read over the application and advised Mr. Ferguson of the error regarding the inception date. He admits that he did not advise Mr. Ferguson of any of the other misstatements or errors set forth in the application.

(5) That in reliance upon the truth and accuracy of the information contained in the application and furnished to him by defendant, plaintiff's agent bound coverage effective October 6, 1976 and subsequently, in reliance upon the information contained in the application, the regional service office of Prudential issued its homeowner's policy No. 51-6H148371.

There was no dispute as to this finding. Mr. Ferguson and Mr. Zimmerman so testified.

(6) That on approximately October 19, 1976, defendant allegedly sustained a loss of certain personal property as a result of a fire at 938 East 3rd South Street, Salt Lake City, and subsequently made claim against plaintiff for the loss of certain items of personal property, including but not limited to, at least three valuable Persian rugs having an alleged value in excess of \$15,000.00.

There was no dispute as to this finding. Defendant so testified.

(7) That the application contained, inter alia, the following misrepresentations, omissions, concealment of facts and incorrect statements:

(a) That defendant had only had one prior loss, to wit, a relatively minor burglary of a few items of nominal value from defendant's residence at 422 South 1200 East, Salt Lake City, in October, 1975.

In fact, defendant had had another burglary loss within three years while residing in California, and in addition, the Salt Lake burglary of October, 1975, involved a large amount of property having a value claimed by defendant in excess of \$8,000.00.

(b) That defendant had not had previous homeowner's insurance and had not made claim against another insurance company.

In fact, defendant had had a policy of similar insurance with Aetna Life & Casualty Company in October of 1975, had submitted a proof of loss to Aetna for approximately \$8,600.00, which proof of loss was denied by Aetna and ultimately compromised for approximately \$5,500.00. That defendant had had a substantial dispute with Aetna regarding the settlement of the burglary claim in October, 1975, resulting in, inter alia, defendant's complaint to the Utah State Insurance Commissioner regarding Aetna's handling of his claim, and the cancellation of his insurance policies with Aetna.

(c) That during the three years prior to October 6, 1976, that the defendant had not been cancelled, refused renewal, nor declined acceptance, by any company.

In fact, defendant called an agent of Aetna, Ed D. Smith & Sons Insurance Agency, on October 2, 1975 and requested a verbal binder of homeowner's or renter's insurance. Coverage was bound by Aetna's agent. On October 7, 1975, defendant called Ed D. Smith & Sons and inquired whether Persian rugs would be covered under that policy and when advised that they would need to be scheduled, requested and received a binder specifically insuring the Persian

rugs. On October 9, the defendant reported a burglary of various items of personal property, including the rugs, to Ed D. Smith, said burglary allegedly occurring on October 8, 1975. Thereafter, his policies of insurance with Aetna were cancelled by Aetna Insurance Company which instructed Ed D. Smith & Sons to advise defendant of said cancellation. That defendant was advised of the cancellation of his Aetna policies by virtue of, inter alia, a letter directed to him from Ed D. Smith & Sons dated October 17, 1975, verbal advice received from a claims representative of Aetna Insurance Company and written indication of the short-term expiration of his policies as set forth on the proof of loss and on the face of two drafts issued to defendant by Aetna. That defendant well knew he had been cancelled by Aetna prior to applying for insurance with plaintiff on October 6, 1976. That cancellation of defendant's Aetna policies was not the result of nonpayment of premium nor any termination of Aetna's agency relationship with Ed D. Smith & Sons, but rather because of the unusual nature of defendant's alleged loss and claim against Aetna.

Defendant admits to the other burglary in California and that he did not so advise Ferguson. He admits that the loss in Salt Lake in October, 1975, was for approximately \$8,600.00. Ferguson testified that defendant did not advise him of the magnitude of that burglary loss. His dealings with Aetna are confirmed by the defendant's own admissions, and by the testimony of Mr. Osowski and Linda Messerly. The findings are further supported by Exhibits P-1, 2, 3, 4 and 5.

(8) That at all times herein material, and specifically prior to October 6, 1976, the defendant well knew all of the above, and knew that

those facts would be relevant to the plaintiff's decision whether or not to bind coverage or to issue a policy, but that nevertheless defendant knowingly, willfully and intentionally concealed said facts from the plaintiff and the plaintiff's agent with the intent to deceive and defraud plaintiff and to induce it to bind coverage and issue a policy of insurance.

There is no doubt but that the defendant well knew all of the facts contained in findings number 7 and 8. That he did so willfully and with the intent to deceive and defraud is a reasonable inference to be drawn from the circumstances of the case. Mr. Ferguson and Mr. Zimmerman testified without dispute that the representations on the application induced Prudential to bind coverage and that Prudential would not have done so if the true facts had been known.

(9) That plaintiff relied upon the false representations made by defendant and plaintiff's agent accordingly bound the coverage and the plaintiff ultimately issued its policy of insurance based upon said application. That the misrepresentations, omissions, concealment of facts and incorrect statements were fraudulent material to the acceptance of the risk by the plaintiff, and that the plaintiff's agent would not have bound coverage if the true facts had been disclosed and that plaintiff would not have issued its policy if the true facts had been known. That the plaintiff, acting in good faith, and reasonably and naturally and in accordance with the usual practice among insurance companies under circumstances such as existed here would not have bound coverage or issued the policy, and would have rejected the application of defendant if plaintiff had known the true facts.

Mr. Ferguson and Mr. Zimmerman so testified. Defendant put on no evidence that Prudential, or any other insurance

company, would have insured the defendant if he had disclosed the facts of the prior cancellation.

(10) That the defendant was conversant in the English language and could speak, read, write and understand same, that defendant was not prevented in any way from reading the application, that defendant had ample opportunity to read said application and did in fact read and sign said application prior to the alleged loss of October 19, 1976.

This finding is supported by the defendant's own admissions and by the testimony of Mr. Osowski, Miss Messerly and Lloyd Ferguson.

(11) That defendant intentionally, knowingly and willfully concealed material facts from plaintiff which he knew were material to plaintiff's acceptance of the risk, that plaintiff in good faith would not have accepted the risk if it had known of the true facts, and that plaintiff was not advised of the true nature of the misrepresentation, omissions, concealment of facts and incorrect statements in advance of issuance of the policy or in advance of the loss of October 19, 1976.

That Prudential was never advised of the prior cancellation prior to the fire was not disputed. The findings of intent and willfulness are reasonable inferences drawn from the facts of the case. The evidence was undisputed that Prudential would not have accepted the risk if it had known of the true facts.

II

THE COURT'S FINDINGS AND CONCLUSIONS WERE IN ACCORDANCE WITH APPLICABLE LAW.

The statute which governs cases of this nature is §31-19-8 Utah Code Annotated (1953). That statute provides in relevant part that

All statements and descriptions in any application for an insurance policy . . . 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 would not have issued . . . it at the same premium rate, or would not have issued (it) . . . 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.

It should be noted that the statute speaks in the alternative, that is, a misrepresentation or omission will prevent recovery under the policy of insurance if fraudulent, or material to the acceptance of the risk, or the insurer in good faith would not have issued the policy at all, or at the same rate.

The following brief chronological analysis of Utah and Tenth Circuit cases may be helpful to the court in setting forth prior interpretations of the statute, and prior court decisions under common law.

The first case found which deals with this issue is Chadwick v. Beneficial Life Ins. Co., 181 P.448 (Utah 1919). The beneficiary brought an action against the company to recover under a policy of life insurance. The company defended upon the basis that certain misrepresentations had been made by the insured as to whether he had a life-threatening condition. The trial court directed a verdict for the insurance company. The Supreme Court reversed because there were factual questions relating to whether the insured in fact knew that he had a life-threatening condition, whether he was in fact asked by the agent, and whether either the insured or the agent knew that he (the insured) had any disease and the seriousness thereof. The court observed that the evidence was sufficient to support a jury verdict for either party. The court adopts the view that in order to defeat coverage, an insurance company would need to prove that the statements made by the insured were untrue and that the insured knew or should have known them to be untrue at the time they were made.

The next case found which was decided on this question is Eklund v. Metropolitan Life Ins. Co., 57 P.2d 362 (Utah

1936). The Utah Supreme Court affirmed a directed verdict for the insurance company where the deceased had represented that she had no prior diseases, specifically cancer, and denied any prior treatment by doctors. In fact, she was suffering from cancer and, presumably, knew it. It was held that the statements made to the company were material to the risk and must have been knowingly false. Since there was only one reasonable inference to be drawn therefrom, a directed verdict for the company was proper.

In 1938 the Tenth Circuit Court of Appeals decided Zolintakis v. Equitable Life Assur. Soc., 97 F.2d 583 (10th Cir. 1938). The District Court had directed a verdict for the company and the Tenth Circuit reversed. While it appeared that the deceased had misrepresented his age, address, occupation and "good morals", it further appeared that age was irrelevant by the policy provisions, that the address and the insured's occupation were essentially truthful and in any event not material, that is, that neither the address nor the occupation made the risk any more hazardous. There was no evidence that the company would not have insured him if it had known the true facts. The Tenth Circuit cites Chadwick v. Beneficial Life Ins. Co., supra, for the proposition that

A misrepresentation will not constitute a defense to an action on a policy of insurance

unless it was intentionally untrue or was made with a reckless disregard for its truth or falsity. Where an insured knowingly makes a material misrepresentation, proof of an actual, conscious purpose to deceive is not necessary.

A material fact is any fact, the knowledge or ignorance of which would naturally influence the insurer's judgment in making the contract, in estimating the degree and character of the risk, or in fixing the rate of insurance. 97 F.2d at 586.

North American Accident Ins. Co. v. Tebbs, 107 F.2d 853 (10th Cir. 1939) affirmed a jury verdict in favor of the insured. The insurance company had claimed that the insured had misrepresented a prior declination of similar insurance. The evidence established that the insured truthfully disclosed prior applications but that he denied they had been declined. However, the evidence was that the applications were conditional and the jury found that the insured did not know they had been declined. It was held that the jury's verdict was supported by substantial evidence.

In 1940 the Tenth Circuit decided Zolintakis v. Equitable Life Assur. Soc., 108 F.2d 902 (10th Cir. 1940) a second time. The jury, on a special verdict, found that the representations regarding residence and occupation were not strictly true, but that they were not knowingly and intentionally untrue nor made with the intent to defraud. Again, the court pointed out that there was conflicting evidence and inferences regarding both representations, and that it was

questionable whether they were even material, and specifically a jury finding of no knowing concealment. Under those facts, the insured was entitled to prevail. The court notes, however, that

One cannot knowingly conceal or misrepresent facts which one knows would influence the risk or the issuance of the policy, and then be heard to say that he did not intend to deceive or defraud, 108 F.2d at 906.

In New York Life Ins. Co. v. Grow, 135 P.2d 120 (Utah 1943) the Supreme Court affirmed a judgment for the insured where the company disputed coverage, claiming that the insured had failed to disclose the existence of heart disease. However, there was evidence that the insured may not have known of his condition. There was evidence that the application was not read to him and that he did not read it. He had a confusing medical history. The evidence showed that the agent may not have asked, and if he did, that he was told of the problem by the insured but that the agent did not inquire further. While the insured signed the application, there was no evidence he had read it. Prior to the loss, the agent was told about an aggravation of the insured's heart condition, but the agent did not change the application because "it was not important." The court reaffirmed the rule in Chadwick, observing that since the company had failed to prove a knowing misrepresentation,

and that no intent to defraud was shown, the verdict was supported by the evidence. Chief Justice Wolfe noted that evidence that the representations made were untrue and that the insured knew or should have known they were untrue, would ordinarily be sufficient proof of the fact that they were fraudulent, that is, that the insured intended to deceive. Justice McDonough observed that a finder of fact could not find an absence of intent to defraud where the applicant knowingly misrepresented facts which he knew or should have known would have influenced the insurer in accepting the risk.

Fidelity & Casualty Co. of New York v. Middlemiss, 135 P.2d 275 (Utah 1943) affirmed a verdict for the insurance company. The insured, a doctor, denied having any physical defects whereas, in fact, he had lost 80% of the vision in the right eye. He later lost the remaining 20% and made claim against the company. He claimed his answers were "true in the general sense." It was held that his contention was not sufficient as he knew, or should have known, that the company may not want to insure his right eye which already was damaged. The doctor had read the application.

In Farrington v. Granite State Fire Ins. Co., 232 P.2d 754 (Utah 1951) a verdict for the insured was affirmed. The company had claimed a misrepresentation regarding the nature

of the use of the building. However, the evidence was that the plaintiff had advised the defendant's agent of the change of use after the issuance of the policy but prior to the loss, and thus knowledge of the change of use was imputed to the company. The change of use was not shown to be material and the company accepted premiums after knowledge of all material facts.

In 1954 the Tenth Circuit affirmed a jury verdict in favor of an insured in Prudential Ins. Co. of America v. Willsey, 214 F.2d 729 (10th Cir. 1954). The jury found, and the evidence supported a finding that the insured had made full disclosure, that the agent may or may not have written the appropriate answers on the application, and the insured had not read the application before signing it.

Wooton v. Combined Ins. Co. of America, 395 P.2d 724 (Utah 1964) affirmed a summary judgment in favor of the insured. The company had claimed misrepresentations as to the insured's health, that is that he had had polio, walked with a limp and had retired from his job. The insured died when he was run over by a car. The evidence was, however, that the company's agent knew that the insured limped, and that he had had polio as a child. He in fact was fully recovered from the polio except for the limp. There was no evidence of materiality since the death was in no related

to the physical defect and in any event the company had expressly excluded coverage for polio or any residual paralysis.

In Theros v. Metropolitan Life Ins. Co., 407 P.2d 685 (Utah 1965) the insured, when applying for life insurance, had denied any lost time from work, heart disease, or medical treatment for heart disease. In fact, he had been hospitalized for a heart attack two years before applying for insurance and had been told of his heart problem by his doctors. The insured did, however, make full disclosure of those facts to the agent who falsely recorded the insured's answers. The Supreme Court held, however, that the insured was duty bound to read the application, that he had signed it and was bound by the answers. He permitted false information to be submitted to the company. The court adopted the majority view that the insured is bound by misstatements appearing in an application, particularly where he had an opportunity to read the application and had signed it. The court affirmed summary judgment in favor of the insurance company.

The Supreme Court affirmed a judgment for the insured in Pritchett v. Equitable Life & Casualty Ins. Co., 421 P.2d 943 (Utah 1966). The company claimed that the insured had failed to disclose that she had cancer. However, there was

no evidence that she had cancer at the time that she applied for insurance. It was claimed that she should have told the company about a prior stomach problem. However, the evidence showed that the company (had it known) would merely have excluded coverage for stomach problems and still would have been liable for cancer. Thus, there was no showing of materiality.

In Marks v. Continental Casualty Co., 427 P.2d 387 (Utah 1967) a judgment in favor of the insured was sustained. The company had claimed that the insured had concealed partial paralysis of the left arm occurring six years before the application and the removal of her "tail-bone" nine years before. The Supreme Court sustained the judgment of the trial court for it appeared that the agent was her brother-in-law and he well knew her past medical history. She did not read the application and, in fact, signed it in blank and mailed it to her brother-in-law. It also appeared that the application did not contain any language near the signature line to the effect that the applicant had read the foregoing answers and that they are true and correct. It further appeared that the misrepresentation, if any, was not material as no relationship appeared between the prior medical problems and the actual back operation for which claim was made.

Utah Supreme Court reversed a summary judgment in favor of the insurance company in Burnham v. Bankers Life & Cas. Co., 470 P.2d 261 (Utah 1970), where the court found that the policy was not contestable since it was a reinstatement of a prior policy. Thus, the alleged misrepresentation was not material to the court's decision, however, in dicta Justice Callister observed that it was very questionable whether the insured's visits with a psychiatrist, for marriage counseling, were in fact material to the risk. He further noted that summary judgment should not have been granted for the insurance company based upon a self-serving affidavit from the insurance company's defense attorney that the company would not have reinstated the policy if they had known of the visits with the psychiatrist. Judge Callister restates what appears to be the state of the law with regard to cases of this nature:

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 the 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. 470 P.2d at 263.

In Moore v. Prudential Ins. Co. of America, 491 P.2d 227 (Utah 1971), the Supreme Court affirmed a jury verdict in favor of the plaintiff. The company contended that the plaintiff's decedent had misstated his medical history, that is that he had failed to disclose a prior condition diagnosed as "cataplexy", a rather rare condition for which there is no known medical explanation. The insured later died of a heart attack, and there was no evidence that the heart attack was in any way related to cataplexy. A witness for the insurance company testified that if the company had known about the cataplexy it would not have issued the policy, a contention which the jury evidently rejected. The Supreme Court affirmed the verdict in favor of the insured observing that it was the company's burden to prove to the jury that it would not have issued the policy but that the jury was certainly not required to believe the company's witness which was "suffused with self-interest." Reasonable minds might differ as to whether the company in fact would have issued the policy, even if they had known of the pre-existing medical problem.

The following general principles of law may be distilled from the above-cited cases.

(1) An insurance company may void a policy of insurance where the applicant intentionally misrepresents certain facts which may affect the acceptance of the risk or the hazard assumed by the insurer.

(2) Whether an applicant in fact knew that the misrepresentation was being made is a factual question.

(3) Whether the applicant intended to defraud the insurance company is a factual question.

(4) Some misrepresentations, which are borderline, may or may not be material to the risk. In such a case, it is a factual question whether the company would, or would not have, issued the policy.

(5) Some misrepresentations rise to such a level of importance that, if it can be established that the insured knew that the misrepresentation was being made, the court will hold the misrepresentation to be material as a matter of law, Eklund v. Metropolitan Life Ins. Co. and Fidelity & Casualty Co. of New York v. Middlemiss, supra.

(6) An insured who reads and signs the application is bound by the answers therein, and will not be excused by claiming that the agent wrote down the wrong information, Theros v. Metropolitan Life Ins. Co., supra.

Failure to disclose prior cancellations is one of the more serious misrepresentations which may be made in applying for insurance. Only one case interpreting Utah law directly deals with that question (North American Accident Ins. Co. v. Tebbs, supra), which affirmed a verdict against the company, but only where the jury specifically found that the insured did not know that he had previously been declined by another company. Many cases hold that where the insured in fact knew of the prior cancellation, such a misrepresentation is material as a matter of law.

In Globe Life & Accident Ins. Co. v. Still, 376 F.2d 611 (5th Cir. 1967) the Fifth Circuit Court of Appeals applied a Georgia statute identical to §31-19-8, Utah Code Annotated (1953, as amended) to facts nearly identical to those undisputed in the present case. Three applications for life, accident and health insurance on defendant Still were taken at his home by plaintiff's agent. The agent asked the questions contained in the applications and recorded the defendant's responses. Defendant Still then signed the applications. One of the applications inquired as to whether any insurer had ever declined an application by defendant Still or cancelled his insurance. The answer recorded by the plaintiff's agent was "no". As a matter of fact, another insurance company had previously cancelled a

health and accident policy issued to defendant Still and had on two occasions declined his application for insurance. The District Court submitted the issue of material misrepresentation to the jury, but the Circuit Court reversed holding:

. . . [I]t was error to submit to the jury the question of whether there was a false representation in the application for policy number 84 concerning insurance that was cancelled and applications that were declined by other companies.

* * *

With respect to the denial of the cancellation of other insurance and declined applications in the application for policy number 84, it is uncontradicted that Still signed the application after it had been completed by the agent. He was bound by the answers that there had been no cancellations of insurance or applications declined by other companies. . . .

The evidence in this case is clear that despite the statement on the application Still had, in fact, been cancelled and declined by another company. Under the law of Georgia such a false statement about rejection or cancellation of other insurance is a material misrepresentation and voids the policy as a matter of law. (Citations omitted). It was thus not a proper matter for jury resolution. Id. at 613 and 614.

In First Nat. Bene. Soc. v. Fiske, 101 P.2d 205 (Arizona 1940) the trial court submitted to a jury the question of whether the insured's failure to list in the application all insurance companies which had previously rejected his applications was a material misrepresentation.

The Arizona Supreme Court quoted from a previous opinion of that Court and held:

. . . [W]here an application with its Answers becomes a part of a policy, as it did in this case, a statement therein by the applicant that he has never been denied insurance is as a matter of law material and, if false, voids the policy at the option of the insurer. This rule is accepted by practically all the courts and in our view rests upon a sound basis because disclosure of the fact that one applying for a policy has been rejected by another company immediately suggests that he is probably not a good risk and undoubtedly leads to a more careful and thorough examination than would be true in the case of one whose application had not been rejected. It not only informs the company whether other insurers have regarded him as unsafe, and places it, so to speak, upon inquiry, but may advise it as to any anxiety for insurance the applicant may have. (Emphasis added). Id. at 206 and 207.

See also, Safeco Insurance Company of America v. Gonacha, 350 P.2d 189 (Colorado 1960) where the Colorado Supreme Court reversed the trial court and held that misrepresentations regarding prior cancellations are material to the risk as a matter of law.

The appellant argues that the District Court erred in refusing to apply an industry standard in determining the materiality of the misrepresentations. Appellant cites Burnham v. Bankers Life & Cas., supra, as authority for the proposition that the court must apply an industry standard. Burnham, of course, notes that whether a misstatement is material is for the jury (or the finder of fact) to determine.

Burnham and Moore v. Prudential, supra, should be read only as requiring evidence of industry practice only where the particular company involved does not have a definite written rule. In the instant case, of course, the rule was in writing and clearly set forth in Exhibit P-6. In any event, there was in fact evidence of the industry standard, put on through the testimony of Mr. Zimmerman, whom the court, unlike the jury in Moore v. Prudential, chose to believe. In addition, the court made a specific finding that the plaintiff herein would not have insured the defendant, not only because of the written rule, but also in accordance with the usual industry practice. Defendant made no attempt at the time of trial to put on any evidence that other insurance companies would have insured the defendant if they had known of the prior cancellation.

CONCLUSION

The court found, and the evidence supported, that the defendant knowingly misrepresented his past insurance history to the plaintiff and that the plaintiff would not have insured him if it had known the true facts. The court found, and the evidence supports, that the defendant's misrepresentations were intentional, fraudulent and calculated to mislead the plaintiff. All of the court's findings are fully supported by competent evidence. The

court's conclusions are consistent with, and indeed mandated by, the statutes of the state of Utah and the prior decisions of this Court.

The findings of fact, conclusions of law and judgment of the District Court should be affirmed.

Respectfully submitted this 10th day of August, 1979.

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