

1959

Marilynn Manning v. Western Airlines and Connecticut General Life Insurance Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

MAR 2 1959

MARILYN K. MANNING,
Plaintiff and Appellant,

— vs. —

WESTERN AIRLINES, a corpora-
tion, and CONNECTICUT
GENERAL LIFE INSURANCE
COMPANY, a corporation,
Defendants and Respondents.

CASE NO. 9109

Case
No. 9109

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

PRELIMINARY STATEMENT

The Plaintiff and Appellant, widow of one Arthur M. Manning, brought an action in the District Court of Salt Lake County against the Respondents to recover as the beneficiary of a group insurance policy. The Trial Court summarily dismissed Appellant's Complaint. The parties hereinafter will be referred to as they appeared in the lower court — Appellant will be referred to as the Plaintiff and Respondents as the Defendants.

FACTS

This action arises out of the death of Arthur M. Manning, who was killed while working as an employee of the Defendant Western Airlines. The said Arthur M. Manning commenced his employment with the Defendant Western Airlines on May 21, 1957; and on May 25, 1957, he signed an application for group life insurance, group accident and sickness insurance, and group hospital and surgical benefits with the family to be included and authorized in writing deductions from his wages to pay the premiums thereafter. (Exhibit D1)

As a part of program of advising Mr. Manning of the group insurance plan, Defendant Western Airlines gave him a pamphlet which had been prepared and published as a joint effort on the part of the Defendants. (Exhibit P2) This booklet, entitled Group Insurance Plan, contains a schedule of the monthly benefits and costs to the employee. According to this schedule the total monthly cost of the insurance plan, including life insurance, was \$11.42. The monthly deductions by the employer as shown were \$11.70. (Exhibit D5) Apparently deductions were being taken on the basis of a new schedule which the evidence would show had never been given to decedent and of which he was not aware. (R 42)

The insurance that was issued was, under the Company's Group Insurance Plan, carried with the Defendant Connecticut General Life Insurance Company. (R. 3) The insured, Arthur M. Manning, was killed while working near an airplane of the Defendant Western Airlines

on August 6, 1957, and while he was still employed with the said Defendant. (R. 2) At the time that Arthur M. Manning signed up for the acceptance of the insurance program he came under a Class "D" employee benefit authorizing the amount of \$3,600.00 life insurance. (R. 3)

In addition to the life insurance coverage of the policy, the employee could have accident, hospitalization, family benefits. (R. 54) At the time of his employment Mr. Manning took out the group life insurance, the group accident and sickness insurance, the group hospital and surgical benefits for both himself and his family. (Exhibit D1)

Thereafter, the said Arthur M. Manning received notification of his insurance coverage, under certificate No. 8818, with the Plaintiff Marily Manning, his wife, being named as the beneficiary thereunder. (R. 2 and R. 4) Subsequently, in the early part of June, 1959, Mr. Manning inquired, in writing, about the possibility of dropping the group life insurance part of the program and yet retain the other portions of the insurance. (Exhibit D7) Before doing so he discussed the matter with his wife; and they decided that because of the fact that she was expecting a child the accident, sickness and hospital provisions should be maintained. (R 68) From the early part of June, 1957, until his death on August 6, 1957, Mr. Manning never received any reply from either the Defendant Connecticut General Life Insurance Company or the Defendant Western Airlines. On the 2nd day of August, 1957, when Mr. Manning brought home his check covering

the pay period from July 15th to July 31st, he had still not heard from the Company regarding his inquiry about the life insurance part of the insurance and discussed the matter with his wife, the Plaintiff herein, and decided to make further inquiry of the Company. (R. 68) Following Mr. Manning's death the Defendants refused to pay Plaintiff under the life insurance provision, claiming Mr. Manning had cancelled his policy for life insurance by reason of Exhibit D7.

The group policy provides for the termination of the insurance as follows:

“F. Insurance Data

(a) . . .

(b) Termination of Insurance. If any employee cancels his payroll deduction order, his insurance shall cease at the end of the period for which the last deduction was made.”
(Exhibit D9)

Considerable discovery work was carried on between the parties in the form of Requests for Admissions and Interrogatories. A pre-trial was held before Judge Faux on June 5, 1959; and in its pre-trial order the Court eliminated any claim for accidental death benefit which would automatically give an additional \$3,600.00. The issue resolved for trial was whether or not the insurance policy remained in effect (1) because of failure to pay as required by the terms of the plan, and (2) because of failure to complete necessary arrangements which would entitle Plaintiff to recover under said plan. Pursuant to Plain-

tiff's demand, the matter was set down for a jury trial. (R. 38)

On June 22, 1959, the date set for the trial of this case, the parties appeared before Judge Ellett, who inquired whether or not there was any issue of fact to be submitted to the jury. At that time, as well as originally at pre-trial, Plaintiff took the position that there was no issue of fact to be tried because Exhibit D7, as a matter of law, did not constitute a cancellation of the life insurance portion of the group insurance, and further because Defendant Western Airlines had deducted from decedent's salary more than enough to pay the insurance premiums, including life, as set forth in the bulletin (Exhibit P2) furnished to decedent by Western at the time of his being employed.

In the event the Court did not sustain Plaintiff's position in this respect, Plaintiff insisted on having the issue as to whether there had or had not been a cancellation of the insurance submitted to the jury. (R. 36)

Judge Ellett, during the inquiry, stated that he would like to find out what issues were to be submitted to the jury and a discussion took place between the Court and counsel about the exhibits to be submitted. Exhibits were then submitted to the Court and received by the Court as Exhibit 1 through 11. (R. 77) After further discussion between Court and counsel regarding these exhibits the Court held that Exhibit D-7 showed as a matter of law that Arthur M. Manning had cancelled his insurance. An order was made to that effect in the absence of any motion by the Defendants.

STATEMENT OF POINTS

I. The Court erred in holding as a matter of law that the life insurance policy had been cancelled:

- (a) As a matter of law the policy had not been cancelled.
- (b) In any event whether or not there had been a cancellation was an issue to be submitted to the jury.

ARGUMENT

I. THE COURT ERRED IN HOLDING AS A MATTER OF LAW THAT THE LIFE INSURANCE POLICY HAD BEEN CANCELLED:

- (a) AS A MATTER OF LAW THE POLICY HAD NOT BEEN CANCELLED.

Appellant submits that there is one basic issue to be decided by this appeal. This issue resolves itself around the construction of Exhibit D-7. It is admitted by Appellant and all parties hereto that Exhibit D-9 constitutes the master insurance policy between the Defendant Western Airlines and the Connecticut General Life Insurance Company. It is also admitted that Mr. Arthur M. Manning on May 5, 1957, took out insurance which was covered by this master insurance policy by means of his application, Exhibit D-1. The Respondent further recognizes that in Exhibit D-9 (the master insurance policy) there is a specific provision for the termination of the insurance coverage of an individual employee. Paragraph F (6) (On the inside of the first cover sheet) provides:

“If any employee cancels his payroll deduction order, his insurance shall cease at the end of the period for which the last deduction was made.”

There is no argument in this matter but that Arthur M. Manning continued his employment with the Defendant Western Airlines from the date of May 22, 1957, to the date of his death on August 6, 1957, and that he made no specific request to have his payroll deduction order cancelled. In fact, it is apparent he did not intend to do so until he was assured by the Airline Company that it could be done without cancelling his other insurance. The narrow issue which the trial court apparently decided in this matter is whether or not Exhibit D-7 constitutes a cancellation of his life insurance with the Western Airlines under the group policy.

Since the Court did not receive any testimony and since there was no motion made by the Defendants herein, Appellant is in doubt as to whether or not the dismissal was taken pursuant to Rule 41 (b), U. R. C. P. (relating to an involuntary dismissal) or under Rule 56 (Summary Judgment). In the event a dismissal is taken under Rule 41 (b) findings of fact and conclusions of law should have been submitted. Admittedly no findings are necessary under Rule 56. For the purpose of this argument Appellant will assume that the court's action was a summary judgment, but whether taken as a summary judgment or involuntary dismissal the rules regarding the sufficiency of the grounds therefor are the same.

In Exhibit D-9, which is the master group insurance policy with Western Airlines and Connecticut General

Life Insurance Company, the provision relating to the termination of the insurance under Paragraph F (b) is as follows:

“Termination of Insurance.

“If any employee *cancels his employee deduction order*, his insurance shall cease at the end of the period for which the last deduction was made.” (Emphasis added)

The deceased Arthur M. Manning never at any time cancelled his payroll deduction order (Exhibit D-1). The law is well settled that the cancellation must be made strictly in accordance with the terms of the policy and notice of cancellation must be unconditional and absolute in form.

Appleman, Insurance Law and Practice, Vol. 6, Sec. 4193, provides in part:

“*The right to cancel a policy can be exercised only in the manner provided in the policy, and the burden of proving a valid cancellation is on the party asserting it.*” (Emphasis added)

In the case of *Dyche v. Bostian, et al.*, (Mo.) 233 S.W. 2nd 721, it was claimed that the insured attempted to cancel a policy with the following provision:

“This policy may be cancelled at any time by either of the parties upon written notice to the other party *stating when not less than ten days thereafter*, cancellation shall be effective. The effective date of such cancellation shall then be the end of the policy period.” (Emphasis added)

The insured wrote a letter on October 24 requesting cancellation of the policy. The letter was received by the agent for the company on October 25, 1946, and he said that they shouldn't cancel the policy until they had talked it over. The agency again phoned the insured concerning the cancellation of the policy. The agent then sent the policies to the company for cancellation on November 7. An injury occurred on November 7, 1946, and the insured then raised the question of whether or not the insurance was in effect. The Court held that the policies were in force on November 7, 1946, stating:

“The law is firmly settled that, where a policy contains a specific provision for cancellation by either party, it is binding upon the parties and must be strictly complied with in order to terminate the policy. In Home Insurance Co. v. Hamilton, 143 Mo. App. 237, 128 S.W. 273, 274, this court said: ‘A contract covering a certain period of time, but containing a conditional provision that it might be terminated before that time, will remain effective the full term, unless the condition of termination is fully complied with. And this is especially applicable to an insurance policy containing a provision allowing a cancellation prior to the end of the term of insurance . . .’

“It is clear that the above provision of the policy for cancellation was not followed by the insured. It required that the insured give written notice to the company and state in the notice the date on which cancellation was to be effective, and the date so specified must not be less than ten days from the date of the notice. All that the record shows is that a letter, *accompanied by the policies*, was written by Mrs. Kelly, probably on October 24, 1946, to Mr. Altman . . . the most that

can be said from the testimony concerning it is that it requested that Mr. Altman have the policies cancelled. There is absolutely no showing that it specified any date of cancellation.” (Emphasis added)

The headnote in the case of *Saskatchewan Government Insurance Office v. Padget* (1957, (CCA 5) 245 F. 2d 48, clearly states the rule of law as follows :

“Generally, an insurance policy is not subject to cancellation at the option of the insured or insurer except upon happening of events as specified in the policy.”

As noted, the cancellation must be strictly in accordance with the terms of the policy and the terms of the policy require that he “cancels his payroll deduction order.” The decedent Arthur M. Manning never cancelled his payroll deduction order, Exhibit “D-1.”

The law is equally clear and well settled that the notice of request for cancellation be clear and unequivocal:

“The notice or request must be unconditional and absolute, and *a conditional request for cancellation is not sufficient if it is not accepted by the company. The question whether a communication should or should not be construed as a notice of or request for cancellation will depend on the intent of the writer or speaker as ascertained from the whole instrument or all of the circumstances and doubts will be construed against cancellation.*” 45 C. J. S., “Insurance,” Sec. 458, p. 116-117. (Emphasis added)

The case most nearly analogous to the case at hand is *Magruder v. United States*, (1929) 32 F. 2d 807. In this case the Court had two issues presented to it: (1) Whether or not the insured had "cancelled" her life insurance while still in the service and (2) whether or not the premiums had been paid or waived. While in the service the insured had authorized deductions from her pay to cover her War Risk Insurance. Treasury Regulations provided that the insurance would lapse and terminate upon a written request duly witnessed for cancellation of the insurance and a corresponding cessation of the deductions of premiums from the pay of the individual. Here the Court refused to find that a war risk insurance policy had been cancelled when the facts indicated that the insured had lined out the authorization for deduction of premiums from disability compensation and had signed a statement to the effect that she had been explained her rights to continue her war risk insurance after she was separated from the service, "but I do not desire to apply for a Government insurance at this time." In analyzing the effect of this instrument the court had this to say: (P. 810)

"When we came to consider whether or not the statement in question contains language sufficient to convey the desire of the insured to cancel her policy, we are confronted with the well-known principle that request for cancellation of an insurance policy must be *unequivocal and absolute* . . . If the parties intended that the statement should be a cancellation of the policy, they certainly made a failure in attempting to express that fact, when using the form of an 'Application for Insurance,' and stating that the insured did not desire to apply for a government insurance at this time. . . . The

authority expressed in the policy to deduct from her pay the monthly premiums was not revoked, *and to now hold, after the insured has passed on and not here to speak, that the statement was a cancellation of the policy, would be violative of the rule recognized by the courts that the cancellation of an insurance contract must be absolute and in clear language.*" (Emphasis added)

In the case of *Van Scoy v. National Fire Insurance Company of Hartford, Connecticut*, (1921) 191 Iowa 1318, 184 N.W. 306, a letter was sent by the insured to the company as follows:

"Blencoe, Iowa, June 1, 1919.

"Dear Sirs: I want to get my policy No. 467741 cancelled that has just recently been taken out for three years. There has been some misunderstanding between your local agent and myself. Kindly inform me what is the best you can do. Yours truly (Signed), W. H. Van Scoy."

The Court stated (at page 307 of 184 N.W.):

"But plaintiff's letter addressed to the company on June 1, 1919, is obviously neither a request or demand for a cancellation. *It does no more than express a wish to have the policy cancelled* and asks to be informed of the terms on which it could be accomplished. This was a natural and proper inquiry as preliminary or preparatory to a cancellation in fact, for the statute provides that it shall be done upon 'equitable terms' and gives to the company the right to exact from plaintiff the customary short rates of premium from the date of the policy to the date of cancellation." (Emphasis added)

In the case of *Adler v. Burnes*, (1934) 288 Mass. 309, 192 N.E. 922, the plaintiff owned some property upon which she had insurance. She was about to sell the property and desired to cancel the insurance. Her father who had been handling her insurance matters went to the agent for the company, a Mr. Burnes. “. . . He next talked with Burnes in the early part of July in consequence of a letter; that at that time he told Burnes not to bother him for the balance of the money as he intended to sell the property and cancel the policy because the other party didn't want to take them. . . .” Burnes told the father to try to sell the policies to the new buyers. The trial court held there had been no cancellation.

“There is no evidence which would warrant a finding that there was any definite, unequivocal demand or request by the plaintiff or by anyone representing her to cancel the policies. All that appears is that, before the sale of the property to Mrs. Olson, Bennett was endeavoring to persuade her to take over the policies, but without success. Bennett did not make any definite request or demand for an immediate or future cancellation of the policies. It is said to be a ‘well-known principle that request for cancellation of an insurance policy must be unequivocal and absolute.’ *Magruder v. United States* (D. C.), 32 F. (2d) 807, 810; *Lyman v. State Mutual Fire Ins. Co.*, 14 Allen, 329, 333; *Clark v. Insurance Co. of North America*, 89 Me. 26, 32, 35 A. 1008, 35 L.R.A. 276; *Davidson v. German Ins. Co.*, 74 N. J. Law, 487, 65 A. 996, 13 L.R.A. (N.S.) 884, 12 Ann. Cas. 1065. See also cases in notes 32 C.J. pp. 1259, 1260. The conversations between Bennett and Burnes amounted at most to an expression of intention to cancel the policies at some time in the future.”

In a similar case, the case of *Phillips v. Hirschi* (1940), 292 Mich. 693, 201 N.W. 196. Mrs. Hirschi and the insurance company had an exchange of correspondence regarding her automobile insurance. On December 2, 1937, she wrote to the company and said: "In reply to yours of the 1st — will say, kindly return the money and keep your policy." She then went on in her letter to explain some differences that had arisen. The trial court held that the policy had been cancelled. Upon appeal the trial court was reversed. The Court said:

"Whether the communication of Mrs. Hirschi voided the agreement of protection of the insurance company, depends upon the intent of the insured; and such intent must be gleaned from the whole instrument. The words of the letter: 'Kindly return the money and keep your policy, I have waited long enough for the same,' taken alone, would indicate that Mrs. Hirschi intended the insurance to end. But in our opinion the letter, taken as a whole, is susceptible to a different interpretation."

Applying the principles of the foregoing cases to the facts in the instant matter, it seems clear that there was, as a matter of law, no cancellation of the insurance policy. Particularly is this true in the light of the rule of law that the provisions of an insurance policy, in the case of any doubt, will be resolved in favor of the assured or the beneficiary thereof. See *Richards v. Standard Accident Insurance Co.*, 58 Utah 622, 200 Pac. 1017; *Gibson v. Equitable Life Assurance Society of the United States*, 84 Utah 452, 36 P. 2d 105. The fact that this was a group

policy does not change the rule since this Court has heretofore held that a group policy will be construed most strictly against the insurer. See *Bucher v. Equitable Life Assurance Society of the United States*, 91 Utah 179, 63 P. 2d 604.

(b) IN ANY EVENT WHETHER OR NOT
THERE HAD BEEN A CANCELLATION
WAS AN ISSUE TO BE SUBMITTED TO
THE JURY.

At the time of pre-trial no claim was made by Defendants that as a matter of law they were entitled to judgment. The Court framed an issue of fact over the objection of Plaintiff who claimed that as a matter of law she was entitled to judgment. The issue of fact for trial was as to the effect of the inquiry made by decedent in the follow-up slip. (Exhibit D-7) This exhibit contains the only statement made by the decedent to either of the Defendants concerning cancellation of insurance, as follows: "I *wish* to drop the 'life insurance' part of my policy *if possible*." (Emphasis added)

This language in the document caused Judge Ellett to dismiss the Plaintiff's Complaint. The word "wish" as shown hereon must be construed in the context of the remaining portion of the writing and can be construed as being precatory, that is something that he desires, not as a mandatory statement of something that must at all events be done. The usual meaning of the word is that it is precatory, something desired. (See *Words and Phrases*,

Vol. 45, pp. 359-360. See also 1959 Annual Accumulative Pocket Part, p. 113.)

Likewise, the words "if possible" have been construed by the court and particularly in the case of *Brown v. Bishop*, 105 Me. 272, 74 Atl. 724, 729 as follows:

"The lexical meaning of the word 'possible' is 'capable of being done; not contrary to the nature of things.' The condition of this contract, as expressed in the words 'if possible,' is to be interpreted with reference to the thing to be done, the cutting and removing of the trees as timber."

Courts should only grant Summary Judgment where the facts are clear and unequivocal. *U. R. C. P.* 56 (c) provides in part as follows:

"... The judgment sought shall be rendered forthwith if the pleadings, depositions, 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. ..."

Professor Moore in his treatise on the Federal Rules of Civil Procedure has this comment on this particular rule:

"The function of the summary judgment is to avoid a useless trial; and a trial is not only not useless (sic) but absolutely necessary where there is a genuine issue as to any material fact. *In ruling on a motion for summary judgment the court's function is to determine whether such a genuine issue exists, not to resolve any factual issues.*" (Moore's Federal Practice, Vol. 6, p. 2101) (Emphasis added)

“The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to judgment as a matter of law. *The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.* Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion for summary judgment, in ruling on the motion *all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion.* And the papers supporting movant’s position are closely scrutinized, while the opposing papers are indulgently treated, in determining whether the movant has satisfied his burden.

“To satisfy the moving party’s burden the evidentiary material before the court, if taken as true, must establish the absence of any genuine issue of material fact, and it must appear that there is no real question as to the credibility of the evidentiary material, so that it is to be taken as true. If the nonexistence of any genuine issue of material fact is established by such credible evidence that on the facts and the law the movant is entitled to judgment as a matter of law, the motion should be granted, unless the opposing party shows good reason why he is at the time of the hearing unable to present facts in opposition to the motion. If, however, the papers before the court disclose a real issue of credibility or, apart from credibility, fail to establish clearly that there is no genuine issue as to any material fact, the motion must be denied.” (Moore’s Federal Practice, Vol. 6, pp. 2133-2126) (Emphasis added)

The evidence must be clear and unequivocal in order to support a Summary Judgment, see *Young v. Felornia* (1952) 121 Utah 646, 244 P. 2d 862 (Cert. denied 344 U. S. 885); *Ulibarri v. Christenson*, 2 Utah 2d 367, 275 P. 2d 170; *Fountain v. Filson* (1949) 336 U. S. 681, 61 S. Ct. 754, 93 L. Ed. 971; *Holbrook et ux v. Webster's Inc. et al*, (1958) 7 Utah 2d 148, 320, P. 2d 661.

The rule of law as to review of a summary judgment is clearly stated in *Federal Practice and Procedure*, by Barren and Holtzoff, Vol. 3, p. 120, as follows:

“On appeal from a summary judgment, the Court appeals should view the facts from a standpoint most favorable to the appellant and accept his allegations of fact as true, and assume a state of facts most favorable to him. On appeal from a summary judgment, the only question is whether the allegations of the party against whom it was rendered were sufficient to raise a material or genuine issue of fact.”

In this case the only evidence then, upon which the Court relied in making its determination is Exhibit D-7 and in particular the part that states “I wish to drop the ‘life insurance’ part of my policy *if possible*. Thank you. /s/ Arthur M. Manning.” (Emphasis added)

The trial court then refused to permit any other evidence to be entered to show what the intent of the decedent may have been, concluding that this Exhibit D-7 was an unequivocal cancellation of the insurance policy R-75. In so deciding the Court stated:

“Maybe if I am in error the Supreme Court at your instance and request — I am sure you will

take this matter there — will tell me that this is a jury question and the jury must determine that, but I think that is an unequivocal document, that it cancelled his insurance, and when they ceased to deduct the thirteen fifty from him, he knew, had notice that they had accepted that, and therefore there would be no jury question. The complaint of the plaintiff will be dismissed.”

We respectfully submit that under the law as cited the court should hold as a matter of law that the life insurance had not been cancelled since there must be a strict compliance with the terms of the policy and Mr. Manning *never* gave any cancellation of his deduction order. In any event, the Exhibit D-7 is sufficiently ambiguous that it is a jury question and the issue should have been submitted to the jury.

CONCLUSION

The Plaintiff respectfully submits that the insurance policy has a strict provision by which the insurance could be cancelled and terminated. That this provision was not followed and all of the presumptions of law favor the position that the policy shall be construed most strictly against the insurer and that the issue of whether or not there was a cancellation must be one which is clear and unequivocal in its nature and we respectfully submit that such is not the case here and that the matter should have been submitted to the jury.

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