1982

# Beth S. Lewis v. Thomas G. Pike : Brief of Respondents

Utah Supreme Court


Harold A. Hintze; Attorneys for Appellant;
Gifford W. Price; Attorneys for Respondents;

IN THE SUPREME COURT

OF THE STATE OF UTAH

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BETH S. LEWIS,

Plaintiff-Appellant,

vs.

THOMAS G. PIKE, individually, THE LOCKHART COMPANY, a Utah Industrial Loan Corporation; and AMERICAN BANKERS LIFE ASSURANCE COMPANY OF FLORIDA, a foreign corporation,

Defendants-Respondents.

Case No. 18195

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# BRIEF OF RESPONDENTS

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Appeal from the Judgment of
The Third Judicial District Court
of Salt Lake County
Honorable G. Hal Taylor, Judge

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BRIEF OF RESPONDENTS

## STATEMENT OF THE CASE

This action was brought by plaintiff (appellant) against defendants (respondents) for recovery due to an alleged failure to obtain credit life insurance on the life of plaintiff's (appellant's) husband in connection with a loan.

## DISPOSITION IN LOWER COURT

Defendants' (respondents') Motion for Summary Judgment was heard on December 3, 1981. The District Judge, Honorable G. Hal Taylor, granted a summary judgment in favor of defendants (respondents). Judgment was entered on December 15, 1981.

## RELIEF SOUGHT ON APPEAL

Respondents ask that the summary judgment entered in this matter be affirmed.

## STATEMENT OF FACTS

### Application for Loan from Lockhart by Lewis'

In early summer 1979, application was made by Darrel E. Lewis and Beth S. Lewis for a loan from The Lockhart Company ("Lockhart") in the amount of $18,000. (Beth S. Lewis Deposition, pp. 22-23, hereinafter "Lewis Deposition"). Prior to July 2, 1979, Mr. Thomas Pike of Lockhart contacted Mr. Lewis to discuss a matter relative to the Lewis' home (not related to the $18,000.00 loan) as Lockhart was then receiving the payments on the contract pursuant to which the Lewis' were purchasing the home, which payments at one time were going through Tracy-Collins. (Lewis Deposition, p. 28). It was during this conversation that Mr. Lewis inquired about Lockhart making an $18,000 loan so that Mr. Lewis could consolidate all of his debts into one and in said conversation Mr. Lewis made arrangements to visit with Mr. Pike about it at the Lockhart offices. (Lewis Deposition, pp. 23; 26).

Thereafter, Mr. Lewis met with Mr. Pike at Lockhart. As to family financial affairs, Mrs. Lewis testified in her deposition that while she and her husband discussed matters, her husband

would ". . . more or less handle matters." (Lewis Deposition, p. 23). Mr. Lewis was familiar with lending matters as he had at one time been a branch office manager for a finance company. (Lewis Deposition p. 8). At the time that the Lewis' were seeking the $18,000 loan from Lockhart, Mr. Lewis was a financial programmer at Hill Field. (Lewis Deposition pp. 6-7). Mr. Lewis returned home after the meeting with Mr. Pike with a loan application, and thereafter most of the signature page of the loan application was typed by Mrs. Lewis, and the document was executed by both she and her husband (Lewis Deposition, pp. 24-25, 29 and 30; Lewis Dep., Exh. 1).

Loan Closing

On July 2, 1979, both Mr. and Mrs. Lewis went to Lockhart to meet with Mr. Pike concerning the closing of the $18,000 loan. (Lewis Deposition, p. 31.) This meeting lasted approximately 30 minutes during which the loan documents were executed. (Lewis Deposition, p. 34). As each document was presented for execution, Mr. Pike explained it to the Lewis'. (Lewis Deposition, p. 34). Among the documents executed by the Lewis' was an "Assignment of Contract", "Notice of Right of Recission", a Trust Deed, and a document entitled "Disclosure Statement" (Lewis Deposition p. 32-40; Lewis Deposition, Exhs. 2, 3, 4, 5 and 6).

In the Disclosure Statement executed by both Mr. and Mrs. Lewis, the loan charges were computed. No charges for credit life insurance were included in the Disclosure Statement at the time of execution. (Lewis Deposition, Exhs. 5, 6). This disclosure form signed by the Lewis' specifically provides in boldfaced capital letters that "credit life & disability insurance is not required to obtain this loan. No charge is made for credit insurance & no credit insurance is provided unless the borrower signs the appropriate statement below." (Lewis Deposition, Exhs. 5, 6). The "appropriate statement" in the form wherein one affirmatively indicates that they desire credit life insurance was not signed by the Lewis' and thus credit life insurance could not be included in the loan. (Lewis Deposition, Exhs. 5, 6).

During this loan closing meeting, according to Mrs. Lewis' deposition testimony, Mrs. Lewis claims that she and her husband discussed between themselves whether it was necessary to have life insurance on both of them or on Mr. Lewis. (R. pp. 36-40). It was during this alleged conversation with her husband allegedly in front of Mr. Pike that Mrs. Lewis claims that she indicated to her husband that she did not want a loan without mortgage insurance on her husband and that Mr. Pike allegedly indicated that they could let him know at a later date. (R. pp. 36-40). According to the testimony of Mrs. Lewis, at the conclusion of this discussion between Mr. Lewis and his wife, Mr. Lewis then turned and allegedly asked Mr. Pike if he could let

him know about the insurance and Mr. Pike said yes. (Lewis Deposition, pp. 37-40). Thus, at the loan closing, Mr. Pike was given no affirmative direction from the Lewis' to actually add in credit life insurance with the loan and the disclosure statement itself was executed by the Lewis' without insurance being included since no direction was given to include it. This is confirmed by Mr. Pike who states that he was never directed to add credit life insurance. (R. pp. 24-25). (Also, Thomas Pike Deposition, p. 28).

Acceptance and Utilization of the Loan Proceeds by the Lewis'

After the aforesaid July 2, 1979, closing and during the remainder of the month of July, 1979, the record discloses that no request for credit life insurance was made by either Mr. or Mrs. Lewis. Per the record, the only contact by either of the Lewis' during July with Lockhart and Mr. Pike after the closing on July 2, 1979, was when a check for the loan proceeds was picked up by the Lewis'. The $18,000 check issued by Lockhart and dated July 12, 1979, was made payable to both Darrel E. Lewis and Beth S. Lewis. (Lewis Deposition, Exh. 5-6).

In her deposition, Mrs. Lewis testified that she was present with her husband when the check was picked up stating that ". . . I feel I saw Mr. Pike that day and we were leaving for California and Mr. Pike said to have a good trip. I did see him the day we went in and picked up the check and we were leaving

for California, and Mr. Pike said to have a good trip." (Lewis Deposition, p. 41). Mrs. Lewis also testified in her deposition that after the check was picked up, Mr. Lewis put it into the bank and that they then used the proceeds to pay debts. (Lewis Deposition, p. 36). The record is clear that at the time the check was picked up, no direction of any kind whatsoever was given to Mr. Pike or Lockhart to add in credit life insurance as there is no evidence in the record that the subject was even discussed when the check was picked-up. (Lewis Deposition, pp. 36 and 41). (Pike Deposition, p. 41).

The Period of Time After the Loan Proceeds Were Used

Other than the picking up of the loan proceeds check with her husband in July, 1979, the appellant Mrs. Lewis never had any further conversation or meeting with Mr. Pike until after her husband's death in September, 1979. (Lewis Deposition pp. 40-41). Mrs. Lewis testified that her husband went in to see Mr. Pike in the early part of August, 1979, but that Mr. Pike was not in. (Lewis Deposition p. 42). She also testified that around the middle of August her husband tried to reach Mr. Pike on the telephone but he was not in. (Lewis Deposition pp. 44-46).

Mrs. Lewis suggests in her deposition that Mr. Pike indicated that he (Pike) had not reached Mr. Lewis, but Mr. Pike's Affidavit states that he (Pike) talked to Mr. Lewis in late

August or early September, 1979. (Lewis Deposition p. 49; R. pp. 24-25). However, even if one were to assume there is a dispute whether Mr. Pike talked to Mr. Lewis in late August or early September, 1979, there is no dispute that at least Mr. Pike tried to contact Mr. Lewis (Lewis Deposition, p. 49; Thomas Pike Deposition, p. 29). Further, it is clear that the record discloses no evidence that during this period of time (after July, 1979), an affirmative direction to obtain credit life insurance was ever given by either Mr. or Mrs. Lewis to Lockhart.

## ARGUMENT

### POINT I.

### THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT AS IT IS UNCONTROVERTED THAT INSURANCE WAS NOT REQUESTED AT THE TIME THE LOAN WAS CLOSED.

A close and careful review of the record in this case shows that there is no material fact in controversy, thus substantiating respondents' right to summary judgment as granted by the lower court. As is set forth in more particularity hereinafter, the appellant's attempt in her brief to demonstrate a factual conflict fails to reveal that such a conflict actually exists as to a material fact.

The appellant's complaint filed in this action alleges that the request for credit life insurance was made at the time of the negotiation and execution of documents:

> During the course of negotiation and execution of the loan application and disclosure statements, the plaintiff and her husband, Darrel Lewis, indicated to defendant Thomas Pike that they would like credit life insurance included in the loan transaction to be taken out on the life of Darrel Lewis, and requested defendant Pike to obtain the necessary insurance from the credit life writer utilized by defendant Lockhart, to wit defendant A.B.L.A. (R. p. 3) (Emphasis added)

Then the complaint goes on to allege that "Subsequent to July 2, 1979, the plaintiff's deceased husband made numerous efforts to confirm the inclusion of credit life insurance and to obtain the necessary premium figure to include in his monthly payment . . . ." (R. p. 3). (Emphasis added)

The thrust of the appellant's allegations is that there was a definite request for credit life insurance made prior to or at the time the loan documents were executed on July 2, 1979, (the "closing") and then thereafter the so-called "efforts" of Mr. Lewis was to confirm the inclusion of the insurance. The gravamen of the complaint is that the respondent Thomas Pike errored in not obtaining the requested insurance which was "allegedly" ordered prior to or at the closing. Plainly and simply, the record shows undisputedly that there was no request made for

insurance prior to the closing, and further, no request was actually made at the closing itself.

A. Per Written Agreement, Insurance on the Life of Darrel Lewis was not Requested.

There is no dispute that the closing loan documents were executed by the plaintiff and her husband on July 2, 1979, (Lewis Deposition, p. 34). Further, admittedly each one of the documents executed by Mr. and Mrs. Lewis at the closing were explained to them by Mr. Pike. (Lewis Deposition, p. 34). Included among the closing documents was the one entitled "Disclosure Statement", (Lewis Deposition, Exh. 5, 6). The disclosure document itself provides spaces wherein the computations are set forth as to the loan charges. Credit life insurance computations were not included in the said spaces and thus the loan finance charges clearly did not include credit life insurance when the disclosure statement was signed by the Lewis'.

Further, apart from the sections of the disclosure statement wherein the actual computed charges for insurance must be set out, there is also the following written in bold faced capital letters:

> CREDIT LIFE & DISABILITY INSURANCE IS NOT REQUIRED TO OBTAIN THIS LOAN. NO CHARGE IS MADE FOR CREDIT INSURANCE & NO CREDIT INSURANCE IS PROVIDED UNLESS THE BORROWER SIGNS THE APPROPRIATE STATEMENT BELOW. (Emphasis in form and added).

Neither the appellant nor her husband signed the document in the space provided where it is necessary for one to elect to include insurance along with the additional cost. This, of course, makes the document inherently consistent since the costs for the insurance were not included in the mathematical computations showing the loan charges.

The Disclosure Statement was explained and it was executed by the Lewis'. It is a binding agreement and an acknowledgement on the part of the appellant as well as her deceased husband concerning the fact that no credit life insurance was requested at the time of the loan closing and thus none was included at the time in the loan charges.

The execution of the disclosure form by the Lewis' concluded the matter as to there being no request for insurance. Any alleged prior negotiations or discussions as well as any contemporaneous discussions could not vary the terms of the written understanding. In the case of State Bank of Lehi v. Woolsey et. al., 565 P.2d 413 (1977) the Utah Supreme Court stated that:

> The court properly adhered to the principle that when the parties have reduced to writing what appears to be a complete and certain agreement, it will be conclusively presumed, in the absence of fraud, that the

> writing contains the whole of the agreement between the parties. Also, that parol evidence of contemporaneous conversations, representations or statements will not be received for the purpose of varying or adding to the terms of the written agreement. (p. 418) (Emphasis added) (See also Rainford v. Rytting, 451 P.2d 769 (Utah 1969)).

At pages 8 and 9 of her brief, appellant argues that the portion of the Disclosure Statement where it states "I do not want Credit Life or Disability Insurance" was not signed either. It is not required that this portion of the form be executed. Insurance is not added to a loan (including its extra cost) unless requested. If one wants insurance, it must be acknowledged and then the cost of such must be included in the disclosure.

In her argument (Brief, pp. 8-9) appellant makes references to the deposition of Mr. Thomas Pike concerning this matter, which deposition is apparently not with the record and may not have been published at the lower court level. However, respondents do not object to its full use. The reference by the appellant to Mr. Pike's deposition is incomplete and does not set out the proper context of his statement as to why one must sign if they want insurance, but don't need to sign if they don't want it.

Appellant has overlooked Mr. Pike's testimony that it is an advantage to sell insurance as there is premium income. (Pike

Deposition, p. 41) Pike explains that the space provided to sign if one doesn't want insurance is not required in the disclosure form but is more of a marketing tool:

> Q. I presume that you must have had some conversation directly with Mr. and Mrs. Lewis regarding those two aspects before Exhibit 1 was prepared? (Exhibit 1 is the Disclosure Statement)
>
> A. That is true.
>
> Q. When did that conversation or conversations occur?
>
> A. Again, it seemed to me we had several conversations between the time of making the application and actually finalizing it. When he determined how long he wanted the loan and when he wanted the insurance, we always came to an agreement and we did with Darrel in advance of the closing as to yes or no on the insurance.
>
> At that point in time there was not a decision to have insurance. There was a decision not to have insurance and that is why the disclosure was filled out the way it was.
>
> Q. Okay. Why wasn't the blank, then, for the signatures, affixed to the part of the application that says, "I do not want credit life insurance"?
>
> A. I'm just not sure totally in this case. This is done at the time of closing when we are together.
>
> Q. Let me ask this. Were you present at the closing?
>
> A. I was.

Q. Was anyone else from the Lockhart Company present?

A. No.

Q. The normal procedure of the Lockhart Company in the processing of loans where credit life is refused by, or I guess refused is the right word, by the borrower would be to complete this middle section of the form under "I do not want credit life or disability insurance" and to have the borrowers sign and date that, isn't it?

A. Sometimes it is, sometimes it isn't.

Q. Okay. Why would it not be? Why is it on the form?

A. It is a marketing tool. That is why it is on the form and we like to use it. The other signatures that are called for there, Mr. Hintze, if they do want insurance, they must sign by law. So we have to - that has to be done.

The other is very helpful often in helping someone to decide they want some insurance. (Pike Deposition, pp. 20-21). (Emphasis added).

Thus, to have insurance one must sign the form so indicating. The part that one may sign indicating no insurance need not be signed as it is a marketing tool. There is nothing in the record disputing this explanation. The disclosure form was completed and executed without requesting credit life insurance, and parol evidence is inappropriate as a written understanding came into existence.

B. Even If, Arguendo, Parol Evidence is Admissible With Respect to the Execution of Documents at the Closing, the Uncontroverted Evidence is Clear That There was no Request for Credit Life Insurance.

Even if, arguendo only, one could suggest that parol evidence should be considered as to whether or not credit life insurance was requested on July 2, 1979, (even in light of the written disclosure statement wherein there was no election made for insurance) the testimony of the appellant makes it most clear that such was not the case. It only further substantiates the already clear written understanding, supra, that there was no request for credit life insurance.

The appellant testified in deposition as follows:

Q: And do you recall having any discussion with respect to this document that has been marked as Exhibit 5? (Referring to Disclosure Statement)

A: Correct, yes.

Q: First of all, I will ask you to identify who said anything about it. Not what, but who.

* * *

A: My husband and I.

Q: Was the conversation you had in the presence of Mr. Pike?

A: Yes, it was.

Q: Now with respect to your husband, could you tell me what it was that he said and maybe first of all you could put it in quotation marks.

A: My husband and I discussed whether it was necessary to have life insurance on both of us or just himself, mortgage insurance on both of us or himself.

Q: That was a discussion you had between yourselves?

A: Yes.

Q: Mr. Pike was present during that conversation?

A: Yes.

Q: What did you say to your husband?

A: We felt we'd like to discuss it further, whether it was necessary to have it on me.

Q: Is that something that you said to your husband, that you ought to discuss it further, or is that something he said to you?

A: I said I feel we should discuss it further, whether it was necessary to have it on me or both of us. Is that what you were asking?

Q: So you said you should discuss it further?

A: Yes.

Q: At another time?

A: And get back with Mr. Pike on it.

Q: Did your husband just agree with you, that you ought to discuss it later?

A: Yes.

Q: Did either one of you express a feeling or indication at that time whether you ought to be covered or not?

A: That's what we discussed, whether I should be covered also.

Q: And it wasn't a case where one of you thought you should be covered and one thought you shouldn't be covered and you would resolve it later?

A: No.

Q: Neither one of you knew for sure whether you ought to be covered?

A: I felt that it wasn't necessary that I should be covered.

(Lewis Deposition p. 37-39) (Emphasis added)

Appellant further makes it clear that on July 2, 1979 - (closing) there was no actual direction for the credit life insurance to be included:

A: Only that I definitely did not want a loan without mortgage insurance on my husband and Mr. Pike indicated that we could let him know at a later date whether it should be on both of us or just my husband and he would leave it open until he heard from us.

Q: Now, is this something you said to your husband that Mr. Pike overhead, or --

A: Mr. Pike was there and heard the whole conversation.

Q: So as you remember, then, can you remember any exact words that you would have said to your husband?

A: Only that I felt it was necessary that he have mortgage insurance.

Q: Do you recall anything your husband said to you?

A: He felt the same way.

Q: And what did he say? Do you recall anything that he actually said rather than what he felt?

A: He turned and asked Mr. Pike if he could let him know and Mr. Pike said yes.

Q: Is there anything else that you can remember that took place.

A: No.

(Lewis Deposition p. 39-40) (Emphasis added)

It is clear, then, even if one could consider parol evidence, that the appellant and her husband on July 2, 1979, did not direct that insurance should be included. Since there was no request per se, such could not be added into the loan charges. A lender in such a situation would have no prerogative to do so. So at the time the documents were executed, credit life insurance was appropriately not included as a component.

Appellant's complaint allegations are not supported by the sworn testimony of the appellant. It is patently clear that at the time of the closing, (as well as prior thereto) no direction was given to include credit life insurance.

## POINT II.

### SUMMARY JUDGMENT WAS PROPER BECAUSE EVEN IF, ARGUENDO, THERE WAS ANY QUESTION AT THE CLOSING AS TO WHETHER THE MATTER OF INSURANCE WAS LEFT OPEN, IT WAS PUT TO REST WHEN APPELLANT UNCONDITIONALLY ACCEPTED THE LOAN PROCEEDS LATER THAT MONTH

After the loan closing on July 2, 1979, the record discloses that there was no other contact from either Mr. or Mrs. Lewis with any representative of Lockhart during July except for the time that both of them met Mr. Pike briefly to pick up the $18,000 loan proceeds check. At the time the Lewis' picked up the proceeds (check dated July 12, 1979) the uncontroverted record is that nothing was said at that time about desiring to

have credit life insurance. Per the record, credit life insurance wasn't even a subject discussed. Plainly and simply the check was unconditionally picked up and the proceeds utilized:

Q. And when would you have first seen the document or writing of which this appears to be a Xerox copy?

A. We came in and picked the check up. This was approximately two weeks later after we applied for the loan. I'm sorry. I cannot tell you for sure.

Q. You are not sure whether your husband picked this up --

A. No, I was with him.

Q. Were you with him when the check was picked up?

A. Yes.

Q. Then with respect to this check do you recall also that it had the bottom portion attached to the check?

A. I am sorry. I really have to say I don't remember but I would say it did.

Q. And then after you picked up that check what did you do with it?

A. He put it in the bank and we made checks out on it to each one of the people that he had specified and paid off the debts that he had borrowed it for.

Q. And where would it have been deposited, which bank?

A. Zion's First National.

Q. In Salt Lake City?

A. No, Bountiful.

(Lewis Deposition, pp. 35-36). (Emphasis added).

Later in her deposition, Mrs. Lewis confirmed her presence when the check was picked up and the record further shows that no request was made on that occasion for credit life insurance:

Q. So you yourself never really saw Mr. Pike, then, before July 2, 1979 and September 17, 1979?

A. Not as I recall.

Q. I think you best remembered you went in to pick up the check and who would you have gotten that check from? I'm referring now to what's marked as Exhibit 5.

A. I do feel that I did see - I'm sorry to take it back but I feel I saw Mr. Pike that day and we were leaving for California and Mr. Pike said to have a good trip. I did see him the day we went in and picked up the check and we were leaving for California, and Mr. Pike said to have a good trip.

Q. So other than that occasion you don't have any recollection of seeing Mr. Pike between July 2 and September 17?

A. No. (Lewis Deposition, p. 41).

In her brief the appellant ignores this material event. Appellant's complaint alleges that the request for insurance was

made at the closing if not before, and yet in her brief appellant seems to contradict her pleadings to suggest the issue was left open at the closing. Thus, ignoring the pleadings of the appellant and even assuming her contrary argument that the issue was left open on July 2, 1979, (the closing), it was no longer left open on or about July 12, 1979, when the Lewis' picked up the proceeds check.

Thus, even assuming that appellant is able to get around the executed written disclosure form and to be heard to argue that the matter was left open pending the Lewis' response, under applicable law the response was given by the Lewis' thus concluding a contract. Under principles of contract law, manifestation of assent ". . . may be either written or oral or by actions and conduct or a combination thereof. . . ." Daum Const. Co. v. Child, 247 P.2d 817, 819 (Utah 1952). The Lewis' unconditional acceptance of the proceeds was their clear and unequivocal response to and acceptance of the loan without credit life insurance. Appellant should not be permitted to ignore the unconditional acceptance, as even principles somewhat akin to estoppel would come into play -- ". . . conduct by one party which leads another party, in reliance thereon, to adopt a course of action resulting in detriment or damage of the first party is permitted to repudiate his conduct." Carnesecca v. Carnesecca, 572 P.2d 708, 712 (Ut. 1977). See also 31 C.J.S. §109.

Mr. and Mrs. Lewis took advantage of receiving the loan proceeds and applying them to their benefit without any further comment to Mr. Pike about credit life insurance. Mr. Lewis had been involved in the past in the lending business and thus borrowing matters were not something new to him. If the issue had been left open at the closing, arguendo, then by appellant's own actions, the proceeds were accepted without any direction given for insurance or any other condition. The Lewis' themselves closed any open issue by their own assent and acceptance.

## POINT III.

### AS TO THE TIME PERIOD AFTER THE DISBURSAL OF THE LOAN PROCEEDS IN JULY, THERE IS NO EVIDENCE WHICH COULD BE CONSIDERED BY A TRIER OF FACT TO ESTABLISH THERE HAD BEEN A REQUEST FOR CREDIT LIFE INSURANCE AND THUS SUMMARY JUDGMENT WAS PROPER.

As set forth, supra, the complaint states that a request for the insurance was made at the time of the execution of the documents, if not before. Discussion by appellant concerning later contacts really goes beyond her own pleadings. However, even if the appellant may get around her pleadings, there is no evidence which could be considered by a trier of fact concerning a request for credit life insurance during the period of time after the loan proceeds had been disbursed, accepted and utilized in July, 1979.

First, any "open" question about whether insurance was to be included was put to rest when the Lewis' elected to accept the

proceeds and utilize them without their requesting it. Second, during the period after July, 1979, it is uncontradicted in the record that appellant herself never made any contact with Mr. Pike nor attempted to do so. Further, in the argument under Point III in her brief, appellant asserts that Mr. Lewis would not necessarily be the agent of his wife. Assuming appellant's own argument, any attempt by Mr. Lewis to contact Lockhart after the disbursal of the loan in July, 1979, was irrelevant as it was not an attempt on behalf of Mrs. Lewis and thus appellant herself clearly made no attempt to contact Lockhart after receiving the benefit of the loan proceeds. Per the record, appellant never made any contact of any kind or nature whatsoever with Lockhart until after the death of her husband. The record is also absolutely clear that appellant never asked Lockhart to contact her after she got the loan proceeds. Thus, during the latter period (after the loan disbursal in July, 1979), appellant has nothing about which to complain as she herself did nothing in her own behalf and no duty was placed on Lockhart as the loan was closed and disbursed.

Now, assuming, arguendo, that the appellant is not held to the argument made in Point III of her brief and appellant may rely on her husband as her agent in trying to contact Lockhart, there is still nothing after July, 1979 on which a claim can be based. Mr. Pike in his affidavit states that in late August,

1979, or in early September, 1979, he did in fact talk to Darrel Lewis ". . . and gave him certain information about credit life insurance. . . ." (R. pp. 24-25). Although Mrs. Lewis in her deposition suggests that Mr. Pike had indicated in a conversation with her in September, 1979, that he had not reached Mr. Lewis, she does state in her deposition that Mr. Pike said that he had tried to reach Mr. Lewis. (Lewis Deposition p. 49, Pike Deposition, p. 29).

Even if one were to assume that there may be a question as to whether or not Mr. Pike actually talked to Mr. Lewis in August or September of 1979, there is no conflict in the record that at least Pike attempted to contact Lewis. However, there is still no evidence of any kind whatsoever in the record that any direction was given in a note or otherwise to Mr. Pike that credit insurance was to be instituted. The note referred to by appellant in her brief (pp. 5 and 11) does not say "add insurance" nor does it contain any other such language requesting insurance.1/

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1/ Further, Mr. Pike explains in his deposition that to add insurance after the loan is closed, other further document execution is then required of the borrowers, which was clearly never accomplished. (Pike Deposition pp. 34-37).

Appellant attempts to argue that the lower court was using the note referred to in appellant's brief to establish the truth of the contents in the note, thus allegedly being contrary to the hearsay rule. The note is not even necessary in the granting of the summary judgment, as argued, supra. However, based upon the objective theory of contracts, the note at face value only makes a request for information and nothing else. Even assuming appellant's argument that the note shouldn't be accepted as indicating that appellant didn't want insurance, i.e. that it shouldn't be considered to show appellant's negative intent, it still does not by any stretch of interpretation state that insurance was wanted or that it should be added. On its objective face, the note clearly is <u>not</u> a request or direction <u>for</u> insurance. Thus, there is nothing in the record showing a request for insurance and there is nothing showing that respondents violated any duty.

## POINT IV.

## LOAN WAS PAID WITHOUT RESERVATION OF ANY RIGHTS

In her deposition, appellant admits that in latter September, 1979, she knew there was no credit insurance. (Lewis Deposition, p. 46). With this knowledge, appellant paid off the entire loan balance in November, 1979. (Lewis Deposition, p. 50-52). According to the deposition testimony, at the time of the payoff,

there were no conditions or reservations made by Mrs. Lewis with respect to the payment and thus payment was unconditionally made. (Lewis Deposition, p. 50-52). Such action is contrary to appellant's asserted claim thus a giving up or waiving of any alleged claim.

## CONCLUSION

The action of the lower Court in granting summary judgment should be sustained. No direction for insurance was given at the closing and the appellant got the benefit of the loan proceeds and gave no direction for insurance at said time. No duty was violated by the respondents. There is no material issue of fact in the matter justifying the time and expense of a trial. The lower court's action was proper.

DATED this 29th day of April, 1982.

Respectfully submitted,

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## MAILING CERTIFICATE

I hereby certify that I caused two copies of the brief to be mailed postage prepaid on this 29th day of April, 1979, to:

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