

2001

Joseph L. Mills v. C.N. Ottosen, Commissioner of Insurance and the State of Utah, by and through its Insurance Department : Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *Mills v. Ottosen*, No. 14496.00 (Utah Supreme Court, 2001).
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UTAH SUPREME COURT

BRIEF

14496 RBA

IN THE SUPREME COURT
OF THE STATE OF UTAH

JOSEPH L. MILLS

Plaintiff-Respondent

vs.

C.N. OTTOSEN, Commissioner
of Insurance and the STATE
OF UTAH, by and through its
Insurance Department,

Defendants-Appellants

Case No. 14496

REPLY BRIEF OF DEFENDANTS-APPELLENTS

Appeal from the Judgment of the Third Judicial District
Court for Salt Lake County,
Honorable Stewart M. Hanson, Sr.

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FILED

DEC 7 - 1976

JOSEPH L. MILLS

vs.

Defendants-Appellants

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REPLY BRIEF OF DEFENDANTS-APPELLANTS

REPLY ARGUMENT

POINT I - PLAINTIFF VIOLATED THE INSURANCE CODE.

A. Mr. Mills' Acts Related to the Law. Plaintiff in his Answering Brief claims difficulty in relating the facts of this case to a violation of the Insurance Code. Defendant is happy to clarify the violation by relating Mr. Mills' acts to the law.

1. The "performance bond" executed by Mr. Mills is a contract of insurance as defined by 31-1-7, because it is a "contract whereby one undertakes to indemnify another or to pay an amount upon determinable risk contingencies."

2. Signing and delivering the bond to Mr. Bradshaw was a "transaction of insurance" as defined by 31-1-11 because it was "execution of an insurance contract."

3. Mr. Mills caused his agency to become an insurer as defined in 31-1-10 because it became "engaged as surety."

4. Mr. Mills' agency did not have a certificate of authority to transact insurance business.

5. Mr. Mills caused his agency to violate the provisions of 31-5-2 because "no insurer shall transact any insurance in this state except that authorized by a valid and existing certificate of authority issued to it by the Commissioner."

6. Mr. Mills "knowingly participated in the violation of a provision of the Insurance Code" contrary to 31-17-50(b) by causing his agency to act as an insurer without a certificate of authority.

7. Mr. Mills, "in the conduct of his affairs under his license," in causing his agency to act as an insurer without a certificate of authority, "showed himself to be and was deemed by the Commissioner to be untrustworthy" contrary to the provisions of 31-17-50(h).

8. Mr. Mills in causing his agency to act as an insurer without a certificate of authority "exercised powers relative to insurance outside the scope of his licensing" contrary to the provisions of 31-17-50(i).

9. Mr. Mills in causing his agency to act as an insurer without a certificate of authority did not "act in

good faith, abstain from deception and practice honesty," nor did he "preserve inviolate the integrity of insurance" as required by 31-1-8.

B. Mr. Mills' Agency was an "insurer."

Plaintiff's answering argument in Point I is largely devoted to maintaining that Mr. Mills did not cause his agency to act as an insurer because although the performance bond was "insurance" and the execution of the bond was an "insurance transaction" the agency was not an "insurer" so as to require a certificate of authority. This so claims Plaintiff, because this transaction of insurance was an isolated one for which no premium was charged.

A discussion of the definition of "insurer" will be helpful. We believe the definition as set out in 31-1-10 reads as if phrased as follows:

"Insurer" includes every person engaged as:

1. Indemnitor,
2. Surety, or
3. Contractor in the business of entering into contracts of insurance or annuity.

We believe the phrase "in the business of entering into contracts of insurance or annuity" modifies only contractor and not either surety or indemnitor. We believe this phrase was used primarily to eliminate from the definition of insurer "the insured" who is also a "contractor." Both

"indemnitor" and "surety" by definition include entering into contracts of insurance. If the phrase were construed to modify both indemnitor and surety as well, this section would be read as,

"Insurer" includes every person engaged as indemnitor in the business of entering into contracts of insurance."

which is not only redundant and circular, but not sensible.

Although we believe the intent of the legislature as expressed in the wording is clear it should also be noted that the rules of legislative construction require such a result. Under the doctrine of the so-called "last antecedent," phrases are to be applied to the words or phrases immediately preceeding and are not to be construed as extending to others more remote. 2 CJS "Statutes" §334 and U.S. - Buscaglis v Bowie, C.C.A. Puerto Rico, 139 F.2d 294 - Corpus Juris cited in U.S. ex rel Santarelli v Hughes, C.C.A. N.J. 116, F2d, 613,616; Utah - Corpus Juris cited in State v Navaro, 26 P.2d 955, 959, 83 Utah 6 - Dunn v Bryan, 200 P.253, 77 Utah 604. It should also be noted there is no comma separating "contractor" from "in the business of entering into contracts of insurance or annuity." This type punctuation as a general rule is construed to mean the clause modifies only the last antecedent and not all the preceding clauses. 82 CJS "Statutes" §334 and S.D. Lewis v Annie Creek Mining Co., 48 N.W. 2d 815.

Finally, we think the results which would flow from Plaintiff's interpretation would be contrary to the whole idea of regulating insurance. Insurance, by its nature, provides

for a small payment to be made to buy the protection. If the protected-against event occurs, usually a disproportionately large sum must be paid the insured. Much of insurance regulation centers around making sure that this large sum can be paid as promised. For instance, the code requires that if an insurer obtains a certificate of authority to write suretyship insurance he must have \$300,000 in capital and \$500,000 in surplus - \$800,000 over and above the liabilities of the insurer. In spite of this, Plaintiff contends that if an insurer is only at it part-time or sporadically so as not to be efficient and does not make money so as to be successful, he can write surety insurance without regulation by the Department. The legislature did not intend such a result.

POINT II - THE VIOLATION WAS SERIOUS ENOUGH TO DEMAND
LICENSE REVOCATION.

A. The Circumstances of this Violation.

Plaintiff in his brief would have the Court believe that the Plaintiff reluctantly and innocently succumbed to the pressures of Mr. Bradshaw and signed the bond with the idea that the bank would look at it and if they liked the surety they could accept it and if they thought the surety was not adequate, they could reject it. The Insurance Commissioner views the circumstances otherwise. Plaintiff's actions in signing a licensed insurer blank bond form and handing it to

Mr. Bradshaw together with a Mills-Gundry card to make the necessary changes and completions is a sorry story. It tells clearer than confession that Mr. Mills was aware he was doing a wrong. It also says something about Mr. Mills. He was willing to implicate Mr. Bradshaw in a wrong instead of independently assuming the responsibility of an insurance transaction himself as a licensed insurance agent knowledgeable in the field. These circumstances do not exculpate Mr. Mills but damn him.

B. The Violation is Serious.

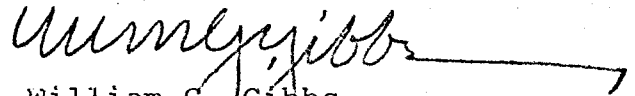
Let us look at the exposure of the bank. Assume the bank had accepted the performance bond as tendered them. Assume they then loaned the \$1,000,000 for construction of the building with the building forming a substantial part of the security for the loan. Assume the contractor did not build the building in accordance with the plans and specifications but shortcut the foundation by using less steel than required and less cement in the concrete than required so the building when completed was unacceptable and had to be razed. The bank would be out the \$1,000,000 but would not have the contemplated building as security. These circumstances are remote of happening, but are the very kinds of circumstances against which the bank was trying to safeguard itself in requiring the performance bond. When Mr. Mills caused to be placed in the stream of commerce the bond which had all of the appearances of being executed by an insurer qualified

under the State Code to write such insurance and executed by an insurer regulated by the Insurance Department so as to minimize the risks of loss for an insured, Mr. Mills at that moment exposed the bank to these dangers. The bank was not damaged, but this was due to the bank's own carefulness, not to Mr. Mills' probity. The integrity of the insurance industry requires that an insurance agent minimize this kind of risk, not contribute to this kind of exposure.

For this reason, the Commissioner felt strongly enough to revoke Mr. Mills' license. He feels strongly enough that Mr. Mills' license should be revoked to perfect this appeal and urge this Court to overrule the Trial Court's judgment and allow him to regulate insurance within this state in accordance with the duty imposed upon him by the law.

Dated this 6th day of December, 1976.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Wm G Gibbs", with a long horizontal line extending to the right.

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