1991

Stuart Inc. v. John Deere Insurance Co. : Brief in Opposition to Certiorari

Utah Supreme Court

Mark O. Morris; Ray, Quinney & Nebeker; Attorney for Respondent.
Douglas M. Durbano, Paul H. Johnson; David L. Miller; Attorney for Appellant.

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT

OF THE STATE OF UTAH

STUART, INC., a Utah corporation,	:	
Plaintiff/Appellant/ Petitioner	:	Petition No. 910016
v.	:	Priority No. 16
JOHN DEERE INSURANCE CO.,	:	
Defendant/Appellee/ Respondent	:	

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETITION FOR REVIEW OF UTAH COURT OF APPEALS DECISION AFFIRMING SUMMARY JUDGMENT OF SECOND DISTRICT COURT OF DAVIS COUNTY, HONORABLE DOUGLAS CORNABY

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QUESTIONS PRESENTED FOR REVIEW

1. In determining that an insurer has no statutory or common law requirement to give notice of an insurance policy's expiring by its own terms, did the panel of the Court of Appeals which affirmed the trial court's grant of summary judgment decide an important question of law which has not been, but should be, settled by the Utah Supreme Court?

2. Did the panel of the Court of Appeals, which affirmed the trial court's grant of summary judgment, render a decision in conflict with another panel of the Court of Appeals on the same issue of law?

3. Did the panel of the Court of Appeals, which affirmed the trial court's grant of summary judgment, render a decision in conflict with a decision of the Utah Supreme Court?

4. Did the panel of the Court of Appeals, which affirmed the trial court's grant of summary judgment, so far depart from the accepted and usual course of judicial proceedings or so far sanction such a departure by the trial court as to call for the Supreme Court's exercise of its powers of supervision?

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Sections 78-2-2(3)(a) and (5) UTAH CODE ANNOT. This is a petition

for certiorari filed by Petitioner pursuant to Rules 45 to 51 of the Utah Rules of Appellate Procedure.

CONTROLLING PROVISIONS OR STATUTES, ETC.

Respondent submits the only controlling statutory provisions important to the consideration of the Petition are the rules of appellate procedure for petitions for writs of certiorari, Rules 45-51 of the Utah Rules of Appellate Procedure. The statutes and the case law set forth and described in the Petition for Writ of Certiorari merely mimic and reiterate those set forth and fully briefed to the Court of Appeals by both parties. The Court of Appeals determined that the interpretation of those statutes and other legal issues were not necessary in rendering its opinion herein. To the extent this Court reviews the merits herein, the following constitutional and statutory provisions were cited by Petitioner to the Court of Appeals, but were deemed to be irrelevant and inapplicable:

§ 31A-21-303 UTAH CODE ANNOT. (1953 as amended)

§ 70C-6-304 UTAH CODE ANNOT. (1953 as amended)

STATEMENT OF THE CASE

Nature of the Proceedings Below

Plaintiff/Appellant STUART, INC. ("STUART"), a Utah corporation which was involuntarily dissolved by the Utah State Department of Business Regulation on March 1, 1987 (R. 138)

commenced this action by filing a complaint against Defendant/Respondent JOHN DEERE INSURANCE CO. ("JOHN DEERE") on August 1, 1988 (R. 1-13).

The Complaint contained one cause of action. STUART complained of JOHN DEERE's alleged failure to abide by the terms of an insurance policy which STUART alleged was contained within a Retail installment Contract ("Contract") (R. 2). The Retail installment Contract covered STUART's purchase of a John Deere backhoe from Scott Machinery Company in Salt Lake City, Utah (R.7).

JOHN DEERE filed a motion for summary judgment on March 3, 1989 (R. 24-25). JOHN DEERE also filed a memorandum of points and authorities (R. 26-33) and, initially, two affidavits in support of its motion, those of Terry Digman (R. 34-44) and Howard Payne (R. 45-56). On or about March 14, 1989, and at the request of STUART, JOHN DEERE consented to extend the time within which STUART could respond to JOHN DEERE's motion (R. 57). On April 17, 1989 JOHN DEERE filed the Amended Affidavit of Howard Payne, which certified that the insurance policy attached to it was the policy in effect at the time STUART alleges it suffered its loss (R. 63-92).

On May 16, 1989 (over 10 weeks after JOHN DEERE filed its motion), STUART filed its Statement of Points in Opposition to Defendant's Motion for Summary Judgment and in Support of

Plaintiff's Cross-Motion for Summary Judgment (R. 93-109). On June 15, 1989, JOHN DEERE filed its Reply Brief in Support of its motion for summary judgment and in opposition to STUART's cross motion for summary judgment (R. 117-127). Attached to this Reply Brief were the Affidavit of Deborah M. Kamenetzky (R. 128-137) and a certified copy of the March 1, 1987 Certificate of Dissolution by which STUART was no longer recognized as a legal entity in Utah (R. 138). STUART's Reply Memorandum in support of its Cross Motion was filed on June 22, 1989 (R. 143-149).

On August 10, 1989 JOHN DEERE filed a Supplemental Memorandum of Points and Authorities in Support of its motion for Summary Judgment (R. 165-175). That memorandum included a copy of a very recent memorandum opinion made, after trial to a jury, by the U.S. District Court for the Western District of Arkansas on June 19, 1989 ("Arkansas Decision"). STUART replied to the Arkansas Decision on August 17, 1989 (R. 176-180). Finally, on August 22, 1989 JOHN DEERE filed a motion for leave to set up counterclaim in the event its motion for summary judgment was denied (R. 181-183).

After all supporting and opposing memoranda had been filed, the Second District Court heard oral argument on September 5, 1989. At the hearing on September 5, 1989, the lower court took the motions under advisement (R. 184).

On September 18, 1989, the lower court ruled on the pending motions for summary judgment. The lower court granted JOHN DEERE's motion for summary judgment and denied STUART's cross motion for summary judgment (R. 195-197). The lower court later ruled that JOHN DEERE's motion for leave to set up counterclaim was moot (R. 202).

At the lower court's direction, and pursuant to Rule 4-504 UCJA, JOHN DEERE prepared and served its proposed Order of Summary Judgment and Dismissal of Complaint with Prejudice ("Order") to counsel for STUART on September 21, 1989 (R. 207). STUART made no objections to the form of the proposed order, and the lower court signed and entered the Order on October 4, 1989 (R. 206).

STUART filed its Notice of Appeal on October 27, 1989 (R. 208). On November 17, 1989 STUART moved this Court for summary disposition in its favor pursuant to Rule 10(A)(3) of the rules of this Court in effect at that time. After JOHN DEERE filed its Memorandum in Opposition to that motion, this Court denied STUART's motion on December 22, 1989, pouring this case over to the Utah Court of Appeals on January 23, 1990.

On December 19, 1990 the Utah Court of Appeals rendered its Decision affirming the trial court's grant of summary judgment. (Opinion attached hereto as Appendix A).

Statement of the Facts

JOHN DEERE is an insurance company which provides insurance for John Deere & Company ("Deere & Company"), the manufacturers of heavy equipment (R. 128). One of the policies by which JOHN DEERE insures Deere & Company is a Retail installment Sales Floater Policy No. IM-14319 (hereafter "Master Policy") (R. 128). The Master Policy insures property owned by Deere & Company, and property sold under contract wherever that property is located (R. 68, 77). The effective date of the Master Policy is January 1, 1982 (R. 128). The Master Policy originally included an "Attachment of Insurance" provision, which provided, in part, as follows,

> This insurance terminates when the actual maturity date of the note is reached or the date on which the security interest of John Deere in said equipment terminates, whichever first occurs.

(R. 128, 68). This shall hereafter be referred to as the "termination language."

In 1983, it was the agreement and intention of the parties to the Master Policy, JOHN DEERE and Deere & Company, that the Master Policy would be changed to cover not only the actual financed merchandise, but to cover any additional security in favor of Deere & Company (R. 128). This additional security insurance amendment to the Master Policy was the only change contemplated and agreed to by the parties (R. 129). Initially, it

was not put into writing. Between 1983 and 1989, JOHN DEERE honored all claims for loss of or damage to non-financed merchandise and equipment, notwithstanding the fact that no formal, written amendment was made to that portion of the Master Policy (R. 129).

In June, 1988, Deborah Kamenetzky, an in-house attorney for JOHN DEERE, undertook to revise the language in the Attachment of Insurance provision to reflect the intention of the parties regarding non-financial merchandise (R. 129). This change in the Master Policy was not formalized by writing until January, 1989 (10 months after STUART suffered its loss and 5 years after it purchased the insurance) (R. 2, 129). By a clerical error, the termination language was omitted from the amended Attachment of Insurance provision (R. 129, 131, 81).

Because John Deere's security interest in the various machinery and equipment it sells under contract will vary per the terms of each and every individual contract, the Master Policy is not sent to them. Rather, individual certificates of insurance are sent to each of the additional insureds, such as STUART (R. 9).

On December 20, 1983 STUART purchased a 1984 John Deere backhoe ("Backhoe") from Scott Machinery Company in Salt Lake City, Utah. This purchase was primarily on credit, since STUART paid $23,406.50 of the $82,266.50 sales price (R. 7). STUART

executed a Retail Purchase Installment Contract ("Contract") by which it applied for credit from the John Deere Industrial Equipment Company to finance the remaining $62,194.29 of the purchase price (R. 7). The Contract provided for monthly payments to be made to John Deere by STUART, beginning on April 1, 1984 and ending on April 1, 1988 (R. 7). John Deere Industrial accepted the Contract on March 7, 1984 (R. 7).

The Contract also required STUART to obtain physical damage insurance for the Backhoe (R. 8). The reason for this requirement was simple -- until John Deere Industrial was paid off, it wanted to make sure that there was adequate insurance on the Backhoe to protect its security interest. The Contract contained the following language:

> If physical damage insurance is purchased by holder, I (we) will be furnished a certificate which describes the insurance. Such insurance shall terminate if the indebtedness is discharged, or if the holder's security interest in the equipment terminates, . . . or at the end of the term of the contract. . . . Any refunds or return premiums shall be applied toward existing indebtedness hereunder with the excess, if any, returned to me (us).

(R. 8).

STUART elected to purchase insurance from JOHN DEERE and paid a premium in the amount of $2,972.29 (R. 7). After John Deere Industrial accepted the Contract, it sent a Certificate of Physical Insurance ("Certificate of Insurance") to STUART. After STUART received the Certificate of Insurance, and presumably read

its terms and description of insurance, STUART did not cancel the insurance and purchase insurance with different terms. STUART elected to keep the Backhoe insured under the terms described in the Certificate of Insurance.

STUART's certificate of insurance set forth the relevant dates of the Master Policy as it applied to STUART. The effective date of the insurance as to STUART was December 20, 1983, the date of purchase (R. 9). In addition to this information, the Certificate of Insurance repeated to STUART what the Contract had stated:

> This certifies that the equipment . . . is insured . . . until the expiration date shown above unless the insurance is terminated sooner as provided in the next sentence. The insurance shall terminate immediately without notice if any one of the following events occurs: the indebtedness is discharged; John Deere's security interest in the property which is the subject of the contract terminates; . . . or the Retail installment Sales Floater Policy under which John Deere has purchased the insurance is terminated.

(R. 9).

STUART never relied upon the Master Policy, nor did STUART even see a copy of the Master Policy until after this litigation commenced (R. 196, 206) (See, also, STUART's Memorandum of Points and Authorities in Support of its Motion for Summary Disposition, p. 6). In its Complaint, STUART alleged that the Contract was the insurance policy. "Defendant issued to Plaintiff a Physical Damage Insurance Policy, No. 870276283AA. . . ." (R. 2). The Contract is not the insurance agreement.

On or about January 20, 1988, STUART contacted John Deere Credit Services and requested a payoff amount (R.34). STUART was advised that the Backhoe could be paid off in full by February 10, 1988 for the sum of $5,578.72 (R. 34). On February 5, 1988, STUART paid $5,578.72 to John Deere Credit, which included a credit for the unearned insurance premium (R. 35).

On March 9, 1988 the Backhoe was destroyed by fire of unknown origin (R. 2). STUART made a claim against what it thought was the insurance policy, which claim was denied by JOHN DEERE for the reason that upon STUART's early payoff, the indebtedness was discharged and Deere & Company no longer had a security interest in the Backhoe (R. 2). These events effected an expiration of the policy, and STUART brought its lawsuit.

SUMMARY OF ARGUMENT

This Court should deny the Petition for Writ of Certiorari because there is no reasonable legal or factual basis for the rule of law which was rejected by two courts below, and which Petitioner asks this Court to adopt. Petitioner's essential claim is that an insurer should be required to give an insured notice when a policy has expired by its terms. This is a position impliedly rejected by the Utah state legislature when it recently recodified its entire insurance code and failed to insert such a requirement. Also, this position was expressly rejected by the

Utah Court of Appeals in various published decisions, one of which is cited by Petitioner in its Petition.

The purposes behind the rules governing writs of certiorari from a decision of the Court of Appeals are to serve the interest in continuity and consistency of law, unless there is some suggestion that either the trial court or Court of Appeals has strayed from the usual course of judicial proceedings in such a way that this Court should review the matter. The Court of Appeals already determined, when it decided to issue its opinion without publication, that the factual and legal issues involved were uncomplicated and not particularly noteworthy. This Court impliedly did so as well, when it determined to pour this case over to the Court of Appeals. Therefore, this Court should deny the Petition.

As a separate matter, in light of the complete absence of a reasonable factual and legal basis for the Petition, and because the Court of Appeals was silent on the issue of costs to be awarded upon remittitur, Respondent respectfully asks this Court to award it its costs on appeal, its costs on the Petition, and a reasonable attorneys' fee in opposing the Petition as a sanction under Rules 33 and 34 of the Utah Rules of Appellate Procedure.

ARGUMENT

I. PETITIONER RAISED NO ISSUES IMPORTANT TO CERTIFICATION

Respondent recognizes that the four grounds for granting a writ of certiorari set forth in Rule 46 are not complete, in that they do not set forth all of the grounds or reasons upon which this Court may desire to review a decision of the Court of Appeals. However, Rule 46 does indicate that a petition for writ of certiorari should be granted only for reasons of a "character" similar to those expressly set forth in Rule 46. Respondent herein respectfully submits that the "character" of reasons for certiorari fall into two underlying policies.

The first and predominant policy underlying Rules 45-51 (embodied in subparts (a), (b), and (d) of Rule 46) is to make the law in Utah clear and unambiguous. This policy suggests that this Court should address any inconsistencies between any respective decisions within separate panels of the Court of Appeals, or between the Court of Appeals and this Court. Further, if the Court of Appeals has addressed an important issue of law, this Court may want to settle the matter. The second policy (embodied in subpart (c) of Rule 46) is to ensure that neither the trial court nor the Court of Appeals has departed from procedure such that a party's rights have been materially prejudiced.

A reading of the Petition reveals that Petitioner is essentially making the same arguments it has made to both the

trial court and to the Court of Appeals, which arguments amount to a disagreement over the interpretation of an insurance contract. Two courts, one trial court and one appellate court, have already heard Petitioner's claims and rejected them. In the case of the Court of Appeals, the factual and legal issues were deemed to be of so uncomplicated and unimportant a nature that it elected not to publish a written opinion. Presumably, this Court similarly determined that the issues presented were not novel, unique or sufficiently important when it poured the case over to the Court of Appeals in January, 1990. Because Petitioner has made no showing of a reason to review the Court of Appeals' decision, this Court should deny the Petition for Writ of Certiorari.

A. Three Of The Four Grounds For Granting Certiorari Are Not Even Pled by Petitioner.

Petitioner made no showing, and did not even contend that the Court of Appeals' affirmation of the trial court's grant of summary judgment conflicted with any other decisions of another panel of the Court of Appeals, or of this Court. Further, Petitioner did not and can not claim that the trial court or Court of Appeals so far departed from any procedures that a review by this Court is merited. Therefore, the only grounds upon which Petitioner does claim entitlement to a review by this Court is a so called "important social polic[y]" (Petition For Writ Of Certiorari at p. 18) supposedly safeguarded by the Utah state

legislature. Respondent submits that the clear and unambiguous language of both the insurance contract at issue, as well as the statutes cited by Petitioner, do not require an insurance company to notify an insured when an insurance policy expires of its own terms, which is precisely what happened in this case.

B. The Court Of Appeals' Ruling Was Consistent With Clear And Unambiguous Law, And Review By This Court Is Unnecessary.

Petitioner misunderstands the purpose of its Petition for Certiorari, and the requirements of Rules 45-51 of the Rules of Appellate Procedure. In its Petition, Petitioner has mimicked the same arguments it made to the trial court and to the Court of Appeals. In its Conclusion, Petitioner asks this Court to reverse the decision of the Court of Appeals and to grant its motion for cross summary judgment. Seeking affirmative relief is not the purpose of a petition. The purpose of the Petition is to try to demonstrate to this Court important reasons for review, and not to reargue the case. Should this Court determine that sufficient reasons for review exist, then, pursuant to Rule 51(b) of the Rules of Appellate Procedure, briefing and oral argument on the merits would be appropriate. As impliedly conceded by Petitioner, no justification for review by this Court exists outside of the same legal arguments made to two courts below.

In considering the Petition, this Court should note first that there was no factual dispute below. Petitioner conceded this

when it made its cross motion for summary judgment. (R. 93-109). Therefore, there are only legal issues involved.

The second point which this Court should consider, or rather reject, is that there was some kind of "secret" or "silent" termination of the insurance policy herein by John Deere. Neither the trial court, nor the Court of Appeals found that the insurance policy was terminated. Rather, each found that the insurance contract expired by its own terms. When every document in the hands of the Petitioner unambiguously informed it that paying off the backhoe would end the insurance contract, Petitioner's claims of not knowing about the insurance's expiring are unfounded.

Lastly, Petitioner asks this Court to find an obligation to insure when no premium for the time period during which the loss occurred was paid. Petitioner claims on page 11 of its Petition that "Plaintiff did not receive a full refund of insurance premiums until after the date of loss." This is false, and there is no factual dispute on the matter. The record is clear that on February 5, 1988, Petitioner paid off its backhoe, which payment included an offsetting credit for unearned premium. (R. at 35). This occurred 5 weeks before the backhoe was destroyed by fire on March 9, 1988 (R. at 2), during which time Petitioner could have obtained insurance from another source. Therefore, Petitioner's claims of having been dealt with unfairly, secretly, or silently are unsupported and insupportable.

1. Utah Case Law Supports the Court of Appeals' Decision.

Petitioner impliedly concedes the legal and statutory propriety of an insurance policy's expiring by its own terms, without the legal necessity of notice by the insured. Petitioner concedes the exception to notice requirements where "the termination is for nonpayment of premiums at the normally scheduled expiration date occurring at the "end of the one-year policy term." Petition at pp. 10-11. Petitioner also stated that the policy reason for allowing the policy to expire without further notice is because "the insured obviously knows of his own present delinquency in making premium payments." Id. at 11. This same policy, applied to John Deere's contract, compels the same conclusion reached by the trial court and by the Court of Appeals.

Petitioner certainly knew that it had paid off the back-hoe, and certainly knew that John Deere's security interest in the backhoe dissolved upon final payment. Those two conditions to policy expiration were made known to Petitioner from the beginning of the contract, and it cannot now claim ignorance. It would be equally unavailing to the Petitioner to say he was unaware of the requirement to pay a policy premium, and therefore failure to pay it should not work an expiration of the policy until he was formally notified. Such a legal position was acknowledged by Petitioner to be meritless, yet it is no different from the

position it asserts now. The Court of Appeals has made this clear in at least two rulings, Godoy v. Farmers Ins. Group, 759 P.2d 1173, 1175-76 (Utah Ct. App. 1988) and Clarke v. American Concept Ins. Co., 758 P.2d 470, 473 (Utah Ct. App. 1988). For these reasons, a writ of certiorari is unwarranted in this case.

C. The Statutes Cited By Petitioner Do Not Require Notice When An Insurance Policy Expires By Its Own Terms.

Petitioner cites to Sections 31A-21-201, 31A-21-303(1)(c), 31A-21-303(2)(a)(iv), 31A-21-303(3), 31A-21-304 and 70C-6-304 UTAH CODE ANNOT. as controlling statutes to be considered by this Court. Petition at ii-iii. Of these, Petitioner only referenced sections 31A-21-303(1)(c), 31A-21-303(3) and 70C-6-304 as controlling in the appeal below, which it did pursuant to Rule 24(a)(3) of the Utah Rules of Appellate Procedure. Brief of Appellant at iv; Reply Brief of Appellant at iv. Any issues and/or arguments raising statutes not considered by the Court of Appeals below are contrary to the policy of this Court, expressed numerous times, that failure to raise an issue with a lower court precludes a later review. See, e.g. Berger v. Minnesota Mutual Life Ins. Co. of St. Paul, 723 P.2d 388, 392 (Utah 1986). Therefore, this Court may disregard the applicability, or not, of Sections 31A-21-201, 31A-21-303(2)(a)(iv) and 31A-21-304 UTAH CODE ANNOT. to the issues raised herein.

Even if this Court considers all of the statutes cited by Petitioner, one thing is clear. Each of the statutes contemplate situations in which the insurer, either on its own or at the request of a third party such as a creditor, affirmatively terminates the insurance policy in question. These statutes contemplate some kind of unilateral act of the insurer, in which case notice of that act of cancellation or termination is required. This Court should disregard those statutes for the same reason that the Court of Appeals found them irrelevant and unavailing.

> The facts of this case do not lead us to the conclusion that John Deere cancelled the policy. "Cancellation" in the insurance context is the right to rescind, abandon, or cancel a contract of insurance. [Citation omitted]. John Deere took no action to cancel the policy. Such action was not necessary. The policy expired based upon its own terms.

December 19, 1990 Opinion at p. 3.

Because none of the statutes or policies raised by Petitioner are applicable to an insurance contract which expired of its own clear and unambiguous terms, this Court should deny the Petition for Writ of Certiorari.

II. THIS COURT SHOULD AWARD ATTORNEYS' FEES AND COSTS TO RESPONDENT.

Rule 34(a) of the Utah Rules of Appellate Procedure requires costs to be awarded to the appellee in cases where an appeal is dismissed and the parties have not otherwise agreed, or

the court has not otherwise ordered that costs would not be awarded. The Opinion of the Court of Appeals is silent on the issue of costs. Under Rule 34(d), and since the case was remitted back to the district court on January 9, 1991, Respondent had until January 24, 1991 to file its verified bill of costs with the district court. However, Petitioner filed its Petition on or about January 17, 1991, thereby removing jurisdiction from the district court, and tolling the time period for a billing of costs to be filed. If this Court determines to deny the Petition for Writ of Certiorari, Respondents respectfully request that this Court order the taxing of costs on appeal against Petitioner, including costs incurred in connection with the Petition for Writ of Certiorari.

Further, pursuant to Rule 33 of the Utah Rules of Appellate Procedure, Respondent respectfully submits that Petitioner's Petition was frivolous, and requests an award of its attorneys' fees incurred in connection herewith. Petitioner's arguments to impose a common law duty upon insurers requiring notification of an insurance policy's expiration on its own terms are not good faith arguments to extend, modify, or reverse existing law. Petitioner's arguments lack any <u>reasonable</u> basis in fact or law, and are therefore frivolous.

> Egregious cases may include those obviously without merit, with no reasonable likelihood of success, and which result in the delay of a proper judgment.

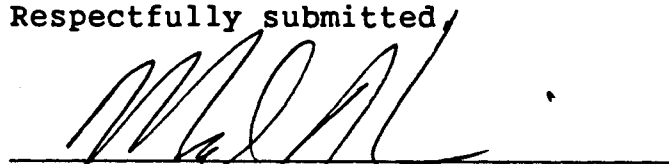
Maughan v. Maughan, 770 P.2d 156, 161 (Utah Ct. App. 1989). See also Erickson v. Wasatch Manor, 149 Utah Adv. Rep. 71, 73 (Utah Ct. Ap. 1990); O'Brien v. Rush 744 P.2d 306, 309 (Utah Ct. App. 1987).

Petitioner has essentially asked this Court to legislate by requiring notice of insurance expiration when the legislature and the Court of Appeals have impliedly and expressly rejected such a burden. See, Clarke, supra, 758 P.2d at 473. Seeking judicial legislation is not a good faith attempt to modify or extend existing law. For these reasons, and because Respondent has had to incur the attorneys fees and costs associated with responding to all of Petitioner's meritless claims throughout this litigation, Respondent respectfully asks this Court to award it its attorneys' fees incurred in connection with the Petition.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari, to grant it all of its costs on appeal, and to award attorneys' fees incurred in connection with the Petition.

Respectfully submitted,



Mark O. Morris
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 1991, four (4) copies of the foregoing BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI were mailed, postage prepaid, to the following:

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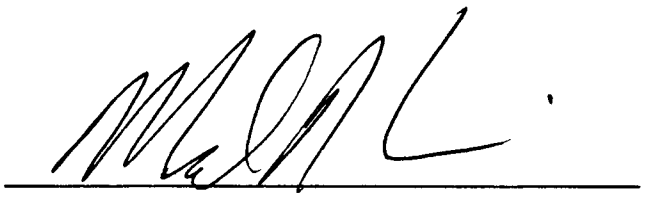

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APPENDIX

December 19, 1990 Opinion of the Court of Appeals

APPENDIX A

IN THE UTAH COURT OF APPEALS

DEC 19 1990

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

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Stuart, Inc., a Utah corporation,	)	
Plaintiff and Appellant,	)	OPINION
	)	(Not For Publication)
v.	)	
	)	Case No. 900052-CA
John Deere Insurance Company,	)	F I L E D
	)	(December 19, 1990)
Defendant and Appellee.	)	

Second District, Davis County
The Honorable Douglas L. Cornaby

Attorneys: Douglas M. Durbano, Paul H. Johnson and David Miller, Ogden, for Appellant
Mark O. Morris, Salt Lake City, for Appellee

Before Judges Billings, Jackson, and Orme.

JACKSON, Judge:

Stuart, Inc. (Stuart) appeals from a summary judgment dismissing its claim of breach of contract. Stuart asserts three claims of error: (1) there was a genuine issue of material fact concerning whether the insurance contract was an integrated document; (2) the trial court improperly derived the intent of the parties from extrinsic and parol evidence; and (3) the trial court erred in finding that the insurance contract terminated prior to April 1, 1988, without notice of cancellation. Stuart claims that any one of the above errors would preclude the trial court from granting summary judgment to John Deere Insurance Company (John Deere). Thus, Stuart asserts that we should reverse the trial court's grant of summary judgment on John Deere's motion and grant the plaintiff's cross-motion for summary judgment. We affirm.

FACTS

On December 20, 1983, Stuart purchased a backhoe from John Deere Industrial Equipment Company on a retail installment

contract. John Deere issued an insurance policy covering the backhoe. On February 5, 1988, Stuart made the final payment on the installment contract. On March 9, 1988, the backhoe was destroyed by fire. Stuart made a claim under the insurance contract, which was denied by John Deere.[1]

On August 1, 1988, Stuart filed a complaint alleging breach of contract by John Deere. After oral arguments, based on the stipulated material facts, the trial court granted summary judgment in favor of John Deere. Stuart appealed.

ISSUE OF FACT OR LAW

Stuart first argues that there was an issue of material fact pending before the trial court. Stuart asserts that whether the contract was ambiguous or integrated concerning the parties' intent is a factual question. Here, Stuart is confusing two separate doctrines of contract law. These doctrines concern (1) whether a written contract is fully integrated so as to trigger the parol evidence rule; and (2) whether a provision of a written contract is ambiguous so that extrinsic evidence must be considered to construe it.

First, whether a contract is an integration is a question of fact. Ringwood v. Foreign Auto Works, Inc., 671 P.2d 182, 183 (Utah 1983). If the contract is not integrated, parol evidence is admissible to determine the parties' intent even if it means varying a term of the written part of the parties' overall agreement. Here, Stuart did not raise any facts suggesting the parties had any agreement or understandings other than as set out in the written contract documents.

The second legal doctrine concerns whether any material term of the contract is ambiguous. "Interpretation of a written contract is ordinarily a question of law, and this court need not defer to the trial court's construction." Jones v. Hinkle, 611 P.2d 733, 735 (Utah 1980); Provo City Corp. v. Neilson Scott Co., 603 P.2d 803 (Utah 1979). "Contract provisions are not rendered ambiguous merely by the fact that the parties urge diverse interpretations." Jones, 611 P.2d at 735. While extrinsic evidence is admissible to assist in the interpretation of ambiguous terms, the threshold question of whether a provision is ambiguous is a question of law. See, e.g., Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1983).

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1. Both of the parties stipulate that these are the undisputed material facts of the case.

We find the provisions of the basic policy and amendment to be entirely unambiguous, as did the trial court. Thus, we construe the critical contractual provisions as a matter of law.

The primary policy of the insured contained the following termination provision: "This insurance terminates when the actual maturity date of the note is reached or the date on which the security interest of John Deere in said equipment terminates, whichever first occurs." An amendment to the policy was made on September 1, 1983, without mention of the above termination provision. The amendment to the original policy contained the following saving language: "Nothing herein contained shall be held to vary, waive, alter, or extend any of the terms, conditions, agreements or declarations of the policy, other than as herein stated." The trial court concluded as a matter of law that, after the above amendment, "the basic policy . . . remained the same, including that aforementioned statement concerning termination of the policy when the security interest of John Deere was satisfied." We agree with the trial court's legal determination. When Stuart paid the debt, John Deere no longer had an insurable security interest in the backhoe. Thus, the insurance policy coverage ended when Stuart paid off the balance owing on the retail installment contract. We conclude as matter of law that the insurance contract was unambiguous and the insurance coverage terminated when Stuart paid the balance owing on the note.

Although the trial court had before it certain extrinsic evidence, it was not relevant to the ultimate legal conclusion because the contract was unambiguous. Thus, we need not consider Stuart's second issue further.

EXPIRATION OR CANCELLATION

Stuart also claims that John Deere cancelled the policy without prior notice to the insured as required by the policy. The facts of this case do not lead us to the conclusion that John Deere cancelled the policy. "Cancellation" in the insurance context is the right to rescind, abandon, or cancel a contract of insurance. 43 Am. Jur. 2d Insurance § 380 (1982). John Deere took no action to cancel the policy. Such action was not necessary. The policy expired based upon its own terms. "The usual effect of a termination of a policy is the termination of coverage thereunder, and where a policy expires by its own terms . . . at a specified time, generally no basis exists thereafter upon which to predicate a recovery." 43 Am. Jur. 2d Insurance § 237 (1982) (footnotes omitted). Here, the policy was not cancelled as Stuart claims, but instead expired

pursuant to the mutual agreement of the parties. The policy contained a provision that it would terminate when John Deere Industrial Equipment Company's security interest in the backhoe terminated. When Stuart paid off the backhoe, John Deere Industrial Equipment Company had no further insurable interest in the backhoe. Thus, the policy expired simultaneously with the expiration of John Deere Industrial Equipment Company's interest in the backhoe and notice was not required. We affirm.

Norman H. Jackson, Judge

WE CONCUR:

Judith M. Billings, Judge

Gregory K. Orme, Judge

COVER SHEET

CASE TITLE:

Stuart, Inc., a Utah corporation,
Plaintiff and Appellant,
v. Case No. 900052-CA
John Deere Insurance Company,
Defendant and Appellee.

PARTIES:

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TRIAL JUDGE:

Honorable Douglas L. Cornaby

December 19, 1990. OPINION (Not For Publication).

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the district court herein be, and the same is, affirmed.
Opinion of the Court by NORMAN H. JACKSON, Judge; JUDITH M. BILLINGS and GREGORY K. ORME, Judges, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of December, 1990, a true and correct copy of the foregoing OPINION was deposited in the United States mail or personally delivered to each of the above parties.

Cheri Knighton
Deputy Clerk

TRIAL COURT:

Davis County Second District Court #CV-43933.