

1989

Kelly Wagner v. Farmers Insurance Exchange : Petition for Rehearing of Plaintiff or Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
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DOCKET NO. 89-0316

IN THE UTAH COURT OF APPEALS

KELLY WAGNER,

Plaintiff/Appellant,

vs.

FARMERS INSURANCE EXCHANGE,

Defendant/Respondent.

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Case No. 890316-CA

PETITION FOR REHEARING
OF PLAINTIFF AND APPELLANT

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FILED

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

KELLY WAGNER,	:	
	:	
Plaintiff/Appellant,	:	
	:	
vs.	:	
	:	
FARMERS INSURANCE EXCHANGE,	:	Case No. 890316-CA
	:	
Defendant/Respondent.	:	

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INTRODUCTION

This appeal presented two questions: whether the trial court properly granted the defendant's motion for summary judgment and whether the court below erred in denying plaintiff's motion for summary judgment. While this Court was of the opinion that the trial court acted properly in denying the plaintiff's motion for summary judgment, it did acknowledge that the theory under which plaintiff sought recovery was an appropriate basis for relief in the proper circumstances. It is respectfully submitted that where the Court erred was in failing to recognize that under the Court's holding with regard to the doctrine of reasonable expectations, the defendant's motion for summary judgment required resolution of a factual issue which was never presented to nor decided by the factfinder and which is inappropriate for summary disposition.

ARGUMENT

THE REASONABLE EXPECTATION OF AN INSURED
IS A QUESTION OF FACT WHICH CANNOT BE
RESOLVED BY AN APPELLATE COURT ON REVIEW OF
THE GRANT OF A MOTION FOR SUMMARY JUDGMENT

This Court misperceived one of the issues presented on appeal and failed to apply the proper standard of review in connection with the trial court's granting of a motion for

summary judgment. The court below ruled, as a matter of law, that the express words of the insurance policy in question had to control the interpretation of the parties' agreement. This Court, however, held that contract terms which are "against the reasonable expectations of the parties may be found void in the appropriate circumstances." Slip. Op. at 5. This Court further acknowledged that to determine the reasonable expectations of the insured one must examine "extrinsic matters such as the intent of the parties, the purpose sought to be accomplished, the subject matter of the contract, and circumstances surrounding the issuance of the policy." Slip. Op. at 6.

It has been uniformly acknowledged that where interpretation of a written instrument turns on the acceptance of extrinsic evidence, the process of weighing such evidence should be for the trier of fact.

Hausam v. Wodrich, 574 P.2d 805, 809 (Alas. 1978). As noted in the Restatement of Contracts 2d, § 212 comment e (1981), "if the issue depends on evidence outside the writing, and the possible inferences are conflicting, the choice is for the trier of fact."

In the instant case, Mr. Wagner purchased "underinsurance" coverage, not just uninsured motorist coverage,

which he was told could be used as a "supplement to [an underinsured's] bodily injury insurance. . . ." Depo. of Cal Coleman at p. 15. Mrs. Wagner has alleged that she and her husband had a reasonable expectation that such coverage would protect them if one of them was injured by the negligence of an underinsured driver. The defendant moved for summary judgment on the grounds that Utah didn't recognize the reasonable expectations doctrine and the trial court agreed. It is inappropriate for this Court to acknowledge, on the one hand, that Utah does recognize the doctrine, and then on the other to affirm the Court as though it had made a factual ruling on that issue, which it did not.

Where a trial court has based its ruling on a misunderstanding of the law, or might have done so, and a correct application would have produced a different result, the party adversely affected is entitled to have the matter readjudicated under correct principle of law.

Hoffman v. Life Ins. Co. of North America, 669 P.2d 410, 420-21 (Utah 1983).

It is important to remember that this case was decided while in its infancy. Only one deposition was taken before defendant sought judgment on the sole basis that under the terms of the policy "uninsured motorist coverage is excluded by the definition of an uninsured motor vehicle which does not

include an automobile owned by or furnished or available for the regular use of an insured or any family member."

Defendant's Motion for Declaratory Judgment at p. 1. This Court, having found that the reasonable expectations of the insured can operate to preclude enforcement of the express terms of the policy and that extrinsic evidence is required to resolve this question, should not preclude the development and presentation of such extrinsic evidence to the factfinder by affirming a grant of summary judgment on a ground which was not argued to the trial court. To do so would be to deny the plaintiff the right to present her evidence on an issue of fact which has not heretofore been decided by the trier of fact and to substitute the judgment of this Court for that of the trier of fact on a factual issue.

The Court treated this appeal as though the case had been fully resolved on the basis of stipulated facts. This is not correct. While the parties did not dispute the evidence in the record, a material dispute certainly existed regarding the ultimate fact, Mr. Wagner's reasonable expectations. The defendant offered no evidence on this question, it merely asserted that it was immaterial because the express language of the contract was controlling as a matter of law. Having determined that Mr. Wagner's reasonable expectations are

material to the resolution of this case, this Court should remand to the District Court for presentation of evidence on this question to the factfinder.

In moving for summary judgment, the defendant did not assert that there was no dispute concerning Mr. Wagner's reasonable expectations and did not purport to even base its motion on the deposition testimony of Mr. Coleman. See Defendant's Motion for Declaratory Judgment at p. 2. This testimony was presented to the lower court in support of plaintiff's motion for summary judgment. While this Court is clearly of the opinion that plaintiff's motion was properly denied, that should not equate to a holding that defendant's motion was properly granted. The unresolved issue of fact, which had not been developed or ruled upon in the court below, was whether Mr. Wagner had a reasonable expectation of coverage under the circumstances of the case.

The Court's error in reviewing this matter was its examination of the record to determine if plaintiff had proven her case as of the date of the defendant's motion was heard. The plaintiff has no such burden in opposing a motion for summary judgment, and certainly not when the motion was predicated on an issue of law.

While the Court indicated that it has made a "thorough

review of the record" and found the plaintiff's evidence wanting in establishing her case, it must be remembered that this is not the Court's function in reviewing the grant of a motion for summary judgment. It is axiomatic that in reviewing the grant of a motion for summary judgment all doubts, uncertainties or inferences concerning issues of fact must be construed in the light most favorable to the party resisting the motion. Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered, 681 P.2d 1258 (Utah 1984). It is the moving party's burden to marshal all the evidence and he is only entitled to judgment "where [he] makes a showing which precludes, as a matter of law, the awarding of any relief to the losing party." FMA Acceptance Co. v. Leatherby Ins. Co., 594 P.2d 1332, 1334 (1979). Here, the moving party offered no evidence of Mr. Wagner's expectation or its reasonableness, nor did the court below make any factual finding on the question. The court below ruled that the doctrine of reasonable expectation was not the law in Utah. This Court disagreed, but failed to recognize that the trial court had not addressed the fact issue, which it deemed to be immaterial. The effect of this Court's ruling, upon grounds differing from those advanced in the trial court, is to preclude plaintiff from the opportunity of developing or presenting her evidence to the

factfinder for determination. As our Supreme Court stated in Reliable Furniture Co. v. Fidelity & Guar. Ins. Underwriters, Inc., 16 Utah 2d 211, 398 P.2d 685 (1965),

It is . . . to safeguard the right of access to the courts for the enforcement of rights and the remedy of wrongs by a trial, and by a jury if desired, that it is of such importance that the court should take care to see that the party adversely affected has a fair opportunity to present his contentions against precipitate action which will deprive him of that privilege. His contentions as to facts should be considered in the light most favorable to him, and only if it clearly appears that he could not establish a right to recovery under the law should such action [entry of summary judgment] be taken; and any doubts which exist should be resolved in favor of affording him the privilege of a trial.

398 Utah 2d 685.

As noted by Justice Durham in State Farm Mut. Auto. Ins. Co. v. Mastbaum, 748 P.2d 1042, 1048-49 (Utah 1987) (Durham, J., dissenting), if the issue of an insured's reasonable expectations is squarely put before the trial court, judgment for the insurer cannot be sustained unless that issue has been the subject of factual findings by the court.

Such findings have not been made in this case. This Court incorrectly treated this action as though the plaintiff was appealing from an adverse ruling on the basis of stipulated facts. This is incorrect. The basic fact about which the

parties have not agreed, and upon which plaintiff has not received a determination by the trier of fact, is Mr. Wagner's reasonable expectation of coverage. This Court should not substitute its judgment on this question for that of the factfinder on the basis of evidence contained in a truncated record.

CONCLUSION

The reasonable expectations of an insured presents a factual issue which must be presented to the factfinder for resolution on the basis of extrinsic evidence and reasonable inferences to be drawn therefrom. This has never occurred in this action. Plaintiff is entitled to develop her evidence and present it to the trial court even if this Court is of the opinion that it would resolve that question against her on the basis of what it presently knows of the evidence. Weighing the evidence and inferences to be drawn from the evidence is not a function of an appellate court. This is the province of the trial court and it has yet to occur in this case. Accordingly, the matter should be remanded for resolution of the factual issue presented on the basis of the standards outlined in the Court's prior opinion.

DATED this 18th day of January, 1990.

PRINCE, YEATES & GELDZAHLER

By M. David Eckersley
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ATTORNEY'S CERTIFICATE

M. David Eckersley, attorney for plaintiff Kelly Wagner, hereby certifies that this petition is filed in good faith and not for the purpose of delay.

By M. David Eckersley
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MAILING CERTIFICATE

I hereby certify that, on the _____ day of January, 1990, I caused to be mailed, postage prepaid, four true and correct copies of the foregoing PETITION FOR REHEARING OF PLAINTIFF AND APPELLANT to the following:

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