

2016

William Compton, and John Simcox, Individuals, and Saltair Investments, LLC., a Utah Limited Liability Company v. Daniel J. McDonald, an Individual, Smith Hartvigsen, PLLC, a Utah Professional Limited Liability Company, Houston Casualty Company, a Texas Licensed Insurance Company, and John Does 2-11 : Reply Brief of the Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

WILLIAM COMPTON, and JOHN
SIMCOX, individuals, and SALTAIR
INVESTMENTS, L.L.C., a Utah limited
liability company,

Plaintiffs/Appellants,

v.

DANIEL J. MCDONALD, an individual,
SMITH HARTVIGSEN, PLLC, a Utah
professional limited liability company,
HOUSTON CASUALTY COMPANY, a
Texas licensed insurance company, and
JOHN DOES 2-11,

Defendants/Appellees.

REPLY BRIEF OF THE
APPELLANT

Appellate Case No. 20150837-SC

Appeal from the Third District Court, Salt
Lake County, Judge Paul Maughan

Trial Court Case No. 130906137

Karl A Bekeny
Paul L. Janowicz
Tucker Ellis, LLP
950 South Main, Ste. 1100
Cleveland, OH 44113

Rebecca Hill
Christensen Jensen
257 East 200 South, Suite 1100
Salt Lake City, UT 84111

Thor Roundy
EVN Law, LLC
801 North 500 West, Suite 150
Bountiful, Utah 84010

FILED
UTAH APPELLATE COURTS

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None.

STATUTES

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OTHER AUTHORITIES

None.

ARGUMENT

I. APPELLEE'S BRIEF CONTAINS SIGNIFICANT FACTUAL INACCURACIES.

Virtually every statement contained within the Brief of Appellee Houston Casualty Company ("HCC") is premised upon some inaccurate construction of the facts. Once the factual inaccuracies are identified and corrected, there is absolutely no basis for any of HCC's arguments against coverage under the Policy.

Perhaps the most gross misconstruction of the facts is reflected by the complete failure of HCC to acknowledge the existence of the Herriman Listing Agreement. The Brief of Appellant discusses the listing agreement and how it related to the arguments that Seegmiller was working for a "fee," that Seegmiller was working as "a real estate agent," and that Seegmiller was working "on behalf of" Prudential. HCC provided absolutely no response to a total of four pages of argument concerning this matter contained within Appellants' Brief on pages 42-45.

The Brief of Appellant also establishes that Seegmiller was paid \$165,000.00 for his services with regard to the Herriman Transaction. Pages 38-39 and 46 of the Brief of Appellant discuss the payment of the \$165,000.00 to Seegmiller as a "fee" that he earned "as a real estate agent." Pursuant to both the Utah Code and the provisions of Seegmiller's contract with Prudential, discussed on pages 42-46 of the Brief of Appellant, the \$165,000.00 fee was directly and expressly regulated by the relationship between

Seegmiller and Prudential as agent and broker. Again, HCC entirely ignores the Utah Code and the contract provisions.

Instead, HCC asserts that Seegmiller did not “receive or *expect to receive*” any fee in connection with his activity. This error affects Appellee’s Brief on pages 8-10, 11, 16-18, 22-23, 25-26, 30-34, and 40. On page 32 of Appellee’s Brief, HCC even quotes Sterling Barnes as saying that the fee was paid for “putting the deal together.” HCC acknowledges on page 33 of its Brief that “Seegmiller received [the payment] for getting Plaintiffs to invest with Barnes, Valley View, and Maxwell.” HCC acknowledges on page 10 of its Brief that “Seegmiller received \$165,000.00 for bringing Plaintiffs’ money into the deal.” In other testimony from Sterling Barnes, Sterling Barnes also stated, “the other part where Bobby could make some money was if he sold lots for [Plaintiffs] then on the sale of those lots he would have acted as their real estate agent.” [R.5025-73.]

The next fact which HCC repeatedly misrepresents in its brief concerns Robert Seegmiller’s other interests in the Herriman Transaction. In the Memorandum Decision and Order, Judge Toomey held that Seegmiller was acting as a real estate agent. Although there was an issue of fact as to whether he was the Plaintiffs’ real estate agent or not, Judge Toomey stated on page 8 of the Memorandum Decision and Order:

Even if a real estate agent is not acting in the capacity of agent for another party, he still owes certain duties to all parties to any transaction in which he is involved. *Dudgeon v. Jones*, 615 P.2 1239, 1248 (Utah 1980). Under the Utah Administrative Code Section 126-2(f), an agent involved in a transaction must disclose in writing his agency relationships. He must disclose in writing to all parties of the transaction any compensation he will receive.

HCC's statements that Seegmiller had an ownership interest in the Herriman property are patently false. In the Herriman Transaction, Valley View Estates was the Seller and the plaintiffs were the proposed buyer under the terms of a written Real Estate Purchase Contract which listed Seegmiller as plaintiff's agent. Nonetheless, HCC expressly asserts that Seegmiller had an ownership interest in the Herriman Transaction on pages 8, 11 and 22 (footnote 7) of its Brief. HCC then implies that the asserted ownership interest, and not the payment of the \$165,000.00 fee as described by Judge Toomey, represents a "personal interest"¹ of Seegmiller on pages 13, 16-18, 22-23, 26-30, 33 and 36 of its Brief.

There are several instances throughout Appellee's Brief in which HCC treats allegations of the original pleadings or correspondence as if they were proven facts. When HCC uses allegations, instead of actual evidence establishing a fact there was inadequate evidence to establish the allegations as they appeared in the Complaint. This willingness to treat allegations as though they were the facts creates a problem for two

¹ As discussed in Argument II, below, the confusion generated by HCC concerning the meaning of the reference by Judge Toomey to Seegmiller having a "personal interest" in the transaction as referring to something other than the undisclosed \$165,000.00 fee appears to be the primary reason that the District Court erroneously granted HCC's Motion for Summary Judgment in the present case. If the "personal interest" of a real estate agent in receiving compensation for his services means that a real estate agent is never acting "solely" on behalf of his broker, then none of the real estate agents ever employed by Prudential have ever been entitled to coverage under the Policy, because they have all had a "personal interest" in receiving a fee for their services whenever they have acted as an agent of Prudential. Obviously, that is the type of absurd result that the courts have rejected when interpreting insurance policies.

parts of HCC's argument. First, as established by case citations from both parties, HCC cannot use allegations in the Complaint as a basis for denial of coverage while the contest between the competing allegations are still pending in the trial court. Second, HCC ignores the actual evidence in the record which was presented by one of the parties to establish that the facts were contrary to the allegations contained in the pleadings. Of particular importance is the testimony of Bruce Tucker concerning his conversations with Seegmiller concerning Plaintiffs' original assertions of some form of dishonesty by Seegmiller. As described in the Brief of Appellant on pages 42, Bruce Tucker testified that in 2006, Seegmiller informed him of the Herriman Transaction, that it was common practice for Seegmiller to generate listings for Prudential through such activities, and that Prudential authorized Seegmiller to accept the entire \$165,000 payment from the Herriman Transaction. Bruce Tucker further testified that he told Seegmiller that Seegmiller did not have to disclose the payment of the fee to the plaintiffs if he was acting as a consultant, rather than an agent. That testimony was not taken until January 13, 2015. It was after learning that Seegmiller's failure to disclose was a result of improper training that Plaintiffs recognized that they would not be able to prove that Seegmiller had any dishonest motive.² [R. 4935-5021.] Again, the errors perpetuated

² It should also be noted that with respect to the Highland transaction, all of the tort claims against Seegmiller have been dismissed pursuant to Seegmiller's Motion for Summary Judgment. Consequently, HCC's attempt to bootstrap in allegations concerning the Highland Litigation cannot support HCC's innuendo that Seegmiller's alleged dishonesty in another case preclude coverage for Seegmiller's negligence in the present case.

within HCC's arguments concerning these issues appear on pages 10-12, 14-15, 18, 26, 30, 33, 35-36, and 39 of Appellee's Brief.

HCC failed to respond to the extensive briefing contained in pages 42-45 of the Brief of Appellant addressing Utah law concerning the scope of employment. The facts that HCC has entirely failed to discuss include (1) the Herriman Listing Agreement that Seegmiller procured which hires Prudential to sell all of the lots being purchased by plaintiffs, (2) the deposition testimony of Bruce Tucker, the principal of Prudential, in which Bruce Tucker testified extensively about his awareness and authorizations of Seegmiller's activities and receipt of the \$165,000 fee in the Herriman Transaction; and (3) the contractual provisions that establish Seegmiller's activity was within the scope of his employment on behalf of Prudential. This error affects Appellee's Brief on pages 8, 15, 17-18, 23, 28-30. The very nature of the legal relationship between a broker and an agent leaves no room for a conclusion that Seegmiller's actions were outside of the scope of what he daily did "on behalf of" Prudential.

There are numerous other factual misstatements by HCC throughout their brief. Additional factual inaccuracies include (1) the fact that Seegmiller and Prudential did dispute HCC's denial of coverage under the Policy (HCC's Brief, pp. 12, 37-38), addressed in Argument V, below; (2) the factual basis upon which Seegmiller paid the attorneys' fees relative to the Herriman Litigation³ (HCC Brief, pp.11-12, 30, 37-38); (3)

³ Seegmiller was told by his attorney Dan McDonald that his employment contract with Prudential required him to pay for Prudential's defense. There is also substantial

HCC's failure to inform this Court that the trial court in the Highland Litigation denied a motion to consolidate the Highland Litigation and Herriman Litigation as reflecting a single series of acts (HCC Brief, p. 11(footnote 5)); and (4) HCC's inaccurate portrayal of the date upon which the claim against Seegmiller and Prudential was made, by failing to reference the date the Complaint was filed and the date upon which Seegmiller and Prudential received and reviewed the Complaint with their attorney (HCC Brief, p. 20), addressed in Argument IV, below.

II. APPELLEE'S BRIEF DEPENDS UPON AN INACCURATE CONSTRUCTION OF THE POLICY.

HCC's Brief fails to deal with the express coverage provision of the Policy. The coverage clause is cited in its entirety on page 30 of the Brief of Appellant. To paraphrase the coverage provision, "[HCC] shall pay on behalf of [Seegmiller] any [judgment] ... as [Seegmiller] acting in a profession described in Item 3 of the Declarations shall become legally obligated to pay ... by reason of any [negligence] by [Seegmiller]" The operative terms of the coverage provisions of the Policy are discussed on pages 31-33 of the Brief of Appellants.

HCC only indirectly addresses the issue of coverage as defined by the coverage clause. The only phrase within the coverage clause that is related to HCC's argument concerning coverage is the phrase "acting in a profession described in Item 3 of the

evidence that Dan McDonald advised Seegmiller and Prudential not to report the claim solely to ensure that the insurance company did not assign the legal work to another firm. [R. 6524-6575.]

Declarations.” HCC’s Brief fails to discuss the difference between the coverage provisions of the Policy and the definitions of the Policy, or the coverage provisions of the Policy and the exclusion provisions of the Policy. There is no possible reading of the coverage provision that would result in the denial of coverage to Mr. Seegmiller. All of the individual words used by HCC come from somewhere in the Policy other than the coverage provision.

Item 3 of the Declarations provides “Named Insureds Profession: See Endorsement # 1, E-32.” The operative provisions of Endorsement # 1 read as follows: “Named Insureds Profession: Solely in the performance of services as a Real Estate Agent/Broker of non-owned properties, for others for a fee.” The identification of the Named Insureds Profession is not even a complete sentence. It is not a definition of coverage. It is not an exclusion provision of the Policy. It does not say that the Policy will only provide coverage if the actions of the Insured are limited to a certain defined set of activities that are to be construed as within the scope of coverage. Endorsement # 1 is only a definition of the Named Insureds Profession as a whole.

A simple factual inquiry establishes that none of the words used in the definition of the Named Insureds Profession actually support any of the arguments being made by HCC.

The heart of the definition of the Named Insureds Profession is contained in the words “in the performance of services as a Real Estate Agent/Broker.” There is no

ambiguity in the Memorandum Decision and Order issued by Judge Toomey that the basis for her finding of negligence on the part of Seegmiller was that he was working as a licensed real estate agent. As a result of his real estate license, he had a duty to disclose two things. First, he was required by law to disclose the scope of his agency to each of the parties to the transaction. The Plaintiffs thought that he was working as their real estate agent, because that fact was stated in the REPC, among other things. Seegmiller asserted that he was just using his real estate license to act as a consultant to Plaintiffs. Judge Toomey found that because he had a license as a real estate agent, it was his obligation to clarify that role in writing to the Plaintiffs as a matter of law. The second thing that Judge Toomey held was that, as a matter of law, a real estate agent has a duty to disclose to all of the parties to the transaction any fee that he is being paid in the transaction. Because Mr. Seegmiller did not disclose to the Plaintiffs that he was being paid a fee of \$165,000.00 for the services he was providing to them in putting the transaction together, that Mr. Seegmiller had breached his duty as a real estate agent to disclose the fees that he was receiving to all parties to the transaction.⁴

“Of non-owned properties” refers to the fact that in the Named Insureds Profession real estate agents typically don’t own the properties that they are listing for sale or with

⁴ Again, as mentioned in footnote 1, above, and discussed under Argument IV, below, the District Court’s error which resulted in this appeal stems from the fact that the District Court appears to have misunderstood that the phrase contained in the Memorandum Decision and Order issued by Judge Toomey, “failing to disclose a personal interest in the transaction,” referred to something other than \$165,000.00 fee being paid to Mr. Seegmiller. In fact the \$165,000 fee was the only interest that Seegmiller had in the transaction.

respect to which they are otherwise providing services in putting together a real estate transaction. In the present case, Seegmiller had no ownership interest in the Herriman property. The seller of the property was Valley View Estates. The purchaser of the property was the Plaintiffs. There was no point in time whatsoever at which Seegmiller or Prudential were the owner of the property or had any prospect of owning the property.⁵ The Herriman Listing Agreement and the REPC were both written agreements whereby Seegmiller and Prudential were selling the lots that plaintiffs was purchasing from Valley View Estates.

With regard to the words “for others,” the error being made by HCC in their analysis is they seem to focus on who Seegmiller was working for. In the Named Insureds Profession, it is common for real estate agents and brokers to work for one or both sides of a real estate transaction. Under the definition contained in the Policy it really doesn’t matter who Seegmiller was providing services to or who was paying his fee. It is a simple fact that he was doing something for someone other than himself.

⁵ Even if Seegmiller had taken an interest in any of the Herriman Property, paragraph 4 of Endorsement 3 of the Policy actually provides for coverage if the real estate agent enters into a contract to resell the property within 90 days. (See Addendum “B” of the Brief of Appellant, p. HCCComp_000339.) Seegmiller’s employment contract even contained terms encouraging him as a real estate agent to invest in properties as a part of his employment. Consequently, it should be clear by reading the Policy as a whole that potential flip transactions were contemplated by the drafter of the Policy and intended to be included in coverage. Again, the existence of a “personal interest” in a transaction is not language that comes from the Policy as a basis upon which HCC might exclude any real estate activity from coverage under the Policy.

As discussed above, Seegmiller was working “for a fee.” Endorsement #1 says nothing about what the fee should be. It says nothing about whether the fee needs to be a traditional real estate commission or not. As the facts discussed above establish, Seegmiller was working for a fee. In the first place, he was actually paid a fee of \$165,000.00 for the services he performed. In the second place, Seegmiller also secured a listing agreement to resell the lots purchased by the Plaintiffs. It is plain to see that Judge Toomey believed that Seegmiller had a legal duty to disclose to the Plaintiffs that he was working for the undisclosed fee. See the Memorandum Decision and Order, page 8. Consequently, between the fee he was paid and the fee he expected to receive pursuant to the Herriman Listing Agreement, it is undisputable that his actions involved a prospective fee.

HCC focuses the majority of their argument on the legal interpretation of the word “solely” as contained within the definition of the Named Insureds Profession. HCC does not address the possibility that some people might read the word “solely” to mean simply that the Named Insureds Profession is only the profession of providing services as a real estate agent. Some people might read the word “solely” to mean that the Policy does not provide coverage for accounting services, legal services or services that might constitute a profession other than the real estate profession in which Seegmiller and Prudential were actually engaged and for which they expressly paid premiums for insurance coverage under the Policy.

HCC's arguments concerning the significance of the word "solely" are easily disposed of, because the word only appears in the definition of the Named Insureds Profession. It is not in the coverage provision and there is no complete sentence in the definition that would allow anyone to think that the term was being used to limit or exclude coverage, or do anything other than describe a single profession as a whole and to preclude the possibility of multiple professions.

If the use of the word "solely" in Endorsement # 1 was intended not only to identify a single profession as the Named Insureds Profession, but was also to serve the purpose of informing the insured that they could lose their insurance coverage if in the course of the performance of services as a real estate agent or broker they were to engage in some other activity that involved their own personal interest, then this Court would have to read the Policy as containing two potential interpretations. And if there are two potential interpretations of the significance of the word "solely" within the Policy, then the use of the word "solely" is ambiguous. HCC fails to address in their argument how the Policy would be interpreted, as a matter of law, if this Court were to determine that the use of the word "solely" were ambiguous. However, that argument has been fully briefed in the Brief of the Appellant on pages 33-37. As a matter of law, if the arguments advanced by HCC with regard to the significance of the word "solely" are given any weight or credibility whatsoever, the only conclusion that this Court can reach is that the

term is ambiguous and that the construction which must be applied as a matter of law is the construction that has been proffered by the Appellant in this case.

HCC attempts to argue that Section II(b) of the Policy limits coverage to actions taken by Seegmiller “on behalf of” Prudential. However, as noted above, HCC entirely failed to respond to the extensive briefing contained in pages 42-45 of the Brief of Appellant addressing the scope of employment of a real estate agent under Utah law. Given all of the facts that HCC fails to address concerning the benefits to Prudential of the Herriman Listing Agreement, the conversation between Prudential and Seegmiller concerning the the payment of the \$165,000 fee to Seegmiller outside of the brokerage account as a necessary authorization made pursuant to the provisions of Seegmiller’s employment contract, and the Utah law defining the scope of employment for a real estate agent, it is clear that that Section II(b) of the Policy is not a factor that could potentially limit coverage. The same is true with respect to Sections IV(a) (criminal or fraudulent acts) and Endorsement 3, paragraph 1 (other professions) or paragraph 4 (ownership, other than flipping property) of the Policy. As discussed in Argument I, above, there are simply no facts to support any application of those Sections to the present controversy. Moreover, as HCC acknowledges in footnote 17 of their Brief, they have the burden of proof with regard to all exclusion provisions of the Policy.

III. HCC’S BRIEF CONTRIBUTES NO USEFUL LEGAL AUTHORITY.

The majority of the cases cited by HCC in their Brief are proffered for the purpose of establishing general principles of contract construction. Many of the cases are the same cases already cited in the Brief of the Appellant for the same principles.

The only case that HCC relies upon extensively for its specific application in the present case is *Walston v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, Nos. 3:09-CV-112-AC, 3:10-CV-579-AC, 3:10-CV-6126-AC, 2012 WL 2049451 (D. Or. June 6, 2012). *Walston* is first introduced on page 22 of HCC's Brief and then is cited repeatedly through page 29 of HCC's Brief. However, the holding in *Walston* does not support any of HCC's arguments.

In *Walston*, McCoy was certified by State Farm to sell State Farm products. McCoy was also working for Willamette. McCoy's position with State Farm involved an executed agreement identifying her as "Investment Advisor Representative." State Farm maintained an insurance policy that covered McCoy with respect to claims "arising out of any actual or alleged Wrongful Act committed by the Investment Advisor Representative solely while acting in his/her capacity as such." The *Walston* court found that McCoy's work as an Investment Advisor Representative for State Farm was factually distinct and different from the work McCoy provided for Willamette. Consequently, claims brought by third-parties against McCoy arising out of her services to Willamette were not covered by the insurance policy that was maintained for the purpose of insuring her services solely as an Investment Advisor Representative on behalf of State Farm.

The most significant distinction between the *Walston* case and the present case is the fact that the word “solely” as used in the State Farm policy appears in the coverage provision of the State Farm policy and it is used for the express purpose of clarifying that the policy only provided insurance coverage for McCoy when she was acting as an Investment Advisor Representative for State Farm. The *Walston* court also pointed out several other provisions of the State Farm policy which made it clear that the intended coverage under the State Farm policy was for the purpose of insuring McCoy’s actions while she was working as an Investment Advisor Representative within the scope of what State Farm had defined as the activities of an Investment Advisor Representative in the contract. Those provisions did not allow for the possibility that the State Farm insurance policy would provide insurance coverage for unrelated activities that McCoy might perform pursuant to her employment with Willamette.

In contrast, in the present case, the Policy does not use the word “solely” in the coverage. Instead, the meaning of the word “solely” is used to express that only one profession is being covered by the Policy, which profession is working as a Real Estate Agent or Broker. Because of the significant factual differences between *Walston* and the present case, the *Walston* case has no application to the present case.

The *Walston* court did discuss *T.M. v. Executive Risk Indemnity Inc.*, 2002 WY 179, 59 P.3d 721 (Wyo. 2002) and *Jarvis Christian Coll. v. Nat’l Union Fire Ins. Co.*, 197 F.3d 742 (5th Cir. 1999). In both of those cases, the word “solely” was used in a

different context and the courts construed the policies in favor of coverage. In both cases, the court found that an ambiguity existed with regard to the use of the word “solely.” Therefore, it is instructive that where a term is used in a contract has significance. It is also instructive that where a term allows for an alternative interpretation of the scope of coverage in the way that it is applied, the resulting ambiguity will be interpreted in favor of coverage. In contract, there is really nothing that comes out of the *Walston* case that helps HCC with their argument, particularly in light of HCC’s erroneous characterization of the facts in the present case.

HCC’s Brief also contains citations to *Harani Eng’g & Land Surveying v. Mehar Inv. Grp. LLC*, No. 09-252-RGA, 2012 WL 917566 (D. Del. March 19, 2012). *Harani* involved the interpretation of a different definition within an insurance contract. The policy defined the term “Professional Services” to be limited to “lead studies/consulting services,” which was not broad enough to cover the allegedly defective work at issue in the case. Consequently, the specifics of how the *Harani* court interpreted the provisions of that insurance policy really doesn’t have any application at all to the present case.

HCC cites the case of *Plank-Greer v. Tannerite Sports, LLC* 102 F. Supp.3d 954 (N.D. Ohio 2015), which actually contains more reasoning that works against HCC. In the *Plank* case, the individual term being analyzed by the court was the word “only.” The provisions of the policy stated, “individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.” In *Plank*, the

defendant decided to blow up a refrigerator at a birthday party they were throwing for a friend. The court found that the act of blowing up a refrigerator at a friend's birthday party did not fall within the scope of "conduct of a business of which you are the sole owner." In reaching its finding, the court stated, "We must look to the insured's alleged actions themselves--and not to the events leading up to those actions--to determine whether they were business related or personal in nature The relevant inquiry was whether the insured was engaged in business at the moment he entered into a fist fight, not on the events leading up to the fist fight." (citations omitted). In the present case, the inquiry is whether with respect to the actions of Seegmiller that resulted in a judgment for negligence, was that related to the Named Insureds Profession. The clear answer is yes. Judge Toomey found that Mr. Seegmiller was negligent because of the duties which he owed to the Plaintiffs as a real estate agent involved in a transaction. The actions he was taking at the time were the same action that resulted in the payment to him of a \$165,000 fee and that resulted in the signing of the Herriman Listing Agreement whereby by Seegmiller and Prudential were entitled to a fee from future sales of the plaintiffs' lots.

HCC also cites *Fire Ins. Exch. v. Alsop*, 709 P.2d 389 (Utah 1985). *Alsop* was a somewhat ridiculous case where a chiropractor attempted to obtain coverage for injuries he caused to a patient under his homeowner's insurance policy, even though homeowner's insurance policy contained an exclusionary clause which expressly stated that it did not provide coverage for any bodily injury arising out of the rendering of

professional services. In rejecting the chiropractor's argument that groundless accusations should be covered, the court stated, "the emphasis should be placed on the alleged activities or omissions of the insured which give rise to the claim and not upon the claimants characterization of her legal theories of liability. But for the professional services which he rendered in connection with the labor and delivery, there could be no claim at all against defendant." *Id.* at 390.

It is important to note, however, that the way that HCC attempts to apply the *Alsop* case is to attempt to re-characterize the judgment for negligence entered against Mr. Seegmiller. Even though Judge Toomey found that the appropriate cause of action was negligence, HCC actually argues that this Court should substitute its own interpretation of the facts and find that Mr. Seegmiller was actually engaged in negligent misrepresentation. See Appellant's Brief at page 35, footnote 18. As discussed in Argument I, above, HCC's argument is factually dependent upon allegations and other statements which are not evidence and which have not resulted in any judgments being entered against Mr. Seegmiller. To the extent that those claims have not already been dismissed by the trial courts, there is absolutely no reason to think that the judgment for negligence secured against Mr. Seegmiller will ever be converted into a judgment for negligent misrepresentation. They are two extremely dissimilar causes of action. Moreover, as there is a judgment against Mr. Seegmiller for negligence, Plaintiffs are entitled to make a claim under the Policy right now.

IV. THE 2006 POLICY APPLIES.

Even though HCC acknowledges on page 20 of its Brief that Prudential's three HCC Professional Liability Policies contain the same material provisions, the significance of identifying the correct Policy is discussed Argument VI, below.

As HCC acknowledges, the three Prudential Policies are all "claims-made" policies. As HCC acknowledges, the Policies define a claim as "a demand received by the Insured for compensation of damages, including the service of a suit. . . ." The lawsuit was filed by the Plaintiffs on November 14, 2007. The filing of a lawsuit constitutes the "making" of a claim under a claims-made policy. See *AOK Lands, Inc. v. Shand, Morahan & Co.*, 860 P.2d 924, 926 (Utah 1993). The lawsuit was received by the Insured on November 19, 2007. Daniel McDonald of the law firm of Smith Hartvigsen met with both Seegmiller and Bruce Tucker as the principal of Prudential on November 19, 2007. The purpose of the meeting was to discuss the allegations contained in the Complaint and to determine how the insured parties wanted to respond. Pursuant to Item 7 of the Declaration of each of the Policy, the expiration date of the 2006 Policy was November 26, 2007. Therefore, the claim was made against the Insured and received by the Insured during the policy period of the 2006 Policy. [R.5964-6026.]

V. THERE HAS BEEN NO WAIVER OF COVERAGE.

Even under the facts as HCC has sought to portray them, nothing by Plaintiffs, Seegmiller or Prudential constitutes a waiver or loss of coverage under Utah law.

HCC is not entitled to deny coverage on the basis of late reporting of the Claim. Utah Code Ann., § 31A-21-312(2) expressly states, “Failure to give notice or file proof of loss as required by Subsection (1)(b) does not bar recovery under the policy if the insurer fails to show it was prejudiced by the failure.” See also *Mullin v. Travelers Indemnity Co. of Connecticut*, 541 F.3d 1219, 1227 (10th Cir. 2008) (insurance company must show prejudice in order to deny coverage on the basis of failure to give timely notice of a claim, applying notice provisions identical to the notice requirement in the Policy).

In order to demonstrate prejudice, a party must prove that they suffered some real harm from a legal standpoint. See *State v. Syddall*, 444 P.2d 753 (Utah 1968). For example, one test of prejudice is whether a party “is now less able to obtain the evidence required. . .” *Langeland v. Monarch Motors, Inc.*, 952 P.2d 1058, 1063 (Utah 1998).

HCC was notified of the Claims just before the substantive proceedings began in the case. HCC could have easily intervened and participated in every aspect of the case from addressing the initial pleadings through discovery and all further motion practice.

When an Insurer makes a decision to deny coverage, they cannot thereafter claim prejudice when the Insured thereafter becomes subject to a Judgment or even enters into a settlement with respect to the Claims against them. See *Benjamin v. Amica Mut. Ins. Co.*, 2006 UT 37, ¶ 29 – 30, 140 P.3d 1210 (when an insurance company gambles on the possibility that it can avoid any obligation for the claims by refusing to provide a defense, it is estopped from second guessing the outcome of the action).

HCC cites *IHC Health Services, Inc. v. D&K Mgmt., Inc.*, 2008 UT, 3, 196 P.3d 588 for the proposition that, “waiver is the intentional relinquishment of a known right.” *Id.* at ¶ 16. In the same paragraph, the *IHC* Court actually identified the standard for establishing the existence of a waiver.

To establish waiver, a defendant must show that the plaintiff had (1) an existing right, (2) knowledge of its existence, and (3) intent to relinquish the right. “[W]aiver must be distinctly made, although it may be express or implied.” in *D&K I.*, we held that “[w]aiver is an intensely fact dependent question.”

Id. at ¶ 16.

Utah law provides a six-year statute of limitation for a party to bring a claim for breach of a written contract. See Utah Code Ann. § 78-2-309. Failure to earlier bring a lawsuit against a party that breaches a contract has never been construed as a waiver of the right to bring a claim for breach of contract.

HCC’s own phone log shows that the attorney for Seegmiller and Prudential disputed with the attorney from HCC, the conclusions she was asserting concerning Utah law. Coverage counsel then sent a letter dated March 2, 2010 to HCC pointing out the specifics of the dispute that the Insureds were raising concerning insurance coverage. In HCC’s denial letter dated March 23, 2010, that HCC denied receiving a copy of the March 2, 2010 letter, even though that letter was found in HCC’s insurance files. Prudential subsequently followed up and inquired concerning HCC’s response to the March 2, 2010 letter. HCC responded to Prudential’s subsequent inquiry by asserting that they had already considered the March 2, 2010 letter and saw no reason to change

their position concerning coverage. Having already informed HCC concerning the error they were making in denying coverage, the logical next step for Prudential and/or Seegmiller was to file a lawsuit against HCC for breach of contract. That was an action that they could not take under the terms of the Policies, because Section VIII(i) provides,

No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this Policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by Judgment against the Insured after actual trial or by written agreement of the Insured, the Claimant and the Company. Any person or organization or the legal representative thereof who has secured such Judgment or written agreement shall thereafter be entitled to recover under this Policy to the extent of the insurance afforded by the Policy.

Consequently, the lawsuit filed against HCC after the entry of Judgment is the next logical action that HCC should have expected.

Utah Code Ann. § 31a-22-202, "Protection of Third-party Claimants," actually prohibits any agreement between an insurer and an insured after the occurrence of an injury from entering into an agreement to retroactively abrogate insurance coverage to the detriment of any third-party Claimant. In the present case, the Policies themselves prevent such a waiver of coverage by their own express provisions. Section VIII(i) actually grants a third-party right of action to anyone who obtains a Judgment against an Insured that meets the terms for coverage under the Policy, as follows: "Any person or organization or the legal representative thereof who has secured such Judgment or written agreement shall thereafter be entitled to recover under this Policy to the extent of the insurance afforded by the Policy." As a matter of both contract and public policy, neither

Seegmiller nor Prudential had the right to waive that provision of the Policies on behalf of Plaintiffs.

Likewise, there is no basis upon which HCC can assert any form of estoppel in the present case. The failure to bring a lawsuit against an insurance carrier for breach of contract prior to the expiration of the statute of limitation has never been construed as the basis for an estoppel claim. Prudential and Seegmiller applied for insurance coverage. When they received a verbal denial, they had another attorney write a letter to the insurance company attempting to correct HCC's incorrect application of Utah law. HCC then denied coverage based on its erroneous application of Utah law and misconstruing the applicable policy. Sometime later, Prudential asked whether HCC had considered the additional information they provided concerning Utah law. HCC responded with a letter stating that they had reviewed the additional information and found no reason to change their position. Neither Prudential nor Seegmiller did anything to disclaim their right to insurance coverage. They were simply the victim of HCC's breach of the insurance contract. Likewise, HCC did nothing to change its position in reliance upon any action or inaction by Prudential and Seegmiller. HCC had already taken the position that they were denying insurance coverage. Continuing to deny insurance coverage does not constitute a change in position that would support an estoppel. Finally, HCC has suffered no injury that would support a claim for equitable estoppel.

The case cited by HCC, *Youngblood v. Auto Owners Ins. Co.*, 2007 UT 28, 158 P.3d 1088, identifies three elements for establishing equitable estoppel. *Id.* at ¶ 14. However, the *Youngblood* case actually involved circumstances of promissory estoppel in which an insurance agent was accused of misrepresenting the coverage provisions of the policy. The case did not involve a situation in which the insurer was claiming that they were entitled to protection because the insured failed to earlier challenge their wrongful denial of insurance coverage. [R.5964-6026.]

**VI. HCC BREACHED ITS DUTY OF COVERAGE WELL IN ADVANCE
OF ANY BASIS FOR ITS DENIALS.**

HCC acknowledges that “under Utah law, “an Insurer ‘has a duty to defend the Insured against a liability claim which is covered or which is potentially covered.’ ” *Summerhays Co. L.C. v. Fed. Deposit Ins. Corp.*, 2014 UT 28, ¶ 36, 332 P.3d 908 (quoting *Mesmer v. MD. Auto Ins. Fund*, 725 a. 2d 1053, 1061 (MD. 1999)).” (emphasis added) HCC also acknowledges in its response that “generally, an insurer’s duty to defend arises out of a potentially covered claim and last until the conclusion of the underlying lawsuit, or until it has been shown that there is no potential for coverage.” (citing 14 Couch on Insurance § 200:47 (3d ed. 2014)).

On January 21, 2010, Dan McDonald provided HCC with notice of the claims being made in civil nos. 070916208 and 070916209. Mr. McDonald included a copy of 12 different documents with his letter making a Claim on the Policies.

HCC was aware that the Policies were claims-made policies. The Complaints that were enclosed with the letter from Mr. McDonald provided the date of the Complaints as November 14, 2007, thus arising during the Policy Period of the 2006 Policy. A copy of the summons was not enclosed. Therefore, HCC did not have any basis upon which to believe that the Claims had first been made against their insureds at any time other than during the Policy Period of the 2006 Policy.

Notwithstanding HCC's actual knowledge that the Claims arose under the 2006 Policy, the March 23, 2010 letter denying coverage analyzed the Claims under the provisions of the 2008 Policy. The Claims records produced by HCC reveal that HCC was aware of the existence of the 2006 Policy and the 2007 Policy. However, in order to deny coverage for the Claim based upon the information available to HCC, HCC had to analyze coverage under the 2008 Policy. That was the only way that HCC could deny coverage to their Insured on the premise that the Insureds had prior knowledge of litigation at the time they applied for the 2008 Policy.

The next mistake made by HCC in their letter of March 23, 2010 was that they analyzed the Policies as though the Policies were claims-reported policies, in which case coverage would arise at the time the Insured reported the claim to HCC. They asserted in the letter of March 23, 2010 that because the Policy Period of the 2008 Policy had ended on November 27, 2009, the reporting of the Claim a few months later in January of 2010 was the reason that the Claims were excluded from coverage.

The third mistake made by HCC on March 23, 2010 was the assertion that under Utah law they were not required to show any prejudice whatsoever when denying a claim on the basis of late reporting by the Insured. HCC never asserted at the time that it had suffered any prejudice. Dan McDonald was aware that under Utah law the Claim could not be denied unless HCC demonstrated prejudice. A conversation took place between Dan McDonald and the attorney for HCC on February 4, 2010, in which Dan McDonald informed HCC's attorney concerning Utah law. When HCC refused to change its position based on the information provided by Mr. McDonald verbally, Mr. McDonald send an email to Leslie Slaugh, hiring him to provide the appropriate citations to Utah law to HCC on behalf of the Insureds. Mr. Slaugh sent a letter dated March 2, 2010 to HCC, detailing the requirements of Utah law concerning HCC's duty to demonstrate prejudice, including citations to Utah statutory and case law authority. Notwithstanding the receipt of Mr. Slaugh's letter containing the correct citations to Utah law, HCC issued its letter denying coverage on March 23, 2010 asserting that they had not received the letter of March 2, 2010, and denying coverage on the basis that the Claims were not reported during the Policy Period of the relevant Policies, and asserting that HCC was not required to show prejudice, citing a Utah statute and a Utah case that involved a claims-reported policy rather than a claims-made policy.

None of the three reasons that HCC set forth in the letter of March 23, 2010 for the actual denial of coverage are currently being argued by HCC. They have changed their

position and their arguments with respect to all three reasons for denying coverage. They now acknowledge that the Policy is a claims-made policy. HCC continues to act in bad faith with respect to the denial of coverage with respect to the judgment. Rather than applying the correct 2006 Policy and acknowledging that a claim was made against the Insureds during the Policy Period of the 2006 Policy, HCC is now attempting to argue that the Claim first arose under the 2007 Policy. The only reason they are making that argument is because it's the only way that they can claim that the Insured had knowledge of the Claim prior to the inception of the 2007 Policy's Period. However, in making that argument, they actually admit that the Claim was first "made" during the 2006 Policy Period and that the Insureds "received" a copy of the Claim during the 2006 Policy Period. Otherwise, how could HCC argue that the Insured had knowledge of the Claim prior to the inception of the Policy?

Next, HCC produced a witness in response to a Rule 30(b)(6) deposition notice. That witness stated that he was not aware of any basis for denial of coverage under the provisions of the Policies other than what was stated in the March 23, letter.

Pending claims against Prudential are purely for their negligent supervisor of Seegmiller, as an agent licensed through their brokerage. On the basis of the very case law acknowledged by HCC in their brief, HCC "has a duty to defend the Insured against a liability claim which is covered or which is potentially covered. . . until the conclusion of the underlying lawsuit, or until it has been shown that there is no potential for

coverage.” Yet, HCC has not stepped up to provide a defense to Prudential or Seegmiller with regard to any of the potentially covered claims. In fact, HCC has no basis upon which to claim that any of the other allegations, other than the covered negligent actions, will ever be established in the underlying cases. Seegmiller and Prudential have come up with a reasonable explanation for their negligence. The burden of proof in a fraud case is simply too high. Because they already have a Judgment, Plaintiffs have no intention of ever pursuing such claims against Seegmiller. [R.5964-6026.]

CONCLUSION

Appellant respectfully requests that the Utah Supreme Court:

a. Correct the District Court’s interpretation of the Policy and direct the District Court that the insurance Policy issued by Houston Casualty Company does provide coverage to Robert Seegmiller with respect to the judgment for negligence issued against Robert Seegmiller in Civil No. 070916209 on June 7, 2012; and

b. Direct the District Court that as judgment creditors, plaintiffs are entitled to coverage pursuant to Section VIII(i) of the insurance Policy issued by Houston Casualty Company with respect to the direct action brought against Houston Casualty Company with respect to the judgment for negligence entered against Robert Seegmiller in Civil No. 070916209 on June 7, 2012.

DATED this 4th day of August, 2016.

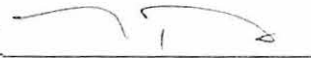
/s/ _____
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **REPLY BRIEF OF THE APPELLANT**, Trial Court Case No. 130906137, Appellate Court Case No. 20150837 were served via U.S. Mail to all parties listed below on this 4th day of August, 2016:

Rebecca Hill
Christensen and Jensen
257 East 200 South, Suite 1100
Salt Lake City, UT 84111

Karl A Bekeny
Paul L. Janowicz
Tucker Ellis, LLP
950 South Main, Ste. 1100
Cleveland, OH 44113

/s/ 

Thor B. Roundy

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