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Meredith Page and Maurine S. Page v. Federal Security Insurance Co. : Brief of Plaintiffs and Respondents

Utah Supreme Court

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT
of the
STATE OF UTAH

UNIVERSITY UTAH
DEC 19 1958
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MEREDITH PAGE and MAURINE S.
PAGE, *Plaintiffs and Respondents,*

vs.

FEDERAL SECURITY INSURANCE
COMPANY, a Utah corporation,
Defendant and Appellant.

Case
No. 8815

Brief of Plaintiffs and Respondents

ROMNEY, BOYER & RONNOW
and DAN S. BUSHNELL

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IN THE SUPREME COURT of the STATE OF UTAH

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Brief of Plaintiffs and Respondents

INTRODUCTORY STATEMENT

The Respondents have no serious disagreement with the Statement of Facts contained in the Appellant's brief. Since the argument of the case requires a complete review of the evidence, no attempt will be made to call attention to any disagreement with statements therein made.

The Appellant has chosen to state its argument in seven different points. However, it appears to the Respondents that all of the points are directed to one issue, namely, was there sufficient competent evidence to justify the submission of the case to the jury? The question of whether Alma M. Page, prior to his death, delivered his insurance policy to the company, Appellant's Point One, is only one factor in determining if an election had been made on the policy prior to the insured's death. Whether the election was made in writing or orally is not the issue now before the Court or before the jury (Appellant's Point Two). Whether the insured intended to elect one of the options is the same issue as whether he, in fact, did make the election pursuant to one of the options (Appellant's Points Three and Four). Whether the court should have granted the Defendant's motion for a directed verdict or the Defendant's motion for judgment notwithstanding the verdict or the granting of a new trial all raised the sufficiency of the evidence to justify the submission of the case to the jury and to sustain the verdict of the jury rendered thereon. For these reasons the Respondents shall answer all of the arguments of the Appellant under the following point:

POINT ONE: THERE IS SUFFICIENT COMPETENT EVIDENCE TO JUSTIFY THE SUBMISSION OF THE CASE TO THE JURY AND SUSTAIN ITS VERDICT BASED THEREON.

The defendant corporation places considerable emphasis upon the testimony of Mrs. Ruth Page. Mrs. Page came from Denmark in 1949, and it was obvious that she was susceptible to being lead by counsel and did not clearly understand all of

the technical terms involved. Her testimony in most instances was vague and indefinite. When being asked about a letter, Exhibit 12, the policy or discussions, some of her answers were as follows:

"Q. Erich kept it? Now, afterwards, Mrs. Page, did you and your husband receive anything through the mails from the insurance company?

A. *That is what I think we did.*" (R. 25).

Q. Now, after that, what did you do? Let me rephrase it. Now was that policy delivered to you and your husband?

A. *I don't recall.*

Q. Did you and your husband talk about it, the insurance policy, after it came back from the insurance company?

A. *No, I don't think so.*" (R. 26).

"Q. How did you know it was fixed?

A. I saw the paper *that I thought was with it*. I don't know if it was attached.

Q. Where was the paper which you saw?

A. With the insurance when it came back.

Q. Was it in the front? Was it in the back? Where was it?

A. *I don't recall.*

Q. You don't recall where that piece of paper was, is that right?

A. Yes, that is right." (R. 26).

"Q. How did you know that it was fixed the way you wanted?

A. *There must have been a piece of paper there.*

Q. Was anything in there besides a piece of paper in that envelope?

A. *I don't recall.*

Q. I'll show you what has been marked Defendant's Exhibit 12 and ask you to read that and tell me whether or not you have ever seen the original of that letter?

A. I'm afraid I didn't read it too well *if we did get it.*

Q. Well, did you ever see a letter like that?

A. *Do I have to say yes or no?"* (R. 27).

Although Mrs. Page used the word "paid-up" it was obvious from the discussions that that term was the one which best described the desire that some arrangement be made with the policy so that future premiums would not have to be paid. In the use which she made of the term, it could have applied equally as well to extended term at full face coverage for fourteen years, cash surrender value, or actually paid-up insurance. She testified:

"Q. You wanted to make arrangements so that you wouldn't have to make any further payments?

A. Yes.

Q. You also testified that Mr. Olschewski told you of different ways to arrange so that you wouldn't have to make further payments?

A. Yes.

Q. You were interested in *cash surrender, reduced paid-up insurance, or extended term*—any one of those ways—so that you wouldn't have to pay any more?

A. Well, yes." (R. 30).

When asked if she recalled the discussions concerning a five-year plan with reference to the policy, the amount of cash surrender value which was available, extended term insurance, or whether the figure of fourteen years at full coverage was discussed, she state she didn't recall and added:

"I'm afraid I let my husband decide what it is."
(R. 32).

It should be remembered that her deposition was taken prior to the trial, at which time the term "Paid-up insurance" was frequently discussed, and it is therefore not unreasonable to assume that with her understanding of these technical matters she would use that term to indicate the termination of any requirement that premiums be paid.

The defendant company has attached to their brief a letter, Exhibit 10. It was established that they had requested from Mrs. Page any letters or correspondence which had been received by her or her husband from the company. Mrs. Page was unable to find the original of Exhibit 10, and that document was submitted on the basis of the office copy, solely upon the testimony that under the normal office routine procedure it would have been mailed.

Although the evidence cited by the defendant corporation might be sufficient if standing alone to warrant a judgment in its favor, or if the jury had decided in its favor it might be sufficient to sustain that verdict, it is submitted that the evidence contradicting the position of the defendant corporation is more probative, is more substantial, is more credible in light of all of the circumstances and is more than sufficient to sustain the verdict of the jury. Clearly, it shows a definite con-

flict in the evidence on a factual issue and therefore required its submission for determination by the jury.

Any number of recent Utah Supreme Court decisions state the proposition that if there is any substantial competent evidence to support the determination of the jury, the same shall be affirmed on appeal; or, stated differently, that if the evidence is in conflict so that it cannot be said as a matter of law that all reasonable persons would draw the same conclusion from said evidence, then there is a factual issue to be determined by the jury. The Appellant has chosen to review the evidence in the light most favorable to its position; however, the traditional rules on review are to the contrary, more particularly, that the evidence will be reviewed in the light most favorable to the Respondents in this case, the jury having made a determination in their favor, and the Court having ruled in their favor in submitting the issues to the jury for their determination, and in later refusing a judgment notwithstanding the verdict, as well as refusing a new trial.

The policy of insurance, Exhibit 1, was admitted at the time of pre-trial and was introduced at the time of trial. On its face there have been no changes, and there was not attached to it any rider or endorsement modifying or changing the policy. Consequently, it was admitted by all and ruled by the Court that, upon the introduction of the policy, the Plaintiffs had established a prima facie case. Thereafter, it became incumbent upon the Defendant to prove its affirmative defense; more particularly, that the insured had elected to modify the policy to one of paid-up insurance. The case was tried

then upon the basis that the Defendant had the burden of proof upon this issue. The policy by its terms provides an automatic non-forfeiture provision to the effect that, even if the premiums are not paid, the policy will be continued on extended term, which in this case would have given coverage for a period in excess of fourteen years. There is another provision in the policy where, if the insured or owner of the policy at the time of its procurement so indicated, an automatic premium loan provision applied, and the cash equity in the policy would be used for an automatic loan to pay the premium. It was admitted by the vice president of the defendant company that there was sufficient cash equity that, if this provision were applicable, the policy would be in full force and effect on the date of the insured's death (R. 54).

The Defendant made the opening and closing argument before the jury on the basis that it had the ultimate burden of proof, and in its brief on Page 33 states that the burden of proof fell upon the Defendant to prove that the insured had, prior to his death, elected the option of reduced paid-up insurance. Therefore, the verdict of the jury may be sustained on either of two theories: First, that the Defendant failed to sustain the burden of proof, or, second, that there is sufficient competent evidence that they as a matter of fact made a determination against the Defendant and in favor of the Plaintiff that no such election had been made. It is submitted that the following evidence is ample to justify the latter determination by the jury and is more than sufficient to require this Court to affirm the verdict.

Evidence was introduced that the Defendant company

did not have any written request showing that an election had been made, even though in other respects it was the policy of their company to require written elections or requests indicating modifications or other action involving policies. There was no carbon copy of the alleged endorsement or rider which was supposed to have been attached to the policy. It was maintained that the rider or endorsement had been attached by eyelets to the front of the policy; however, the jury was requested to examine the eyelets to see if they had been removed or changed or if there was any evidence of fragments of paper remaining thereunder, indicating a document had been removed. Evidence was introduced that it was the usual custom to require that such an election in the insurance business be made upon written request duly signed by the insured. It was maintained by the Defendant that it had advised Lincoln National Life, their re-insurance company, that the policy had been so changed. However, a search of the records of this only independent source of information concerning this matter failed to produce any evidence that such a change had been made, or that the company had been so advised of such a change. After the death of the insured, one of the Plaintiffs called and talked to a secretary of the Defendant company and inquired about the policy, advised the company that the insured had been killed, and was advised after some delay that the amount on the policy was the full face amount, minus a \$400 loan. The documents of the company are inconsistent as to dates when the policy lapsed, and the date that the company maintains that the election was made. Although the company painstakingly made changes on numerous company cards and indexes with red pencil to the effect that the policy

had been converted, they did not make any change upon the face of the policy, which they maintain was in their possession. Again it was testified that the usual custom with a policy in the trade is to make the change right on the face of the policy by striking through the face amount and inserting the modified amount for which paid-up insurance would be granted. The Plaintiff testified that he had a discussion with the vice president and the president of the company, and that they stated a mistake had been made, and that if the re-insurance company would make payment, they would pay the full amount of the policy. Incidentally, counsel for the insurance company, in a letter after the issue was raised, stated that if the Defendant company is on the risk for an amount in excess of \$10,000, then Lincoln National was also on the risk under the original of this agreement. Such evidence is more particularly reviewed as follows:

1. NO SIGNED, WRITTEN DOCUMENT SHOWING AN ELECTION FOR PAID-UP INSURANCE.

After the death of the insured, his father, one of the Plaintiffs, went to the office of the company and had a conference with Mr. Olschewski. Mr. Page asked to see a copy of the election or endorsement. In this regard, Mr. Page testified as follows:

"A. I met him, and Mr. Olschewski seemed to be very nervous, and I wanted a signed document from my son where he signed a document where he reduced the fact amount of that policy.

Q. What did he say when you told him that?

A. He became very angry. He said he didn't have any signature of my son.

Q. Did he attempt to find one?

A. Yes.

Q. When he looked, were you present?

A. I was present, my wife and my son's wife.

Q. Did he go through the files in your presence?

A. Yes, he went through many files.

Q. Did he produce for you any instructions, any signed election?

A. No, he did not.

Q. Did he produce for you a copy of the endorsement?

A. No, he didn't. I asked for that. I said, 'You say you have no signed document where he elected the paid-up insurance and reduced the value of the insurance? Where is the attachment to the policy, the duplicate?' And he said there would have been an attachment to the policy. I said it wasn't attached to the policy and he said he didn't have any duplicate. I asked him, 'What have you got?' He said he had a carbon, two carbon copies of a letter he had written to my son. I said, 'Well, it seems funny you should have two carbon copies of a letter supposed to have been written to my son and no carbon copies of the endorsement or no carbon copies of the account of the original paid-up endorsement.' (R. 98, 99).

On this matter, Mr. Olschewski testified as follows:

"Q. Did you in this case request a written election by the insured?

A. No.

Q. You do not have in your files any written document of any kind which he signed or otherwise indicated what election he want to take, if any?

A. That is right." (R. 59).

2. IN THE INSURANCE TRADE IT IS THE USUAL CUSTOM, POLICY AND PROCEDURE TO REQUIRE A SIGNED, WRITTEN ELECTION WHEN A POLICY IS CONVERTED TO PAID-UP INSURANCE.

Although Mr. Olschewski, vice president of the Defendant corporation, denied that at the time the change was made he knew that such custom prevailed in the industry, he did admit that he now knew such was the custom. He was asked:

"Do you not know that it is the usual policy and practice of the insurance companies in this area to require a written election on non-forfeiture options?

A. I do not know that.

Q. Do you know it now?

A. Yes.

Q. Do you understand then that it is the general policy of insurance companies in this area?

A. I think it is the advisable thing to do to prevent this kind of thing." (R. 61).

Mr. Wilmer Barnett, cashier of Lincoln National Life, a Home Office employee, being employed at the Regional Office here in Salt Lake City, and who testified that he had had twenty years experience in the insurance business, testified about this custom as follows:

"Q. Would you state what is the custom, policy, or procedure?

- A. Any person making any changes in reference to a policy does so only over the signature of the owner thereafter.
- Q. Does that apply to a non-forfeiture or other changes?
- A. To all changes including non-forfeiture.
- Q. What other types are there?
- A. The owner might change the beneficiary on his policy. He has the right to change the ownership or control and transfer it to someone else. He may make an election of dividend options as well as non-forfeiture options in the policy.
- Q. In all those cases that same custom and procedure applies?
- A. The signature of the owner of the policy is the manner in which that is accepted." (R. 108).

Mr. Olschewski testified that he had been with the Defendant company from the time of its inception in 1950, and that his duties involved policy issuing, underwriting, claims department, re-insurance and policy adjustments and modifications (R. 56). Mr. Olschewski testified that it was the policy of his company in connection with reinstatement applications handled by him that they be signed by the owner and that usually the company procured a written election in connection with dividend payments (R. 56-58).

3. THE COMPANY COULD NOT PRODUCE A CARBON COPY OF THE ALLEGED ENDORSEMENT OR RIDER WHICH WAS SUPPOSED TO HAVE BEEN ATTACHED TO THE POLICY.

Mr. Olschewski testified that he was familiar with the office routine of the company and that it was the usual practice and procedure of the company to make carbon copies of all documents so that the company could keep a complete file of all transactions (R. 63). He further testified that he dictated the letter of transmittal and the endorsement at the same time, and that he did not instruct the secretary to either make or not to make carbon copies for the company's files (R. 63). The secretary, who happened to be the wife of the vice president, Mr. Olschewski, testified that she made an original and two carbon copies of the letter (R. 85). The company could not produce a carbon copy of the endorsement which they claim was attached to the face of the policy. Mr. Olschewski was asked:

"Q. Do you have a carbon copy of the endorsement alleged to have been attached to this policy?

A. No." (R. 63).

4. AN INSPECTION OF THE EYELETS ON THE POLICY INDICATES THAT NO RIDER WAS EVER ATTACHED.

The company maintained that the endorsement changing the policy to one of paid-up insurance was attached to the face of the policy by the two outside eyelets. At the trial, witnesses for the company were asked to take their knives, if they so desired, and to pry open said eyelets to determine if any evidence of scraps of paper were present to indicate that such a document was attached by the eyelets. The policy was passed to the jury for their examination. It is submitted that an examination at this time will show that the said eyelets

have not either been removed or tampered with, and that they do not show that any rider was ever attached by them which has subsequently been torn off. This point is very significant since it is the very position of the Defendant that the rider was so attached and an examination will not corroborate such a position. The inspection of the Court is invited to the policy and the eyelets attached thereon. The black photo copies of the original application had been attached by the center eyelet and had been torn off. An examination of that eyelet will show that part of the black document is still under the edges of that eyelet.

5. LINCOLN NATIONAL, A RE-INSURANCE COMPANY OF THE DEFENDANT, HAS NO RECORD SHOWING THAT THE POLICY HAD BEEN CONVERTED TO PAID-UP INSURANCE.

It was maintained by the Defendant company that the re-insurance company had been advised of the change. In this regard, Mr. Barnett, cashier of Lincoln National, was subpoenaed to be present and to bring with him any documents or papers concerning any notice or advice from the Defendant corporation regarding modifications of the policy.

Mr. Barnett was asked:

"Q. Mr. Barnett, were you advised that there were or were not documents available showing the change to paid-up policy?

A. There were no documents showing it had been changed to a paid-up policy." (R. 107).

In another instance, he was asked the following questions:

"Q. Were you subpoenaed to appear in this action?

A. I was.

Q. And in the subpoena were you requested to bring any documents or papers concerning any notice or advice from the Federal Security Insurance Company that may have been received concerning the policy of Alma M. Page?

A. Yes.

Q. Particularly were you asked to bring any documents of the Company that would indicate that your Company had been advised that the policy had been changed to a paid-up policy?

A. Yes.

Q. Did you and your Company make an attempt to acquire and to locate those documents?

A. Yes, we did.

Q. What did you do?

A. Our local office does not have the information with reference to reinsurance, so I called our Fort Wayne office and the Reinsurance Department and asked if there was anything there on file and I was informed as to what he had found.

Q. Did you request from that office any documents pertaining to this particular policy and the fact that it had or had not been converted to a paid-up policy?

A. He informed me by telegram with reference to the information requested on the subpoena.

Q. Do you have that telegram with you?

A. I do. (Presents telegram to be marked as Plaintiff's Exhibit 13).

Q. I show you what has now been marked as Exhibit 13 and ask you if this is the telegram that you received?

A. It is.

Q. Does it say that there are no documents or evidence that the policy was changed to a paid-up policy?

A. It does." (R. 105, 106).

The telegram, Exhibit 13, which was received in evidence, states as follows:

"No documents or evidence in our files that this policy became paid up or was changed."

Without corroboration from the only independent source which the defendant company gave to the plaintiffs where a check might be made as to such conversion, the court was left with only the self-serving documents of the defendant corporation which could have been prepared or altered at any time.

6. IT IS THE USUAL POLICY IN THE INSURANCE TRADE TO MAKE A CHANGE RIGHT ON THE FACE OF THE POLICY BY DRAWING A LINE THROUGH THE FACE AMOUNT AND INSERTING THE NEW, REDUCED, PAID-UP AMOUNT.

In this regard, Mr. Olschewski was asked as follows:

"Q. You say it is the custom that they do make a change on the face, of reductions to paid up policies?

A. Yes." (R. 61).

Although the company took great pains to write in red on numerous office cards which were introduced as evidence showing that the policy had been reduced and paid up, etc., it is submitted that they made no change on the face of the policy itself, which is the principal contract showing the obligations, rights and duties of the respective parties. It is their contention, as shown by their brief, that the policy was in their possession for the purpose of effectuating this election. It is interesting to note that in connection with Exhibit 3, in red pencil, a big "X" is marked through the amount of the insurance and at the side is written, "Reduced, paid up." Then on August 8, 1955, written in pen, it is stated, "Elected paid-up for \$1,443," which is circled in red. Nevertheless, one "K.W.", a secretary in the office of the company, at the very bottom of the card, wrote in pen, "Lapsed, 9/16/55. K.W." The secretary was identified but was not called to testify. It is inconceivable that she would have written on the bottom of the card, "Lapsed, 9/16/55" if in fact the red notations were placed thereon on 8/8/55 as was testified to by Mr. Olschewski.

Mr. Olschewski testified that he could not explain why Exhibit 3 shows 9/16/55 as the lapse date. He testified as follows:

"Q. Can you explain why Exhibit 3 shows 9/16/55 instead of 7/16/55? I will ask you this question: Did that Exhibit 3 show the date lapsed was 9/16/55?

A. I can't explain why.

Q. It has the initials here 'K.W.' Is K.W. one of the employees of the company?

A. Yes. Kay Walker." (R. 71).

It was testified to by Mr. Olschewski that at the time of the election on August 8, 1955, he made the various changes on the cards which were introduced. However, on September 16, 1955, Exhibit 6, in a communication to Lincoln National Life, the policy was identified and was shown to have been lapsed. A document, Exhibit 8, produced from the files of the defendant company from Lincoln National Life Insurance Company, identifies the Page contract or policy and shows that it was lapsed. The entry was made on January 4, 1956 in connection with business for the month of October, 1955. If the election had been made as testified to on August 8, 1955, it would appear that the records of the company should so reflect rather than have the delay to September and October and the notation that the policy had lapsed rather than that it had been converted to paid-up insurance. As has previously been stated, the automatic non-forfeiture provisions or loan provisions would make the policy in full force and effect even though it may have lapsed because of nonpayment of premiums.

7. A SECRETARY OF THE COMPANY, AFTER THE DEATH OF THE INSURED, STATED THAT THE FULL FACE AMOUNT OF THE POLICY WOULD BE PAID, MINUS THE LOAN THEREON.

Mr. Page testified that, after the death of his son, he called the company and talked to a secretary and requested from her the necessary forms, and inquired about the amount which would be paid. He stated that after waiting ten to fifteen minutes on the telephone, he was advised that the face amount of the policy would be paid minus the \$400 loan (R. 97-98).

8. OFFICERS OF THE COMPANY STATED THAT, IF THERE WAS STILL REINSURANCE, THEY WOULD MAKE THE PAYMENT; THAT THEY HAD MADE A MISTAKE.

Mr. Page testified that in a conversation with Mr. Olschewski he was advised as follows:

“Well, Mr. Olschewski said he was very busy and I said I’d like to get this matter straightened out, and then at that time Mr. Olschewski said they had made a mistake and they would see if their reinsurance company would pay the policy. He said they would get them to pay it provided it hadn’t been terminated, would be no loss to the Federal Security if the Lincoln National would pay the policy and he would investigate this case and see if that time had lapsed.” (R. 100).

He testified further that a similar conversation was had with the president of the company in the presence of Mr. Olschewski (R. 101). In a letter from the general counsel of the company, Exhibit 14, after the issue in this lawsuit was presented, it was stated as follows:

“Initially we wish to state that if you are on the risk for an amount in excess of \$10,000, we are also on the risk under our original reinsurance agreement.”

Two Utah cases discuss the sufficiency of evidence in insurance cases to warrant a submission of the factual issues to the jury.

In *Palace Laundry Co. vs. Royal Indemnity Co.*, 224 P. 657, 63 U. 201, the Supreme Court stated:

“While the evidence respecting these matters, to the

mind of the writer, is meager and inconclusive, if there was some substantial evidence from which the jury could infer and find that the safe was broken open by the use of some tool or tools, and that there were some visible marks upon the same indicating that it was opened by the use of such tools * * * "

The court then reviews the evidence and concludes as follows on this issue:

"It is true that some other witnesses who saw the safe soon after the burglary said that they did not notice the marks testified to by the manager. The mere fact that they failed to notice them, however, was not conclusive. The jury had a right to believe the testimony of the manager and the other evidence which indicated the use of force and violence upon the safe. We are forced to the conclusion, therefore, that there was some substantial evidence showing that the defendant was liable under the policy."

In *Rouleau vs. Continental Life Ins. & Investment Co.*, 45 Utah 234, 144 P. 1096, the court had occasion to consider the sufficiency of the evidence to present a jury issue for determination wherein the company produced carbon copies of the letter which purportedly served notice upon the plaintiff that the policy had lapsed. The court in discussing this issue stated as follows:

"Up to this point there is no conflict in the evidence. The company claims that, in addition to the correspondence referred to, it, on the 16th day of October, the last day of grace under the terms of the policy to pay the premium, wrote the plaintiff, and produced and put in evidence a carbon copy of the letter as follows:

'Not having heard from you in answer to our

letter of the 5th, we have been compelled to cancel your policy No. 2508 on our books by its surrender value.'

"There is proof that such a letter was dictated to a stenographer by the company manager, and that it was signed by him, but the defendant made no sufficient proof that it was mailed; that it was deposited in the post office, or United States letter box, or delivered to a United States mail carrier, or other agency or instrumentality in charge of or under the control of the United States mail service. But that defect of proof is supplied by this: Plaintiff's wife, in writing for him on the 31st of October, the day he mailed the money order and the note, in that letter stated:

'Just in reach of your letter of the 16th, for having left my business in hands of others, for I was compelled to absent myself from the city, and on my return, see that this thing was not attended to. I now forward the amount required, trusting that you will accept it, although I know that it is late. If accepted, please send receipt.'

"It is thus seen that in that letter reference is made to a letter from the company 'of the 16th.' The plaintiff in explanation of that, testified that his wife, and not he, wrote and signed the letter, and, in effect, that he had no knowledge that it contained such statement, and that the letter to which he, in fact, replied was the letter of October 5th, in that he had not received nor seen any such letter as that of the 16th.

"On this evidence the case was submitted to the jury, who rendered a verdict in favor of the plaintiff for the face of the policy less the loan and unpaid premiums. The defendant appeals."

It was the contention of the insurance company that the policy was cancelled on the 16th day of October, the last day

of the grace terms under the policy. At the conclusion of the case a motion for a directed verdict was made but denied. The court in considering the issues raised by such motion concluded that even under the foregoing set of facts, there was sufficient evidence to submit the case to the jury. In so doing it stated as follows:

“At the outset let it be said that, if the evidence without conflict shows, as contended for by the defendant, that its letter of October 16th, 1911, notifying the plaintiff of the cancellation of the policy, was received by him, then the defendant is entitled to prevail. The court so, in effect, instructed the jury. The evidence as to that, however, is, as we think, in conflict. There, of course, is good and sufficient evidence to show as has been seen, that the letter of October 16th was sent by the defendant, that it was received by the plaintiff in due course. That is supported by the plaintiff's letter written on the 31st acknowledging the receipt of the letter of the 16th from the company. But on the other hand, there is evidence to support a contrary finding. Supporting that is the testimony of the plaintiff that no such letter was received by him, his explanation how reference to ‘the 16th’ was made in his letter of the 31st written by his wife, his letter apparently responsive to another letter, the letter of the defendant of November 11th, wherein it undertook to state the time and the manner notice was given the plaintiff of a cancellation of the policy, making direct reference to and copying its letter of November 2nd, but making none whatever to its alleged letter of October 16th, in the probability or improbability of its declaring the policy cancelled on a day on which it, under its terms, was not subject to cancellation or forfeiture, and not until a later day. What the real truth is in such respect, and whether the claim of the defendant or that of the plaintiff was supported by the

greater weight of the evidence, was for the jury.
(Citation of authorities.)

“The defendant therefore was not entitled to a direction of a verdict, or to a charge, on the theory that the evidence without conflict showed that the letter of October 16th was received by the plaintiff and that he then was notified of the cancellation of the policy.”

The judgment entered upon the verdict of the jury was affirmed.

All of the foregoing evidence is more than ample to sustain the verdict of the jury. No written request, no copy of the endorsement, no changes made on the face of the policy, no evidence that any endorsement had ever been attached by the eyelets to the policy; that it was the usual custom to require a written request and make a change on the face of the policy; that the secretary said the full amount minus the loan would be paid; delay in making any change on the records of the company, and inconsistent modifications shown by their own self-serving records, plus the fact that the president and vice president of the company had said a mistake had been made and if there was re-insurance it would be paid, not only sustain the finding, but compel a finding to the effect that the defendant had not sustained its burden of proof in showing that a paid-up election had been made.

CONCLUSION

Recognizing that when a life insurance contract is to be construed and placed into effect, one of the contracting parties will be deceased, insurance companies are required to be

extremely cautious and careful in seeing that the contract is complete in all respects. An insurance company, which has a large office staff, trained personnel, and control of the various endorsements, modifications, and terms of the contract which are requested and discussed or agreed to by the contracting parties, should be required to make sure that there can be no question about the terms of the contract. If a modification of the contract is to be accomplished, it is only reasonable to require that that change be made on the face of the policy and, in addition, if necessary, that a rider or endorsement be attached thereto. An example of the danger involved is present in this case if the defendant corporation is able to establish that there was a substantial reduction in the coverage of the policy by self-serving documents in their own office, which could be changed, prepared and produced at any time. Mr. Page, the insured, is not present to testify and there is nothing on the policy itself to show that there has ever been a change. The face amount was not changed, and there is no evidence that there was ever a rider or attachment made to the policy by the two eyelets as claimed by the defendant corporation.

The trial judge, Judge Martin Larson, recognized that there was a factual issue for determination by the jury when he denied the defendant corporation's motion for a directed verdict prior to submitting the case to the jury. He again reaffirmed this position in denying their motion for a judgment notwithstanding the verdict and for a new trial, wherein he stated as follows:

"The court thinks that there was a question of fact for the jury to determine and thought so at the time

he submitted the case to the jury, that there was a factual question for determination * * * .

“The courts in Utah always tell the jury that they are the sole and exclusive judges of the facts and credibility of the witnesses. Now, if there is a question for them to pass upon, it would be kind of an absurd proposition to tell the jury that they are the sole judges of the facts and credibility of the witnesses if you view the facts and credibility of the witnesses the same as I do, and if you differ from me, then you are no judge of the facts or the credibility at all, so I will proceed to judge it.

“So the motion that has been argued and presented is denied.”

The decision of the trial judge, as well as the verdict of the jury, should be affirmed.

Respectfully submitted,

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