

1959

Meredith Page and Maurine S. Page v. Federal Security Insurance Co. : Brief of Defendant and Appellant on Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT

of the
STATE OF UTAH FILED

JAN 6 - 1959

MEREDITH PAGE and MAURINE S.
PAGE,
Plaintiffs and Respondents,

vs.

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

Clerk, Supreme Court, Utah

Case No.
8815

BRIEF OF DEFENDANT AND APPELLANT
ON PETITION FOR REHEARING

COTRO-MANES & COTRO-MANES
Attorneys for Defendant and Appellant

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of the

STATE OF UTAH

MEREDITH PAGE and MAURINE S. PAGE,)	
Plaintiffs and Respondents,)	Case No
vs)	8815
FEDERAL SECURITY INSURANCE COMPANY,)	
a Utah corporation,)	
Defendant and Appellant,)	
-----)	

PETITION FOR REHEARING

Comes now the above named defendant-appell and petitions this Honorable Court for rehearing the above entitled cause, and for an order vacating the denial of the appeal and affirmance of the judgment of the trial court.

This petition is based upon the points set forth in the defendant-appellant's brief herein.

COTRO-MANES & COTRO-MANES

By Paul M. L. Manes
Attorneys for Defendant
Appellant

We do hereby certify that in our opinion this is good cause to believe that the judgment objected is erroneous and that the case should be reexamined as prayed in said petition.

Dated January 6, 1959.

COTRO-MANES & COTRO-MANES

By Paul M. L. Manes
Attorneys for Defendant
Appellant

IN THE SUPREME COURT
of the
STATE OF UTAH

MEREDITH PAGE and MAURINE S.
PAGE, *Plaintiffs and Respondents,*

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FEDERAL SECURITY INSURANCE
COMPANY, a Utah corporation,
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BRIEF OF DEFENDANT AND APPELLANT
ON PETITION FOR REHEARING

CARDINAL POINTS TO BE CONSIDERED BY THE
COURT IN THE MATTER OF THE PETITION FOR
REHEARING IN THE ABOVE ENTITLED CAUSE
OF ACTION.

The defendant and appellant respectfully submits to this
Honorable Court its contentions as to why the petition for

rehearing should be granted and the matter resubmitted for further consideration.

STATEMENT OF POINTS

Point One. The Court erred in its decision wherein it stated that, according to her testimony, the widow of the deceased insured should have had the policy in her possession.

Point Two. The Court erred in its decision wherein it is stated that the defendant company claimed to have notified the reinsurer, Lincoln National Life Insurance Company, of the conversion of the policy to a paid-up policy.

Point Three. The Defendant-Appellant based its challenge to the jury's verdict not only on the testimony of the witnesses, but also on the written documentary evidence which was uncontradicted and certainly credible evidence, and which the jury arbitrarily disregarded.

Point Four. The entire records of the defendant company, together with the corroborating testimony of the witnesses, established that as a matter of law the deceased insured had elected one of the options under the policy.

ARGUMENT

POINT ONE

THE COURT ERRED IN ITS DECISION WHEREIN IT STATED THAT, ACCORDING TO HER TESTIMONY, THE WIDOW OF THE DECEASED INSURED SHOULD HAVE HAD THE POLICY IN HER POSSESSION.

In the Court's opinion, it is stated:

"It is also significant that, according to her testimony, she received the policy in the mail after these talks, and therefore would have had it in her possession. Yet after her husband's death she * * * did not have the policy, nor did she have either the rider or the accompanying letter, which the company claimed were sent."

The testimony shows that the decedent's widow, Ruth Jensen Page, did not claim to have had the policy in her possession at any time, except briefly when it was first returned by the insurance company.

"Q. (Mr. Cotro-Manes) Now, after the policy came back from the Insurance Company like you said you wanted, what did you do with the life insurance policy?

A. (Ruth Jensen Page) My husband had it.

Q. What did he do with it?

A. Do with it?

Q. Where did he put it?

A. I don't know whether we had it or his dad had it. We used to keep it in the safety box."

Record, 27-28

"Q. (Mr. Cotro-Manes)Then, the next time you saw this policy was after your husband's death, on the 22nd day of April, 1957, is that correct, when they showed it to you, when Mr. Ronnow showed it to you?

A. (Mrs. Page) Yes."

Record, 28

The testimony of Meredith Page, one of the plaintiffs herein, was to the effect that the policy was in his safe at his home on the date of the death of the insured. (Record 95).

In the light of the testimony of Ruth Jensen Page and Meredith Page, we submit that there is no basis for the Court's contention that, according to her testimony, the widow should have had the policy in her possession when her husband died.

We further submit that in the light of the testimony, there is but one conclusion to be reached, that is to say, that the letter of transmittal and the rider would be with the policy, and it is undisputed that this policy was, at the time of the insured's death, in the possession of the plaintiff, Meredith Page.

POINT TWO

THE COURT ERRED IN ITS DECISION WHEREIN IT IS STATED THAT THE DEFENDANT COMPANY CLAIMED TO HAVE NOTIFIED THE REINSURER, LINCOLN NATIONAL LIFE INSURANCE COMPANY, OF THE CONVERSION OF THE POLICY TO A PAID-UP POLICY.

The record shows that the defendant insurance company, throughout the entire trial, contended that the Lincoln National Life Insurance Company was not notified of the conversion of the policy in question to a *paid-up policy, on the ground and for the reason that such information was not required to be sent and was not, in fact, sent to the Lincoln National Life.*

"Q. (Mr. Ronnow) Did you at any time after this alleged election advise Lincoln National that the policy has been changed from a current policy to one of paid-up in the sum of \$1443.00?

A. (Erich Olschewski) *We advised termination.*

Q. You advised termination, is that correct? Did you advise them as to the election of one of these clauses?

A. No, we did not explain then."

Record, 64

"Q. (Mr. Ronnow) * * * You asked Lincoln National to terminate their insurance on this policy?

A. (Mr. Olschewski) Yes.

Q. Did you write them a letter?

A. No. That is done by the clerk who handled it once a month with other cases that might be terminated."

Record, 64

"Q. (Mr. Ronnow) I show you what has been marked as Exhibit 6, and will you tell us what type of statement it is?

A. (Mr. Olschewski) This is the notice to the reinsurance company advising them of discontinuance of the premium payment for reinsurance payment and to request a refund if any refund is due on any unearned payment in the case of Alma M. Page.

Q. If Mr. Page did not pay any premium after the middle of 1955, his policy would be listed on such a report, would it not?

A. Yes.

Q. And his policy would be listed there irregardless of whether he had elected any of these options or failed to pay his premium and made no election?

A. No."

Record, 65, 66

The record discloses in detail the extensive procedure involved in the notification of the Lincoln National, the re-insurer. Nowhere in the record do any of the defendant's witnesses state that they notified Lincoln National of any election of any of the options covered by the policy.

What was actually done, was that on September 16, 1955, the Lincoln National was notified that the Alma Page policy was "lapsed" as far as Lincoln National Life was concerned. It must be borne in mind, and the record so shows, that the reinsurance policy with Lincoln National had been paid for one year in advance, that is to say, from the 15th day of December, 1954, to December 15, 1955, as had the premium to the defendant company.

Therefore, the defendant had notified the Lincoln National of a premium rebate dating from July 15, 1955 to December 15, 1955. The explanation of the dating back to July 15 was stated by Mr. Olschewski as shown at Record 71, wherein it was pointed out that the 31-day grace period was taken into consideration in dating back the "lapsed" date, as far as the Lincoln National was concerned, from the date of the election by Alma Page in August, to July.

This statement is substantiated by plaintiff's Exhibit 13 (telegram from Lincoln National).

The date of September 16 was merely the date when request was made for rebate from Lincoln.

It should be remembered that the policy in question was paid up until December 15, 1955, and the defendant company could not have treated the policy as lapsed if it were not for the fact that an election had been made by the insured.

POINT THREE

THE DEFENDANT-APPELLANT BASED ITS CHALLENGE TO THE JURY'S VERDICT NOT ONLY ON THE TESTIMONY OF THE WITNESSES, BUT ALSO ON THE WRITTEN DOCUMENTARY EVIDENCE WHICH WAS UNCONTRADICTED AND CERTAINLY CREDIBLE EVIDENCE, AND WHICH THE JURY ARBITRARILY DISREGARDED.

Defendant's Exhibit 10, a letter dated August 3, 1955, from the defendant to the insured and his wife, contains the following paragraph relating to the insurance policy:

"We shall continue to hold your policy in our possession until we hear from you."

Exhibit 10 was in the possession of the decedent's widow, Ruth Jensen Page. The plaintiffs did not attempt to contradict this letter nor in any way contradict the testimony of Mrs. Page that she and her husband received that letter. This documentary evidence establishes beyond any doubt that the company had the insurance policy in its possession on the 3rd day of August, 1955.

Can the jury arbitrarily disregard this evidence?

Defendant's Exhibit 12 is a carbon copy of a letter of transmittal from the defendant to the insured, which shows the return of the insurance policy to the insured. This exhibit was attacked by plaintiffs, not on the ground that it was fraudulent or that it was prepared at some time other than that testified to by the defendant's witnesses, but on the ground that there was no direct evidence that it had been received.

The uncontradicted testimony of Merle Thomas Olschewski shows that the letter was dictated to her by Mr. Olschewski, that she took it down by shorthand, transcribed it from her notes, typed the letter, addressed the envelope, placed the letter in the envelope, stamped it and mailed it to Mr. Alma Page at Riverton, Utah. (R. 84 through 87).

"The mailing of a letter postpaid, and properly addressed to a person shown to reside in a city or town to which the letter was addressed, creates no legal presumption, but a presumption or inference of fact, that it reached its destination."

Campbell v. Gowans et al
35 U. 268, 100 P. 397

"A writing or document made contemporaneously with a transaction in which are evidenced facts pertinent to an issue, when admitted as proof of those facts, is ordinarily regarded as more reliable proof and of greater probative force than the oral testimony of a witness as to such facts based upon memory and recollection."

20 Am. Jur. 1029
Evidence, Sec. 1179

It is to be observed that the oral testimony did not conflict with the written documentary evidence, but clearly paralleled the writing in every respect. There being no contradictory testimony, this evidence stands as uncontradicted evidence, and to allow a jury to pass upon such evidence which stands unimpeached and uncontradicted by any means, is, we submit, *to allow the jury to resort to speculation, conjecture, surmise, guess and supposition.*

The uncontradicted documentary evidence cannot be said to stand in the same position as the testimony of an interested

witness, which the court alleges Ruth Jensen Page (the widow) to be. We submit that where a witness who might have some interest testifies to facts which are borne out by uncontradicted documentary evidence, such facts stand as established, and a jury should not be allowed to speculate.

The court points out that the widow was a recent immigrant to the United States, who admitted that she experienced some difficulty in understanding insurance matters. Certainly, it cannot be doubted that she knew that she and her husband went to the company's office to make an election. We submit that it was not proper to permit the jury to decide this fact, as there was no evidence at all to the effect that the insured and the witness did not go to the company offices, but on the contrary, there are three witnesses and two documents to establish the fact. It cannot be doubted that the various options contained in the policy were discussed, and this evidence, being uncontradicted, should not have been left to speculation on the part of the jury.

For a woman who did not understand insurance, the widow gave a definition of "paid-up insurance" which would put many natives to shame.

"Q. (Mr. Bushnell) Mrs. Page, will you state what you understand to be meant by the term paid-up insurance?

A. Amount that would be left over when we stopped payments, and we owed on the insurance, I understand, \$400. for payment and then we deduct that from it and then that paid-up insurance is all that would be on the insurance if anything happened."

R. 29, 30

Mrs. Page was asked one question on re-direct examination as follows:

"Q. (Mr. Cotro-Manes) Mrs. Page, do you remember the amount of insurance on the paid-up insurance policy?

A. One thousand four hundred something."

R. 32

In the light of this evidence and all other uncontradicted evidence introduced in the case, this matter should not have been submitted to a jury and the jury permitted to speculate, in view of the decisions regarding speculation by juries, which this jurisdiction recognizes and purports to follow:

"The general rule that the credibility of witnesses is a question for a jury alone does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony when from no reasonable point of view it is open to doubt."

Chesapeake & O. R. Co. vs. Martin, 1931,
283 U. S. 209, 75 L. Ed. 983
51 S. Ct. 453, 62 A.L.R. 2d 1192, 1201

The Supreme Court of Wyoming, in the case of Beck vs. Givens, 1957, Wyoming, 309 P.2d 715, 313 P.2d 977, held that while the trier of facts should be accorded great freedom in evaluating testimony it should not arbitrarily disregard the undisputed testimony of a witness in the absence of evasiveness, equivocation, improbability or impossibility.

In the annotation in 62 A.L.R. 2d 1192, many cases are cited in support of the proposition that juries may not arbitrarily disregard testimony which is not contradicted nor in any way discredited.

"But when the testimony of witnesses, interested in the event or otherwise, is clear and convincing, not incredible in the light of general knowledge and common experience, not extraordinary, not contradicted in any way by witnesses or circumstances, and so plain and complete that disbelief of the story could not reasonably arise in the rational process of an ordinarily intelligent mind, then a question has been presented for the court to decide and not the jury." (Citing cases.)

Ferdinand v. Agricultural Ins. Co.
22 N. J. 482, 126 A2d 323, 62 A.L.R.
2d 1179, 1187

"Where the positive testimony of a witness is uncontradicted and unimpeached, either by other positive testimony or by circumstantial evidence, either extrinsic or intrinsic, it cannot be disregarded, but must control the decision of the court or jury."

62 A.L.R. 2d 1197, citing
Anderson v. Liljengren
50 Minn. 3, 52 N.W. 219

We submit that the only contradiction in the whole record, as we view it, is that Mr. Page, one of the plaintiffs herein, testified that the policy had been in his strong box ever since it was issued.

"Q. (Mr. Cotro-Manes) All right, you stated a minute ago that you have a strong box at your home, is that correct?

A. Yes.

Q. And that the policy had been inside that box ever since it was issued?

A. That is right.

Q. And your son never had the combination to it?

A. That is right.

Q. All this time the policy was in this box?

A. Yes.

Q. Did you ever give it to your son?

A. I have never given it to my son."

R. 102

All the documentary evidence and the testimony of all of the defendant's witnesses show that the policy in question was delivered to the defendant insurance company, and that the defendant, on August 3, 1955, advised the insured and his wife:

"We shall continue to hold your policy in our possession until we hear from you."

Defendant's Exhibit 10

Further, the defendant, in its communication to the insured, dated August 15, 1955, stated:

" . . . we return herewith your policy No. 20 PLB-3101."

Defendant's Exhibit 12

The court, in its decision, states, inter alia:

"Meredith Page further testified that after Alma's death he telephoned the defendant's office and the person answering for the company, upon being advised of Alma's death, took several minutes to check into the matter and told him that according to their records he and his wife as beneficiaries, were entitled to the full face amount, of the policy, minus a \$400.00 loan."

The record shows, with regard to this telephone call:

"Q. (Mr. Bushnell) Take your time, Mr. Page. After you identified the policy and told her why you were calling, was there any discussion concerning forms or items on the policy or things of that kind?

* * * *

A. She said that the forms would be mailed out for the death claim of the policy, and then I said how much would be the amount and she said it was less the \$400.00 * * * ."

R. 97

At the time this phone call was made, Mr. Page, the witness, had before him the insurance policy showing on its face the amount of \$11,682.00, unless the rider showing the election was attached. In all sincerity, we ask: Why, when he had the policy before him, was it necessary for Mr. Page to telephone the company and ask a clerk, "How much would be the amount"? Is it not logical to conclude that the rider was attached to the policy, as testified by the other witnesses, and that Mr. Page, having doubts, called the defendant's office to ascertain what it meant?

Further, it was his own counsel who put the amount in Mr. Page's mouth, when he asked:

"Q. (Mr. Bushnell) When you say the amount here are you talking about the face amount of \$11,682?"

R. 97, 98

Nowhere in the whole record does it show that anyone ever actually told Mr. Page that he was entitled to \$11,682.00 less the loan.

POINT FOUR

THE ENTIRE RECORDS OF THE DEFENDANT COMPANY, TOGETHER WITH THE CORROBORATING TESTIMONY OF THE WITNESSES, ESTABLISHED THAT AS A MATTER OF LAW THE DECEASED INSURED HAD ELECTED ONE OF THE OPTIONS UNDER THE POLICY.

At the time of the offering of the various company records, the plaintiffs' counsel stated:

"Mr. Bushnell: Let's stop there because I object: If Your Honor please, in connection with exhibits 2 through 9 for the purpose of this motion, the plaintiff is willing to still say that if witnesses were called from the office of the defendant, they would testify that these are the business documents, business entries in the usual course of their business and for this motion we have not insisted upon any foundation and if he therefore makes his motion as to these numbered exhibits, they were not offered at the time of the pre-trial when they easily could have been offered, and we object to their introduction at this time."

R. 17

The exhibits in question, 2, 3, 4, and 9, were admitted by the court, and therefore plaintiffs' admissions as to the fact that they were prepared in the usual course of business precludes any challenge by the jury as to their authenticity or to their content.

These exhibits show that certain entries were made, and as they were made in the normal course of business, the undisputed presumption is that the entries were made at the

time of the event, in this case, the election of the option by the insured.

This undisputed documentary evidence may not be ignored by the jury, nor can the jury be permitted to speculate upon its content. As a matter of law, inasmuch as the entries were not challenged, but on the contrary were admitted to have been made in the course of business, these documents stand as establishing the facts stated thereon.

CONCLUSION

We submit that the court erred in not taking into consideration that unless an election had been made previously, when the insured, Alma M. Page, received a check (Defendant's Exhibit 9) for a \$4.75 dividend, he would not have cashed the check, but on the contrary would have inquired why a \$4.75 dividend only, when the previous dividend for the first half of 1955 had been \$56.00, and for the full year of 1954 was \$85.98. (See Defendant's Exhibit 4).

The court makes a point regarding the eyelets in the insurance policy, Exhibit 1. However, the court failed to take into consideration the fact that the photostatic copies of the application, Part I and Part II, which had been attached to the insurance policy by an eyelet located in the center of the policy, were forcibly removed by someone, as the mute evidence will indicate.

We submit, that although the record is silent as to who detached the photostats, the evidence is conclusive that the insured or the beneficiary, Meredith Page, had the policy

in his possession after the 15th day of August, 1955, until the same was presented as an exhibit in this matter.

We submit, further, that nowhere in the record did the plaintiffs attempt to show that the widow, Ruth Jensen Page, had any feelings, bias, prejudice or interest in this matter whatsoever. The first attempt to raise this issue was during the arguments before the Supreme Court, when Counsel for plaintiffs admitted that the question had not been raised at the time of the trial.

The court itself has now resorted to conjecture and speculation which is completely without the evidence, testimony and case, in an attempt to show that the widow might have been interested or have had a bias or prejudice to the outcome of the trial. It is to be noted that this woman was a recent convert to the LDS Church, and it is extremely unlikely that one so recently converted to religion would violate the oath which she took to God.

We respectfully submit that the petition for rehearing should be granted, and the court should reconsider its decision in the true light of all of the evidence in order that justice may prevail and there will no longer be an inference that the officers of the defendant company deliberately perjured themselves, altered their records, created false evidence, and connived to defeat an obligation, as is now drawn from the court's decision.

Respectfully submitted,

COTRO-MANES & COTRO-MANES

Attorneys for Defendant and Appellant