

1956

Richard H. Mortensen and Alfred Tredway v. Life Insurance Corporation of America et al : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Mortensen v. Life Insurance Corporation of America*, No. 8551 (Utah Supreme Court, 1956).
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IN THE SUPREME COURT
of the

STATE OF UTAH **FILED**
DEC 26 1956

RICHARD H. MORTENSEN,
and ALFRED TREDWAY,

Respondents,

vs.

LIFE INSURANCE CORPORA-
TION OF AMERICA, a Utah
corporation, CLEO H. BUL-
LARD, and RICHARD DON
CAFFERTY.

Appellants.

Clerk, Supreme Court, Utah

Case No. 8551

APPELLANT'S BRIEF

Appeal from the District Court of Salt Lake County,
Utah, Joseph E. Jeppson, Judge

REESE C. ANDERSON
Attorney for Appellants

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STATEMENT OF THE CASE

This is an action for libel and slander. The respondents, Richard H. Mortensen and Alfred Tredway, claim that the appellants, Life Insurance Corporation of America, Cleo H. Bullard and Richard Don Cafferty, defamed them resulting in general and special damages. The case was tried in the District Court of Salt Lake County, State

of Utah. Trial was before Judge Joseph E. Jeppson and a jury. The trial Judge denied the motion of the appellants, Life Insurance Corporation of America, Cleo H. Bullard, and Richard Don Cafferty to dismiss the respondents Complaint, at the close of Respondents Case, upon the ground of privileged communication. The trial Judge also denied appellants' motion for a directed verdict. The jury rendered a verdict against the appellants, Life Insurance Corporation of America, Bullard, and Cafferty and found that the plaintiff Tredway suffered general damages in the sum of \$500.00 and the respondents, Mortensen suffered general damages in the sum of \$1,000.00, and that the plaintiffs, Mortensen and Tredway, suffered special damages in the sum of \$5,000.00 and the jury awarded the plaintiff jointly as prominent damages the sum of \$2,000.00. A counterclaim of the appellant Life Insurance Corporation of America, which was reserved, resulted in a judgment for the defendant, Life Insurance Corporation of America against Richard H. Mortensen in the sum of 42.05 and judgment against the respondent, Alfred Tredway, in the sum of \$540.70. Judgment was entered on the verdict on the 7th day of June, 1956. Notice of Appeal was filed on the 28th day of June, 1956. The Designation of Record was filed on the 10th day of August, 1956 and Order Extending the Record

on Appeal to the 14th day of November, 1956, was entered on the 11th day of October, 1956. An Order extending the time for appellants brief to December 24, 1956, was entered on the 7th day of December, 1956.

STATEMENT OF FACTS

For convenience: The plaintiff, Richard H. Mortensen shall hereinafter be referred to as Mortensen. The plaintiff, Alfred Tredway, shall hereinafter be referred to as Tredway. The defendant Life Insurance Corporation of America, shall hereinafter be referred to as Licoa. The defendant, Richard Don Cafferty, shall hereinafter be referred to as Cafferty. The defendant, Charles P. Connally shall hereinafter be referred to as Connally. The Reliance National Life Insurance Company, the name of which appears hereinafter in the testimony, shall hereinafter be referred to as Reliance.

Mortensen and Tredway were employed by Licoa in the latter part of 1954. Subsequent to their employment by Licoa, they entered into negotiation of a contract of employment with Reliance.

On October 13, 1954 Mortensen and Tredway were licensed by the Insurance Department of the State of Utah under Reliance. On October 15, 1954, Licoa wrote a letter to the Insurance Department stating the licenses of Mortensen and Tredway should be terminated. The letter stated that the

licenses should be cancelled with prejudice, that Mortensen and Tredway had acted against the best interest of the company, and each had a debit balance with the company. The Insurance Department informed the President of Reliance of the letter from Licoa and placed the burden of whether or not the licenses of Mortensen and Tredway under Reliance should continue on the President of Reliance. The Insurance Department terminated the licenses of Mortensen and Tredway under Licoa. The President of Reliance entered into a contract with Mortensen and Tredway other than a contract which they had been negotiating at the time of receipt of the information of the President of Reliance from the Insurance Commissioner concerning the letter from Licoa. Mortensen and Tredway then filed this action against Licoa, Bullard, and Cafferty and seeking damages on the grounds that they had been defamed. The jury returned a verdict against Licoa, Bullard, and Cafferty awarding Mortensen and Tredway damages in the sum of \$8,500.-00. This appeal was taken from the refusal of the trial Judge to dismiss the cause of action of Mortensen and Tredway at the close of their case and a motion for a directed verdict against Mortensen and Tredway.

Mortensen started to work for Licoa about August 15, 1954. (R 185). Tredway was first em-

ployed by Licoa about the middle of September, 1954 (R 207-208).

About the first week of October, 1954 (R 93 & R 187) Mortensen and Tredway approached Reliance for an agency directors position (R 186). Mr. Salisbury, President of Reliance (R 92), at the first meeting with Mortensen and Tredway said that it would be necessary to investigate Mortensen and Tredway thoroughly before anything was done about a contract (R 93). Mr. Salisbury also stated that Mortensen and Tredway should investigate Reliance (R 93).

Salisbury then investigated Mortensen and Tredway and at a second meeting of Mortensen and Tredway and Salisbury, Salisbury said it looked like an agency supervisor contract could be entered into with Mr. Mortensen and Tredway (R 94). No contract was made at the time of the second meeting (R 94).

Between the time of the second meeting and a third meeting of Mortensen and Tredway and Salisbury, Salisbury received a call from the State Insurance Department (R 95). The call was from Mrs. Burns, the license clerk of the State Department of Insurance (R 97). Mrs. Burns informed Salisbury about a letter from Licoa which set out the termination with prejudice of the license of Mortensen and Tredway (R 97). Salisbury saw the let-

ter at a later date in the file of the State Insurance Commissioners office (R 97).

At a third meeting of Mortensen, Tredway, and Salisbury, about the 17th or 20th of October, the fact that Salisbury had received some information would make it inadvisable for him as President of teh company to enter into a general supervisory contract with Mortensen and Tredway (R 98), a general supervisory contract would have to be based on a general agency contract until Mortensen and Tredway could prove that they were capable of handling the job (R 98).

Mortensen and Tredway were licensed by Reliance on October, 13, 1954 (R 107). Mortensen was licensed under Reliance up until the time of the trial of this action (R 106-107). Tredway was licensed by Reliance through March, 1955 (R 74) at which time he was dismissed because of a conflict of personalities (R. 211-212).

Cafferty made a statement to Bullard and Licoa that while Mortensen and Tredway were employed by Licoa they attempted to recruit salesmen of Licoa to go to work for Reliance (R 14) and that Mortensen and Tredway had sent samples of sales materials of Licoa's to Reliance (R 14). These statements of Cafferty caused Bullard to write the Insurance Commissioner a letter (R 17). The letter written by Bullard was as follows:

“Also please cancel with prejudice the licenses of Alfred B. Tredway and R. H. Mortensen, whose actions were not in the best interest of the company. Our books indicate an agency debit of \$89.75 on R. H. Mortensen, and \$428 on A. B. Tredway.” (R 189)

The letter was dated October 15, 1954 (R 1 & R4).

The jury returned a special verdict finding as follows: The defendant Cafferty made a statement to the defendant Bullard and the defendant Licoa saying that while Mortensen and Tredway were employed by Licoa they attempted to recruit salesmen of Licoa to go to work for Reliance and (R 14) that such statement (R 15) was false. That Cafferty made a statement to Bullard and Licoa that Mortensen and Tredway had sent samples of the sales material of Licoa to Reliance (R 14). That the statement of Cafferty that Mortensen and Tredway while agents for Licoa, attempted to recruit salesmen from Licoa to go to work for Reliance defaming the defendants Mortensen and Tredway (R 16) and the statement of Cafferty that the plaintiffs sent samples of sales materials to Reliance also defamed Mortensen and Tredway (R 16). That the statements of Cafferty concerning the recruiting of salesmen and the furnishing of samples of sales materials to Reliance were the proximate cause of the writing and mailing of the letter from Bullard

and Licoa to the Insurance Commissioner (R 17). That Mortensen and Tredway did not act against the best interest of Licoa (R 18). The jury found that there was a debit balance on the books of the company Licoa on October 14, 1954 but that Mortensen had no debit balance on the books of the company on October 15, 1954 (R 18). That the statement that Tredway had a debit balance did not defame him, (R 19) but the statement Mortensen had a debit balance on the books of the company did defame him. That the statement that Mortensen (R 19) and Tredway did not act in the best interest of the company defamed both Mortensen and Tredway (R 19). It was found that at least one of the statements which defamed Mortensen and Tredway were made maliciously by Cafferty (R 20). That the letter sent the Insurance Commissioner sent by Bullard and Licoa was written with malice on the part of Bullard. The jury awarded as follows: The plaintiff, Tredway, \$500.00 general damages (R 21). The plaintiff Mortensen \$1,000.00 general damages. Special damages for loss of a supervisory contract with Reliance was awarded to Mortensen and Tredway in the sum of \$5,000.00 (R 21) and as punitive damages Mortensen and Tredway were awarded the sum of \$2,000.00 jointly. (R 21).

STATEMENT OF POINT

POINT I

IT IS THE DUTY OF THE INSURER TO PRESERVE INVIOLEATE THE INTEGRITY OF INSURANCE. A LETTER FROM AN INSURER TO THE INSURANCE COMMISSIONER MAKING CHARGES AGAINST AGENTS GOING TO THEIR ELIGIBILITY TO WORK UNDER A LICENSE UNDER A DIFFERENT COMPANY, SHOULD BE ABSOLUTELY PRIVILEGED IN THE INTEREST OF PUBLIC POLICY, AND IT WAS ERROR FOR THE TRIAL JUDGE TO DENY A MOTION TO DISMISS PLAINTIFF'S COMPLAINT BASED UPON A COMMUNICATION SENT IN THE INTEREST OF PRESERVING THE INTEGRITY OF INSURANCE.

ARGUMENT

POINT I

IT IS THE DUTY OF THE INSURER TO PRESERVE INVIOLEATE THE INTEGRITY OF INSURANCE. A LETTER FROM AN INSURER TO THE INSURANCE COMMISSIONER MAKING CHARGES AGAINST AGENTS GOING TO THEIR ELIGIBILITY TO WORK UNDER A LICENSE UNDER A DIFFERENT COMPANY, SHOULD BE ABSOLUTELY PRIVILEGED IN THE INTEREST OF PUBLIC POLICY, AND IT WAS ERROR FOR THE TRIAL JUDGE TO DENY A MOTION TO DISMISS PLAINTIFF'S COMPLAINT BASED UPON A COMMUNICATION SENT IN THE INTEREST OF PRESERVING THE INTEGRITY OF INSURANCE.

On October 15, 1954 Mortensen and Tredway were licensed as agents of Reliance and Licoa. On that date, Bullard wrote to the Insurance Commissioner requesting the termination of their license under Licoa. Coupled with the request for termination of the license with Licoa were certain allegations in the nature of a complaint against Mortensen and Tredway. The Complaint was treated by the Insurance Department as a complaint to a sufficient degree that it was the basis of a telephone call by the insurance department to Reliance, the other company under which Mortensen and Tredway were licensed. The insurance department left any decision to be made up to the discretion of Reliance. Had the complaint been treated properly by the Insurance Department and had a proper

hearing been held, there would have been no question as to absolute privilege of the communication from Licoa to the Insurance Commissioner. The failure of the Insurance Department to observe proper procedure, and instead leaving the determination of the continuance of the licenses of Mortensen and Tredway to Reliance, should not be the basis of destroying absolute privilege of communication of complaints to the Insurance Commissioner and the allowing of a recovery by Mortensen and Tredway against those reporting to the Insurance Department a proper complaint. To deny absolute privilege to such communications destroys the intent and purpose of the Insurance Code in controlling agents. The communication should be given the same absolute privilege as a complaint filed in a proper court but which does not state a cause of action. Such absolute privilege is essential to the preservation of proper policing of the insurance industry.

That the insurance business is affected by public interest and it is the duty of the insurer to preserve inviolate the integrity of insurance as shown by the provisions of Section 31-1-8 UCA, 1953 which provided as follows:

Section 31-1-8, UCA (1953) provides:

“GOVERNMENTAL REGULATION

Within the intent of this code the business of insurance is one affected with the public interest, requiring that all persons be

actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, and their representatives rests the duty of preserving inviolate the integrity of insurance.”

Mortensen and Tredway were licensed by Reliance on October 13, 1954. On October 15, 1954 a letter was sent to the Insurance Commissioner cancelling their license with Licoa. The letter contained the following language:

“Also please cancel with prejudice the licenses of Alfred B. Tredway and R. H. Mortensen, whose actions were not in the best interest of the company. Our books indicate an agency debit of \$89.75 on R. H. Mortensen, and \$428 on A.B. Tredway.”

That such was a charge against Mortensen and Tredway going to their eligibility to work for Reliance can be seen upon analysis of the letter and the facts which occurred. Cancellation with prejudice in that the relationship between the insurer and the agent was not as it should be, namely a good relationship. Such a bad relationship can reflect on the company which is a part of the insurance industry and in turn reflecting on the industry in a bad light which is contrary to the intent and meaning of the Insurance Code.

Not working in the best interest of the company gives rise to an inference that it would place

Licoa, a part of the insurance business, in disrepute. Placing a company in disrepute has repercussions throughout the insurance business. It being a matter of common knowledge in that the failure or failures of one insurance company can shake the faith of the public in the insurance business as a whole. This again is contrary to the intent and purpose of the Insurance Code.

Setting out the debit balance also goes to the ability of Mortensen and Tredway to serve the industry. The debit balance shown could have arisen from any of several ways. The manner in which a debit balance has arisen should be discovered and corrected. Further, a deficiency left unpaid in a small company is in itself not in the best interest of the company. Such a deficiency affects the financial standing of a small company adversely which can affect the industry as a whole because of the repercussions which can occur.

The Insurance Department was aware of the question raised going to the ability of Mortensen and Tredway to act as agents. The act of the Insurance Department calling Reliance and informing that company of the charges made and leaving the decision up to Reliance of whether or not Reliance wanted to continue them as agents leaves no other conclusions to be drawn than that the letter was interpreted as a charge against Mortensen and Tred-

way's qualifications to be licensed to work for another company.

It should be pointed out that there is a distinction to be made between the cancellation of Mortensen's and Tredway's licenses under Licoa and a charge going to their ability to work for Reliance.

Upon receipt of the letter from Licoa, the Insurance Department could have chosen one of the following courses of conduct: (1) The insurance commissioner could have issued an order to Mortensen and Tredway for them to show cause why the license under Reliance should not be cancelled. A hearing could have then been had, and a determination of fact been made. Such procedure would have all of the earmarks of a quasi-judicial proceeding.

(2) The Insurance Commissioner could have ordered a hearing and based upon findings of such hearing entered an appropriate order and, if such were warranted, Mortensen and Tredway licenses could have been revoked. This again would have been a quasi-judicial proceeding.

(3) The Insurance Commissioner could have revoked the licenses of both Mortensen and Tredway and given each of them notice. After the notice of such revocation Mortensen and Tredway could have demanded a hearing as provided by the code and upon such hearing had their license reinstated or

the revocation continue in effect. This would have been analogous to the Complaint having been filed, a default judgment entered, and a motion having been made for renewal of the default. This apparent reason for the provision under this procedure under the Code is to permit the Insurance Commissioner to take immediate action to prevent persons not conducting themselves properly from continuing their misconduct. While it is a summary proceeding it is no less quasi-judicial. Under the above possible procedures to have been followed, the letter from Licoa to the department is analogous to a complaint being filed in a law suit. A hearing is provided for, a determination based upon such hearing is provided for, an appropriate written order is provided for, and an Appeal can be taken. Such a complaint should be absolutely privileged.

The possible action of an order to show cause could have been had under the following provisions of UCA, (1953) :

Section 31-4-4. POWERS OF A COMMISSIONER-HEARINGS

- (1) The commissioner may hold a hearing for any purpose he deems proper.

Section 31-4-5 SHOW CAUSE NOTICE

- (1) If any person is entitled to a hearing by any provision of this code before any proposed action is taken, the notice of the proposed action may be in the form of a notice to

show cause stating that the proposed action may be taken unless such person shows cause at a hearing to be held as specified in the notice, why the proposed action should not be taken.

The possible procedure by way of ordering a hearing could have been had under the provisions of Section 31-4-1 set out above.

The procedure for the revocation of the license and the demand for hearing are provided for by the following code provisions.

Section 31-17-50, UCA (1953) provides:

“LICENSE - SUSPENSION, REVOCATION OR DENIAL—GROUNDS

(1) The commissioner may suspend, revoke, or refuse to renew any license issued under this chapter or any surplus line broker's license as provided for in chapter 15 of this code, or for any of the following causes:

(a) for any cause for which issuance of the license could have been refused had it then existed and been known to the commissioner;

(b) if the licensee wilfully violates or knowingly participates in the violation of any provision of this code;

(c) * * * *

(d) * * * *

(e) if the licensee has, with intent to deceive, materially misrepresented the terms of effect of any insurance contract; or has

engaged or is about to engage in any fraudulent transaction;

(f) * * * *

(g) * * * *

(h) if in the conduct of his affairs under the license, the licensee has shown himself to be, and is so deemed by the commissioner, incompetent, or untrustworthy, a source of injury and loss to the public;

Section 31-4-1, UCA (1953) provides:

POWERS OF COMMISSIONER-HEARINGS

(1) * * * *

(2) * * * *

(1) * * * *

He shall hold a hearing

(1) if required by any provision of this code, or

(2) upon written demand for a hearing made by any person aggrieved by any act or threatened act or failure of the commissioner to act, if such failure is deemed an act under any provision of this code, or by any report, promulgation or order of the commissioner.

(2) * * * *

(3) * * * *

The questions to be answered with regard to absolute privilege are (1) whether or not an occasion existed or the statement and (2) whether or not the matter complained of was pertinent to the

occasion. Absolute privilege is given those occasions which are so important to the public good that the law holds that nothing which may be written with probable cause under the sanction of the occasion with probable cause, whether with or without malice can be libel. The pertinency of the matter to the occasion determines the question of whether or not the privilege applies. The Insurance Code of the State of Utah regulates the issuance, renewal and revocation of licenses for agents. The commissioner of insurance is given full jurisdiction in the premises. The inquiry is limited to the cause shown or the charge made. A test of the pertinency is afforded. The party complainant is involved in the showing of good cause for the revocation of the license. A hearing by the insurance commissioner is provided for. The hearing involves an opposite party, namely, the defendant or agent whose license is being revoked. The hearing provided for is a legal hearing and notice to the defendant is implied and specifically provided for. The act with respect to the revocation of the insurance agent's license clothes the Insurance Commissioner with attributes similar to those of a court and in effect makes the Insurance Commissioner a court to determine the matter of revocation.

The privilege or immunity applies wherever there is an authorized inquiry which, though not

before a court of justice, is before a tribunal which has similar attributes. The basis of privilege is public policy. The commissioner with respect to agent's licenses has the attributes similar to those of a court, and public policy requires that immunity be accorded to the statements of the parties too, and witnesses in an investigation of this sort.

Persons dealing with insurance agents are uninformed persons and the procedure for the granting and revocation of agent's license is for the protection of such people. The Insurance Commissioner should have every facility for informing himself as to insurance agents, their conduct, their character and everything concerning the agent which may have some bearing on his conduct in dealing with the uninformed persons of the general public. One of the facilities that should be afforded the Insurance Commissioner and the procedure for the revocation of licenses as well as the granting of licenses is that of privilege of communication to the Insurance Commissioner.

Insurance companies and others interested in the conduct of agents and the insurance industry and those dealing with the insurance industry should be encouraged to bring to the attention of the Insurance Commissioner the derilection of such agents. The intent of Title 31, UCA (1953) to protect insurers and the general public would be obstructed,

if those instituting or participating in proceedings to bring about the revocation of the license of an unworthy agent may be subjected by reason of their statements to suit for libel or a suit for slander. The statute throws around such proceeding before the Insurance Commissioner safeguards similar to those hedging proceedings before a court of justice. There should be the same immunity in both tribunals.

In this case, the occasion for the statements by the agents of the defendant company was the written request for the revocation of the licenses of the plaintiffs. Such occasion was in the nature of the commencement of a proceeding before the Insurance Commissioner of the State of Utah. The matter complained of was pertinent to the occasion. The inferences which were drawn by the plaintiffs in this action tend to point out the character of those persons whose licenses should be terminated and to whom licenses to solicit applications for insurance should be denied, that such is pertinent to the proceeding involved should need no elaboration. The very purpose of the provisions of the code with respect to the licensing of agents indicate that only persons having the character to deal with the general public should be granted a license.

See, *Independent Life Insurance Company v. Rodgers*, Sup. Ct. of Tenn., 1933, 55 S W 2nd 767, where an agent had gone to work for a second com-

pany and the first company complained of a deficiency and it was held there was absolute privilege as to the letter to the Insurance Commissioner.

Also see, Independent Life Insurance Company v. Hunter, Sup. Ct. of Tenn., 1933, 63 S.W. 2nd 668, where it was held there was conditional privilege only as the agent had not been licensed under another company and as a result the insurance commissioner did not have jurisdiction.

CONCLUSION

Mortensen and Tredway were licensed as agents for two companies, Licoa and Reliance. Licoa requested the cancellation of Mortensen and Tredway licenses under Licoa. Coupled with the cancellation of the licenses under Licoa was a charge going to the ability of Mortensen and Tredway to be licensed as agents of the other company and all companies. That the charge went to their ability to serve as agents is evidenced by the conduct of the Insurance Department and the conduct of Reliance. Writings made in quasi-judicial proceedings are absolutely privileged. The charge made was a charge made in a quasi-judicial proceedings and should be absolutely privileged. To hold that the communication from Licoa to the Insurance Commissioner is not absolutely privileged would prevent all companies from making complaints against agents and would have the affect of destroying the procedure set up for the policing of agents of insurers and the public would be denied the protection provided by the procedure.

Respectfully submitted,

REESE C. ANDERSON
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