

2000

# Melvin R. Pollard v. Truck Insurance Exchange : Reply Brief

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Clifford J. Payne; Nelson, Chipman, Quigley and Hansen; Attorneys for Appellee.

Edward M. Garrett; Garrett & Garrett; attorney for appellant.

---

## Recommended Citation

Reply Brief, *Pollard v. Truck Insurance Exchange*, No. 20000167 (Utah Court of Appeals, 2000).

[https://digitalcommons.law.byu.edu/byu\\_ca2/2652](https://digitalcommons.law.byu.edu/byu_ca2/2652)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

[http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

MELVIN R. POLLARD,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	Trial Court No.990905650
	)	
TRUCK INSURANCE EXCHANGE,	)	Appellate Court No. 20000167CA
	)	
Defendant/Appellee,	)	PRIORITY 15
	)	

Appeal from the Third District Court, Salt Lake County, Judge Ann M. Stirba

Edward M. Garrett, #1163  
GARRETT & GARRETT  
2091 East 1300 South, ·  
Suite 201  
Salt Lake City, Utah 84108  
Telephone: 801-581-1144  
Attorney for  
Plaintiff/Appellant

Paulette Stange  
Clerk of the Court

MELVIN R. POLLARD,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	Trial Court No.990905650
	)	
TRUCK INSURANCE EXCHANGE,	)	Appellate Court No. 20000167CA
	)	
Defendant/Appellee,	)	PRIORITY 15
	)	

Appeal from the Third District Court, Salt Lake County, Judge Ann M. Stirba

Edward M. Garrett, #1163  
GARRETT & GARRETT  
2091 East 1300 South,  
Suite 201  
Salt Lake City, Utah 84108  
Telephone: 801-581-1144  
Attorney for \_\_\_\_\_  
Plaintiff/Appellant

## TABLE OF CONTENTS

PRELIMINARY STATEMENT.....	1
ARGUMENT.....	1
I.    THE DISTRICT COURT ERRED IN FINDING THAT THE COMMERCIAL AUTO INSURANCE POLICY WAS CLEAR AND UNAMBIGUOUS. THE ISSUE IS DE NOVO BEFORE THIS COURT.....	2
II.   UTAH'S UM STATUTORY SCHEME DOES NTO DENY BENEFITS TO MR. POLLARD UNDER HIS COMMERCIAL POLICY.....	7
III.  THE DOCTRINE OF REASONABLE EXPECTATION IS PRESENT IN THIS CASE AND DOES PROVIDE UM COVERAGE TO MEL POLLARD.....	8
CONCLUSION.....	11

## TABLE OF AUTHORITIES

### Statutes

31A-32-305 UCA.....7,8

31A-21-106 UCA.....8

### Cases

*Bear River Mutual Insurance Co., v. Wright*, 770 P.2d 1019 (Utah 1989).....2

*Clark v. State Farm Mut. Automobile Ins. Co.*, 743 P.2d 1227 (Utah 1987)....5

*Cullum v. Farmers Insurance Exchange*, 857 P.2d 922 (Utah 1993).....7,8

*USF&G v. Sandt*, 854 P.2d 519 (Utah 1993).....6

*Wagner v. Farmers Insurance Exchange*, 786 P.2d 763 (Utah 1990).....8,10

### PRELIMINARY STATEMENT

Before Pollard specifically argues the points raised by Farmers in its brief, we ask the Court to be especially mindful of certain matters of bedrock importance in this case, that Farmers simply refuses to discuss. Examples of these are:

1. Farmers makes no attempt to reconcile the fact that it engrafts essentially family type UM coverage, into its commercial liability policy, creating an ambiguity.
2. Farmers makes no attempt to quote, discuss or defend the specific terms of its UM coverage, or to refute the arguments Pollard makes that the UM coverage terms provide little if any UM coverage.
3. Farmers does not discuss, distinguish or attempt to tell this Court why the cases from other jurisdictions, cited by Pollard are not compelling precedent. Those policies containing UM coverage of identical or similar terms as the policy here in question, were deemed ambiguous and provided coverage for the corporate owner.

The above deficiencies in Farmers brief will be discussed in more detail below.

### ARGUMENT

The contentions put forth by Farmers may be summarized as follows:

1. That the policy is clear and unambiguous and does not provide UM coverage for Pollard.
2. That the Utah UM Statute does not allow coverage for Pollards use of his motorcycle.

3. That the reasonable expectations concept is not applicable in this case.

POINT ONE

THE DISTRICT COURT ERRED IN FINDING THAT THE  
COMMERCIAL AUTO INSURANCE POLICY WAS  
CLEAR AND UNAMBIGUOUS. THE ISSUE IS  
DE NOVO BEFORE THIS COURT.

In support of the conclusion that the policy is clear and unambiguous, Farmers cites the definition of “auto” contained on page 9 of 11 pages in Appendix 3 (the Policy) attached to Pollards brief. The definition reads:

“B. ‘Auto’ means a land motor vehicle, trailer or semi-trailer designed for travel on public roads but does not include ‘mobile equipment’.”

Farmers contends that a motorcycle clearly falls within that definition. That is not the case. “Motorcycle” is not mentioned in the definition. “Auto” is defined as a vehicle designed for travel on public roads. It is true that motorcycles travel public roads but much of their attraction is for off road use as recreational vehicles. Farmers then says that the case of *Bear River Mutual Insurance Company v. Wright*, 770 P.2d 1019 (Ut. App. 1989), settled any definitional issues in this case. The Court will note that *Wright*, did not deal with a definition of “auto”, it dealt with the question of whether a “motorcycle” is an “automobile”. The Court held that either an “automobile” or “motorcycle” *might* be considered a “motor vehicle”. Nonetheless the case held that a “motorcycle” is not an “automobile”.

Applying *Wright* to our case we find that Farmers defines the word “auto” in its policy. The word “auto” is merely a shorthand way of saying automobile. The word “motorcycle” is not used in Farmers policy.

Regardless of the construction of the definition, this is not a point in this case. As shown, the grant of UM coverage does not require the insured, "you" or "family members" to be occupying any "auto".

---

Farmers then argues that coverage is provided only for "covered autos" and that Pollard would not be insured unless he was occupying one of the fourteen "covered autos" listed on the policy.

This may be repetitious but to expand an argument above, there is no provision in the "Business Auto Coverage Form" of the commercial policy that states, that an insured must be occupying a listed "auto".

This is clear by reference to UM Coverage Form, which states:

**"A. COVERAGE**

1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver a "uninsured motor vehicle". . . . .

**B. WHO IS AN INSURED**

1. You
2. If you are an individual, any "family member".
3. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto".

Under paragraph A above there is no requirement that an insured be occupying a covered auto in order to claim UM coverage. Paragraph B, defines who is an insured. "You" are the two corporations, namely Climate Source and Pollard Mechanical, Inc. We know that corporate entities can never be damaged by an Uninsured Motorist. Further, corporations do not have relatives. Paragraph three above does make a distinction. It provides that anyone else claiming



insurance must be "occupying" a covered "auto". As noted in Pollards initial brief however, the fourteen listed "autos" are company "autos" and would be used on company business and operated by employees. If they are injured by an uninsured motorist it would be likely that they would be covered by workmen's compensation and there would be no UM coverage because it is excluded.

"We will not pay for any element of "loss" if a person is entitled to receive pay for the same element of "loss" under any worker's compensation, disability benefits, or similar law."

Farmers Policy states that it will provide UM coverage for an insured; but when it defines insured; there is no one who can qualify. Thus, Farmers has provided no meaningful coverage under the UM section of the policy, even though it received a premium for that coverage. This is a fundamental flaw in the policy, which creates an ambiguity that can be reconciled only by resolving the issue against Farmers and in favor of Pollard, the corporate owner. This is the conclusion drawn by all of the cases cited by Pollard in his initial brief.

Farmers has not addressed this issue, it does not discuss the UM terms in its brief, and it makes no attempt to refute or distinguish the many cases of other jurisdictions, that have determined that the policy language, which is common to many commercial policies, is ambiguous.

This is a situation where an insurance company has engrafted a basic family type UM coverage onto a commercial liability policy. This is a matter of first impression in our courts. There are no Utah cases on the subject. This Court should follow the precedent of other

jurisdictions and hold that the policy is ambiguous; that no meaningful UM coverage is provided; and that the ambiguity should be resolved in favor of Pollard.

Farmers then turns to the Utah case of *Clark v. State Farm Mutual Automobile Ins. Co.*, 743 P.2d 1227 (Utah 1987). It cites that case for the proposition that an insured cannot buy one policy of insurance and expect to have that policy cover all other autos the policyholder may own. Farmers would have the Court hold that Pollard was attempting to transfer the Business Auto Policy to his motorcycle, which coincidentally was also insured by Farmers.

Pollard is not attempting to transfer coverage from the Commercial policy to his motorcycle or to stack coverage. The ruling he seeks is that he is entitled to coverage on one of the fourteen commercial vehicles he insured. He is entitled to what Farmers contracted for under Paragraph E, CHANGES IN CONDITIONS, of the UM coverage. It provides:

- “If there is other applicable insurance available under one or more policies or provisions of coverage:
  - a. The maximum recovery under all coverage under all coverage forms or policies combined may equal but not exceed the highest applicable limit for any one vehicle under any coverage form or policy providing coverage on either a primary or excess basis.”

We conclude this point by noting again that the language of the UM coverage is ambiguous. Farmers does not quote or discuss the precise language of its UM coverage, nor does it admit to the cases from other jurisdictions that have ruled on identical or similar terms holding that the policy is ambiguous and that coverage would be granted to the corporate owner.

For an excellent dissertation on issues advanced by Pollard in this case, we commend to the Court the Utah case of *USF&G v. Sandt*, 854 P.2d 519 (Utah 1993). That case sets forth with citations, a number of rules adopted by the Utah Court over many years for the construction of insurance policy. One rule that has specific application to our case is, as follows:

“If an ambiguity arises, the rules of construction outlined above must be employed to resolve the ambiguity. An ambiguity in a contract may arise (1) because of vague or ambiguous language in a particular provision or (2) because two or more contract provisions, when read together, give rise to different or inconsistent meanings, even though each provision is clear when read alone. The policy in the instant case contains both types of ambiguity. With respect to both types of ambiguity, the policy must be construed in light of how the average, reasonable purchaser of insurance would understand the language of the policy as a whole.”

“[T]he insured is entitled to the broadest protection that he could reasonably believe the commonly understood meaning of its terms afforded him.” It follows that the ambiguous or uncertain language in an insurance contract that is fairly susceptible to different interpretations should be construed in favor of coverage. (Citations Omitted) It also follows that if an insurance contract has inconsistent provisions, one which can be construed against coverage and one, which can be construed in favor of coverage, the contract should be construed in favor of coverage.”

## POINT TWO

### UTAH'S UM STATUTORY SCHEME DOES NOT DENY BENEFITS TO MR. POLLARD UNDER HIS COMMERCIAL POLICY.

Farmer's argument under this point concedes that Pollard is an insured under the commercial auto insurance policy. However, Farmers argues further that even if the policy were construed to provide UM coverage for Mr. Pollard the Utah UM Statute prohibits such coverage.

Pollard agrees that the statute does not grant coverage. Coverage can be determined only by reference to the policy.

Nonetheless, Farmers reaches out to Subsection 7a of 31A-32-305, Uninsured and Underinsured Motorist Coverage, and states that Pollard is prohibited from claiming UM coverage under the policy, because he was not operating a listed vehicle.

Pollard has already shown to the Court in his initial brief, that Subsection 7a does not include the operation of a motorcycle because motorcycle is not contemplated by the UM section and the specific definition of "motor vehicle" contained in Subsection 4a of the UM statute, specifically excludes motorcycle. Therefore 7a has no application to this case.

Even further Farmers can't legally reach out to a statute and use that as a basis to decline coverage. Insurance law does not work that way. If Farmers desires to decline coverage it must point to a provision in its policy which clearly takes away the coverage that would otherwise be present.

Supporting Pollards argument that Farmers cannot reach to a statute to deny coverage is the Utah case of *Cullum v. Farmers Insurance Exchange*, 857 P.2d 922 (Utah 1993). In that case Farmers had a "step-down" in its policy that reduced coverage, which stated:

“We will provide insurance for an insured person other than you or a family member up to the limits of the financial responsibility law only.”

The Court held that an insurance company cannot reach out and incorporate by reference a statutory provision that may limit coverage. This violates Section 31A-21-106 UCA. That statute provides in substance that an insurance policy may not incorporate provisions by reference. The statutory provision prohibits an insurance company from forcing an insured to look elsewhere for information about the policy.

The principles of *Cullum* are applicable to our case. If Farmers wanted to avoid coverage in this case by relying on Subsection 7a (A) of 31A-22-305, it should have put that subsection in the policy in understandable language. This it did not do. This is another reason why the statute has no application in this case.<sup>1</sup>

### POINT THREE

#### THE DOCTRINE OF REASONABLE EXPECTATION IS PRESENT IN THIS CASE AND DOES PROVIDE UM COVERAGE TO MEL POLLARD.

Relying upon the case of *Wagner v. Farmers Insurance Exchange*, 786 P.2d 763, (Ut. App. 1990), Farmers states that Pollard has not met the criteria of that case and therefore the doctrine is not available to him in this case.

The criteria set forth in *Wagner*, are these:

1. Did Farmers know or should have known of Pollards expectation of UM coverage for injuries to himself?

2. Did Farmers create or help to create Pollards expectation of coverage?

3. Was Pollards expectation of coverage reasonable?

Pollard filed an Affidavit in this case, Appendix Two attached to Pollards initial brief. (R. 30) The facts set forth in the Affidavit are uncontradicted. The Court will find the following: Climate Source is a Utah Corporation organized in 1989. Pollard Mechanical, Inc., is a Utah Corporation organized in 1994. Melvin Pollard is the owner of all of the issued and outstanding stock of both corporations, and serves as President and Director of both companies. There are no other officers or directors in either company. Both companies are in the business of installation, and repair of heating and air conditioning systems. Before incorporation Pollard operated the business as a sole proprietor. For many years, both as a sole proprietor and later under corporate form, Pollard purchased all business insurance including automobile insurance from Farmers Insurance Group of Companies. All policies were renewed annually. Over the years Pollard gained the knowledge from conversations with Farmers agents that he, personally, was insured under the Business Owners policy coverage's, whether the vehicle he was operating was described in the policy or whether it was not. Pollard believed and expected that he would be fully covered for the injuries he received in the motorcycle accident of September 1997.

Farmers created or helped to create that expectancy. Its agents over many years told Pollard that he personally was covered under the commercial liability policy including the "auto" section.

---

<sup>1</sup> The Farmers policy does contain an exclusion, under Section C of the UM coverage. Farmers has not cited this exclusion nor argued for its application, and hence it will not be discussed by Pollard. Suffice it to say that the exclusion is also ambiguous.

There are some notable quotes in the *Wagner* case.

“We recognize that ‘automobile insurance is generally sold through adhesion contracts that are not negotiated at arms length’, and that ‘[p]urchasers commonly rely on the assumption that they are fully covered by the insurance that they buy’. (Citations omitted.) Where possible, we attempt to give effect to the reasonable expectations of the insured party.”

“There are circumstances when the reasonable expectations of the insured may counteract a clear exclusion in the policy. See *State Farm Mutual Auto Ins. Co., v. Mastbaum*, 748 P.2d 1042, 1047 (Utah 1987) (Durham, J., dissenting).”

“If the evidence indicates that the insurer knew or should have known of the insured’s expectation or that he created or helped to create this expectation, equity weights heavily in favor of holding the insurer to fulfill the insured’s expectation.” (Citation omitted.)

“Third, we must determine whether Wagner’s alleged expectation of coverage was reasonable. ‘In most cases, this criterion will be met if one of the other two is: the insurer normally should not be presumed to know of an unreasonable expectation. Conversely, if the insurer created an expectation, it is probably reasonable for the insured to hold it’.” (Citation omitted.)

Farmers reliance on *Wagner* is misplaced. Pollard has met the criteria set forth in *Wagner*.

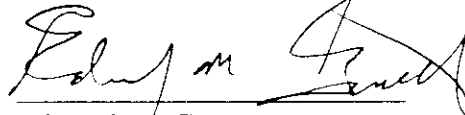
The reasonable expectation doctrine compels the conclusion that Pollard is entitled to UM coverage under the Commercial Policy.

## CONCLUSION

The Summary Judgment granted by the Lower Court to Farmers should be reversed and a Motion for Partial Summary Judgment of Pollard to declare UM coverage in his favor should be granted. The case should be returned to the District Court for trial on this issues of liability of the UM driver and Pollards damages.

Respectfully Submitted,

GARRETT & GARRETT

A handwritten signature in cursive script, appearing to read "Edward M. Garrett", written over a horizontal line.

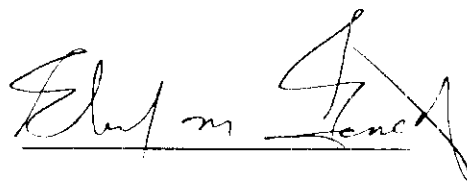
Edward M. Garrett



CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing REPLY BRIEF OF THE PLAINTIFF/APPELLANT, were mailed, first class, postage prepaid, affixed hereto, the following on this 13<sup>th</sup> day of September, 2000.

Clifford J. Payne  
NELSON, CHIPMAN, QUIGLEY AND HANSEN  
215 South State Street, Suite 800  
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "Clifford J. Payne", written over a horizontal line.