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Jay L. Wood, Darrell K. Tanner, Scott A Stokes, and
Leo Syphus v. Utah Farm Bureau Insurance
Company, a Utah corporation, Farm Bureau Life
Insurance Company, an Iowa corporation and FBL
Insurance Company, an Iowa corporation : Reply
Brief

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IN THE UTAH COURT OF APPEALS

JAY L. WOOD, DARRELL K. TANNER,
SCOTT A STOKES, and LEO SYPHUS,

Appellants/ Plaintiffs

vs.

UTAH FARM BUREAU INSURANCE
COMPANY, a Utah corporation, FARM
BUREAU LIFE INSURANCE COMPANY,
an Iowa corporation and FBL INSURANCE
COMPANY, an Iowa corporation,

Appellees/Defendants

Case No. 20000349-CA
District Court No. 970906166CV

Priority 15

REPLY BRIEF OF THE APPELLANTS/PLAINTIFFS

Appeal from the Ruling of the Second District Court, Weber County,
Honorable Michael D. Lyon, District Judge

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COURT OF APPEALS

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ARGUMENT

I. QUESTIONS OF FACT PRECLUDE ENTRY OF SUMMARY JUDGMENT ON STOKES, TANNER, AND WOOD’S WRONGFUL TERMINATION CLAIM.

In its brief, Farm Bureau largely ignored the fact that the agents presented evidence that Darrin Ivie and other Farm Bureau managers modified the March 1994 contracts *after* the agents signed them. Instead, Farm Bureau focuses on a point that is uncontested by the agents—that the October 14, 1993, letters were superceded by the March 1994 contracts. Indeed, Farm Bureau cited both *Ryan v. Dan’s Food Stores*, 972 P.2d 395 (Utah 1998) and *Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306 (Ut. Ct. App. 1994) for the proposition that a preexisting employment contract can be unilaterally modified by the employer. Appellees’ Brief at 23. The agents agree with this point and further assert that the employment relationship was modified not once but *twice* by Farm Bureau, and it is the second modification that made the relationship terminable for cause. Farm Bureau modified the at-will provisions of the March 1994 contracts by Darrin Ivie’s repeated references to the prior October 15 letters, which promised continued employment if certain production standards were met. Farm Bureau cannot rely on *Ryan* and *Trembly* when it is convenient to its arguments and ignore these cases when they support the agents’ claims.

The agents have consistently claimed that the October 14 letters were reasserted, repeatedly, as the standard of employment *after* the March 1994 contracts were signed. The agents accepted this modification by staying in Farm Bureau’s employ. *See Trembly*, 884 P.2d at 1314. Farm Bureau’s response to this point is that there was no “meeting of the minds” for this modification. However, a “meeting of the minds” is a factual question for the jury, not the court.

See Sanderson v. First Sec. Leasing Co., 844 P.2d 303, 306 (Utah 1992); *R. J. Daum Constr. Co. v. Child*, 247 P.2d 817, 818 (Utah 1952)(“If there was evidence from which it would be reasonable to find that there was a meeting of the minds, [summary judgment] cannot be sustained.”). The trial court had evidence before it that the contract had indeed been modified and should have allowed the jury to decide whether there was an implied-in-fact contract. Evidence of the employer's intention to modify an at-will relationship may include letters, bulletins, oral statements, and the employer's course of conduct. *See Berube v. Fashion Centre Ltd.*, 771 P.2d 1033, 1044 (Utah 1989). The agents testified that Mr. Ivie continued to hold out the October 15 letters as the standard of employment and that Mr. Ivie referred to these letters in weekly meetings with the agents after the March 1994 contracts were signed. R.463, 472. Furthermore, Jay Wood specifically testified that he believed that the October 15 letter continued to govern his employment relationship. R.472. Most compelling is the promise of continued employment contained in the October 15 letters that Mr. Ivie continually referred to:

As discussed at the end of the first quarter of 1994 ¼ of these production standards must be written and transmitted to the home office. At the end of the second quarter ½ of these production standards must be issued (these numbers will be reflected on the 12 month rolling average production report). At that time if the numbers are less than expected I will begin recruiting to find your replacement. It will take me approximately 90-120 days to prepare someone to take your place. At the end of the third quarter I will once again revisit your results. At that time one of two things could happen:

1. I see that your numbers meet the expected result at that time I will simply hire the new agent and increase our compliment or
2. If after I look at the numbers the results are still not there the new agent will move into your office.

(See Ex. 9 of Appellants' Opening Brief.)(emphasis added.) These letters do not merely set out a "goal" for the agents to meet to avoid termination, but also make a promise to the agents that they will have time to meet these goals and be retained if they are met. Based on these facts, a reasonable jury could find that the 1994 Career Agent Contracts were modified by an implied-in-fact contract created by Mr. Ivie's re-affirmance of the October 15 letters and his meetings with the agents regarding their progress under the terms of the October 15 letters.

Farm Bureau also alleges that Mr. Stokes contradicted his deposition testimony with an affidavit submitted after his deposition was taken. This is simply not true and is not supported by the testimony cited by Farm Bureau. The agents, including Mr. Stokes, have consistently argued that the modified employment contract ran through the third quarter of 1994. Thus, Mr. Stokes' "no" answer to the question "Did he ever tell you, if you do meet the goals I'm not going to terminate you *ever*?" is not inconsistent or inaccurate. See Appellees' Brief at 28 (emphasis added). Neither Mr. Stokes, nor any other plaintiff, has asserted that Farm Bureau guaranteed lifetime employment if the agents met their 1994 third quarter production goals, which was the clear meaning of Mr. Minnock's question.

In short, the trial court plainly infringed on the exclusive province of the jury, which is to decide factual disputes, when it ruled that the March 1994 contracts controlled the employment arrangement. At the very least there is a question of fact as to whether Mr. Ivie's actions and statements created an implied in fact contract which modified the 1994 Career Agent Contracts precluding summary judgment.

II. FARM BUREAU MADE INACCURATE AND INAPPROPRIATE FACTUAL ARGUMENTS CONCERNING LEO SYPHUS.

In its brief, Farm Bureau argues, for the first time, that Leo Syphus actually received his termination letter on September 27, 1994—three days before his termination became effective. This argument was not made at any stage of the proceeding below and relies on an inadmissible piece of hearsay evidence that Farm Bureau never attempted to authenticate or introduce prior to this appeal. Farm Bureau argued below that “on or about September 12, 1994, Mr. Syphus was sent a letter by Utah Farm Bureau informing that his contract with Utah Farm Bureau was terminated” (*See* Farm Bureau’s Memo in Support of Mot. Sum. Judgment at 22, attached hereto as Exhibit 19) and Farm Bureau also adopted the assertion that Mr. Syphus “received his termination letter on or about September 12, 1994.” *See* Farm Bureau’s Reply Memo at 14, attached hereto as Exhibit 20.

It was upon this September 12 termination date, not the date now asserted by Farm Bureau, that the trial court based its decision. Accordingly, the facts before the trial court were that Mr. Syphus was terminated eighteen days prior to his production quota deadline. Farm Bureau argues that even if there was a modified employment contract, Mr. Stokes failed to actually meet the goals by September 30, 1994. This argument ignores the fact that Farm Bureau by firing Mr. Syphus eighteen days before September 30, 1994, Farm Bureau committed an anticipatory breach of the contract, which excused Mr. Syphus’ continued performance. Common sense also dictates that an employee cannot be expected to continue working for an employer that has confiscated his books and summarily fired him. In fact, before he was

terminated Mr. Syphus was on pace to meet the property and casualty minimums set in the June 30 letter, and had several leads to meet his life minimum, which could be met with only one sale. *See Syphus Depo.* at 33-36, 86-88 (Ex. 4 to Appellants' Opening Brief). Mr. Syphus also needed to complete 40-50 "client reviews" which are nothing more than short telephone interviews with existing clients. Mr. Syphus had already completed over 85 client reviews and could have finished the task by conducting less than three client reviews per day. This information alone is sufficient to show that Mr. Syphus had "the ability to perform all such conditions" of the anticipatorily breached contract, as stated by *Petersen v. Intermountain Capital Corporation*, 508 P.2d 536, 538 (Utah 1973). Whether or not Mr. Syphus "could" or "would" have made these sales if he had not been fired is a hypothetical question assigned to the jury, not the court.

III. SUMMARY JUDGMENT WAS IMPROPERLY GRANTED AS TO THE OWNERSHIP OF THE AGENTS' BOOKS OF BUSINESS.

Because the Career Agents were independent contractors, not regular employees, there are actually two businesses involved: the agents' business and Farm Bureau's business. Contrary to Farm Bureau's assertions, the "Accounts and Records" provision of the contract is ambiguous because it declares that "All accounts, account records, policyholder files, policyholder lists, rate books or manuals, applications and other forms and all other records in Career Agent's possession pertaining to Companies' business will be the property of Companies and will be returned to Companies upon demand." *See Career Agent Contract* ¶5(b) (Ex 5 of Appellant's Opening Brief) (emphasis added). This language, which only requires the agents to return documents pertaining to Farm Bureau's business, is consistent with the notion that the Career

Agents are independent contractors running a separate business with separate business records. Moreover, the contract does not expressly require the agents to relinquish records pertaining to their own, independent, businesses.

It is not clear, based on the language alone, that Farm Bureau had the right to confiscate every document relating to a Farm Bureau insurance policy that the agents had created in their businesses. This ambiguity requires the court to look to the course of conduct to determine the parties' intent as to the retention of records pertaining to the Career Agent's business. This conduct includes, *inter alia*, telling the Career Agents at hiring that the book of business was theirs and that they could retire on it, compensating the Career Agents for voluntarily parting with accounts from their books of business, and requiring the Career Agents to purchase all the account records and forms on which information concerning the book of business were kept. Because the contract is ambiguous, a reasonable fact finder could find that the agents owned their books of business based upon Farm Bureau's course of conduct and representations as to ownership.

REMAINING ARGUMENTS

The remainder of Farm Bureau's brief does not set forth any new matters as under Utah R. App. Pro. 25(c) therefore the appellants rely on the arguments set forth in their opening brief to rebut Farm Bureau's arguments concerning the issues of good faith and fair dealing, unjust enrichment, and punitive damages.

CONCLUSION

The Career Agents have demonstrated that material facts remain to be decided in this case. We ask this court to vacate the order granting summary judgment and remand the case to the Second District Court for further proceedings.

DATED this 18th day of October, 2000.



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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2000, I caused to be mailed, first-class, postage prepaid, a true and correct copy of the Reply Brief of the Appellants/Plaintiffs to:

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IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
WEBER COUNTY, STATE OF UTAH

JAY L. WOOD, DARRELL K. TANNER,	:	
SCOTT A. STOKES and LEO SYPHUS,	:	MEMORANDUM IN SUPPORT OF
individuals,	:	DEFENDANTS' MOTION FOR
	:	SUMMARY JUDGMENT
Plaintiffs,	:	
vs.	:	
UTAH FARM BUREAU INSURANCE	:	
COMPANY, a Utah Corporation, FARM	:	
BUREAU LIFE INSURANCE	:	Civil No. 970906166CV
COMPANY; an Iowa Corporation and	:	Honorable Michael D. Lyon
FBL INSURANCE COMPANY, an Iowa	:	
corporation,	:	
	:	
Defendants.	:	

Defendants, by and through their counsel of record, respectfully submit the following
Memorandum in Support of their Motion for Summary Judgment:

\$335.00 per week in life insurance premiums, and \$1,107 in property and casualty premiums, he would be terminated on September 30, 1994.

Mr. Syphus concedes that he did not meet the goals set forth in the letter for client reviews:

THE WITNESS: They had us doing these review sheets, you know, concerning their whole insurance, like an annual fact finder, and as I recall, I had about 85 to 90 of those signed, and as I'd go around the community or through the farm areas, why, if I'd see one of my insureds, I'd stop and say, "I've got to do this," and I'd say, "Just sign this and I'll take it back to the office and fill in the rest of the information on your insurance." And so I don't know what happened to it, but I figured I had around 85 or 90 of them. And that would be in 60 days.

Q. (By Mr. Minnock) Well, and you needed 130, according to this letter?

A. Yeah.

Q. So you were still 40 short. Forty to 50 short?

A. Yeah.

(Deposition of Leo Syphus, pp. 32-33, attached as Exhibit "D"). He also concedes that he did not meet the requirements set forth in the letter with respect to life insurance production:

Q. Do you know whether you met your goal, which was set out in the June 30th, 1994 letter, of getting \$330 per week in life?

A. No.

Q. Did you make it?

A. No.

Q. You didn't make it?

A. No.

(*Id.* at 35-36). On or about September 12, 1994, Mr. Syphus was sent a letter by Utah Farm Bureau informing that his contract with Utah Farm Bureau was terminated effective September 30, 1994. (See Letter from Ron Palmer to Leo Syphus, attached as Exhibit "J").

Tab 20

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JAY L. WOOD, DARRELL K. TANNER.	:	
SCOTT A. STOKES and LEO SYPHUS,	:	REPLY MEMORANDUM IN SUPPORT
individuals,	:	OF DEFENDANTS' MOTION FOR
	:	SUMMARY JUDGMENT
Plaintiffs,	:	
vs.	:	
UTAH FARM BUREAU INSURANCE	:	
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BUREAU LIFE INSURANCE	:	Civil No. 970906166CV
COMPANY; an Iowa Corporation and	:	Honorable Michael D. Lyon
FBL INSURANCE COMPANY, an Iowa	:	
corporation,	:	
	:	
Defendants.	:	

Defendants, by and through their counsel of record, respectfully submit the following
Reply Memorandum in Support of their Motion for Summary Judgment:

Webster v. Sill, 675 P.2d 1170, 1173 (Utah 1983). Mr. Stokes has provided no explanation of the reason for this abrupt change in his testimony, and his subsequent affidavit cannot be used to avoid summary judgment. Defendants did not breach any agreement by terminating the Plaintiffs.

B. DEFENDANTS DID NOT BREACH THE AGREEMENT BY TERMINATING LEO SYPHUS.

Perhaps the easiest way to examine Leo Syphus' claim for wrongful termination of his agency contract is to rely upon very basic contract principles. If we assume that the June 30, 1994, letter to Mr. Syphus constituted a contract,³ then in exchange for Mr. Syphus' agreement to meet certain production goals by September 30, 1994, Defendants would not terminate him. If Mr. Syphus did not meet those goals, then Defendants had no obligation to retain him after September 30, 1994.

The Plaintiffs apparently have no quarrel with this approach, but rather contend that Mr. Syphus did not have until September 30, 1994, to meet those goals, because he received his termination letter on or about September 12, 1994. However, the Plaintiffs concede that the

³ The Plaintiffs suggest that Defendants do not dispute that the letters from the agency managers to the Plaintiffs modified their contracts. Actually, Defendants do dispute that any of the letters constituted a legally binding modification to their at-will agency. Rather, the Defendants' submit that whether the letters did in fact modify the relationship is immaterial because they either met the terms of the agreement in Mr. Syphus' case, or that the terms of the modification are no longer enforceable due to the subsequent contracts in the case of Mr. Stokes, Mr. Tanner, and Mr. Wood.

letter provided that the termination was to become effective *September 30, 1994*. Mr. Syphus testified that he fully understood that he was still a licensed insurance agent for Defendants until September 30, 1994, and could have lawfully sold policies for Defendants until that date:

Q. Well, but according to the Utah insurance commissioner, you're still appointed with them until September 30, 1994, right?

A. Yes.

Q. And you're still authorized to accept applications until September 30, 1994, correct?

A. Yes.

Q. Okay. So until September 30, 1994, there was nothing to prevent you from going out and getting applications and submitting them to the company, correct?

A. No.

(Deposition of Leo Syphus, pp. 88-89, attached as Exhibit "A"). Mr. Syphus was given the full measure of time permitted by the June 30, 1994, letter to meet his production goals, but he failed to do so. Mr. Syphus could have submitted applications meeting his goals by September 30, 1994, and then demanded that Defendants perform their obligations under the alleged contract by retaining him. Mr. Syphus chose not to do so. Therefore, pursuant to standard contract principles, Mr. Syphus did not perform the consideration required of him under the terms of the contract, and Defendants therefore had no duty to perform any alleged duty to retain him after September 30, 1994.