2002

Cheryl Hardy v. The Prudential Insurance Company of America : Petition for Rehearing

Utah Supreme Court

Richard Ferrari; Watkiss and Campbell; Attorney for Defendants-Respondents.
Dan W. Bushnell; Merrill F. Nelson; Kirton, McConkie, and Bushnell; Attorney for Plaintiff-Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

CHERYL HARDY, Plaintiff-Appellant, vs. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; WAYNE L. RIGBY, Insurance Agent, Defendants-Respondents.	Docket No. 20582

PETITION FOR REHEARING

Appeal from a Judgment of the District
Court of Salt Lake County,
Honorable Dean E. Conder

WATKISS & CAMPBELL
RICHARD B. FERRARI
310 South Main Street, 12th Floor
Salt Lake City, Utah 84101

Attorney for Defendants-Respondents

KIRTON, McCONKIE & BUSHNELL
DAN W. BUSHNELL
MERRILL F. NELSON
330 South 300 East
Salt Lake City, Utah 84111

Attorney for Plaintiff-Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

CHERYL HARDY, Plaintiff-Appellant, vs. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; WAYNE L. RIGBY, Insurance Agent, Defendants-Respondents.	)	Docket No. 20582

PETITION FOR REHEARING

Appeal from a Judgment of the District
Court of Salt Lake County,
Honorable Dean E. Conder

WATKISS & CAMPBELL
RICHARD B. FERRARI
310 South Main Street, 12th Floor
Salt Lake City, Utah 84101

Attorney for Defendants-Respondents

KIRTON, McCONKIE & BUSHNELL
DAN W. BUSHNELL
MERRILL F. NELSON
330 South 300 East
Salt Lake City, Utah 84111

Attorney for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

CHERYL HARDY, Plaintiff-Appellant, vs. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; WAYNE L. RIGBY, Insurance Agent, Defendants-Respondents.	)	Docket No. 20582

PETITION FOR REHEARING

The Prudential Insurance Company of America ("Prudential") and Wayne L. Rigby, defendants and respondents herein, petition the Court for rehearing on the above matter pursuant to Rule 35, Rules of the Utah Supreme Court. This Petition is made on the following grounds:

1. The Decision herein has not addressed -- and apparently has overlooked the question of the propriety of summary judgment in favor of Wayne L. Rigby. Neither defendant's Brief, nor her counsel's oral remarks, stated any reason why the judgment should not be affirmed as to Mr. Rigby.

2. The Decision apparently misapprehended both the relevant facts and the applicable law concerning Prudential's entitlement to summary judgment by reason of Lynn and Cheryl Hardy's fraud. Indeed, the Decision, as rendered, would make it impossible for a trial court

to dispose summarily of even the clearest claims or defenses grounded in fraud.

ARGUMENT

I.

THE COURT'S DECISION OVERLOOKED THE QUESTION OF THE PROPERTY OF SUMMARY JUDGMENT IN FAVOR OF WAYNE L. RIGBY, WHICH PLAINTIFF-APPELLANT'S BRIEF DID NOT OPPOSE.

Respondents pointed out, at page 2 of their Brief herein:

> Plaintiff has mentioned her claim against Mr. Rigby no where is her brief -- nor, for that matter, in her Memorandum in Opposition to Defendants' Motion for Summary Judgment. (R. at 992-1011.) The allegations against him, a non-diverse defendant, apparently were never meant to be taken seriously.

The Amended Complaint's three claims are that "Prudential has wilfully breached the contract of insurance on decedent's life ... ." (Amended Compl., Count I, ¶9); that "Prudential has acted in bad faith by wrongfully and unreasonably refusing to pay the insurance proceeds" (Id., Count II, ¶14), and that "Prudential by wilfully and intentionally refusing to pay plaintiff's claim ... has engaged in outrageous and intolerable conduct ... " (Id., Count III, ¶18). R. 29-33. Obviously, none of these alleged wrongful acts were committed by Mr. Rigby, who, it is undisputed, had no part in the claims process or in the denial of plaintiff's claim. R. 78-94, 1182. He should not be burdened with an unfounded lawsuit and the summary judgment in his favor, which plaintiff never contested, should be affirmed.

II.

THE COURT'S DECISION HEREIN MISAPPREHENDED BOTH THE FACTS RELEVANT TO THE DISTRICT COURT'S FINDING OF FRAUD AND THE LAW SPECIFICALLY APPLICABLE TO THIS POINT.

As the Decision notes, at pages 5 and 6, an insurance policy is subject to rescission in any of several events, one of which is fraud. UTAH CODE ANN. §31-19-8 (1974 Repl.Vol.). "Fraud", of course, is an act of intentional deception.

It is well-established that mere negligence in believing an intentionally untrue statement is not sufficient to defeat a claim for fraud.

> Negligence is a proper defense in a case of negligent misrepresentations, but it is not a proper defense in the case of intentional misrepresentation.

Berkeley Bank for Cooperatives v. Meibos, 607 F.2d 798, 804 (Utah 1980). Accord, Dugan v. Jones, 615 P.2d 1239, 1249 (Utah 1980), Johnson v. Allen, 108 Utah 148, 159 P.2d 134, 137 (1945); Holdsworth v. Strong, 545 F.2d 687, 694 (10th Cir. 1976), cert. denied, 430 F.2d 955 (1977) (applying Utah law). Therefore, plaintiff's claims that Prudential should have figured out that Hardy's statements were untrue provide no answer to a claim of fraud.[1]

---

[1]Plaintiff relies upon such claims as Dr. Thorne's statement that Hardy's family history, smoking, etc., "constitute significant external indications of potential cardiac abnormalities." Pl. Br., App. at 55. However, for underwriting purposes, there is a vast difference between a potential abnormality and an existing one. Hardy's family history and EEG result -- all indications of potential problems -- were considered by Prudential, but did not quite make him ratable. By contrast, the fact that he had had a heart attack would have rated him at least a "Special Class 4," if he was insurable at all. R. 683-685.

The decision at least twice stated that Lynn Hardy "did not disclose" or "did not inform" Shauna Perry, a paramedical, or Dr. Joseph Evans, a physician, of his 1974 heart attack. Dec. at 2-3. In fact, he specifically denied having had any cardiovascular problems. When he was asked: "[H]ave you ever been treated by a doctor for or had any known sign of a disease or disorder of the ... heart, arteries or veins?" he answered that he had not. Pl. Br., App. at 8, 10. That was an affirmative misstatement, which he knew was untrue. He did not say, "I had a problem, but I'm well now" or "It doesn't matter." He denied ever having had a problem. He did not simply fail to volunteer information; he said something which he knew was untrue. Similarly, Mrs. Hardy told an underwriting investigator Lynn "never had a serious illness." R. at 671-677. (The Decision's statement, at page 5, note 1, that Prudential had cited no misrepresentations by Mrs. Hardy, is incorrect.)

The Decision indicated that it is plausible that Hardy answered untruthfully concerning his 1974 heart attach because he was told that history more than five years old did not matter. (But if this were so, why would he have volunteered detailed information about his other medical history going as far back as his childhood rheumatic fever? Pl. Br. App. at 8, 10. He picked and chose what he would conceal.)

Further, Hardy made the following untrue statements about his medical history within the past five years:

a. When he was asked, if he had "in the past 5 years .. consulted or been attended or examined by any doctor or other practitioner," he answered "No" (Ibid.) thus concealing his

treatment by Dr. Joseph Thorne, who is "engaged in the exclusive practice of cardiology" (Thorne Afft., §1, Br. App. at 53);

b. He concealed his examination at the High Risk Coronary Consultation Clinic, which entailed a full review of his heart problems (R. 677-682)[2];

c. He concealed his examination at the University of Utah cardiology department in 1979 (Ibid.);

d. When he was asked if he was taking any prescription drugs, he answered in the negative, although he was taking Atromid-S, a cardiovascular medication.[3]

This is not a case in which the claimed defrauder can explain his motivations to a trier of fact. The district court had to induce Hardy's motives from the objective evidence. That evidence allows only one conclusion: that he intentionally misrepresented his medical history to conceal his heart attack and his current heart disease. He obviously did not operate on the assumption that his medical

---

[2]Dr. Thorne states that he referred Hardy to the Clinic "to participate in a study of the effect of familial relationships on cardiac disorders" (Pl. Br., App. at 54) -- and such as his.

[3]The Decision states that "he was not taking medication to treat his heart" (Dec. at 4), apparently in reliance upon Dr. Thorne's carefully worded affidavit. Pl. Br., App. at 54. The affidavit states: "Atromid-S is prescribed only to regulate the cholesterol and triglyceride level. Atromid-S has no direct physiological function or affect on the heart." (Emphasis added.) This is too clever by half. Cholesterol and triglyceride levels determine the amount of obstruction in the arteries; when arteries become blocked, the result is an occlusion, or in popular parlance, a heart attack. While it may have no direct physiological function or effect on the heart, the drug's purpose obviously is to retard further obstruction of the arteries and thus to prevent heart attacks. It is not prescribed for people who do not have cardiovascular problems.

history of more than five years was immaterial and that his more recent history was material. On the contrary, he revealed such matters as his childhood rheumatic fever and his eleven-year-old prostate problems, while concealing his heart attack. Similarly, in reporting his recent medical history he omitted mentioning Dr. Thorne, the High Risk Cardiovascular Center and the University of Utah Medical Center, Cardiology Department. He also had concealed his heart history on Department of Transportation examinations -- even on an examination within five years of his attack (R. at 682). There was only one pattern to Hardy's revelation and concealment: he omitted every treatment by a heart specialist or clinic and every event of cardiovascular related treatment, no matter whom he was dealing with.

A court is not obliged to create issues of fact in considering a motion for summary judgment. Mintz v. Mathers Fund, Inc., 463 F.2d 495, 498 (7th Cir. 1972). A party's self-serving conjecture cannot overcame overwhelming objective evidence. Anderson v. Beneficial Fire & G. Co., 21 Utah 2d 173, 442 P.2d 993 (1968).

In the instant case, there can be no serious question that Hardy set out to conceal and that he succeeded in doing so. That Lynn and Cheryl Hardy committed fraud should be deemed established. It follows that plaintiff's claims of negligence by Prudential must fail. The only remaining issue is plaintiff's claim that Mr. Rigby told Mr. Hardy to omit his heart attack from Part One of the application. As has been pointed out already, this claim is palpably unbelievable because every witness Mrs. Hardy summons testifies differently. Further, the form which Mr. Rigby completed -- Part One (Pl. Br. App.

at 4-5) -- only inquired if Hardy had had a heart attack within the previous 12 months. Hardy's negative answer to that question, of course, was correct.

CONCLUSION

The above matter should be reheard and the above matters addressed.

RESPECTFULLY SUBMITTED this 19th day of September, 1988.

WATKISS & CAMPBELL
RICHARD B. FERRARI

Attorneys for Defendants-Respondents

By Richard B. Ferrari