

1989

Ward Perkins v. Lincoln National Life Insurance Company and Great-West Life Insurance Company : Reply Brief

Utah Court of Appeals

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890732-CA

WARD PERKINS, Personal
Representative of the
estate of Norma Perkins,

Plaintiff/Respondent,

vs.

LINCOLN NATIONAL LIFE
INSURANCE COMPANY,

Defendant/Respondent,

and

GREAT-WEST LIFE ASSURANCE
COMPANY,

Defendant/Appellant.

Case No. 890732-CA

Category 14b

APPELLANT'S REPLY BRIEF TO
RESPONDENT PERKINS' BRIEF

APPEAL FROM THE SUMMARY JUDGMENT OF
THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY
THE HON. DON V. TIEBS

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WARD PERKINS, Personal
Representative of the
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LIST OF PARTIES

In addition to the parties and attorneys shown on the cover page, third-party defendant Southwest Health Management Company, Inc., although served with process, has never appeared in this action, and to date, a default has not been entered against it.

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

WARD PERKINS, Personal	:	
Representative of the	:	
estate of Norma Perkins,	:	
	:	
Plaintiff/Respondent,	:	
	:	
vs.	:	
	:	Case No. 890732-CA
LINCOLN NATIONAL LIFE	:	
INSURANCE COMPANY,	:	Category 14b
	:	
Defendant/Respondent,	:	
	:	
and	:	
	:	
GREAT-WEST LIFE ASSURANCE	:	
COMPANY,	:	
	:	
Defendant/Appellant.	:	

APPELLANT'S REPLY BRIEF TO
RESPONDENT PERKINS' BRIEF

Appellant Great-West Life Assurance Company ("Great-West"), by and through Clark W. Sessions and Cynthia K.C. Meyer of Campbell Maack & Sessions, its attorneys of record, submits the following reply to the brief of Respondent Perkins.

SUMMARY OF ARGUMENT

Insurance companies have the fundamental right to determine the risks they will insure. Legions of cases uphold insurance companies' denial of coverage when conditions precedent to coverage have not been met. Great-West contracted with Southwest Health Management Company, Inc. ("Southwest"), to insure the latter's

employees actively at work. The active work requirement is a condition precedent to coverage, not an exclusion from coverage already in place.

The group health and life insurance policy underwritten by Great-West was non-contributory; that is, employees such as Norma Perkins did not pay the premium amounts to Great-West. Southwest paid the premiums. Great-West refunded the premiums paid on behalf of Norma Perkins to Southwest. Southwest negotiated the premium refund check. Respondent Ward Perkins' ("Mr. Perkins") argument that Great-West retained the premiums paid by Norma Perkins and did not refund the premiums to Mrs. Perkins or her estate is unavailing. Mrs. Perkins did not pay the premiums and Great-West did not refund the premiums to Mrs. Perkins or her estate because they were not paid by her.

Southwest's characterization of Mrs. Perkins' employment status, Mrs. Perkins' hopes or intentions to return to work, and her doctor's hopes or intentions for Mrs. Perkins' return to work are irrelevant. Indeed, Mrs. Perkins' intentions or hopes are not legally within the knowledge of Mr. Perkins, Southwest, or Mrs. Perkins' medical doctor. The fact that Mrs. Perkins was not actively at work after June 3, 1986, is undisputed and entitles Great-West to judgment in its favor. Great-West first learned that Mrs. Perkins' last date of active employment was June 3, 1986, when it received the Life Claim Report submitted to Great-West by Southwest on Mr. Perkins' behalf. Great-West did not know nor did it have reason to know until it received the Life Claim Report that Norma Perkins' last date of active employment was June 3, 1986.

Great-West distributed the EDGE policy booklets to Southwest for distribution in turn to Southwest employees enrolled in the group health and life insurance program underwritten by Great-West. Great-West's contract was with Southwest, and not with the individual members of the group, and it was not required to directly submit each policy booklet to each employee. Southwest, however, may have had a duty to distribute the policy booklets to the employees enrolled in the group health and life insurance program. Although Mr. Perkins argues that Mrs. Perkins was not aware of the information contained in the EDGE booklet, Mr. Perkins submitted no affidavits in conformance with Utah Rule of Civil Procedure 56(e) stating that Mrs. Perkins was in fact unaware of the policy provisions.¹

ARGUMENT

POINT I

GREAT-WEST CONTRACTED TO INSURE ONLY EMPLOYEES WHO WERE ACTIVELY AT WORK

Insurance companies have the fundamental right to determine the risks they will insure. The Utah Supreme Court in Marriott v. Pacific Nat'l Life, 24 Utah 2d 182, 467 P.2d 981 (1970), recognized this right in stating that it is not unreasonable for insurance companies to impose rules as to eligibility so that coverage is only on regular employees of the work force. 467 P.2d at 983. Group insurers justifiably rely on insureds' active employment as an indication of their relative good health and insurability. See

¹ It is highly questionable whether such an affidavit could pass muster given its hearsay nature and the probabilities of Utah Rule of Evidence 601.

Appleman, Insurance Law and Practice § 41 (1981); Credeur v. Continental Assurance Co., 502 So. 2d 214, 218 (La. Ct. App. 1987).

Furthermore, legions of cases have upheld insurance companies' denial of coverage when conditions precedent to coverage were not met. See, e.g., cases cited and discussed at pages 15 through 27 of Brief of Appellant.

Great-West contracted with Southwest (not with the individual Southwest employees) to insure those employees actively at work as defined in the policy. The active employment requirement is not a policy exclusion. It is a condition precedent to coverage--a requirement for eligibility. Thus, General Motors Acceptance Corp. v. Martinez, 668 P.2d 498 (Utah 1983), relied on by Mr. Perkins is distinguishable. In that case, Mr. Martinez was denied benefits under his credit life and disability policy because of a pre-existing condition. The pre-existing condition exclusion in Martinez was an exclusion of which Mr. Martinez was unaware due to what can only be characterized as the insurance agent's gross negligence. See id. at 500. Mr. Martinez purchased an automobile on a conditional sales contract and was told that in order to obtain financing, he had to purchase a credit life and disability insurance policy. Mr. Martinez was not informed of the exclusion for pre-existing conditions. The car dealer's agent did not inquire as to Mr. Martinez' past or present health, Mr. Martinez was not asked to sign the credit insurance application which listed the coverage exclusions, nor was he provided with a copy of the insurance application or the certificate of insurance. Id. Utah Code Ann. § 31-34-6(1) required all credit life or credit accident

and health insurance to be evidenced by an individual policy to be delivered to the debtor. The court stated:

Because those who purchase such [credit life] policies rely on the assumption that they are covered by the insurance they buy, the Legislature, in the interest of fair dealing, has deemed it mandatory that an insured be given a copy of the policy so that he can take whatever action is appropriate to protect his interests and be assured that the coverage which he thinks he has contracted for is actually provided. It is not consonant with our statute for an insurance company to accept premiums and then deny liability on the ground of an exclusion of which the insured was not aware because the insurer had never informed him of the exclusion or given him the means to ascertain its existence.

Id. at 501 (emphasis added). The court then held:

In view of these reasons and the unequivocal nature of the duty imposed by § 31-34-6, we hold that an insurance company is estopped from relying upon an exclusion in a policy if the company has failed to deliver the policy or certificate of insurance to the insured or any other documents stating the exclusion.

Id. Obviously, the facts in Martinez are distinguishable from the facts in this case. In Martinez, a statute required copies of the credit life policy or certificate of insurance containing any exclusions to be delivered directly to each individual insured. The insurance policy in Martinez was apparently an individual policy rather than a group policy. Furthermore, the car dealership/insurance agent did not so much as require Mr. Martinez to sign the application for insurance coverage which set forth the exclusions. Martinez is not applicable to this case. It is factually and legally distinguishable. In fact, in Todd v. Dow Chemical Co., 760 F.2d 192 (8th Cir. 1985), the court held that the

doctrines of waiver and estoppel "usually cannot operate to extend coverage where none exists under the contract." Id. at 195 (citations omitted). The coverage under the Great-West policy never extended to Mrs. Perkins because she was not eligible for coverage in the first instance.

Mr. Perkins simply cannot clear the first hurdle which is showing that Mrs. Perkins was actively at work on the effective date of Great-West's coverage. Mrs. Perkins' last date of active employment was June 3, 1986, some 27 days prior to Great-West's coverage taking effect as to any employee of Southwest. (Exhibit A to Memorandum in support of Great-West Life Assurance Company's Motion for Summary Judgment; record at 7, 62, 71).

POINT II

NORMA PERKINS DID NOT PAY ANY PREMIUMS TO GREAT-WEST AND ALL PREMIUMS PAID ON HER BEHALF BY SOUTHWEST WERE REFUNDED TO SOUTHWEST

Mr. Perkins states over and over in his brief that Mrs. Perkins paid premiums to Great-West and that Great-West did not return the premiums to Mrs. Perkins or her personal representative. Mr. Perkins characterizes these facts as undisputed. See Brief of Appellee Perkins at 4, 5, 6, 7 and 11. It is true that there is no dispute as to who paid premiums and to whom the premiums were refunded. Contrary to Mr. Perkins' assertions, however, Mrs. Perkins did not pay any premiums to Great-West. Southwest did. It is true that Great-West did not refund the premiums to Mrs. Perkins or her estate. Great-West refunded the premiums to Southwest who negotiated the refund check. (Record at 169-70).

Two points must be made concerning Mr. Perkins' statements concerning the payment and refund of premiums. First, this case is before this Court on appeal from summary judgment entered in favor of Mr. Perkins. Mr. Perkins submitted below absolutely no support for his statement that Mrs. Perkins paid premium amounts. Great-West, on the other hand, submitted an affidavit of John Kingsbury, who stated under oath that the policy was non-contributory, that is, that the employer pays 100 percent of the premiums, and attached a copy of the master card showing that coverage was non-contributory and that premiums were to be paid 100% by Southwest. Mr. Kingsbury also stated that a refund check was submitted to Southwest for the full premiums paid on Mrs. Perkins' behalf, and that the refund check was negotiated by Southwest (record at 169-70) There is no genuine dispute as to who paid and to whom were refunded the premiums. The only properly supported factual statements submitted in the court below were submitted by Great-West, not by Mr. Perkins.

POINT III

SOUTHWEST'S CHARACTERIZATION OF MRS. PERKINS' EMPLOYMENT STATUS, MRS. PERKINS' HOPES TO RETURN TO WORK AND HER DOCTOR'S INTENTIONS ARE IRRELEVANT

In clear and unambiguous language, the group health and life insurance policy underwritten by Great-West provides that employees are eligible for coverage if, among other things, they are permanent and full-time employees working the minimum number of hours per week. In equally unambiguous language, the policy states that coverage begins on the date the employee completes the eligibility waiting period unless the employee is not at work on

that day in which case the coverage begins when the employee returns to work. (Exhibit D to Memorandum in Support of Great-West Life Assurance Company's Motion for Summary Judgment, also reproduced in Appendix 3 to Brief of Appellant, at p. 17A). The qualification section of the Schedule of Benefits states:

Qualification: You must Work 32 hours per week to qualify as a permanent, full-time full pay Employee. The Work must be performed at a location other than your home.

(Id. at p. 1 of the Schedule of Benefits). The Schedule of Benefits also defines the eligibility waiting period for active employees as the later of the plan effective date (in this case, July 1, 1986) and "the first day of the insurance month coinciding with or next after the date you complete 90 days of continuous service." (Id.) Since Mrs. Perkins had been continuously employed by Southwest for many years prior to the plan's effective date, her coverage would have commenced on July 1, 1986, if she had been at work on that day. It is undisputed that Mrs. Perkins was not at work on July 1, 1986, and never returned to work.

Mr. Perkins argues, however, that since (1) Mrs. Perkins intended to return to work, (2) Mrs. Perkins' doctor expected her to return to work, (3) Southwest considered Mrs. Perkins to be an active employee even though she was on disability leave, and (4) Mrs. Perkins was receiving accrued sick leave and vacation pay, she was an active employee entitled to coverage under the Great-West policy. These arguments fail for several reasons.

First, after June 3, 1986, Mrs. Perkins did not work a minimum of 32 hours per week and she apparently was not paid her regular

salary or wages; thus she did not satisfy the basic eligibility requirements of full-time, full pay active employment at a minimum 32 hours per week. This, alone, is fatal to Mr. Perkins' claim. Mrs. Perkins' hopes to return to work and her doctor's and employer's expectations and characterizations of her employment status are simply irrelevant. In Elsey v. Prudential Insurance Company of America, 262 F.2d 432 (10th Cir. 1958), cited in Brief of Appellant, the Court of Appeals, in upholding a denial of coverage, held that "actively at work on full-time" means "actually on the job and performing the employee's customary work," and that "being on the payroll is not enough." Id. at 435. Mrs. Perkins apparently was not even on the payroll after her disability leave began. See, e.g., record at 33 (Affidavit of Mark Toohey dated August 30, 1988, indicating that Mrs. Perkins was paid accrued sick leave and vacation during her disability leave).

Second, since Mrs. Perkins never returned to work, she never became eligible for coverage. It was Southwest who first alerted Great-West that Mrs. Perkins' last date of active employment was June 3, 1986, some 27 days before the effective date of coverage under the Great-West policy. Had she returned to work, her effective date of coverage would have begun on the date she returned to work. (Exhibit D to Memorandum in Support of Great-West's Motion for Summary Judgment at p. 17A).

Third, Mrs. Perkins' intentions or hopes were not properly before the lower court. Mr. Perkins made no representations concerning Mrs. Perkins' intentions or hopes to return to work, as indeed he could not. Any statements attributable to Mrs. Perkins

constitute hearsay, and are not otherwise admissible under Utah's Dead Man Rule, Utah Rule of Evidence 601. Consequently, even if Mr. Perkins had filed an affidavit in support of his motion for summary judgment concerning Mrs. Perkins' hopes or intentions, such statements would be improper and inadmissible under Utah Rule of Civil Procedure 56(e).

Simply put, since Mrs. Perkins was not actively at work on July 1, 1986, the effective date of coverage, and never returned to work prior to her passing, she was not covered under the group health and life insurance policy underwritten by Great-West.

POINT IV

WHETHER MRS. PERKINS WAS UNAWARE OF POLICY PROVISIONS WAS NOT PROPERLY BEFORE THE COURT

Mr. Perkins contends that Mrs. Perkins was unaware of the policy exclusions² and that fact estops Great-West from denying coverage. Great-West submitted affidavit testimony that the EDGE policy booklets were distributed to Southwest for distribution in turn to the Southwest employees who applied for coverage under the policy underwritten by Great-West. (Record at 71). Mr. Perkins submitted no affidavits below stating whether Mrs. Perkins had knowledge of the provisions. Indeed, any such statements would have to be on Mr. Perkins' personal knowledge since Mrs. Perkins' statements to him would constitute inadmissible hearsay.

Importantly, Great-West made information available to the individual insureds by distributing the policy books to Southwest,

² The eligibility requirement in the Great-West policy of active, full-time, full pay employment is not an exclusion. It is a condition precedent to coverage.

the party with whom Great-West contracted. Whether Southwest distributed to policy booklets to the employees was not before the lower court, but if Southwest breached its duty, perhaps Mr. Perkins has a cause of action against Southwest as the plan administrator.

The Utah Supreme Court stated in Larson v. Wycoff Co., 624 P.2d 1151 (Utah 1981), that

[a] party claiming an estoppel cannot rely on representations or acts if they are contrary to his own knowledge of the truth or if he had the means by which with reasonable diligence he could ascertain the true situation.

Id. at 1155 (emphasis added). Even if Southwest did not distribute the EDGE booklets and Mrs. Perkins did not have actual knowledge of the policy provisions, with reasonable diligence she could have become aware of the provisions by requesting the EDGE booklet from Southwest. It is uncontroverted that the means existed for Mrs. Perkins to learn of the policy provisions. Mr. Perkins submitted only argument but no properly supported facts to the contrary. Again, estoppel usually cannot extend insurance coverage where none existed in the first place. Todd v. Dow Chemical Co., 760 F.2d 192 (8th Cir. 1985).

The Utah Supreme Court in Larson stated:

"Ordinarily, in the absence of prejudice to the employee or of facts giving rise to estoppel, an insurance carrier, may, notwithstanding voluntary payment of compensation, the furnishing of hospital or medical care, the entry of appearance, or statement made that the policy covered the employee, urge the defense that the employee did not meet with an accident, or that the policy did not cover the employment It would be unjust to both the employee and the

insurance carrier if the law were that when the insurance carrier once undertakes to provide medical or other care for an injured workman it has lost all right to afterwards defend against what it believes to be an unjust or illegal claim."

624 P.2d at 1155 (emphasis added) (quoting Harding v. Industrial Comm'n of Utah, 83 Utah 376, 381, 28 P.2d 182, 184 (1934)).

Mr. Perkins has simply raised no facts giving rise to an estoppel against Great-West. Great-West made the policy books available for distribution to its employees. Southwest had the responsibility to complete that distribution.

Mr. Perkins' reliance on U & I Properties, Inc. v. Republic National Life Insurance Co., 10 Wash. App. 640, 519 P.2d 19 (Ct. App. 1974), is misplaced and confused. (See p. 6 of Brief of Appellee Perkins). In U & I, the court reversed a finding in favor of coverage. In addition, the sentence set off by parentheses in Mr. Perkins' brief: "(Mutual Life subsequently approved the application, unaware of his death)," is actually a quote of the U & I court, referring to another case, Starr v. Mutual Life Insurance Co., 41 Wash. 228, 83 P. 116 (1905). Finally, as indicated by Mr. Perkins, although the court recognized the principle that insurers who retain premiums knowing of facts voiding the policy may be bound by waiver or estoppel, the court did not, in fact, hold that the insurer was estopped from denying coverage. The Court reversed the finding of coverage. Significantly, Great-West did not retain premiums knowing of Mrs. Perkins' work status. When Great-West learned that her last date of active employment was June 3, 1986, on its receipt of the Life

Claim Report, it denied the claim and thereafter refunded the premiums.

Inasmuch as Great-West provided the policy booklets to Southwest for distribution to the employees, Mr. Perkins' estoppel argument must fail.

CONCLUSION

Mrs. Perkins was not eligible for coverage under the Great-West policy and never became eligible by returning to work. She did not pay the premiums to Great-West as the group life and health insurance plan was non-contributory, and, in fact, the premiums were refunded to and accepted by Southwest. The hopes and expectations of Mrs. Perkins and her doctor and employer are simply immaterial to a determination whether she was eligible for coverage. Finally, Mrs. Perkins' knowledge of the policy provisions was not factually supported below. Indeed, it is undisputed that Great-West provided the policy booklets to Southwest for distribution to the employees.

For the reasons set forth herein and in the Brief of Appellant, Great-West respectfully requests the relief requested in Great-West's main brief.

Respectfully submitted this 26 day of September, 1990.

CAMPBELL MAACK & SESSIONS



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Appellant Great-West
Life Assurance Company

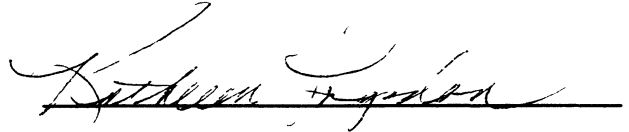
CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing APPELLANT'S REPLY BRIEF TO RESPONDENT PERKINS' BRIEF were mailed by first class mail, postage prepaid, this 26th day of September, 1990 to:

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and that four true and correct copies of the same were hand delivered to:

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A handwritten signature in cursive script, appearing to read "Katherine L. Jensen", is written over a horizontal line.