

2016

Fire Insurance Exchange, Plaintiff and Appellee, v. Robert Allen Otmanns, Defendant and Appellant.

Utah Supreme Court

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IN THE UTAH SUPREME COURT

FIRE INSURANCE EXCHANGE,

Plaintiff and Appellee,

v.

ROBERT ALLEN OTMANN,

Defendant and Appellant.

BRIEF OF APPELLANT

Case No. 20160304

ROBERT ALLEN OTMANN,

Defendant and Appellant

ON APPEAL FROM A JUDGMENT OF THE
UTAH COURT OF APPEALS, 2016 UT App 54

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ORAL ARGUMENT REQUESTED

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JURISDICTION

This Court has jurisdiction under UTAH CODE ANN. § 78A-3-102(3)(A).

ISSUES

1. Was the coverage question “fairly debatable” as a matter of law? This issue was presented and fairly included in the first question presented for review in the Petition for Writ of Certiorari.

Standard of Review: “On certiorari, we review the court of appeals’ decision for correctness.”¹ “The correctness of the court of appeals’ decision turns on whether that court correctly reviewed the trial court’s decision under the appropriate standard of review.”² “Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law....Whether an insured’s claim is fairly debatable under a given set of facts is also a question of law. However,...the fairly-debatable defense should not be resolved through summary judgment if reasonable minds could differ as to whether the defendant’s conduct measures up to the standard

1 *Utah v. Garner*, 2005 UT 6, ¶ 7, 106 P.3d 729 (internal quotations omitted).

2 *State v. Dean*, 2004 UT 63, ¶ 7, 95 P.3d 276 (citing *Newspaper Agency Corp. v. Auditing Div.*, 938 P.2d 266, 267 (Utah 1997)).

required for insurance claim investigations....Furthermore, summary judgment should be granted only when it clearly appears that there is no reasonable probability that the party moved against could prevail.”³

2. Were there genuine issues regarding the reasonableness of the insurer’s conduct in this case? This issue was presented and fairly included in the second question presented for review in the Petition for Writ of Certiorari.

Standard of Review: “We begin with the well-recognized statement that in a summary judgment proceeding, all facts and the reasonable inferences to be made therefrom should be construed in a light favorable to the non-moving party. In some cases, the parties may agree on the objective statement of the facts, but may fundamentally disagree on the reasonable inferences to be made from those facts....Even if the moving party’s objective statement of the facts [is] agreed upon, reasonable inferences made from those undisputed facts can indeed create a genuine issue of material fact.”⁴

³ *Jones v. Farmers Ins. Exchange*, 2012 UT 52, ¶¶ 1, 6, 8, 286 P.3d 301 (internal quotations, citations omitted).

⁴ *USA Power, LLC v. PacifiCorp*, 2010 UT 31, ¶ 33, 235 P.3d 749 (citation omitted).

3. Did the trial court abuse its discretion in denying Oltmanns Rule 56(f) relief? This issue was fairly included in the second question presented for review in the Petition for Writ of Certiorari.

Standard of Review: “We review the denial of a rule 56(f) motion for an abuse of discretion. We will not reverse the district court’s decision to grant or deny a rule 56(f) motion for discovery unless it exceeds the limits of reasonability.”⁵

DETERMINATIVE RULES

UTAH R. CIV. PROC. 56(C), (E)-(F) (Addendum 1 hereto).

STATEMENT OF THE CASE

A. **Nature of the Case, Course of Proceedings, and Disposition in the Courts Below.**

1. Declaratory Judgment Action

Brady Blackner was seriously injured while being towed by a Honda AquaTrax that was operated by his cousin-in-law, Robert Allen Oltmanns. (R. 2, ¶4). Blackner filed action for personal injuries against Oltmanns, and others, in

5 *Overstock.com, Inc. v. SmartBargains, Inc.*, 2008 UT 55, ¶ 20, 192 P.3d 858 (internal quotation, citations omitted).

Farmington District Court. (R. 2, ¶5). At the time, Oltmanns and his wife were insured by Fire Insurance Exchange under a policy of homeowner's insurance. (R. 2, ¶6). Oltmanns tendered defense of the action to Fire Insurance. (R. 2, ¶7).

Fire Insurance did not accept the tender. Instead, it filed this action for declaratory judgment taking the position that there was no coverage. (R. 3, ¶10). In the meantime, Fire Insurance asked counsel to continue representing Oltmanns at his own expense. (R. 558).

Before discovery was taken, Fire Insurance moved for summary judgment. (R. 29). The motion was filed on the basis of the following exclusion:

We do not cover **bodily injury**,...which

....

7. results from the ownership, maintenance, use, loading or unloading of:...
- c. jet skis and jet sleds⁶ or
- d. any other watercraft owned or rented to an **insured** and which: (1) has more than 50 horsepower inboard or inboard-outdrive motor power;.... (RR. 598-99) (emphasis in original).

6 No one argued that the Honda AquaTrax was a "jet sled." *Fire Ins. Exchange v. Oltmanns*, 2012 UT App 230, ¶ 10 n.3, 285 P.3d 802.

There was no disputing that the Honda AquaTrax was a sit-down version of a personal watercraft with an inboard "135-horsepower...engine." (RR. 44-45). However, it was neither owned by, nor rented to, Oltmanns. (R. 6, ¶4). Therefore, Subparagraph (d) was inapplicable. Rather, Fire Insurance contended that the AquaTrax was a "jet ski," and subject to the exclusion in Subparagraph (c).

Fire Insurance claimed that Subparagraph (c) applied to "any jet ski." (R. 32). Specifically, it contended that Jet Ski had become "a genericized term for any type of personal watercraft." (R. 34, ¶9). The insurer found support for this in Wikipedia. (R. 57). However, the same entry also noted that "Jet Ski is the brand name of personal watercraft (PWC) manufactured by Kawasaki Heavy Industries." (emphasis in original). This was not all: "Jet Ski...can also refer to versions of PWCs with pivoting handlepoles known as 'stand-ups.'"

Fire Insurance's Wikipedia authority stressed this latter definition: "'Jet Ski' became foremost the colloquial term for stand-up personal watercraft, because in 1973 Kawasaki was responsible for a limited production of stand-up models..." (R. 57) (emphasis added). This was followed by a table showing that the Jet Ski trademark was generic for "Stand-up personal watercraft." (R. 62).

Fire Insurance settled on the one – and only – definition that supported its claim and contended that the policy “clearly and unambiguously excludes coverage for any jet ski, and not just the ‘Jet Ski®’ brand....” (R. 32). It dismissed Subparagraph (d), which had application to all makes and models of watercraft, with the argument that it did not contain the word “personal.” (R. 178). Summary judgment was granted on these bases. (R. 181).

Oltmanns and Blackner appealed (Case No. 20100462-CA). The appeal was decided on August 16, 2012. *Fire Ins. Exchange v. Oltmanns*, 2012 UT App 230, 285 P.3d 802. The court ruled that Subparagraph 7(c) was “ambiguous as a matter of law.” *Id.*, at ¶ 10. Based on Wikipedia, “at least one additional interpretation [of jet ski] is entirely possible.” *Id.*, at ¶ 9. “Did [the insurer] mean all manner of personal watercraft? Or did it mean only the stand-up variety?” *Id.*, at ¶ 10.

“Because the exclusionary provision is ambiguous, it must be construed against the drafter, and thus the language relied on by the insurance company is not effective to exclude coverage for an insured’s accident resulting from use of an AquaTrax personal watercraft of the sit-down variety.” *Id.*, at ¶ 11. The

judgment of the district court was reversed and the case “remanded for trial or such other proceedings as may now be in order.” Id.

Fire Insurance proceeded to settle the *Blackner* case. (R. 228, ¶14). It, also, reimbursed Oltmanns for his fees defending the *Blackner* case. (Id., at ¶15). However, Fire Insurance “refused, despite demand, to pay Defendant Oltmanns for his attorney’s fees prosecuting this coverage action and the successful appeal.” (Id., at ¶16).

2. Counterclaim for Breach of the Implied Covenant

On January 9, 2013, Oltmanns filed a Counterclaim for breach of the implied covenant of good faith and fair dealing. (R. 226). Specifically, he alleged that Fire Insurance “did not fairly evaluate the [*Blackner*] claim, and unreasonably rejected it,....” (R. 228, ¶21).⁷ The claim was for “attorney’s fees for prosecuting this coverage action and the successful appeal.” (Id., at ¶22).

On January 24, 2013, Oltmanns filed a First Amended Counterclaim (R. 244) adding a claim for breach of the insurance contract. (R. 246). Leave to file the First

⁷ See *Beck v. Farmers Ins. Exchange*, 701 P.2d 795, 801 (Utah 1985).

Amended Counterclaim was granted. (R. 309). Fire Insurance's response was a Motion for Judgment on the Pleadings (R. 352), which was denied. (R. 398).

As part of the Order Denying Plaintiff's Motion for Judgment on the Pleadings (R. 398), Oltmanns was required to make a more definite statement of his counterclaim, which he did in the Second Amended Counterclaim filed on September 30, 2013. (R. 403). The parties proceeded to discovery, which included interrogatories and requests for production of documents. (RR. 458, 464, 484).

On May 30, 2014, Fire Insurance moved, a second time, for summary judgment. (R. 494). The motion was based, in principal part, on the Affidavit of Shawn L. Stephens (R. 537), Litigation Claims Specialist for Fire Insurance. (*Id.*, at ¶2). Stephens is the one who investigated the *Blackner* claim. (R. 538, ¶3).⁸

Stephens secured the basic pleadings in the *Blackner* case, a copy of the Rental Agreement, and Oltmanns' deposition. (RR. 538-39, ¶9). After meeting

⁸ Stephens originally characterized his investigation as "thorough." (R. 538, ¶8). Objection was made that this was "conclusory" since there was nothing to indicate what was a "thorough" coverage investigation. (RR. 665-66, ¶18). Accordingly, the characterization was withdrawn. (R. 867, ¶18) (Addendum 3 hereto). However, the characterization continued to appear in Fire Insurance's pleadings. (R. 738).

with his supervisors, the decision was made “to send this matter to outside counsel for a coverage opinion.” (R. 539, ¶11). Other than a request for the vehicle registration (R. 558), which was never received, this was the sum total of the factual investigation.

The coverage letter (R. 560) (Addendum 5 hereto) was simply filed with the exhibits to the Memorandum in Support of Motion for Summary Judgment. (R. 518). There was nothing authenticating the physical exhibit. Stephens was the source for the factual statement in the Memorandum in Support (R. 503, ¶23), but all he said was: “I received the coverage opinion....” (R. 540, ¶14) (emphasis added).

To be clear, an affidavit of coverage counsel was not included. As a result, Stephens is the one who published the contents of the letter: “Based on his research regarding the term ‘jet-ski,’ [counsel] believed that we had a 75% chance in prevailing in a declaratory relief action.” (R. 540, ¶14).

However, Oltmanns did not object on the basis of authentication: “The statement [¶23, Statement of Undisputed Facts] is inadmissible, and conclusory, hearsay. It is based on the Affidavit of Shawn L. Stephens. (Exhibit D). However,

he was not the author of counsel's letter (Exhibit K), and there is no affidavit from counsel. As a result, there is no support for the statement, other than counsel's letter,...." (R. 666, ¶23) (emphasis added).

In its Reply Memorandum, Fire Insurance confused the authentication requirements with the hearsay rule: "The statement is based off of Shawn Stephens understanding of the coverage opinion....Thus, the statement is not hearsay as it is based on the first hand knowledge and understanding of Shawn Stephens." (R. 732, ¶23).

At the summary judgment hearing, Fire Insurance changed tack and argued that the letter was not offered for the truth of the matter asserted. UTAH R. EVID. 801(C)(2). This was the basis for the trial court's ruling:

[T]his Court finds that statement ["Fire Insurance had a 75% chance in prevailing in a declaratory relief action"] is based upon the understanding of Shawn Stephens for Fire Insurance, as set forth in his affidavit. The Court concludes that the statement of fact is not hearsay because receiving the coverage opinion from coverage counsel,...was part of the process of investigating the facts of the accident and fairly evaluating the claim.

R. 868, ¶23 (Addendum 3 hereto).

As a result, Fire Insurance certified the reasonableness of its own conduct. It is not hard to see why this ruling was made, particularly, when Fire Insurance argued before the trial court that “the conduct and analysis of coverage counsel...is not at issue.” (R. 737, ¶2) (emphasis added).

According to Fire Insurance, the quality of the coverage opinion did not matter. It was enough that Fire Insurance had a coverage opinion justifying the filing of an action for declaratory judgment. And yet, Fire Insurance continued to assert the “75% chance of prevailing in a declaratory relief action” (R. 567). At the same time denying that the basis for the opinion was relevant.

Fire Insurance’s Motion for Summary Judgment was granted on September 24, 2014. The Order Granting Summary Judgment was entered on October 10, 2014. (R. 863) (Addendum 3 hereto). Appeal was filed on October 20, 2014. (R. 876) (Appellate Case No. 20140984-CA).

The order was affirmed on appeal. *Fire Ins. Exchange v. Oltmanns*, 2016 UT App 54, ¶ 16, 370 P.3d 566 (Addendum 2 hereto). This judgment is the subject of the present appeal.

B. Statement of Facts

Very few facts were relevant to the coverage decision. Therefore, most of the Statement of Undisputed Facts (R. 499) was immaterial. Oltmanns controverted those few statements he deemed material. For example, ¶18: "Fire Insurance began a thorough coverage investigation and evaluation regarding the accident in July of 2006 that involved Oltmanns." (R. 502).

As noted above (pg. 8 n.8), Oltmanns argued this was "nothing but a conclusion that is unsupported by the facts." (R. 665, ¶18). There was nothing to indicate what would be a "thorough coverage investigation." Accordingly, Fire Insurance withdrew the characterization, and this was accepted by the trial court. (R. 867, ¶18) (Addendum 3 hereto).⁹

Fire Insurance was content to leave the matter as follows: "Fire Insurance conducted an investigation and followed the necessary steps required by Fire Insurance Exchange." (R. 731, ¶18). This, of course, was entirely different. There was no disputing that Fire Insurance conducted some kind of investigation.

⁹ Though, as we stated above (pg. 8 n.8), it continued to appear in the pleadings. (R. 738).

Even so, Fire Insurance felt the need to re-characterize the testimony of its witness (Shawn Stephens):

- When a claim is made under a policy of insurance issued by Fire Insurance Exchange, we conduct an investigation.
- As part of this investigation, the initial step is to ensure the applicable insurance policy was in effect at the time the loss occurred.
- Thereafter, we review the insuring agreement and the definitions contained in the insurance policy.
- A review of the exclusions and conditions and their relation to the loss is then done to determine if the loss is a covered occurrence and to determine if the person seeking coverage qualifies as an insured.
- If we have a coverage question regarding the language of an insuring agreement, we often refer the matter to outside counsel to provide a coverage opinion. We rely on outside counsel to assist in making a coverage determination.
- Fire Insurance Exchange followed this process when we conducted an investigation relating to the accident that occurred that is the subject of this matter.

RR. 730-31, ¶18.

Most of this was not at issue. For example, there was no question that Fire Insurance relied, principally (if not exclusively) on the opinion of outside counsel.

In fact, what appears to have been most significant was counsel's statement of "a 75% chance in prevailing in a declaratory relief action." (R. 540, ¶14).

However, there was one glaring omission. In the "Analysis of Coverage," there was no mention of "defense." There was never any explanation for Fire Insurance's failure to assume the defense of the *Blackner* action even though the tender was plainly acknowledged. (R. 561) (Addendum 5 hereto).

Counsel, also, acknowledged: "Under Utah law, a liability insurance carrier's duty to defend is broader than its duty to indemnify." (R. 565). However, counsel merely recommended the filing of a declaratory judgment action. (R. 567) (Addendum 5 hereto): "It would be dangerous to simply deny coverage because Mr. Blackner and Mr. Oltmanns may enter into an agreement to stipulate to a large judgment and Mr. Oltmanns could then assign his claims against Fire Insurance [E]xchange to Mr. Blackner." (Id.)

However, counsel never advised against assuming the defense of the *Blackner* action. Fire Insurance made this decision, entirely, on its own. Fire Insurance has argued – repeatedly – that it did not reject the tender. However, it

never assumed the defense; not, at least, until after ruling by the Court of Appeals. For this, Fire Insurance got no protection from the coverage opinion.

Fire Insurance, basically, acknowledged this: "[T]he coverage opinion is relevant only to the issue of Fire Insurance's decision to file a declaratory judgment action, not its ultimate success or failure." (RR. 739-40) (emphasis added). Evidently, Fire Insurance did not consider that it could file for declaratory judgment and provide a defense for Oltmanns – at the same time.

There was more to Oltmann's objection (R. 666): "Further, there is evidence that Plaintiff's investigation was less than 'thorough.' See Statement of Additional Facts, ¶1." Statement of Additional Facts No. 1 was as follows:

Before sending the claim for a coverage evaluation, [Fire Insurance] determined that it needed "a copy of the vehicle title and registration at the time of the accident to determine how the jetski [sic] is classified." [Fire Insurance] wanted to know if the vehicle were classified as a "watercraft." [Fire Insurance] thought this may "affect coverage as per the terms of the insured's policy." [Fire Insurance] conceded: "This information is needed before sending out for coverage opinion [sic]." However, the vehicle title and registration were not secured. Fire Insurance Exchange's Answer to Interrogatory No. 1 (Exhibit 1 hereto). It is clear that Utah titles and registers "personal watercraft." Utah Code Ann. § 73-18-2(16); Vessel Application for Utah Title (TC-656V).

RR. 667-68, ¶1.

As previously noted (pg. 9), this is what remained of Fire Insurance's investigation, which it never completed:

Fire Insurance Exchange did not need said information prior to sending the matter out for a coverage opinion....It was determined that the identified information would be helpful, but it was not felt to be critical. If coverage counsel felt the information was essential for a coverage opinion, additional efforts to obtain said information would have been made.

R. 735.

Even though Fire Insurance admitted that the vehicle registration may "affect coverage as per the terms of the insured's policy," and the information was "needed before sending out for coverage opinion," the trial court deemed it to be of no significance. Therefore, ¶18 was declared to be "undisputed." (R. 867, ¶18) (Addendum 3 hereto).

Oltmanns, also, controverted ¶23: "Based on [counsel's] research regarding the term 'jet-ski,' [he] believed that Fire Insurance had a 75% chance in prevailing in a declaratory relief action." (R. 666, ¶23). As noted above (pg. 9), Oltmanns objected that the statement was inadmissible hearsay: "It is based on the Affidavit of Shawn L. Stephens. (Exhibit D). However, he was not the author of counsel's

letter (Exhibit K), and there is no affidavit from counsel. As a result, there is no support for the statement, other than counsel's letter,...." (Id.)

Fire Insurance's response showed a fundamental misunderstanding of the hearsay rule: "The statement is based off of Shawn Stephens understanding of the coverage opinion sent to him....Thus, the statement is not hearsay as it is based on the first hand knowledge and understanding of Shawn Stephens." (R. 732, ¶23).

We have seen how Fire Insurance avoided objection with this argument:

Fire Insurance responded that the statement was not offered for "the truth of the matter asserted." UTAH R. EVID. 801(C)(2). However, this Court finds that statement is based upon the understanding of Shawn Stephens for Fire Insurance, as set forth in his affidavit. The Court concludes that the statement of fact is not hearsay because receiving the coverage opinion from coverage counsel,...was part of the process of investigating the facts of the accident and fairly evaluating the claim. Thus, Oltmanns' response creates no genuine issue of material fact. As a result, this Court concludes that this statement of fact is undisputed.

R. 868, ¶23 (Addendum 3 hereto).

It is not hard to see why the trial court made this decision; particularly, when Fire Insurance argued that "the conduct and analysis of coverage counsel...is not at issue." (R. 737, ¶2).

However, as before, there was more to the response:

[C]ounsel does not explain the “75%” coverage evaluation in his letter. It appears to have been based on nothing but *dictum* from the Florida case on which counsel, apparently, relied. In fact, there is no way to reconcile the coverage evaluation with the actual ruling of the Florida case. Further, there is no way to know whether – and if so, to what extent – counsel applied the Utah rule of strict construction of insurance policy exclusions. It does not appear that counsel considered how his Wikipedia search of outside sources suggested that the policy exclusion was ambiguous. It is certain he did not consider how the “watercraft” exclusion in the policy pointed to a narrower construction of the *jet skis* exclusion....[I]f the Court is inclined to grant the motion, Defendant OLTMANNS should be granted leave to depose [coverage] counsel. See Declaration of Donald L. Dalton, Utah R. Civ. Proc. 56(f) (submitted herewith) [Addendum 4 hereto]. See also Statement of Additional Facts, ¶2.

R. 666, ¶23.

If the opinion was admitted, there were inferences that needed to be drawn from the “vague and conclusory nature of counsel’s coverage letter.” (R. 668, ¶2).

These were detailed in Statement of Additional Facts No. 2:

- Counsel’s opinion was based on *dictum*, not on the actual ruling of the Florida case.
- Counsel did not credit that the supposedly “generic” definition of *jet ski* was an inadequate basis for ruling in the Florida case.
- Counsel did not credit that what made the policy exclusion “unambiguous” was the addition of the language: “jet ski or similar type of craft.”

- Counsel did not consider what the absence of that language, in this case, meant to the construction of the policy exclusion.
- At least, counsel attached undue significance to the *dictum* from the Florida case; and did not give sufficient weight to the difference in the policies considered in light of the Utah standard of strict construction of insurance policy exclusions.
- Counsel did not consider how his resort to extrinsic evidence (Wikipedia search) suggested that *jet ski* was susceptible to different interpretations.
- Counsel gave no heed to the “watercraft” exclusion in the policy, which suggested a narrower construction of *jet skis*. (Exhibit L, pg. 16, ¶7(d) [R. 599]).

RR. 668-69, ¶2.

Oltmanns was taking no chances with summary judgment. Even though Fire Insurance failed to secure an affidavit of counsel, Oltmanns filed a declaration of his counsel – plainly labeled under UTAH R. CIV. PROC. 56(F) – arguing that coverage counsel’s deposition should be taken. (R. 682) (Addendum 4 hereto).¹⁰

¹⁰ At the hearing, Oltmanns, also, argued (to no effect) under UTAH R. CIV. PROC. 56(E).

Fire Insurance moved to strike the declaration. (R. 764). However, the trial court waved it away concluding that it did not raise any genuine issues.

Therefore, the motion was denied for being “moot.” (R. 872).

Again, the trial court concluded that none of this raised any genuine issues. Accordingly, ¶23 was “undisputed.” (R. 868, ¶23) (Addendum 3 hereto).

SUMMARY OF ARGUMENT

1. There was no good basis for filing the declaratory judgment action. It was evident from the authority on which Fire Insurance relied (Wikipedia) that “jet ski” had multiple definitions – only one of which supported the position it took on coverage. Therefore, it came as no surprise that the Court of Appeals ruled (3-0) the provision was “ambiguous as a matter of law.” Long-standing case authority, some of which was acknowledged by Fire Insurance’s counsel, indicated that because of the ambiguity, the policy exclusion would be strictly construed against the insurer. There were no factual issues regarding the validity of the insurance claim, and legal issues – such as, ambiguousness – do not make for “fairly debatable” coverage questions. Therefore, the Court of Appeals erred in affirming the decision of the trial court on summary judgment.

2. No matter what, Fire Insurance was not entitled to judgment as a matter of law. There is a clear and notable distinction between factual disputes regarding the validity of the underlying insurance claim and what information the insurance company used to deny the claim. There were no factual disputes regarding the validity of the insurance claim. There were, however, significant disputes regarding the information Fire Insurance used to deny the claim. Mainly, the basis for the exaggerated prognosis of “a 75% chance of prevailing,” which was *dictum* from a Florida case that was completely inapplicable to this case. These issues were waved away by the trial court – and affirmed by the Court of Appeals – with the determination that the quality of the coverage opinion had no bearing on the fairness of the coverage evaluation. It was enough for both of the courts below that Fire Insurance had a coverage opinion – no matter how flawed.

3. Again, the Court of Appeals affirmed the trial court refusal to consider the inferences that were reasonably drawn from the “undisputed” statements of fact. These inferences were identified by Oltmanns and presented to the trial court in opposition to the Motion for Summary Judgment and in a plainly-labeled UTAH R. CIV. PROC. 56(F) declaration. Fire Insurance moved to

strike the declaration, but the trial court ruled that the motion was “moot.” However, the questions raised by Oltmanns show that the “75% chance of prevailing” was overstated. There was a failure to account for the ambiguity that appeared, as a matter of law, on the face of the policy exclusion. This was compounded by the failure of counsel to note the law of “strict construction” that applies to insurance policy exclusions. It ended with counsel’s reliance on a case that actually supported acceptance of the tender. The trial court abused its discretion in rejecting the Rule 56(f) declaration. Oltmanns raised genuine issues of material fact that precluded entry of summary judgment.

ARGUMENT

I. THE “JET SKIS” EXCLUSION WAS AMBIGUOUS AS A MATTER OF LAW. THEREFORE, THE COVERAGE QUESTION WAS NOT FAIRLY DEBATABLE.

In the first appeal, the Court of Appeals concluded that the “jet skis” exclusion was “ambiguous as a matter of law.” 2012 UT App 230, at ¶ 10. “Even discounting the bizarre possibility that [the insurer] meant to refer only to one Kawasaki watercraft model, it still cannot be definitively said what the insurer

intended:....” Id. This was because “at least one additional interpretation [of “jet skis”] is entirely possible.” Id., at ¶ 9.

The consequences were clear: “Because the exclusionary provision is ambiguous, it must be construed against the drafter, and thus the language relied on by the insurance company is not effective to exclude coverage for an insured’s accident resulting from use of an AquaTrax personal watercraft of the sit-down variety.” Id., at ¶ 11.

It was conceded that “the facts are not in dispute and never have been; instead, this case concerns a purely legal issue, i.e., whether the term ‘jet ski’ as used in Oltmanns’s insurance policy was ambiguous as a matter of law.” 2016 UT App 54, at ¶ 12. As a result, the trial court ruling was reviewed “for correctness, according it no deference.” Id., at ¶ 9 (emphasis added).

There were no factual issues regarding coverage. The policy did not define “jet skis,” and Jet Ski® was a registered trademark of Kawasaki Heavy Industries, which obviously did not apply to the Honda AquaTrax. Therefore, Fire Insurance had to cast outside the policy for support that “jet ski” was a genericized term for all personal watercraft.

It found support for this in Wikipedia, but this was not the only definition. The Wikipedia entry started with the following: “Jet Ski is the brand name of personal watercraft (PWC) manufactured by Kawasaki Heavy Industries.” (emphasis in original). This was not all: “Jet Ski...can also refer to versions of PWCs with pivoting handlepoles known as ‘stand-ups.’”

In fact, the entry went on to say that “‘Jet Ski’ became foremost the colloquial term for stand-up personal watercraft,....” (emphasis added). There was even a table at the back showing that the Jet Ski trademark was generic for “Stand-up personal watercraft.” It was undisputed that the Honda AquaTrax was a sit-down version of personal watercraft.

Given the competing definitions, there was no getting around the ambiguity of the “jet skis” exclusion. It seemed clear that the coverage question could not be “fairly debatable” – and certainly not as a matter of law.

It seems a rather open question whether legal issues – such as, ambiguousness – can be “fairly debatable”:

When making the determination of whether a claim is fairly debatable, a judge should remain mindful of an insurer’s implied duties to diligently investigate claims, evaluate claims fairly, and act reasonably and promptly in settling or denying claims. Only when

there is a legitimate factual issue as to the validity of the insured's claim, such that reasonable minds could not differ as to whether the insurer's conduct measured up to the required standard of care, should the court grant judgment as a matter of law.

Jones v. Farmers Ins. Exchange, supra, at ¶ 12 (internal quotation, citation omitted) (emphasis added).

There was none of that here, or in *Jones*:

Normally, the district court's conclusion would be entitled to some deference. However, the district court based its ruling largely on the legal conclusion that if the plaintiff could not prevail on summary judgment, then summary judgment must be granted for the defendant....This case therefore is more like a traditional appeal from a grant of summary judgment, which we review for correctness.

Id., at ¶ 13 (citations omitted) (emphasis added).

This gets to the heart of the matter because the Court of Appeals elevated legal error to the status of a genuine factual dispute: "Finally, we find it very persuasive that the district court initially accepted Fire Insurance's theory and argument in this case, i.e., in the first round of judicial consideration, not only was there a debate, but Fire Insurance actually won the debate." 2016 UT App 54, ¶ 13.

This cannot be the standard for judging insurer conduct. It is certain that reasonable minds can differ on legal issues, but some questions are closer than others. There may have been no justification for the trial court's decision. At this

point, we would be substituting the quality of the judicial decision for the reasonableness of the insurer's conduct.

An insurance coverage question cannot be "fairly debatable" just because the trial court got it wrong in the first instance. Summary judgment is a legal question. Therefore, if we accept that legal questions are "fairly debatable," there would never be any basis for summary judgment, at least, not on insurance coverage matters, so long as there was a question whether the standards for summary judgment have been met.

There was no other justification for the court's ruling. The Court of Appeals considered it "very relevant that courts, albeit in somewhat different contexts than that presented in this case, have concluded that both 'stand-up' and 'sit-down' watercraft may be considered jet skis." 2016 UT App 54, at ¶ 13. However, neither of the cases helped.

Ford v. Polaris Industries, Inc., 139 Cal.App.4th 755, 43 Cal.Rptr.3^d 215 (Cal. App. 2006), was a products liability case that did not involve insurance coverage. Even so, the California Court of Appeals clarified that the case involved a "personal watercraft" and the sport of "jet skiing." *Id.*, at 759 n.3.

State Farm Fire & Casualty Co. v. Johnson, 596 So.2d 1162 (Fla. App. 1992) is the same case relied upon by Fire Insurance's coverage counsel. To say that it was decided "in somewhat different contexts than that presented in this case," 2016 UT App 54, ¶ 13, is an understatement

Even counsel admitted that the case was not an exact fit: "The *Johnson* case is slightly different from the present case in that the State Farm policy excluded coverage for a 'jet ski or similar type of craft,' while the Fire Insurance Exchange policy excludes coverage just for a 'jet ski.'" (emphasis added).

However, this was an absolutely crucial distinction. On this basis, the Florida Court of Appeals ruled that the policy provision was unambiguous. 596 So.2d at 1164. The trial court record showed "that the Yamaha Wave Runner [was], at the very least, similar to the Kawasaki Jet Ski." *Id.*

There would have been no dispute in this case if Fire Insurance had used such language. But counsel turned away from this very important distinction and just like the Court of Appeals, 2016 UT App 54, ¶ 13, seized on *dictum* from the case: "The term 'jet ski' is often used as a generic term for all personal watercraft despite the fact that it is a registered trademark of Kawasaki." 596 So.2d at 1163.

This was not the basis for the court's ruling. The court made the comment, simply, to address the contention of the trial court that "State Farm should have amended its policy to include the term 'personal watercraft' as defined in [Florida statute]." *Id.* The court made clear that the supposedly "generic" definition of Jet Ski was an inadequate basis for ruling.

But none of this saw the light of day. This was because the Court of Appeals found further support for Fire Insurance's position in matters that were never considered by coverage counsel. 2016 UT 54, ¶ 16 n.4. Such as, changes to the Wikipedia definition of Jet Ski after counsel's letter. *Id.*, at ¶ 13.

It should not matter that Wikipedia – today – is more favorable to Fire Insurance's interpretation of "jet ski." The "sit-down/stand-up" distinction was never very important to Oltmanns's case. Of more importance was the fact that Jet Ski® is a registered trademark of Kawasaki Heavy Industries, which still appears in the Wikipedia entry cited by the Court of Appeals. 2016 UT App 54, ¶ 13 n.3.

We do not believe that legal issues, which are reviewed for simple correctness, are proper subjects for the "fairly debatable" standard. Just because the trial court got the question wrong does not make the coverage question fairly

debatable. Otherwise, there would be no end to what is fairly debatable, and the insurer would have effective immunity from any claim for breach of the implied covenant of good faith and fair dealing.

II. THERE WERE GENUINE ISSUES AS TO WHETHER FIRE INSURANCE'S CONDUCT MEASURED UP TO THE REQUIRED STANDARD OF CARE.

- A. The coverage opinion was fundamentally flawed. It was based on a case that did not support the coverage position. Therefore, Fire Insurance's reliance on it was not reasonable.

In *Jones*, the insurer took the position that genuine issues prevented summary judgment in the insured's favor, which they probably did. However, this did not make the coverage question fairly debatable as a matter of law:

There is a notable distinction between a factual dispute about the validity of the underlying insurance claim and a factual dispute about what information the insurance company used to deny the claim. Mr. Jones alleges in his case that, based on the information Farmers indisputably had, it should have granted his claim or conducted further investigation before denying it. There is little dispute about what information Farmers used to deny Mr. Jones's claim. The disputed facts, therefore, involve the question of whether Farmers' conduct measured up to the required standard of good faith and fair dealing.

Jones, supra, at ¶ 11 (emphasis added).

The same is true here. We know, exactly, what information Fire Insurance used to deny Oltmanns' claim. It was the coverage opinion of legal counsel. He told the insurer there was "a 75% chance of prevailing in a declaratory relief action." This – alone – should have given the insurer pause. For, if there was a 75% chance of prevailing in the declaratory judgment action, there was, at least, a 25% chance of failing, which (of course) the insurer did.

Whatever else, we know that the 75% prognosis was most significant in Fire Insurance's reasoning of the matter. This was the basis for the decision to refuse the tender and file declaratory judgment. However, Fire Insurance then took the inexplicable position that the quality of the coverage opinion was "irrelevant" to its decision.

There is no getting around the substance of the opinion unless the Court accepts the argument that a coverage opinion – any coverage opinion – no matter how flawed, is an absolute bar to claim for breach, which we believe cannot be done because the quality of the opinion is inseparable from the insurer's duty:

An analysis of whether an insurance claim is fairly debatable is closely related to an analysis of whether an insurer fulfilled its duty...to evaluate the claim fairly. When making the determination

of whether a claim is fairly debatable, a judge should remain mindful of an insurer's implied duties to diligently investigate claims, evaluate claims fairly, and act reasonably and promptly in settling or denying claims.

Jones v. Farmers Ins. Exchange, supra, at ¶ 12.

Saleh v. Farmers Ins. Exchange, 2006 UT 20, 133 P.3d 428 was cited by coverage counsel for the following: "If the policy provision is ambiguous, it will be construed in favor of coverage." (R. 565). There is no telling how far counsel went with this. It must be assumed that he read the following: "A contract may be ambiguous because it is unclear, it omits terms, or the terms used to express the intention of the parties may be understood to have two or more plausible meanings." *Id.*, at ¶ 15 (internal quotation omitted).

Of course, there was more to this, which would have been recognized by seasoned insurance counsel. (It should be noted that Fire Insurance's coverage counsel was counsel for the insurer in *Saleh*.) Utah courts have been quite explicit about the difference between insuring provisions and exclusionary clauses: "[P]rovisions that limit or exclude coverage should be strictly construed against the insurer." *U.S. Fidelity & Guaranty Co. v. Sandt*, 854 P.2d 519, 523 (Utah 1993).

Counsel did not have to look very far for this. *U.S. Fidelity & Guaranty Co.* was cited as being in accord with *Saleh*: “*Sandt’s* test for ambiguity is worded slightly differently but is functionally equivalent.” 2006 UT 20, ¶ 17 & n.1. *Sandt* does seem to put a softer spin on the test for ambiguity in insurance cases: “It follows that ambiguous or uncertain language in an insurance contract that is fairly susceptible to different interpretations should be construed in favor of coverage.” 854 P.2d at 522-23 (emphasis added).

Based on these rules of construction, “jet ski” would have to be seen as the very definition of ambiguity. Counsel started by noting that “‘Jet Ski® is a trade name for Kawasaki.” The coverage analysis should have stopped there – since the watercraft was manufactured by Honda, not by Kawasaki. But counsel went on: “The name [Jet Ski], however, has become a genericized trademark for any type of personal watercraft.” Now, there are *two* definitions, and here comes a third: “Jet Ski... can also refer to versions of [personal watercraft] with pivoting handlepoles known as ‘stand-ups.’”

There can be no denying that Jet Ski was fairly susceptible to different interpretations, but this was not the worst of it. A most plausible definition

appeared in the Wikipedia entry that was attached to the coverage opinion: "'Jet Ski' became foremost the colloquial term for stand-up personal watercraft, because in 1973 Kawasaki was responsible for a limited production of stand-up models...." (emphasis added).¹¹

This may be why counsel resorted to case law, but even there, uncertainty appeared: "Because of the unique language of the Fire Insurance Exchange policy, we have not found the exact language...in any other cases which have addressed the question of what constitutes a 'jet ski' for purposes of an exclusion under a homeowners policy."

We have already examined the case on which counsel relied: *State Farm Fire & Casualty Co. v. Johnson, supra*. It bears repeating that the issue came up later in the same court. *Thomas v. Prudential Property & Casualty*, 673 So.2d 141 (Fla. App. 1996). Insurers were seen to have changed their policies to avoid the problems with Jet Ski. "Watercraft" was found to apply, unambiguously, to all manner of personal watercraft exceeding 50 motor horsepower. *Id.*, at 142.

11 Indeed, there was a table attached to the Wikipedia entry, which was part of the original summary judgment motion, showing that Jet Ski was *generic* for "Stand-up personal watercraft."

Thus, the hazard of the position Fire Insurance took in this case:

An objective assessment of the legal landscape evidences that LICOA lacked a reasonable basis in law for disputing Pedicini's claim to benefits according to his interpretation of "actual charges." Under clearly established Kentucky law, ambiguous contractual terms are construed in favor of the insured. The term "actual charges" is patently ambiguous; the use of the term in the supplemental policy is hopelessly circular, as the term "actual charges" even appears within its own definition in the policy....In light of these facts, LICOA should have realized that unilaterally altering its definition of "actual charges" was likely to result in legal claims against it by its policyholders and that, under Kentucky law, LICOA would lack a reasonable basis for denying those policyholders relief....As a result, it is difficult to see how LICOA can maintain that the proper resolution of its dispute with Pedicini is fairly debatable as a matter of law.

Pedicini v. Life Ins. Co. of Alabama, 682 F.3d 522, 529 (6th Cir. 2012)
(internal quotations, citations omitted).

As we have stated, there would have been no dispute if Fire Insurance had used the language "or similar type of craft." The fact that language was missing from the "jet skis" exclusion should have made all the difference. Instead, counsel relied on *dictum* from the Florida case in rendering his opinion. Presumably, this is why the most he would say is "I believe we have a very strong argument...."

Fire Insurance latched on to the statement: "I believe we have a 75% chance of prevailing in a declaratory relief action." However, the basis for the calculation was never explained. The higher figure may have had to do with counsel's failure to note the "strict construction" of insurance policy exclusions. It may have been the result of counsel's unsupported assertion that "a reasonable policyholder would not see any difference between coverage for a Kawasaki jet ski or any other brand of personal watercraft,...."

Whatever the basis, the "75% chance" was way overstated. It started with the failure to account for the ambiguity that appeared, as a matter of law, on the face of the policy exclusion. It was compounded by the failure to note the law of "strict construction" that applies to insurance policy exclusions. It ended with reliance on a case that actually supported the acceptance of the tender; a case, at least, that supported assumption of the insured's defense. However, none of this saw the light of day in the trial court.

B. To avoid operation of the hearsay rule, the coverage opinion was not admitted for the truth of the matter asserted.

When an insurer relies on the advice of counsel, as it did in this case, the insurer has put the substance of the counsel at issue. In Utah, this is because the

insurer is expected, as part of the implied covenant of good faith and fair dealing, to diligently investigate the facts and fairly evaluate the claim, and then, act promptly and reasonably in rejecting or settling the claim. See *Beck v. Farmers Ins. Exchange, supra*, at 801.

There is nothing to suggest that the insurer's duty may be transferred to legal counsel. If the insurer chooses to follow the advice of counsel, as it did in this case, the reasonableness of its conduct becomes synonymous with the quality of the counsel. Otherwise, there would be no basis for evaluating the insurer's conduct. It would be the same as saying there was no basis for the insurer's conduct.

Admittedly, Fire Insurance has, thus far, succeeded in avoiding examination of the coverage opinion: "Fire Insurance did not offer the coverage opinion to prove the truth of the matter asserted in the coverage opinion. Rather, Fire Insurance offered the coverage opinion to show its effect on the hearer."¹²

Fire Insurance has claimed that the coverage opinion was "relevant only to the issue of Fire Insurance's good faith decision to file a declaratory judgment

12 Brief of Appellee at 27 (Case No. 20140984-CA).

action, not the declaratory action's ultimate success or failure."¹³ But there is no explanation for how the insurer's "good faith" may be evaluated without examining the coverage opinion.

Fire Insurance was able to convince the trial court to inquire no further than the "75% chance in prevailing in a declaratory relief action," but the trial court did not accept the insurer's truth-of-the-matter argument (which was absurd), and the trial court knew it, which is why it ruled: "[T]his Court finds that statement is based upon the understanding of Shawn Stephen for Fire Insurance,...."

But this means that Fire Insurance certified its own good faith. Fire Insurance cannot have it both ways. Either, the coverage opinion is irrelevant, which is what Fire Insurance has consistently argued; in which case, the trial court erred by admitting any part of it. Or, the coverage opinion is perfectly relevant for explaining why Fire Insurance did what it did; in which case, the trial court erred by refusing to evaluate it.

Fire Insurance convinced the trial court not to inquire into the substance of the admittedly qualified opinion based on *Prince v. Bear River Mutual Ins. Co.*, 2002

13 Brief of Appellee at 24.

UT 68, 56 P.3d 524, and *Callioux for Progressive Ins. Co.*, 745 P.2d 838 (Utah App. 1987). For Fire Insurance, it was enough that it had a coverage opinion supporting its decision to file for declaratory relief. According to the insurer, the claim was “fairly debatable” because its counsel stated “a 75% chance of prevailing in a declaratory relief action.” It managed to convince the trial court that this was an adequate basis for summary judgment.

The trial court concluded that Fire Insurance satisfied its duty to diligently investigate, fairly evaluate, and reasonably refuse the tender of the claim with an opinion of legal counsel. The trial court did not inquire about the substance of the opinion because to do so would violate the hearsay rule. Therefore, the trial court refused to consider the basis for the flawed conclusion that “we have a 75% chance of prevailing in a declaratory relief action.” There may as well have been no basis for the decision.

- C. Counsel never advised against assuming defense of the *Blackner* action. In this respect, Fire Insurance was acting, entirely, on its own without cover from the legal opinion.

In light of the foregoing, it is easy to see how Fire Insurance breached its duty by failing to assume defense of the *Blackner* action. Counsel acknowledged

the tender of defense that went with the claim. He advised against rejecting the claim outright. He advised that the duty to defend was "broader" than the duty to indemnify. He, then, acknowledged the request that Oltmanns' counsel continue representing him without guarantee of reimbursement. However, nowhere, did he advise against assuming the defense.

What Fire Insurance got was a recommendation to file for declaratory judgment. Fire Insurance argued over-and-over in the trial court that it had the right to seek declaratory relief. No one contended otherwise. However, it never occurred to Fire Insurance that it could argue the coverage question while at the same time defending its insured. Fire Insurance has never suggested that it satisfied this duty by asking Oltmanns' counsel to continue representing him without guarantee of reimbursement. Oltmanns was facing personal liability of several hundred thousand dollars.¹⁴ Oltmanns had to spend the next several years defending the personal injury action while, at the same time, litigating with his insurance company – on his own dime.

14 Blackner's claim was settled for the policy limit of \$300,000.00.

Fire Insurance was within its rights to file for declaratory relief. For this, it had the advice of counsel. However, in all other respects, it breached its duty. A fair evaluation of the claim would have shown that the “jet skis” exclusion was unenforceable. A diligent investigation would have shown that the “jet skis” exclusion was not even applicable. A reasonable response would have been to assume defense of the *Blackner* action.

There is no way that Fire Insurance can be seen as having satisfied those duties, as a matter of law, by leaving Oltmanns to fend for himself – for three (3) long years – against the *Blackner* action. In this respect, Fire Insurance was acting entirely on its own without the cover of legal counsel. Its duties, both contractual and implied, were breached by this alone.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING THE RULE 56(f) DECLARATION.

Oltmanns was taking no chances with summary judgment. Even though he thought the motion would fail based on the inferences that should have been drawn from the undisputed facts that appeared in the record, he argued that genuine issues precluded entry of judgment as a matter of law. Accordingly, he controverted the two principal statements of fact in Fire Insurance’s motion:

Paragraph 18: "Fire Insurance began a thorough coverage investigation and evaluation regarding the accident in July of 2006 that involved Oltmanns."

Paragraph 23: "Based on [counsel's] research regarding the term 'jet-ski,' [he] believed that Fire Insurance had a 75% chance in prevailing in a declaratory relief action."

Oltmanns controverted ¶18 with Statement of Additional Facts No. 1:

Before sending the claim for a coverage evaluation, [Fire Insurance] determined that it needed "a copy of the vehicle title and registration at the time of the accident to determine how the jetski [sic] is classified." [Fire Insurance] wanted to know if the vehicle were classified as a "watercraft." [Fire Insurance] thought this may "affect coverage as per the terms of the insured's policy." [Fire Insurance] conceded: "This information is needed before sending out for coverage opinion [sic]." However, the vehicle title and registration were not secured. Fire Insurance Exchange's Answer to Interrogatory No. 1 (Exhibit 1 hereto). It is clear that Utah titles and registers "personal watercraft." Utah Code Ann. § 73-18-2(16); Vessel Application for Utah Title (TC-656V).

At one time, Fire Insurance thought it was important to get a copy of the vehicle registration. In fact, Fire Insurance thought the information was necessary "before sending out for coverage opinion [sic]." It is easy to see why. If the vehicle was registered as a "personal watercraft," as appears above, Subparagraph 7(c) would not apply, and the coverage position would fold.

This is what remained of Fire Insurance's factual investigation, but it was never completed. Fire Insurance claimed in an after-the-fact explanation that the information may be "helpful," but was not "critical." Basically, Fire Insurance blamed the failure to secure the vehicle registration on coverage counsel: "If coverage counsel felt the information was essential for a coverage opinion, additional efforts to obtain said information would have been made."

Despite what Fire Insurance said when discussing the matter internally, the trial court deemed the vehicle registration to be of no significance. Therefore, ¶18 was declared to be "undisputed." However, the failure to secure the vehicle registration went to the heart of Fire Insurance's contention that its coverage investigation followed company policy. Statement of Additional Facts No. 1 shows this was not true.

Oltmanns controverted ¶23 with Statement of Additional Facts No. 2:

Though it does not appear in the Statement of Undisputed Facts, [Fire Insurance] argues, throughout its motion, that counsel rendered a "thorough coverage opinion." (See Memorandum in Support, pg. 12). However, no facts have been stated that would support this conclusion: *i.e.*, what is a "thorough coverage opinion." This is, absolutely, fatal to [Fire Insurance's] motion. Based on the vague and conclusory nature of counsel's coverage letter, the following

inferences must be drawn, which point to a less than “thorough coverage opinion”:

- Counsel’s opinion was based on *dictum*, not on the actual ruling of the Florida case.
- Counsel did not credit that the supposedly “generic” definition of *jet ski* was an inadequate basis for ruling in the Florida case.
- Counsel did not credit that what made the policy exclusion “unambiguous” was the addition of the language: “jet ski or similar type of craft.”
- Counsel did not consider what the absence of that language, in this case, meant to the construction of the policy exclusion.
- At least, counsel attached undue significance to the *dictum* from the Florida case; and did not give sufficient weight to the difference in the policies considered in light of the Utah standard of strict construction of insurance policy exclusions.
- Counsel did not consider how his resort to extrinsic evidence (Wikipedia search) suggested that *jet ski* was susceptible to different interpretations.
- Counsel gave no heed to the “watercraft” exclusion in the policy, which suggested a narrower construction of *jet skis*.

These inferences were identified by Oltmanns and presented to the trial court both in response to the Motion for Summary Judgment and in a

plainly-labeled UTAH R. CIV. PROC. 56(F) declaration. Fire Insurance moved to strike the declaration.

In response, Oltmanns cited *USA Power, LLC v. PacifiCorp*, 2010 UT 31, 235 P.3d 749: “Even if the moving party’s objective statement of the facts are agreed upon, reasonable inferences made from those undisputed facts can indeed create a genuine issue of material fact. That the objective facts are undisputed does not mean that no genuine issues remain as to those facts.” *Id.*, at ¶ 32 (internal quotations omitted).

The trial court ruled that the motion was “moot.” However, the questions raised by Oltmanns show that the “75% chance of prevailing” was overstated. There was a failure to account for the ambiguity that appeared, as a matter of law, on the face of the policy exclusion. This was compounded by the failure of counsel to note the law of “strict construction” that applies to insurance policy exclusions. It ended with counsel’s reliance on a case that actually supported the acceptance of the tender; at least, a case that supported assumption of the insured’s defense.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals (2016 UT App 54) affirming the Order Granting Fire Insurance Exchange's Motion for Summary Judgment (R. 863) (Addendum 3 hereto), should be REVERSED.

CERTIFICATE OF COMPLIANCE

Pursuant to UTAH R. APP. PROC. 24(F)(1)(C), Appellant's undersigned counsel certifies the following word count of the foregoing Brief of Appellant, including, Table of Contents and Authorities and Addendum containing Determinative Rules: 9,652.

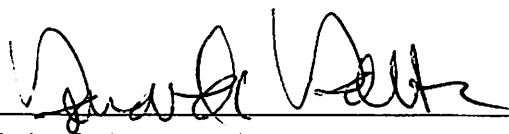
DATED this 6th day of September, 2016.

DALTON & KELLEY, PLC

/s/ Donald L. Dalton

Donald L. Dalton

Attorney for Appellant


(Original signature)

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2016, I caused a true and correct copy of the within and foregoing, "Brief of Appellant," to be e-mailed to:

Stewart B. Harman
Joel D. Taylor
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136 E. South Temple, Suite 1700
Salt Lake City UT 84111

*/s/ Donald L. Dalton*_____

ADDENDUM

Utah Rule of Civil Procedure 56. Summary judgment.

(c) *Motion and proceedings thereon.* The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

(e) *Form of affidavits; further testimony.* The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits....

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

THE UTAH COURT OF APPEALS

FIRE INSURANCE EXCHANGE,
Appellee,
v.
ROBERT ALLEN OLTMANNS,
Appellant.

Opinion
No. 20140984-CA
Filed March 24, 2016

Second District Court, Farmington Department
The Honorable Glen R. Dawson
No. 090700825

Donald L. Dalton, Attorney for Appellant
Stewart B. Harman and Joel D. Taylor, Attorneys
for Appellee

JUDGE GREGORY K. ORME authored this Opinion, in which JUDGES
J. FREDERIC VOROS JR. and MICHELE M. CHRISTIANSEN concurred.

ORME, Judge:

¶1 Appellant Robert Allen Oltmanns returns to this court, once again appealing a district court decision granting summary judgment to Fire Insurance Exchange. The core dispute between these two parties previously came to this court and was resolved in *Fire Insurance Exchange v. Oltmanns*, 2012 UT App 230, 285 P.3d 802. Last time we reversed; this time, we affirm.

BACKGROUND

¶2 This suit grew out of an accident in 2006 involving a personal watercraft piloted by Oltmanns, which resulted in the injury of Oltmanns's brother-in-law. Concerned early on about

potential tort liability stemming from the accident, Oltmanns consulted with a Fire Insurance agent, who offered to assist Oltmanns in filing a claim even though the agent was not certain there would be coverage.¹ At that time, Oltmanns declined the agent's offer of assistance in submitting the claim.

¶3 A year later, the brother-in-law sued Oltmanns for negligence and won, obtaining a judgment against him. Oltmanns again contacted Fire Insurance. This time, however, Oltmanns demanded that Fire Insurance pay the full amount of his liability to his brother-in-law under his homeowner's insurance policy. After extensive in-house review, Fire Insurance submitted Oltmanns's claim to outside counsel for a coverage opinion. It also told Oltmanns's attorney to continue representing Oltmanns and informed him that Fire Insurance might reimburse him for his fees and expenses.

¶4 Soon thereafter, in a quite thorough coverage opinion, outside counsel expressed the view that the term "jet ski" as used in Oltmanns's policy most likely would be construed as referring to the broad category of motorized personal watercraft such that, in counsel's opinion, "Fire Insurance had a 75% chance of prevailing in a declaratory relief action." Counsel advised filing such an action to receive a definitive ruling on the coverage question, and Fire Insurance then filed this declaratory judgment action seeking a determination of its responsibility to Oltmanns under his policy.

¶5 Shortly after filing its action, Fire Insurance moved for summary judgment, and the district court, agreeing with outside counsel's interpretation, ruled in favor of Fire Insurance.

1. Oltmanns's policy with Fire Insurance excluded coverage for accidents involving the use of "jet skis." In the prior appeal, we concluded that this term was ambiguous. *See Fire Insurance Exchange v. Oltmanns*, 2012 UT App 230, ¶ 10, 285 P.3d 802.

Oltmanns appealed, and we reversed, concluding that although one definition of the term “jet ski” supported the view taken by Fire Insurance and the district court, the term was ambiguous because “jet ski” was subject to several different interpretations, some of which favored Oltmanns. *Oltmanns*, 2012 UT App 230, ¶¶ 9–10. Construing the contract against the drafter and in favor of the policyholder, we ruled in favor of Oltmanns and remanded the case to the district court. *Id.* ¶ 11.

¶6 Fire Insurance did not petition for rehearing, did not petition for certiorari review, and did not try to develop new arguments for the district court’s consideration on remand. On the contrary, it promptly settled with Oltmanns and agreed to reimburse him for the attorney fees incurred in defending the tort case. Fire Insurance declined, however, to cover Oltmanns’s attorney fees related to the coverage dispute, including those related to the successful appeal from the district court’s grant of summary judgment to Fire Insurance.

¶7 In an effort to recover those attorney fees, Oltmanns filed a counterclaim against Fire Insurance in the still-open declaratory judgment action, claiming breach of the implied covenant of good faith and fair dealing for Fire Insurance’s alleged failure to “fairly evaluate” the claim pending against Oltmanns and for “unreasonably reject[ing]” that claim.² The parties began discovery on the issues presented by the counterclaim in the fall of 2013.

2. Unlike some insurance policies that apparently allow for the recovery of attorney fees from the insurer by the insured following a successful coverage action, both sides indicated during oral argument that the insurance contract in this case has no such provision. Therefore, the parties agree, Oltmanns is entitled to recover his attorney fees only if he can prove bad faith—or at least a lack of good faith—by Fire Insurance.

¶8 Almost a year later, Fire Insurance moved for summary judgment, relying on the coverage opinion letter and the affidavit of the claims specialist who investigated Oltmanns's insurance claim. Despite Oltmanns's opposition to the motion, the district court determined that Fire Insurance's denial of the claim was reasonable because the interpretation issue was fairly debatable. The court granted summary judgment to Fire Insurance.

ISSUE AND STANDARD OF REVIEW

¶9 Oltmanns contends that Fire Insurance was not entitled to summary judgment because the interpretation question was not "fairly debatable" as a matter of law. Whether denial of a claim was "fairly debatable under the facts . . . is a question of law that we review for correctness." *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 33, 56 P.3d 524. Although on summary judgment we ordinarily "accord no deference to the district court's conclusions of law, including its interpretation of precedent and statute," *Torian v. Craig*, 2012 UT 63, ¶ 13, 289 P.3d 479, given the highly fact-intensive inquiry typically necessary to make a "fairly debatable" determination, "trial courts have 'some discretion'" and "we will therefore 'grant the trial court's conclusion some deference'" when the pivotal question is fact sensitive, *Prince*, 2002 UT 68, ¶ 33 (quoting *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 464 (Utah 1996)). Here, it is not, *see infra* ¶ 12, and so we review the district court's ruling for correctness, according it no deference.

ANALYSIS

¶10 Oltmanns challenges Fire Insurance's decision to obtain a coverage determination through its declaratory judgment action, claiming that Fire Insurance's decision to do so was in bad faith, breaching the covenant of good faith and fair dealing.

Fire Insurance, for its part, defends its actions as reasonable under the “fairly debatable” standard. The district court agreed with Fire Insurance and granted summary judgment in its favor.

¶11 “[D]enial of a claim is reasonable if the insured’s claim is fairly debatable.” *Prince*, 2002 UT 68, ¶ 28. This is because “if an insurer denies an ‘insured’s claim [that] is fairly debatable, [then] the insurer is entitled to debate it and cannot be held to have breached the implied covenant [of good faith and fair dealing] if it chooses to do so.’” *Id.* (quoting *Morris v. Health Net of Cal., Inc.*, 1999 UT 95, ¶ 7, 988 P.2d 940) (first and second alterations in original) (additional internal quotation marks omitted). The district court’s prior ruling validating Fire Insurance’s interpretation of the policy surely seems to make it difficult to argue that Fire Insurance’s position was not at least “fairly debatable.”

¶12 In some respects, the instant case is not unlike previous “fairly debatable” cases in that reasonable minds could—and did—differ as to their interpretation of key points. *See id.* ¶¶ 35–36; *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 842 (Utah Ct. App. 1987). *See also Morris v. Health Net of Cal., Inc.*, 1999 UT 95, ¶ 7, 988 P.2d 940 (“[U]nder Utah law, ‘when an insured’s claim is fairly debatable, the insurer is entitled to debate it[.]’”) (quoting *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 465 (Utah 1996)). Unlike those cases, however, here the facts are not in dispute and never have been; instead, this case concerns a purely legal issue, i.e., whether the term “jet ski” as used in Oltmanns’s insurance policy was ambiguous as a matter of law. In the first appeal, we concluded that the term was ambiguous, and resolved the ambiguity against the insurer. *See Oltmanns*, 2012 UT App 230, ¶¶ 10–11. *See also United States Fidelity & Guar. Co. v. Sandt*, 854 P.2d 519, 523 (Utah 1993) (“[P]rovisions that limit or exclude coverage should be strictly construed against the insurer.”).

¶13 This conclusion does not, however, compel the determination that the meaning of the clause in question was not “fairly debatable.” On the contrary, considering the totality of the circumstances, it is very relevant that courts, albeit in somewhat different contexts than that presented in this case, have concluded that both “stand-up” and “sit-down” watercraft may be considered jet skis. *See, e.g., Ford v. Polaris Indus., Inc.*, 43 Cal. Rptr. 3d 215, 217–18 (Ct. App. 2006) (referring to a two-seater personal watercraft as a “jet ski”); *State Farm Fire & Casualty Co. v. Johnson*, 596 So. 2d 1162, 1163 (Fla. Dist. Ct. App. 1992) (per curiam) (“The term ‘jet ski’ is often used as a generic term for all personal watercraft despite the fact that it is a registered trademark of Kawasaki.”). It is additionally relevant that Wikipedia, the key source for our conclusion in *Oltmanns* as to the colloquial understanding of the term “jet ski,” now features no less than four different definitions of the term, one of which supports Oltmanns’s position and one of which supports that of Fire Insurance. *See Jet Ski*, Wikipedia, https://en.wikipedia.org/wiki/Jet_Ski [<https://perma.cc/Z5N9-M2CG>] (last visited Feb. 17, 2016).³ Finally, we find it very

3. The Wikipedia entry, as presently constituted, actually furnishes stronger support for Fire Insurance’s position than it previously did, because the “sit-down” and “stand-up” distinction we relied upon in seeing ambiguity has since been deleted. *Compare Fire Insurance Exchange v. Oltmanns*, 2012 UT App 230, ¶ 9, 285 P.3d 802 (“The term ‘Jet Ski’ . . . is often misapplied to all personal watercraft with pivoting handlepoles manipulated by a standing rider; these are properly known as Stand-up [Personal Watercraft].”), *with Jet Ski*, Wikipedia, https://en.wikipedia.org/wiki/Jet_Ski [<https://perma.cc/Z5N9-M2CG>] (last visited Feb. 17, 2016) (“Jet Ski is the brand name of a personal watercraft manufactured by Kawasaki. . . . The term is sometimes used to refer to any type of personal watercraft Though the proper noun ‘Jet Ski’ is a registered trademark of

(continued...)

persuasive that the district court initially accepted Fire Insurance's theory and argument in this case, i.e., in the first round of judicial consideration, not only was there a debate, but Fire Insurance actually won the debate.

¶14 As a further note, although it is true that we ultimately accepted the definition argued for by Oltmanns in *Fire Insurance Exchange v. Oltmanns*, 2012 UT App 230, 285 P.3d 802, we did so only after applying the interpretative rule that ambiguous exclusions are to be construed against the insurer. *Id.* ¶ 6. Moreover, we applied that rule even though application of the rule, in these precise terms, was not Oltmanns's primary theory in the original appeal.

CONCLUSION

¶15 An insurance company may reasonably and fairly rely, at least initially, upon a coverage opinion from qualified outside counsel, received in the course of careful investigation and evaluation of a claim. Moreover, submitting the issue to a court for interpretation in a declaratory judgment action is a prudent, reasonable step toward the resolution of a legitimate dispute

(...continued)

Kawasaki, the common noun 'jet ski' refers to small recreational watercraft."). It is, of course, difficult to discern whether the change came about in response to our prior opinion, perhaps at the instance of someone with a stake in the debate. *See generally Oltmanns*, 2012 UT App 230, ¶ 18 n.3 (Voros, J., concurring) ("Among its shortcomings—and strengths—is Wikipedia's fluidity. Anyone can edit a Wikipedia entry at any time, making it vulnerable to opportunistic editing. Thus, an unscrupulous lawyer (or client) could edit the Web site entry to frame the facts in a light favorable to the client's cause.") (citations and internal quotation marks omitted).

Fire Insurance Exchange v. Oltmanns

over a coverage term or exclusion. And when an insurance company proceeds in a reasonable way to resolve a difficult coverage question, its eventual loss at the appellate level does not foreclose a determination that an issue of interpretation was fairly debatable, as was the case here.

¶16 Affirmed.⁴

4. Oltmanns also challenges the district court's denial of a motion he filed under former rule 56(f) of the Utah Rules of Civil Procedure. Because we conclude that Fire Insurance's interpretation of the term "jet ski" as used in Oltmanns's insurance policy was "fairly debatable" as a matter of law, *supra* ¶¶ 11–13, we decline to consider this issue.

The Order of Court is stated below:

Dated: October 10, 2014
11:51:23 AM

/s/ Glen R. Dawson
District Court Judge



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IN THE SECOND JUDICIAL DISTRICT COURT
DAVIS COUNTY, STATE OF UTAH

FIRE INSURANCE EXCHANGE,
Plaintiff,

v.

ROBERT ALLEN OLTMANNS, BRADY
BLACKNER,

Defendants.

ORDER GRANTING FIRE INSURANCE
EXCHANGE'S MOTION FOR
SUMMARY JUDGMENT

Case No. 090700825

Honorable Glen R. Dawson

Plaintiff and Counterclaim Defendant, Fire Insurance Exchange's ("Fire Insurance" or "Plaintiff"), motion for summary judgment duly came before this Court for hearing on September 24, 2014, at 1:30 p.m. Fire Insurance Exchange appeared through its counsel, Joel D. Taylor. Defendant and Counterclaim Plaintiff, Robert Allen Oltmanns ("Oltmanns" or "Defendant"), appeared through his attorney, Donald L. Dalton. Prior to the hearing the parties

submitted memoranda which were reviewed by the Court, and the Court heard oral arguments from each of the parties.

In response to the motion, Oltmanns filed a memorandum in opposition asserting that genuine issues existed as to certain material facts. The memorandum was supported by a declaration by Oltmanns' counsel under Utah R. Civ. Proc. 56(e) and (f). However, the Court was not persuaded by Oltmanns' opposition. Therefore, the Court, being fully advised, concludes that there are no genuine issues of material fact that preclude summary judgment. The Court further concludes that the following material facts are undisputed:

1. This action concerns a policy of homeowners insurance issued by Plaintiff to Defendant Oltmanns.
2. Oltmanns was sued by Brady Blackner for injuries he sustained while Oltmanns was operating a Honda F-12 AquaTrax personal watercraft in Case No. 070700309.
3. In September 2006, Oltmanns went to his insurance agent, Sherrie Eichmeier, to inquire about his homeowners insurance policy.
4. In September 2006, Oltmanns and Sherrie Eichmeier read the exclusions in Oltmanns' homeowners insurance policy. Both Oltmanns and Sherrie Eichmeier thought that Oltmanns' accident that occurred on July 11, 2006, was probably not covered due to the language contained in the exclusion regarding 'jet skis.'
5. Sherrie Eichmeier told Oltmanns the only way to determine if coverage was provided

under his homeowners policy for his July 11, 2006, accident was to submit a formal claim on his homeowners insurance policy so that an investigation could be conducted.

6. Sherrie Eichmeier offered to assist Oltmanns in making a formal claim on his homeowners insurance policy so that a formal investigation could be conducted on Oltmanns' July 11, 2006 accident, to see if coverage was available.
7. Robert Oltmanns declined Sherrie Eichmeier's offer to assist him in making a formal claim on his homeowners insurance policy for the July 11, 2006 accident.
8. In September 2006, Robert Oltmanns decided he did not want to make a claim on his homeowners insurance policy to see if coverage was provided for his July 11, 2006, wave runner accident.
9. Robert Oltmanns never asked Sherrie Eichmeier to assist him in making a formal claim on his homeowners insurance policy in September 2006 to determine if his July 11, 2006, wave runner accident was covered under his homeowners insurance policy.
10. Oltmanns alleges that during this interaction with Sherrie Eichmeier in 2006 that he tendered a claim on his homeowners policy for his accident on July 11, 2006. Oltmanns alleges that Fire Insurance denied this claim.
11. The Blackner lawsuit was filed against Oltmanns the following year in June 2007.
12. On August 26, 2009, Oltmanns tendered defense of Blackner v. Caserio, Case No. 070700309, Second Judicial District Court, Davis County, State of Utah, to Fire

Insurance.

13. Oltmanns in his *Second Amended Counterclaim* alleges, for the first time, the claim was “re-tendered” to Fire Insurance on August 26, 2009.
14. The next day on August 27, 2009, Shawn Stephens, Litigation Claims Specialist for Fire Insurance, contacted Oltmanns’ counsel, Don Dalton, to discuss the language of Oltmanns’ homeowners insurance policy.
15. Shawn Stephens told Mr. Dalton that if Oltmanns was seeking coverage for the accident that occurred on July 11, 2006, that Fire Insurance would complete a thorough investigation of the loss and how coverage would potentially apply.
16. Shawn Stephens specifically told Don Dalton that his email on August 27, 2009, was not to be misconstrued as a denial of any kind, regarding Oltmanns’ accident.
17. In response to Shawn Stephens’ August 27, 2009 email, Mr. Dalton informed Fire Insurance that Oltmanns was making a claim on his homeowners insurance policy.
18. Starting the next day on August 28, 2009, Fire Insurance began a coverage investigation and evaluation regarding the accident in July of 2006 that involved Oltmanns. Shawn Stephens, in conducting the investigation and evaluation, requested and received the summons and complaint filed against Oltmanns (Case No. 070700309), the cross-claim against Oltmanns from the rental companies, a copy of the rental agreement for the personal watercraft, and the deposition transcript of Robert Oltmanns regarding the

accident in Case No. 070700309. Initially, Fire Insurance stated that it “began a *thorough* coverage investigation.” Oltmanns objected that the statement was nothing but a conclusion that was not supported by the facts. Oltmanns, also, referred to his Statement of Additional Fact No. 1 (below). In response, Fire Insurance withdrew the word “thorough.” Given the foregoing regarding the use of the word ‘thorough’ this Court concludes that Oltmanns’ denial creates no genuine issue of material fact which would preclude summary judgment. Therefore, this fact is undisputed.

19. It took several weeks for Fire Insurance to obtain the necessary documents needed to complete a coverage investigation and evaluation.
20. Fire Insurance held a meeting in the claims litigation department, which included supervisors, about Oltmanns’ claim and demand for coverage. As a result of the meeting, Fire Insurance decided to send the matter to outside counsel for a coverage opinion.
21. On November 20, 2009, Fire Insurance sent a copy of their file to attorney Alma Nelson for a coverage opinion as to whether the July 2006 accident was a covered occurrence under Robert Oltmanns’ policy. The documents Fire Insurance sent to Mr. Nelson for his coverage opinion included: the summons and complaint against Robert Oltmanns in case no. 070700309; the filed answers to the complaint for case no. 070700309; a copy of the rental agreement for the personal watercraft; Robert Oltmanns’ Deposition transcript in case no. 070700309; and correspondence with Mr. Dalton.
22. Also on November 20, 2009, Fire Insurance sent a letter to Don Dalton to inform him that

the matter was sent to outside counsel for a coverage opinion. Fire Insurance asked Mr. Dalton to continue defending Robert Oltmanns and told him that in the event coverage was extended for the July 2006 accident, Fire Insurance would reimburse him for the costs and fees incurred by Robert Oltmanns.

23. On December 11, 2009, Fire Insurance received the coverage opinion from attorney Alma Nelson. Based on Alma Nelson's research regarding the term "jet-ski," Mr. Nelson believed that Fire Insurance had a 75% chance in prevailing in a declaratory relief action. In his coverage opinion, Mr. Nelson sought authorization to file a declaratory relief action. Oltmanns objected that the statement, based on Mr. Nelson's letter, was inadmissible, conclusory, hearsay since there was no explanation for the "75%" coverage evaluation. See Statement of Additional Fact No. 2. Fire Insurance responded that the statement was not offered for "the truth of the matter asserted." Utah R. Evid. 801(c)(2). However, this Court finds that statement is based upon the understanding of Shawn Stephens for Fire Insurance, as set forth in his affidavit. The Court concludes that the statement of fact is not hearsay because receiving the coverage opinion from coverage counsel, Attorney Alma Nelson, was part of the process of investigating the facts of the accident and fairly evaluating the claim. Thus, Oltmanns' response creates no genuine issue of material fact. As a result, this Court concludes that this statement of fact is undisputed.

24. On December 14, 2009, Fire Insurance authorized attorney Alma Nelson to file the declaratory relief action.

25. The declaratory relief action was filed on December 18, 2009.
26. Robert Oltmanns' homeowners insurance policy which is at issue in this matter does not provide attorney's fees for Oltmanns for representation against Fire Insurance when Fire Insurance files a declaratory relief action.
27. Oltmanns seeks damages for alleged breach of contract and the alleged breach of the implied covenant of good faith and fair dealing. Specifically, Oltmanns alleges "Plaintiff did not fairly evaluate the claim, and unreasonably rejected it, in violation of Utah law, thus breaching the implied covenant of good faith and fair dealing." In addition, Oltmanns alleges he is entitled to attorney's fees and damages for "severe emotional distress caused by the coverage denial...."
28. Oltmanns never sought nor received any medical treatment for his alleged severe emotional distress. Oltmanns objected that the statement was irrelevant because Defendant OLTMANNS has made no claim (in tort) for 'emotional distress.' Rather, Defendant OLTMANNS' claim is for consequential damages, in this case, attorney's fees and 'mental anguish,' resulting from breach of the insurance contract and the implied covenant of good faith and fair dealing. This Court, however, concludes that Oltmanns' response to this statement of fact creates no genuine issue of material fact which would preclude the granting of summary judgment.
29. After the Court of Appeals remanded this case to the district court, Fire Insurance settled the underlying claims against Defendant Oltmanns. The *Blackner* lawsuit was dismissed.

(October 30, 2012). Oltmanns' objected that this statement of fact is immaterial. This Court, however, concludes that Oltmanns' response to this statement creates no genuine issue of material fact which would preclude the granting of summary judgment. In addition, this Court concludes that this statement of fact is material, in that it shows Fire Insurance continually acted in good faith throughout the legal process. It further shows that Fire Insurance acted promptly and reasonably in settling the claim against Oltmanns.

30. Fire Insurance paid Oltmanns for his costs and attorney's fees incurred in the defense of the *Blackner* case. Oltmanns' objected that this statement of fact is immaterial. This Court, however, concludes that Oltmanns' response to this statement creates no genuine issue of material fact which would preclude the granting of summary judgment. In addition, this Court concludes that this statement of fact is material, in that it shows Fire Insurance continually acted in good faith throughout the legal process and in showing that Fire Insurance acted promptly and reasonably in settling the claim against Oltmanns.

31. This Court is the trier of fact in this matter.

32. Oltmanns made the following statement of additional fact (No. 1), which was based on Fire Insurance's response to Oltmanns' interrogatories: "Before sending the claim for a coverage evaluation, Plaintiff determined that it needed a copy of the vehicle title and registration at the time of the accident to determine how the jetski [sic] is classified. Plaintiff wanted to know if the vehicle were classified as a 'watercraft.' Plaintiff thought this may affect coverage as per the terms of the insured's policy. Plaintiff conceded: This

information is needed before sending out for coverage opinion [sic]. However, the vehicle title and registration were not secured. It is clear that Utah titles and registers 'personal watercraft.' Utah Code Ann. § 73-18-2(16); Vessel Application for Utah Title (TC-656V)." (internal quotations omitted). Fire Insurance objected on the same basis that it objected to the interrogatories. At the same time, Fire Insurance repeated the complete answer it gave to the interrogatories: "Fire Insurance Exchange did not need said information prior to sending the matter out for a coverage opinion. However, said information may have assisted coverage counsel in understanding how the Honda F-12 personal watercraft was classified. In addition, the registration may have provided technical language, including to whom the watercraft was registered to. Fire Insurance Exchange sought to provide coverage counsel with as much information as possible within the time constraints. It was determined that the identified information would be helpful, but it was not felt to be critical. If coverage counsel felt the information was essential for a coverage opinion, additional efforts to obtain said information would have been made." The Court concludes that this additional fact, along with the response from Fire Insurance that if coverage counsel felt the information to be necessary for the coverage opinion that additional efforts to obtain the information would have been made, creates no genuine issue of material fact precluding summary judgment. As a result, this fact is undisputed in Fire Insurance's Motion for Summary Judgment.

Given the foregoing undisputed material facts, this Court concludes that Fire Insurance, in relation to the claim made by Brady Blackner against Robert Oltmanns, diligently investigated

the facts to determine if the claim was valid. Fire Insurance fairly evaluated the claim. Thereafter, Fire Insurance, acted promptly and reasonably by first filing a declaratory relief action and ultimately settling the claim against Robert Oltmanns on his behalf. This Court concludes that Fire Insurance was faced with a fairly debatable question surrounding the coverage of Brady Blackners' claims against Robert Oltmanns. Specifically, this Court concludes the definition of 'jet skis' as found in Oltmanns' homeowners insurance policy presented a fairly debatable claim. Thus, this Court concludes Fire Insurance was entitled to seek a declaratory judgment as to its obligations to Oltmanns and its duties under the insurance contract. Therefore, for the foregoing reasons this Court concludes that Fire Insurance did not breach the implied covenant of good faith and fair dealing owed to Oltmanns. Further, this Court concludes that Fire Insurance did not breach the insurance contract with Oltmanns. Just the opposite, this Court concludes that Fire Insurance continually acted in good faith and performed its duties under the homeowners insurance contract with Oltmanns. It is therefore,

ORDERED AND ADJUDGED that Fire Insurance's Motion for Summary Judgment on Oltmanns' claim of breach of the implied covenant of good faith and fair dealing and Oltmanns' claim of breach of contract is **GRANTED**. Accordingly, Oltmanns' causes of action for breach of the implied covenant of good faith and fair dealing and breach of contract as found in the Second Amended Counterclaim are **DISMISSED** with prejudice. Fire Insurance's motion to strike the declaration of Oltmanns' counsel is denied as moot. At the hearing, Fire Insurance withdrew its motion to dismiss based on the statute of limitations (Utah Code Ann. § 31A21-313). The Court allowed the motion to dismiss to be withdrawn without prejudice. This

ORDER granting summary judgment in favor of Fire Insurance disposes of all claims against Fire Insurance in this action and is the final order.

*****END OF ORDER*****

Signature of **COURT** at the top.

Approved as to Form:

DALTON & KELLEY, PLC

/s/ Donald L. Dalton _____/

Donald L. Dalton

Attorney for Robert Allen Oltmanns

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IN THE SECOND JUDICIAL DISTRICT COURT
DAVIS COUNTY, STATE OF UTAH

FIRE INSURANCE EXCHANGE,

Plaintiff,

Vs.

ROBERT ALLEN OLTMANNS, BRADY
BLACKNER,

Defendants.

**DECLARATION OF DONALD L.
DALTON (RULE 56(f))**

Case No. 090700825

Honorable Glen R. Dawson

DONALD L. DALTON, pursuant to Utah Code Ann. § 78B-5-705, declares as follows:

1. As appears from Fire Insurance Exchange's Motion for Summary Judgment, it relied on the advice of counsel in refusing the tender of defense of the claim against Defendant OLTMANNS.
2. The advice appears in a letter of counsel dated December 11, 2009 (Exhibit J). The letter is referenced in the Affidavit of Shawn L. Stephens (Exhibit D, ¶14). However, there is no affidavit of counsel, and he has not been deposed.

3. What appears to have been most significant to Plaintiff was counsel's statement of "a 75% chance of prevailing in a declaratory judgment action." (Exhibit J, pg. 8). However, there is no explanation how counsel came to this determination.
4. It appears to have been based on *State Farm Fire & Casualty Co. v. Johnson*, 596 So.2d 1162 (Fla. App. 1992). However, it appears to have been based on *dictum* from the case.
5. Specifically, it appears to have been based on the Florida court's observation that "[t]he term 'jet ski' is often used as a generic term for all personal watercraft despite the fact that it is a registered trademark of Kawasaki." 596 So.2d at 1163. However, this was not the basis for the court's ruling.
6. Rather, the ruling was based on the unambiguous policy exclusion ("jet ski or similar type of craft." 596 So.2d at 1164. The ruling was also based on the trial record that showed "the Yamaha Wave Runner [was], at the very least, similar to the Kawasaki Jet Ski." *Id.*
7. Given the circumstances of the case, it appears quite clear that the supposedly "generic" nature of *jet ski* was an inadequate basis for ruling in that case.
8. Based on this, I would ask counsel how he reconciled the Florida court ruling – rather than its *dictum* – with the coverage determination.
9. I would also ask whether, and if so, to what extent, he factored in the Utah rule of strict construction of insurance policy exclusions.
10. I would ask counsel if he considered whether his resort to extrinsic evidence (Wikipedia search) suggested that *jet skis* was susceptible to different interpretations.

11. I would also ask if he considered whether the “watercraft” exclusion in the policy suggested a narrower interpretation of *jet skis*.

12. It was not possible to depose counsel, in response to Plaintiff’s Motion for Summary Judgment because of the expiration of the discovery cut-off. See Amended Scheduling Order, ¶1 (March 5, 2014). See also Utah R. Civ. Proc. 56(f).

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

Executed on this 13th day of June, 2014.

/s/ Donald L. Dalton

DONALD L. DALTON

CERTIFICATE OF SERVICE

THIS WILL CERTIFY that I caused a true and correct copy of the within and foregoing, "Declaration of Donald L. Dalton (Rule 56(f))," to be e-filed this 13th day of June, 2014, with service to:

Scott W. Christensen
Joel D. Taylor
Plant, Christensen & Kanell, P.C.
136 East South Temple, Suite 1700
Salt Lake City UT 84111

/s/ Donald L. Dalton

AARON ALMA NELSON
BRUCE C. BURT*
MICHAEL D. LICHFIELD
LINDA L.W. ROTH

*ALSO ADMITTED
IN WYOMING

NELSON, CHIPMAN & BURT
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TELECOPIER (801) 364-3756

DON J. HANSON
(1918-2003)
JOHN M. CHIPMAN
(RETIRED)

December 11, 2009

Sent To Farmers Document Center and to Personal E-Mail

Mr. Shawn L. Stephens
Field Claims Representative
Fire Insurance Exchange
P.O. Box 268994
Oklahoma City, OK 73126
shawn.stephens@farmersinsurance.com

Re: Insured: R & E Oltmanns
Claim No.: 1014609377
Policy No.: 76 0919082163
Date of Loss: 07/11/2006
Claimant: Brady Blackner

Dear Mr. Stephens:

This letter is in response to your request for our opinion regarding coverage to your insured, Robert Oltmanns, for claims made against Mr. Oltmanns by Brady Blackner for injuries sustained by Mr. Blackner as a result of an accident involving a Honda F-12 personal watercraft.

SUMMARY OF FACTS

On July 11, 2006, your insured, Robert Oltmanns, was operating a Honda F-12 personal watercraft, from which he was towing Brady Blackner on a tube. The tube ran into a rock, causing injuries to Mr. Blackner's foot, thigh and ankle.

The Honda personal watercraft operated by Mr. Oltmanns at the time of the accident was owned by Triple R Rental, Inc., and had been rented to Keith Caserio before the accident. Mr. Caserio allowed Robert Oltmanns to operate the personal watercraft at the time of the accident.

Brady Blackner has brought suit against Keith Caserio, Robert Oltmanns and various rental companies to recover for his injuries. Mr. Blackner alleges that the accident was caused by negligence of Robert Oltmanns in the operation of the Honda personal watercraft and by negligence

of Mr Caserio and the rental companies in entrusting the watercraft to a person who was not trained or competent to drive the watercraft. He alleges general and special damages, and punitive damages, "if the evidences warrant such."

Both the Complaint and the Answer by Mr. Oltmanns' attorney refer to a date of the accident in July of 2003. This appears to be an error, as the rental agreement for the personal watercraft is dated July 6, 2006.

At the time of the accident, Robert Oltmanns was insured under a Protector Plus Homeowners package policy, Fourth Edition, with Fire Insurance Exchange, having liability limits of \$300,000. Mr. Oltmanns apparently advised his insurance agent, Sherrie Eichmeier, of claims made against him by Mr. Blackner in September of 2006, but the agent told him there was no coverage. Mr. Oltmanns' attorney, Donald L. Dalton, then appeared on behalf of Mr. Oltmanns in the lawsuit filed by Mr. Blackner and has been defending that lawsuit on behalf of Mr. Oltmanns since July of 2007.

On August 26, 2009, Mr. Dalton sent a letter to agent Sherrie Eichmeier, tendering the defense of Mr. Oltmann in the pending lawsuit to Fire Insurance Exchange, and arguing that coverage would apply under the homeowners policy. On September 30, 2009, Kraig Kimber of Fire Insurance Exchange sent a letter to Mr. Oltmann with a reservation of rights to deny coverage. On November 20, 2009, Shawn Stephens sent a letter to Mr. Oltmanns' attorneys, advising them that Fire Insurance Exchange was sending the matter to outside counsel for a coverage opinion and asking that Mr. Dalton continue to represent Mr. Oltmanns in the lawsuit. Mr. Stephens' letter stated that if coverage is extended, Fire Insurance Exchange will reimburse Mr. Dalton for reasonable costs and expenses for defense of the case from the date Fire Insurance Exchange received the Notice of Claim, August 26, 2009, until a coverage decision is made.

POLICY PROVISIONS

The Farmers Protector Plus homeowners package policy provides liability coverage as follows:

Coverage E - Personal Liability

We will pay those damages which an **insured** becomes legally obligated to pay because of **bodily injury . . .** resulting from an **occurrence** to which this coverage applies. . . .

At our expense and with attorneys of our choice we will defend an insured against any covered claim or suit. . . .

The policy contains the following exclusion:

Applying To Coverage E and F - Personal Liability and Medical Payments to Others

We do not cover bodily injury . . . which

. . .

7. Results from the ownership, maintenance, use, loading or unloading of:

- a. Aircraft
- b. Motor vehicles
- c. jet skis and jet sleds or
- d. Any other watercraft owned or rented to an insured and which:

(1) Has more than 50 horsepower inboard or outboard-outdrive motor power; or

(2) Is powered by one or more outboard motors with more than 25 total horsepower; or

(3) Is a sailing vessel 26 feet or more in length.

. . .

8. Results from the entrustment of any aircraft, motor vehicles, jet skis or jet sleds to any person. Entrustment means the permission you give to any person other than you to use any personal aircraft, motor vehicles, jet skis or jet sleds owned or controlled by you.

9. Results from the entrustment of watercraft described in 7d above.
- ...

Exclusion 7c, clearly excludes coverage for injuries resulting from "ownership, maintenance, use, loading or unloading" of "jet skis and jet sleds." The question is whether the Honda F-12 personal watercraft operated by Mr. Oltmanns at the time of the accident was a "jet ski" under the terms of the policy. We will discuss this issue hercafter.

Exclusion 7d, which excludes coverage for ownership, maintenance, use, loading or unloading of "any other watercraft owned or rented to an insured" would not apply, since the Honda personal watercraft which was operated by Mr. Oltmanns at the time of the accident was not "owned or rented to an insured" under the terms of the policy. It was rented to Keith Caserio, who was not an insured under the Fire Insurance Exchange homeowners policy issued to Mr. Oltmanns.

Exclusion 8, which excludes coverage for injury which "results from the entrustment of . . . jet skis . . . to any person" would not apply because this exclusion defines "entrustment" as "the permission you give to any person other than you to use any . . . jet skis . . . owned or controlled by you." The policy defines "you" as the named insured and spouse, if a resident of the same household. Since the Honda personal watercraft operated by Mr. Oltmanns at the time of the accident was not owned by Mr. Oltmanns, and Mr. Oltmanns did not give permission to anyone else to operate the Honda personal watercraft, the exclusion for entrustment would not apply.

Exclusion No. 9 also would not apply. Exclusion No. 9 excludes coverage for injury which "results from the entrustment of watercraft described in 7d above." The "watercraft" described in 7d is watercraft owned or rented to an insured. As discussed above, since the Honda personal watercraft was not owned or rented to Mr. Oltmanns, or any other insured under Mr. Oltmanns' policy, this exclusion would not apply.

Since none of the other exclusions apply, the coverage issue comes down to whether the Honda personal watercraft operated by Mr. Oltmanns at the time of the accident was a "jet ski" under the terms of the exclusion in the Fire Insurance Exchange policy.

BLACKNER AND OLTMANNS' CLAIMS OF COVERAGE

The attorneys for Brady Blackner and Robert Oltmanns obviously will be arguing that a "jet ski" is a particular brand and type of personal watercraft, and that the exclusion in the Fire Insurance Exchange policy should not apply to the Honda F-12 personal watercraft operated by Mr. Oltmanns at the time of the accident. In fact, the attorney for Mr. Blackner has tried to set this up through

questions asked of Mr. Oltmanns in Mr. Oltmanns' deposition. On page 31 of Mr. Oltmanns' deposition, the following testimony appears:

Q: Okay. let me ask you, at the time of the accident did you know what a Jet Ski was?

A: Yeah.

Q: Did you have an understanding of how a Jet Ski may differ from the term personal watercraft?

A: No, I did not know the difference.

Q: Do you know the difference now?

A: No.

Q: Do you have any memory of what type of personal watercraft you were driving?

A: From what I remember I think it was a Honda.

Q: Did it say Jet Ski anywhere on it?

A: I don't remember.

(Deposition of Robert Oltmanns, pp. 31-32.)

Later in the deposition, Mr. Blackner's attorney showed Mr. Oltmanns' pictures of what he called a "Jet Ski," and the following testimony was given:

Q: Let me represent to you that this is a Jet Ski. Have you ever seen this type of personal watercraft when you've been boating or out on the lake?

A: Is this the one where the handle sits up?

Q: Right.

A: Yeah I have.

Q: And have you seen how the riders can stand up on them and they operate it by moving the handle up and down?

A: Yeah.

Q: Is that different than the personal watercraft that you were driving when this accident happened?

A: Yes.

Q: And the mode of operation from what you've observed from a Jet Ski is very different than the personal watercraft that you were riding; is that correct?

A: Yeah, I would -- yeah.

Q: And you've never operated a Jet Ski; is that correct?

A: I have never.

(*Deposition of Robert Oltmanns*, pp. 37-38.)

ANALYSIS OF COVERAGE

The Fire Insurance Exchange homeowners policy excludes coverage for injuries which result from the "ownership, maintenance, use, loading or unloading" of "jet skis." The term "jet skis" in the policy is not capitalized. Nevertheless, Mr. Blackner and Mr. Oltmanns will argue that this is a brand name, or at least refers to a particular type of personal watercraft in which the handlebars raise up and the rider stands while operating the watercraft. I do not believe this claim is supported by either the evidence or the case law.

Under Utah law, a liability insurance carrier's duty to defend is broader than its duty to indemnify. *Deseret Federal Savings & Loan Association v. United States Fidelity & Guaranty Co.*, 714 P.2d 1143 (Utah 1986). In general, an insurer's duty to defend is determined by comparing the allegations of the complaint with the provisions of the insurance policy. *Fire Insurance Exchange v. Estate of Otto F. Therkelsen, Jr.*, 2001 UT 48; 27 P.3d 555. The Utah Supreme Court has held, however, that where the policy language is the same as the language of the Fire Insurance Exchange homeowners policy, the insurer may look beyond the allegations of the complaint to determine if coverage applied under the facts of the case. *Fire Insurance Exchange v. Therkelsen, supra*; *Fire Insurance Exchange v. Rosenberg*, 930 P.2d 1202 (Utah App. 1997).

Under Utah law, if an insurance policy provision is not ambiguous, it will be interpreted according to its terms. If the policy provision is ambiguous, it will be construed in favor of coverage. *Saleh v. Farmers Insurance Exchange*, 2006 UT 20, 133 P.3d 428. Unless the language of an insurance contract is ambiguous or unclear, the court must construe it according to its plain and ordinary meaning. *Miller v. USAA Casualty Insurance Co.*, 2002 UT 6, 44 P.3d 663.

The term "jet ski" is not defined in the Fire Insurance Exchange policy. Therefore, we must look to the plain and ordinary meaning of the term and decide if it is ambiguous.

"Jet Ski®" is a trade name for Kawasaki. The attorney for Mr. Blackner apparently claims that the Kawasaki "Jet Ski®" is a stand-up personal watercraft with handlebars that raise up to allow the operator to stand. In fact, Kawasaki "Jet Ski®" makes both a stand-up model and a sit-down model. The sit-down model is practically identical to the Honda AquaTrax® F-12 personal watercraft which Mr. Oltmanns was operating at the time of the accident. We are enclosing documents which we obtained from the internet showing both the stand-up model Kawasaki Jet Ski and the sit-down model Kawasaki Jet Ski, as well as the Honda AquaTrax® F-12 personal

watercraft. We Googled the term "jet ski," and the first name that came up was the Honda AquaTrax®. A copy of that web search is enclosed.

We also went to Wikipedia and looked at "jet ski." A copy of the article from Wikipedia is enclosed. The article states:

Jet Ski is the brand name of a personal watercraft (PWC) manufactured by Kawasaki Heavy Industries. The name, however, has become a genericized trademark for any type of personal watercraft. Jet Ski (or JetSki, often shortened to "Ski") can also refer to versions of PWCs with pivoting handlepoles known as "stand-ups." Sit-down PWCs are also called "Jet Skis."

A general search of court cases finds numerous cases in which the courts have referred to various brands of personal watercraft as "jet skis." For example, in *Ford v. Polaris Industries, Inc.*, 139 Cal. App. 4th 755, 43 Cal. Rptr. 3d 215 (2006), the court referred to a two-seater Polaris personal watercraft as a "jet ski," and to its operator as a "jet skier." In *Mission Bay Jet Sports, LLC, v. Colombo*, the United States Court of Appeals for the Ninth Circuit referred to a Sea-Doo personal watercraft as a "jet ski."

Because of the unique language of the Fire Insurance Exchange policy, we have not found the exact language of the Fire Insurance Exchange policy in any other cases which have addressed the question of what constitutes a "jet ski" for purposes of an exclusion under a homeowners policy. A case which is very close to the present case, however, is *State Farm Fire & Casualty Co. v. Johnson*, 596 So. 2d 1162 (Fla. App. 1992). In that case, Mr. Johnson was operating a Yamaha Wave Runner personal watercraft when he was involved in an accident causing personal injuries. Mr. Johnson sought liability coverage under his homeowners policy, but State Farm denied coverage based on an exclusion in the State Farm policy for bodily injury or property damage arising out of the ownership, maintenance, or use of a watercraft "designed as an air boat, air cushion, jet ski or similar type of craft." Mr. Johnson then filed a declaratory relief action, claiming that the Yamaha Wave Runner which he was operating at the time of the accident was not a "jet ski or similar type of craft." Mr. Johnson argued that the Yamaha Wave Runner, unlike the Kawasaki Jet Ski, could be operated from a sitting position and was not similar to a Jet Ski.

At the trial of the declaratory relief action, State Farm presented evidence that Kawasaki manufactured both a stand-up and a sit-down model Jet Ski, and that the Jet Ski was virtually identical to the Yamaha Wave Runner. Sales brochures for both the Kawasaki Jet Ski and the Yamaha Wave Runner were entered into evidence, demonstrating that the two personal watercraft were virtually identical. Nevertheless, the trial court held that the State Farm policy did not clearly exclude coverage for a Wave Runner, and held that coverage applied.

On appeal, the Florida Court of Appeals reversed the trial court, holding that the Yamaha Wave Runner was clearly a "jet ski or similar type of craft," and that coverage was clearly excluded under the State Farm policy. The court noted that the average person could not differentiate between the Kawasaki Jet Ski and the Yamaha Wave Runner. The court further noted that the term "jet ski" is often used as a generic term for all personal watercraft, despite the fact that it was a registered trademark of Kawasaki. The court held that the policy language was not ambiguous, and that the Yamaha Wave Runner was, at the very least, similar to the Kawasaki Jet Ski.

The *Johnson* case is slightly different from the present case in that the State Farm policy excluded coverage for a "jet ski or similar type of craft," while the Fire Insurance Exchange policy excludes coverage just for a "jet ski." Nevertheless, since "jet ski" is used generically for all watercraft, since the courts have regularly used the term "jet ski" to refer to various brands of watercraft, and since a reasonable policyholder would not see any difference between coverage for a Kawasaki jet ski or any other brand of personal watercraft, I believe we have a very strong argument that the Fire Insurance Exchange policy excludes coverage for the accident in question.

Based on the information we now have, I believe we have a 75% chance of prevailing in a declaratory relief action.

RECOMMENDATIONS

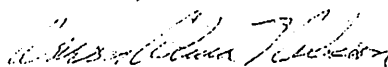
It is obvious from the deposition of Robert Oltmanns that Brady Blackner's attorney is attempting to set up Fire Insurance Exchange for liability on this claim. It would be dangerous to simply deny coverage because Mr. Blackner and Mr. Oltmanns may enter into an agreement to stipulate to a large judgment and Mr. Oltmanns could then assign his claims against Fire Insurance exchange to Mr. Blackner.

Since we are likely to become involved in litigation anyway, I recommend that you authorize me to file a declaratory relief action against Robert Oltmanns and Brady Blackner, seeking a declaration that Fire Insurance Exchange does not owe coverage for the claims made against Mr. Oltmanns.

If you have any questions, please call me.

Very truly yours,

NELSON, CHIPMAN & BURT



Aaron Alma Nelson

AAN/df
enclosures