

1968

Mabel A. Bench v. The Equitable Life Assurance Society of The United States : Appellant's Brief

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In The Supreme Court of the State of Utah

MABEL A. BENCH,

Plaintiff-Appellant,

-vs-

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
a corporation,

Defendant, Respondent.

Case No.

11105

APPELLANT'S BRIEF

Appeal from Order of Dismissal of the Third Judicial District
Court for Salt Lake County, Honorable Stewart M. Hansen
Judge.

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FILED

MAR 15 1968

Clerk, Supreme Court, Utah

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APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is an Appeal from an Order by the Honorable Stewart M. Hanson, Judge of the Third Judicial District Court dismissing Plaintiff's Amended Complaint for failure to state a cause of action. Plaintiff, as widow and beneficiary, sued Defendant insurance company under group insurance policies issued by Defendant to the deceased's employer, Ajax Press Company, with two death benefit certificates, a medical benefit certificate and a weekly indemnity certificate issued to deceased.

DISPOSITION IN LOWER COURT

The case being at issue, at pretrial the Court directed that certain issues as to one policy, the \$800.00 policy, be disposed of by Motion for Summary Judgment and continued the pretrial (Pretrial Order paragraph 7 R 42). Plaintiff, in accordance with leave of Court at pretrial, amended the Complaint asserting two other policies, the weekly indemnity policy and the medical benefits policy and submitted interrogatories which were never responded to. Defendant's Motion to Dismiss the amended Complaint was granted.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the Complaint reinstated for further proceedings in accordance with the pretrial order, including disposition of the legal question poised with reference to the \$800.00 policy (No. 5311848), further discovery regarding amounts provided under the \$1500.00 policy (No. 0486A), and details of benefits under the other two policies, and thereafter trial of the issues then remaining.

STATEMENT OF FACTS

Decedant, Leland E. Bench, died July 1, 1963 after being terminated of his employment April 26, 1963 by employer, Ajax Press Company. Plaintiff, the deceased's widow, claims benefits under certain life, weekly indemnity and medical benefit group insurance policies written by Defendant company.

Plaintiff claims that decedent was totally disabled from date of termination until date of death, a condition under one of the policies, and that Defendant denied liability and refused to disclose certain of the policies thereby waiving notice and proofs of loss.

Plaintiff's Complaint alleges generally the existence of insurance covering her husband's death and the refusal of the Defendant to pay thereunder; Defendant's Answer admitted two policies, an \$800.00 policy No. 5311848 and a \$1500.00 policy No. 0486A and omitted reference to a policy, Certificate No. 0486W referred to by pretrial order and Certificate No. 0846-H mentioned for the first time in the Amended Complaint.

As to the two policies admitted, Defendant's original Answer to the original Complaint admitted that Plaintiff was beneficiary, denied liability on the \$800.00 policy because of clause excluding payment where death occurred over thirty-one days from termination of employment and denied liability on the \$1500.00 policy because of alleged failure of Plaintiff to submit Proof of Death within a year and Proof of Disability from date of termination until date of death.

Interrogatories disclosed notice by Plaintiff to Defendant "within a week after the death of Mr. Bench." (R 28)

The record is silent as to details of Defendant's denial of liability, as to Plaintiff's fulfillment of conditions precedent, as to facts supporting the alleged

estopple, and the nature of benefits under policies No. 0486-W and No. 0846-H.

The case being at issue was pretried by Honorable Joseph G. Jeppson, the Pre-trial Order detailing that as to the \$800.00 policy, the effect of its provisions where death occurred more than thirty-days after termination of employment should be as a matter of law determined by Motion for Summary Judgment, and that as to the \$1500.00 policy, a provision for replacement brought to light at pretrial lent doubt as to the amount recoverable in the event of coverage and that the replaced policy should be furnished by Defendant.

As to the \$1500.00 policy, it was encumbent in the original Complaint, the Answer thereto, and the pretrial order that the only thing to be decided thereon was first, whether Proof of Death was submitted or necessity thereof waived by denial of liability and second, whether deceased was totally disabled from the date of termination until death.

Also at pretrial Plaintiff was given leave to amend to assert liability under certificate No. 0486-W a medical benefits policy not theretofore disclosed by the pleadings, and the pretrial was continued, the Court saying:

"The pertrial is continued without date, and may be renoticed without going to the foot of the pretrial back-log of cases." (R 42)

By Amended Complaint Plaintiff asserted the three referred to policies, First Cause of Action, the \$800.00 policy No. 5311848; Second Cause of Action,

the \$1500.00 policy No. 0486-A; Third Cause of Action, the weekly benefits policy No. 0486-W; Fourth Cause of Action, policy No. 0846-H, a medical benefits policy; and Fifth Cause of Action asserting any other policies.

The Amended Complaint also asserted deceased's total disability from termination of employment until death, a requisite under the \$1500.00 policy No. 0486-A, due and required notice under all of the policies, fulfillment of all conditions precedent, and estoppel of Defendant to claim time, notice, and other defenses.

The record does not, and should have been made to reveal details of Defendant's denial of payment; also of facts supporting Plaintiff's allegation of estoppel of Defendant to claim policy defenses and we may assume that Plaintiff's Interrogatories in the record (R 64), never answered, inquiring as to Ajax Press officials authorized to act for Defendant company, Interrogatory No. 3, 4, and 9 and with respect to visits by Plaintiff by Ajax Press personnel concerning insurance benefits, Interrogatory No. 11, had these interrogatories been answered, may have supplied particulars that adherence to the record precludes the writer from commenting upon.

Defendant moved (R 69) the Court to dismiss Plaintiff's Second Amended Complaint asserting failure of same to state a cause of action and citing Rule 12, the Answers to Interrogatories, the Deposition of Plaintiff and the Affidavit of Larry Blake.

The District Court granted the Motion to Dismiss without detailing why nor whether the legal issue on the \$800.00 policy, directed to be disposed of by the pretrial order, was specifically ruled on or only incidentally disposed of by the catch-all Dismissal Order. Neither does the Dismissal Order indicate how the case, as to the \$1500.00 policy, deemed at issue at pretrial, met with dismissal summarily.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN IGNORING PRE-TRIAL ORDER.

As to the \$800.00 policy No. 5311848, the same contains this clause (R 17):

"The insurance upon the life of any employee shall automatically cease upon the thirty-first day following the termination of his employment with the employer in the specified classes of employees; but in the case of the termination of the employment for any reason whatsoever while insured under said policy, the employee shall be entitled to have issued to him by the society, without further evidence of insurability, upon application made to the society within thirty-one days after such termination and upon the payment of the premium applicable to the class of risk to which he belongs and to the form and amount of the policy at his then attained age, an individual policy of life insurance in any one of the forms then customarily issued by the society, except term insurance, in an amount equal to, or at his option, less than the amount of his protection under the group insurance policy at the time of such termination. Such individual insurance policy shall

become effective at the end of thirty-one days after the termination of the employment provided the premium therefor is paid to the society not later than such effective date."

Noting the legal question thereby raised, the Pre-trial Judge (R 41) directed that same be disposed of by Motion for Summary Judgment. However, after Plaintiff amended the Complaint as allowed by the Pre-trial Order, Defendant moved to dismiss and the record does not reveal whether the question was specifically considered or only incidentally disposed of by the Court in granting the Motion to Dismiss.

In connection with this \$800.00 policy, numerous cases hold that one whose employment has terminated and who dies or becomes disabled within the grace period, is protected, although the policy provides that the insurance shall cease upon the termination of the employment.

In **Powell -vs- Equitable Life Assurance Society**, 173 S.C. 50, 174 S.E. 649, it was held where a deceased woman employee had been insured under a group insurance policy providing for termination of employment, except that the employer could elect to consider employees temporarily laid off or temporarily disabled as still employed during such a period, and granting a grace period of thirty-one days for the payment of the premiums, during which period the policy was to continue in force, and it appeared that although the employee was laid off because of her physical condition on December 10, 1931, the termination date of her insurance was

filled in on the employer's insurance register as of February 1, 1932 and that she died on February 27th the same year without having returned to work, that even though her insurance was terminated February 1st, she still had insurance protection under the grace provision of the policy and that the trial Court committed no error in leaving to the jury the question of employment and in refusing the insurer's motion for non-suit and direction of verdict.

In **Equitable Life Assurance Society vs. Hoover**, 187 Okla. 134, 101 Pac. 2nd 632, the Court held in such a policy that the term "grace period" apparently meant period of continuance under a conversion clause. There the policy provided for termination of insurance on termination of employment and thirty-one days to convert and the Court held that the insurance did not terminate until the end of the thirty-one day grace period although there was, in fact, in that case, no conversion.

In the instant case there is no thirty-one day grace period to convert; the actual policy is in force for thirty-one days; therefore a reasonable time should be allowed for conversion after the thirty-one day grace period. Decedant died thirty-five days after the end of the thirty-one day termination period.

In **Atlas vs. Miles**, 161 Pac 2nd 1022, it was held that a group policy terminable on termination of employment and thirty-one days conversion period did not terminate despite the fact of no conversion until after the thirty-one day grace period so that there

was coverage where the insured terminated November 10th and died December 6th.

In **Shanks vs. Travelers Insurance Company**, Okla. 25 F Supp. 740, a deceased employee was covered by a group policy and although he had not exercised his conversion privilege, good for thirty-one days, and died the day following termination, it was held the deceased was covered by insurance even though he had not exercised his conversion privilege.

In the instant case it can be inferred that decedent, had he not been disabled, would have exercised conversion privilege; also that he may have done so had he been notified or been made knowledgeable of the privilege and also that he had reasonable time after termination of the policy which, in turn, terminated thirty-one days following termination of employment.

In **Steiner vs. Travelers Insurance Company**, 279 Ill. App. 607, a group insurance policy provided that coverage thereunder terminated with termination of employment but that temporary layoff or leave of absence should not be considered as termination unless the employer should so elect; the employee died six weeks after he was laid off and while the contract with the employee was in full force and effect, it was held that the incontestible provision in the policy imposed on the insurer the burden of proving that the employment of the deceased had terminated within the provisions of the policy.

In the instant case, the Plaintiff came (R 66) paragraph 6, that decedant was terminated for the same disability which resulted in his death and from Defendant's Affidavit (R 57) we are led to believe that termination at best, if not according to Plaintiff's Complaint, was because decedent told Larry Blake "Go to hell."

Full discovery not having been completed, the facts may well disclose decedant was improperly terminated and that the burden that was as in the Illinois case on the Defendant to prove that the employment of the deceased employee had terminated within the provisions of the policy.

Travelers Insurance Company vs. Fox, 155 Md. 210, 141 Atl. 547 held that where liability under a group policy such as this was claimed because of termination, the burden of proving the discharge was on the insurance company.

Peters vs. Aetna Life Insurance Company, 279 Mich. 663, 273 N.W. 307 holds categorically that the burden of proof in a policy such as this, where the policy has lapsed by reason of termination of the employee's employment, is on the insurance company.

In the instant case the Plaintiff alleges that, and apparently feels that she can prove that insured was disabled during the period in which he was entitled to apply for a converted policy. If so, recovery in the instant case on the \$800.00 policy would undoubtedly be allowed in Oklahoma or Illinois and, in accordance with the pretrial order of the Court

here the Court should have specifically decided what the law is in Utah.

With respect to the \$1500.00 policy, No. 0486-A, the cause was, at pretrial, at issue with only two questions to be decided: the adequacy of proof to the company or waiver of necessity of same, and secondly, whether the deceased was disabled from date of termination until date of death, the policy providing (R-19) that is disability continues from date of termination until date of death "There shall be paid to such employee's beneficiary under said policy the amount of insurance in force thereunder on the life of such employee at said date . . ."

The fact that the Court at pretrial (R-41) allowed Plaintiff further discovery as to the amount recoverable under the \$1500.00 policy, No. 0486-A, did not change the fact that the case was already at issue with respect to said policy and the Court's dismissal of the case as to that policy, along with the \$800.00 policy on which there was difficult issues of law, came as a complete surprise to Plaintiff.

It is the usual ruling that denial of liability by an insurance company waives necessity of formal proofs of loss, 22 ALR, 407, **Wilkerson vs. Standard Accident Insurance Company**, 180 Calif. 252, 180 Pac. 607. Plaintiff was entitled to assume in view of the pretrial order that the cause of action as to the \$1500.00 policy was already at issue and that she need not spell out in detail the denial of liability, the party denying liability in behalf of the insurance company, the nature of notice given of death

as set forth in Response to Interrogatories, (R-28) or the detail as to performance of conditions precedent to Plaintiff's demands and to Defendant's liability as alleged in the Second Amended Complaint (R-66) or to support the estoppel alleged in paragraph 10, (R-67).

Regarding denial of liability as a waiver of proofs, 29 A Am. Jur. reads as follows:

Article 1431. Denial of Liability—A denial of liability of an insurer, made during the period prescribed by the policy for the presentation of proofs, and on grounds not relating to the proofs, will ordinarily be considered a waiver of the provision of the policy requiring the proofs to be presented, or a waiver of the insufficiency of the proofs or of defects therein. The denial of liability is equivalent to declaration that the insurer will not pay although proofs are furnished in accordance with the policy, and the law will not require the doing of a vain or useless thing.

The Am. Jur. text cites **Stewart vs. Commercial Insurance Company**, 114 Utah 278, 198 Pac. 2nd 467, a casualty loss case where the foregoing principles are recited, the head note reading:

“Denial of liability by insurance carrier made, during period prescribed by policy for presentation of proof or loss, on grounds not relating to proofs will ordinarily be considered waiver of provisions of policy requiring proofs to be presented.”

The foregoing Utah Casualty loss case in turn cites **Miller vs. New York Life Insurance Company**, 84 Utah 533, 37 Pac. 2nd 547, a life insurance case, where the Utah Supreme Court, page 549 said:

“ . . . on the facts found by the jury's verdict, the company waived further information and formal proof by reason of its denial of liability and failure to furnish blank forms.” **Federal Life Insurance Company vs. Lewis**, 76 Olka. 142, 183 Pac. 975, 5 ALR 1637. The rule supported by the weight of authority is thus stated in 14 RCL 1349: “ ‘If the insurer refuses to furnish blanks on the grounds that no liability exists, it waives proofs of loss. Where it is customary for the insurer to furnish blanks for proof of loss, its refusal to do so upon request is a waiver of proof.’ ”

Had the Interrogatories (R-64) been answered, the record may well have been made to reveal the details of notice and denial of liability and the identity and authority of persons receiving such notice and their authority in acting for the company in denying liability.

POINT II

THE COMPLAINT, CONTRARY TO THE TRIAL COURT'S ORDER, STATES A CAUSE OF ACTION.

As to the medical and weekly benefit policies, Nos. 0486-W and 0846-H, set forth in the third and fourth causes of action, the general allegations in the Amended Complaint apply, i.e., coverage, notice, rights as beneficiary, compliance by Plaintiff with conditions precedent and estoppel to claim lack of notice etc.

There being no requirement, as for instance with fraud, for Plaintiff to particularize in pleading, a cause of action is stated and in the absence of a demand, or a requirement by the Court, that Plaintiff

iff particularize on those elements, it is difficult to see why the Complaint was dismissed.

We are brought to the third point and an inquiry as to whether evidentiary matters disclosed in the record warrant dismissal in the nature of a Summary Judgment.

POINT III

EVIDENTIARY MATTERS IN THE RECORD DO NOT SUSTAIN DISMISSAL.

Evidentiary matters in the record consist of the following: Insurance policies produced (R-12, 13, 43, 44), Affidavit of Larry Blake (R-56), Answering Affidavit of Plaintiff (R-58), Response to Interrogatories (R-27 and 28) and the Deposition of Plaintiff.

No aid, of course, is given on the \$800.00 policy question, that being a matter of law.

As to the \$1500.00 policy, No. 0486-A remembering there are two questions, submission of Proof of Death within a year and the matter of total disability from termination of employment until death, let us examine the evidence for aid. The Interrogatories (R-28) give no aid except the answer that notification of claim was within one week after the death of Mr. Bench and this aids Plaintiff—not defendant.

The \$1500.00 policy on exhibit of course spells out the requirement of disability from termination until death. The deposition makes amply clear that deceased was totally disabled from termination until

death. A few quotations indicate how positive the testimony is on this:

(Deposition of Plaintiff, page 8, L 24.)

Q. So he stayed right in bed from the date he was terminated until he went out to the County hospital?

A. Except when he went for a treatment.

(Deposition page 8, L 19.)

Q. And between April 26th and the date he went to the County Hospital was he confined to bed or was he up and around?

A. He had to go to bed and have his feet elevated, his leg.

Q. Both legs or only one?

A. Just the one.

(Deposition page 8, L 25.)

Q. During this period of time, what did your husband do while he was at home? Was he in bed all of the time?

A. He would lie around in bed or on the couch. The doctor told him to stay off it.

(Deposition p. 11, L 30.)

Q. What was the appearance of it? Was it an open wound?

A. It was kind of open wound with stuff all around it with red streaks up his leg and down.

Q. Didn't it appear to improve any with these treatments?

- A. It didn't seem like it was improving as good as it should.
- Q. You mentioned that he went in the hospital on the Thursday before July 1st.
- A. Yes.
- Q. He was admitted at that time as a bed patient? Was he in the hospital?
- A. That is right.
- Q. And didn't ever leave the hospital?
- A. No, not until after death.

(Deposition p. 17, L 9.)

- Q. During the period between April 26 and the Thursday before July 1st did your husband leave the house at all except to go to the hospital for treatment?
- A. Not unless the children came up to see him and then they would take him to their house for a little bit, you know. Then he would lay down on the couch and put his leg up.
- Q. Other than those very short social visits, he didn't leave the house at all?
- A. No.
- Q. Was he able to walk on that leg?
- A. Limp. It hurt.

(Deposition p. 17, L 25.)

- Q. The morning of the accident do you know whether there was anything wrong with his leg when he left for work that day?
- A. There wasn't anything wrong with it.

Q. What time did he come home that day?

A. He came home 2:30 A.M.

Q. Did he show you the leg?

A. Yes.

Q. Did he tell you about the accident?

A. Yes.

Q. Describe it.

A. It is about 2½ inches long. It looks it would be about between a half inch or three-quarters of an inch deep. Something like that. It was cut quite deep.

Q. Through the skin?

A. Yes.

(P. 20, L 27.)

Q. About how long after the accident did he first go to the hospital?

A. We couldn't get in until the welfare gave him permission and . . .

(P. 20, L 27.)

Q. And the progress of the leg between those times was what? Did he get better or worse or what?

A. He kept getting worse.

Supplementing the deposition is the Plaintiff's Affidavit (R-38) that deceased was unable to work, confined to the house, directed by the doctor to stay off his feet; that he was continually disabled and ill from termination of work until death and that the same condition which disabled him during that pe-

riod was that which precluded him from continuing work and was the same that led to his death July 1st.

As against that, we have the Affidavit of Larry Blake (R-57) where deceased told Larry Blake "Go to hell," indicating that affiant called the doctor's office—obviously before deceased had seen the doctor—

(Deposition p. 18, L 27)

A. He didn't see Dr. Burnham.

Q. Did your husband try to contact him?

A. I tried to call Dr. Burnham's office but couldn't get an appointment.

Q. Couldn't get an appointment until when?

A. She didn't say when.

Q. Was this on what day? What day of the week?

A. Monday morning.

Q. Did he go to work the following day?

A. No, Sir.

Q. When did he next go to the plant?

A. The following Friday . . .

(Deposition p. 19, L 20)

Q. Is that when he got the blue slip?

A. Yes.,

learned that decedant had not seen the doctor and concluded he was well. The Affidavit goes on

"Upon return to Ajax Press Company this Affiant prepared formal termination notice and to this Affiant's knowledge, Leland Bench did not return to work after Affiant talked with Bench at his home."

On the issue of total disability from termination until death, said Affidavit (R-57) is quite insignificant against the overwhelming impact of the wife's delinquency by Affidavit and deposition of deceased's complete incapacity from termination until death.

Regarding policy No. 0486-W, alleged in Plaintiff's Complaint, (R-67) and in the previous Complaint (R-47) no answer has been made and we are at a loss to know the precise reason for dismissal as it relates to that certificate.

Regarding certificate No. 0846-H, medical benefits clause, the applicable responsive material in the answer (R-53) reads,

8. "That group policy No. 0486-H provides certain hospital and surgical benefits as scheduled therein, being limited however to not more than the actual cost incurred by the employee, and further provides that notice of claim shall be given to the Defendant within twenty days after the commencement of hospital confinement or operation and that written proof of confinement and charges incurred shall be furnished within ninety days after the expiration of the period of hospital confinement or operation.
9. That no claim has ever been made under the hospital and surgical benefit provisions of policy No. 0486-A and the Defendant is informed and upon such information and belief, alleges that the Plaintiff did not incur any hospital or surgical

expense but that in truth and in fact, the deceased was admitted to and treated as a charity patient at the Salt Lake County Hospital and therefore the Defendant has no liability to the Plaintiff under hospital and surgical provisions of policy No. 0486-A."

We then only have the legal question presented whether the insurance company can take advantage of the deceased's entitlement to, and enjoyment of, treatment at the expense of the county.

(In addition, of course, is the question of notice, proof and waiver of proof and estoppel.)

It is conceded, of course, that medical benefits recovered would be for the benefit of the county.

CONCLUSION

In conclusion it would be appropriate for this Court to make the following Order:

1. Regarding the \$800.00 policy No. 5311848, to squarely decide the legal question referred to in the pretrial order and in the Illinois and Oklahoma cases decided in the insured's favor.

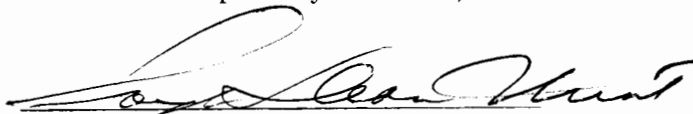
2. Regarding the \$1500.00 policy No. 0486-A setting the case for trial on the issues already joined at date of pretrial.

3. On the weekly benefits certificate, setting the case for trial on the issues of notice, Proof of Claim, waiver of necessity of Proof of Loss and estoppel.

4. On the medical payments policy, squarely deciding the issue of whether Plaintiff is precluded from recovery by reason of the hospitalization having been paid by the County and reserving for trial the other issues as with the weekly indemnity certificate.

5. On all factors, allowing further discovery, including response to the Interrogatories (R-64); that Plaintiff may show the details of her allegation of notice, waiver of Proof of Loss and estoppel.

Respectfully submitted,



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Mailed a copy of the foregoing Brief of Appellant to
Wallace D. Hurd, Attorney for Defendant-Respondent, this
15th day of March, 1968.



GAYLE DEAN HUNT