

2002

J & C Enterprises Inc., a Utah corporation v. Mid-Continent Casualty Company, an Oklahoma corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

J & C ENTERPRISES, INC., a)	
Utah corporation,)	
)	Appeal No. 20020421
Plaintiff / Appellant,)	
)	
v.)	
)	Priority 15
MID-CONTINENT CASUALTY COMPANY,)	
an Oklahoma corporation)	
)	
Defendant / Appellee.)	

BRIEF OF APPELLEE

**APPEAL FROM ORDER GRANTING SUMMARY JUDGMENT ENTERED BY
THE HONORABLE A. LYNN PAYNE, EIGHTH DISTRICT COURT**

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Defendant / Appellee requests oral argument and a published opinion.

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JURISDICTION

Appellee has no disagreement with appellant regarding the jurisdiction of this Court.

ISSUES PRESENTED

Appellant's statement regarding the standard of review applicable to the issues is correct but incomplete. The appropriate standard of review is also dictated by Rule 56(e), which states:

When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Id. This court stated in *Amica Mut, Ins Co. v. Schettler*, 768 P.2d 950 (Utah App. 1989), “. . . when the moving party has presented evidence sufficient to support a judgment in its favor, and the opposing party fails to submit contrary evidence, a trial court is justified in concluding that no genuine issue of fact is present or would be at trial. *Id.* at 957, citing *Dupler v. Yates*, 351 P.2d 624, 636-637 (1960).

STATEMENT OF THE CASE

This action arises out of an insurance claim. On August 27, 1997, a 1982 Ford LT9000 truck and crane owned by plaintiff was involved in an accident, which resulted in its total loss. The truck and crane were insured under policy Number SP 51940 with Mid-

Continent Casualty Company. The limit of coverage for the truck and crane was \$75,000, however, the policy provisions entitled J & C Enterprises to recover only the amount of the actual cash value of the truck and crane immediately before the accident. During a period of three months following the accident, Mid-Continent attempted to resolved the claim. Plaintiff's principal, Junior Lewis, raised disputes on several matters.

For over two months, from August 27, 1997, to November 8, 1997, Junior Lewis, CEO of J & C Enterprises, demanded that Mid-Continent pay \$75,000 for the truck and crane, based upon his mistaken and unfounded assumption that the policy provided coverage for a "stated amount" rather than the actual cash value of the truck and crane. Mid-Continent obtained appraisals, made an offer to resolve the claim for \$33,500 and advanced plaintiff a check in the amount of \$30,000. The parties resolved the valuation dispute and by January 19, 1998, arrived at an agreed upon valuation of \$55,000 for the truck and crane, leaving a total amount owing from Mid-Continent of \$54,500 (a \$500 deductible applied to the claim). Mid-Continent then sent plaintiff another check for \$14,500, bringing the total paid to \$44,500, and tendered the remaining \$10,000 to plaintiff upon release of the salvage of the truck and crane.

The second matter of dispute centered around Mr. Lewis' demand for storage expense at \$50 per day from August 28, 1997. Junior Lewis refused to accept payment of the final \$10,000 and refused to release to Mid-Continent the salvage of the truck and crane based

upon a claim that J & C Enterprises had incurred costs for storage of the wrecked crane on property at his own residence in Naples, Utah, which he owns as trustee for his mentally disabled daughter. In February of 2001, the trial court resolved the storage dispute, concluding, based upon the undisputed evidence submitted, that plaintiff did not incur any expense for storage and is therefore not entitled to recover therefor. The court further concluded that there is no factual basis to support plaintiff's claims against defendant for bad faith, punitive damages or for attorneys fees. Plaintiff's unreasonable demand for \$50 per day from the day after the loss to the present is the primary reason this matter has not been fully resolved, even after a trial. Junior Lewis seeks to have this court reinstate the claim for storage expense, which now exceeds \$100,000, exclusive of interest.

A third matter of dispute involved a claim for debris removal and cleanup expense. Mid-Continent did not deny the claim but questioned it and requested further information which was never provided. This dispute was a minor one which would not have prevented the claim from being resolved if J & C Enterprises had not persisted in its unreasonable demand for storage expense. The evidence on this issue is undisputed that on the day following the loss, Junior Lewis and Charles Lewis, the principals of J&C Enterprises, conducted a salvage operation "in house" using J&C Enterprises personnel and equipment. J & C Enterprises did not incur any outside expense. The trial court ultimately awarded plaintiff \$2,940 after considering fairly debatable facts at trial.

The fourth and final matter of dispute concerned plaintiff's claims for bad faith, punitive damages and attorney's fees. The trial court ruled on summary judgment that all matters were fairly debatable and that there is no factual basis to support plaintiff's claims for bad faith, punitive damages or for attorneys fees. J & C Enterprises seeks to have this Court reinstate these claims. The evidence conclusively shows that Mid-Continent has consistently dealt with J & C Enterprises in good faith by paying the claim promptly and tendering the balance of \$10,000 as soon as the agreed upon valuation was reached. The company's reasonable and good faith effort to resolve the claim precludes any award of attorneys fees or punitive damages.

All attempts to resolve plaintiff's claim failed because Junior Lewis insists on pursuing, ultimately by means of this appeal, a claim for fabricated and exaggerated storage expense. He has relentlessly refused to accept the remaining amount due, refused to release the salvage or accept any set off for its value (which the trial court determined to be \$4,000 based upon his own testimony). He even rejected offers which included amounts for debris removal and clean up.

The trial court ultimately resolved all of the issues at trial, awarding plaintiff the undisputed remaining amount of \$10,000, plus \$2,940.00 for debris removal and cleanup, less \$4,000 for the salvage. See Final Order and Judgment. Record at 574.

RELEVANT FACTS

1. On August 27, 1997, a 1982 Ford LT9000 truck and crane owned by plaintiff was involved in an accident, which resulted in its total loss. Complaint, paragraph 9. Record at 3.

2. The truck and crane were insured under policy Number SP 51940 with Mid-Continent Insurance Company. The limit of coverage for the truck and crane was \$75,000. Complaint paragraphs 6 and 7. Record at 3. A copy of the policy declarations and the provisions which are pertinent to this action are attached as "Exhibit A" to defendant's memorandum in support of motion for summary judgment. Record at 222.

3. The provisions of the insurance policy state as follows:

CONTRACTOR'S EQUIPMENT SCHEDULED COVERAGE FORM

A. COVERAGE

We will pay for "loss" to covered property from any of the Cover Causes of Loss..

1. Covered Property, as used in this Coverage Form means:

a. Your contractor's equipment and tools;

. . .

3. Covered Causes of Loss

Covered causes of loss means Risks of Direct Physical 'loss' to the Covered Property except those causes of 'loss' listed in the Exclusions.

4. Coverage Extension

a. Debris Removal

- (1) We will pay your expenses to remove debris of Covered Property caused by or resulting from an insured peril that occurs during the policy period.

. . .

B. EXCLUSIONS

2. We will not pay for a 'loss' caused by or resulting from any of the following:
 - a. Delay, loss of use, loss of market or any other consequential loss.

. . .

E. VALUATION

The value of the property will be the least of the following amounts:

1. The actual cash value of that property;
2. The cost of reasonably restoring that property to its condition immediately before "loss"; or
3. The cost of replacing that property with substantially identical property.

DEFINITIONS

"Loss" means accidental loss or damage.

LOSS CONDITIONS

B. APPRAISAL

If we and you disagree on the value of the property or the amount of "loss" either may make written demand for an appraisal of the "loss". In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The Appraisers will state separately the value of the property and amount of "loss". If they fail to agree, they will submit their difference to the umpire. A decisions agreed to by any two will be binding. Each Party will:

1. Pay its chosen appraiser, and
2. Bear the other expenses of the appraisal and umpire equally.

4. On the day following the loss, Junior Lewis and Charles Lewis, the principal officers of J&C Enterprises, conducted a salvage operation “in house”, using J&C Enterprises personnel and equipment; they did not incur any outside expense. Deposition of Junior Lewis, Page 21, lines 11- 20. Copies attached as “Exhibit B” to defendant’s memorandum in support of motion for summary judgment. Record at 222.

5. Also, on the day following the loss, Junior Lewis and Charles Lewis made the decision to transport the salvage to the Julie Ann Lewis Trust Property, a six acre parcel of land located at 3980 South 2500 East, Vernal, Utah. Deposition of Junior Lewis, Page 21, lines 21-25. Copies attached as “Exhibit B” to defendant’s memorandum in support of motion for summary judgment. Record at 222.

6. Junior Lewis and his wife, Nell Lewis, are the trustees of the Julie Ann Lewis Trust. They reside at the property without paying rent and have complete control over the property. Junior Lewis Deposition, Page 85, lines 11-17, Page 89, lines 1-5. Copies attached as “Exhibit B” to defendant’s memorandum in support of motion for summary judgment. Record at 222.

7. The property was acquired with funds from a settlement for injuries to their daughter, Julie Ann Lewis, who suffered severe brain damage and mental disability as a result of an allergic reaction to a vaccination when she was 4 months old. Deposition of Junior Lewis, Page 83, lines 15-20, Page 87, lines 18-24. Copies attached as “Exhibit B” to

defendant's memorandum in support of motion for summary judgment. Record at 222.

8. J & C Enterprises has stored items of equipment over the years at the Julie Ann Lewis Trust Property under an informal arrangement pursuant to which J&C Enterprises pays the annual property taxes. Junior Lewis cannot recall any instance when the trust earned income for storage of equipment, with the exception of payment by USF&G for storage of the trailer which was being pulled by the crane at the time of the accident. Deposition of Junior Lewis, Page 91, lines 6-23. Copies attached as "Exhibit B" to defendant's memorandum in support of motion for summary judgment. Record at 222.

9. The annual taxes on the property for 1997 were \$713.47. See Uintah Country Property Information Report attached as "Exhibit C" to defendant's memorandum in support of motion for summary judgment. Record at 222.

10. Plaintiff's complaint, paragraph 13, alleges that plaintiff has incurred costs for storage of the wrecked crane, however, J & C Enterprises has never paid any storage fees and Junior Lewis testified that he does not believe that J & C Enterprises has any obligation to do so. Deposition of Junior Lewis, Page 41, lines 4-8, Page 42, lines 8-13. Copies attached as "Exhibit B" to defendant's memorandum in support of motion for summary judgment. Record at 222.

11. For a period of months following the accident, Junior Lewis claimed that J &

C Enterprises was entitled to \$75,000 for the loss of the truck and crane, and he told Mid-Continent's representative, Duane Nichols, that he would not accept less than the full \$75,000. Deposition of Junior Lewis, Page 31, lines 4-6. Copies attached as "Exhibit B" to defendant's memorandum in support of motion for summary judgment. Record at 222.

12. By January of 1998, Junior Lewis finally conceded that the policy was an actual cash value policy, not a stated value policy, and through an appraisal process he also reached an agreement with Mid-Continent on the value of the truck and crane at \$54,500.00 (\$55,000.00, less the \$500 deductible) of which Mid-Continent had already paid \$44,500 and tendered the balance of \$10,000. Deposition of Junior Lewis, Page 71, lines 18-25, Page 72, lines 1-3. Copies attached as "Exhibit B" to defendant's memorandum in support of motion for summary judgment. Record at 222.

13. In spite of the agreement on the valuation of the truck and crane, Junior Lewis rejected Mid-Continent's check for the final \$10,000. He takes the position that J & C Enterprises is entitled to \$50.00 per day since the accident for storage and has advised Mid-Continent on numerous occasions that he would not release the salvage unless Mid-Continent agrees to pay \$50.00 per day from August 28, 1997, to the present. Deposition of Junior Lewis, Page 72, lines 4-13, Page 74, lines 11-14, Page 32, lines 6- 10, Page 45, lines 23-25, Page 46, lines 1-7, Page 47, lines 7-11. Copies attached as "Exhibit B" to defendant's memorandum in support of motion for summary judgment. Record at 222.

14. Defendant, Mid-Continent, has consistently taken the position (1) that plaintiff did not provide evidence it actually incurred storage expense or any expense for debris removal and clean up; and (2) that the delays in the settlement of plaintiff's insurance claim were caused by plaintiff's unfounded and excessive demands for \$75,000 on a truck and crane worth \$55,000 and for \$50.00 per day for storage since August 28, 1997. defendant's memorandum in support of motion for summary judgment, Page 5. Record at 222.

15. As of March 28, 2000, the date of Junior Lewis' deposition, plaintiff's storage and debris removal and cleanup claims exceeded 50,000. Deposition of Junior Lewis, Page 94, lines 19-25, Page 95, lines 1-7. Defendant's memorandum in support of motion for summary judgment, Page 5. Record at 222.

16. After a long hearing on the motion for summary judgment of defendant on January 30, 2001, Judge A. Lynne Payne of the Eighth Judicial District Court in Vernal, Utah granted defendant's motion in part and denied it in part. A full transcript of the hearing and his ruling is included in the record on appeal at page 595. Thereafter, on February 23, 2001, Judge Payne entered findings of fact and conclusions of law as follows:

FINDINGS OF FACT CONCLUSIONS OF LAW

1. Based upon the undisputed evidence submitted, the court finds that plaintiff used its own personnel and equipment for cleanup, debris removal and towing after the accident and is entitled recover under its policy of insurance

with defendant for the reasonable value of said cleanup, debris removal and towing in an amount to be proven.

2. Under the provisions of plaintiff's policy of insurance with defendant, plaintiff would be entitled to coverage for the amount of expenses reasonably incurred for storage of the salvage of its insured vehicle after the accident, however, based upon the undisputed evidence submitted, the court finds that plaintiff did not incur any expense for storage and is therefore not entitled to recover from defendant for any claimed storage expense.

3. Based upon the undisputed evidence submitted, the court finds that there is no factual basis to support plaintiff's claims against defendant for bad faith, punitive damages or for attorneys fees arising from claims of bad faith or punitive damages.

ORDER

Based upon the forgoing findings of fact and conclusions of law, it is hereby

ORDERED ADJUDGED AND DECREED that the motion for summary judgment of defendant is denied in part and granted in part, and that plaintiff's claims for storage expense, bad faith, punitive damages and attorneys fees arising from claims of bad faith and punitive damages are hereby dismissed, with prejudice. It is further ordered that plaintiff is entitled to recover under its policy of insurance with defendant for the reasonable value of the use of its own personnel and equipment for cleanup, debris removal and towing in an amount to be proven.

SUMMARY OF ARGUMENT

The representatives of Mid-Continent Casualty Company acted consistently in good faith and made every effort to resolve the property damage claim of J & C Enterprises fairly. By contrast, Junior Lewis, on behalf of plaintiff, J & C Enterprises, repeatedly violated his duty of good faith and fair dealing and acted in bad faith by refusing to accept all reasonable offers to resolve the claim.

Based upon the undisputed evidence presented to the court on the motion for summary judgment of defendant, Mid-Continent, the trial court correctly granted summary judgment dismissing plaintiff's claims for storage expense, bad faith, punitive damages and attorney's fees. The court correctly determined that Mid-Continent's denial of coverage for plaintiff's storage claim was proper, as the overwhelming undisputed evidence established that plaintiff did not incur any expense for storage and is therefore not entitled to recover from defendant for any claimed storage expense. Mid-Continent paid plaintiff \$44,500.00 in timely fashion for the loss of the crane. Thereafter, as soon as agreed upon appraisal was reached, Mid-Continent repeatedly tendered payment of the remaining \$10,000, and requested release of the salvage.

Mid-Continent Casualty has always conceded that an appropriate claim for debris removal and clean up would be covered under the policy. Judge Payne did not even have to consider this issue from a legal stand point. The motion for summary judgment asserted only

that plaintiff had not proven it had incurred any expense for debris removal and cleanup, and was based upon the undisputed testimony of Junior Lewis that the cleanup and debris removal had been done by plaintiff and that no expense to any other party had been incurred. The trial court concluded that plaintiff would be entitled to recover, based upon proof at trial, for the reasonable value of the employee labor and equipment used. He also correctly concluded based upon undisputed facts that Mid-Continent's position on this issue was fairly debatable and that plaintiff's claims for bad faith, punitive damages and attorney's fees should be dismissed, with prejudice.

J & C Enterprises refused all reasonable offers to settle and further refused to release the salvage because of an unreasonable demand for fabricated and exaggerated storage expense, which up to the time of the court's summary judgment order exceeded \$50,000.00. Since the date of the loss and even after the court's summary judgment ruling, J & C Enterprises has persisted in rejecting good faith efforts to resolve the remaining claims, and has refused reasonable offers by Mid-Continent simply because Junior Lewis still insists that he is entitled to what now amounts to over \$100,000 in storage expense. He hopes to persuade this Court to reinstate the claim for storage expense. The undisputed facts cannot sustain plaintiff's claims for bad faith, punitive damages and attorneys fees, and the trial court's dismissal should be affirmed. The undisputed facts establish that it was plaintiff's representative Junior Lewis who acted in bad faith.

Billings v. Union Bankers Ins. Co., 918 P.2d 461 (Utah 1996), is directly on point.

There the Utah Supreme Court stated “[W]hen an insured's claim is fairly debatable, the insurer is entitled to debate it and cannot be held to have breached the implied covenant [of good faith] if it chooses to do so.” *Id.* at 465. Here the claims are not only debatable, they are largely unfounded and have been correctly dismissed by the trial court. Other jurisdictions agree. In *Bartlett v. John Hancock Mutual Life Ins. Co.*, 538 A.2d 997, 1000 (R.I. 1988), the Rhode Island Supreme Court held that there can be no cause of action against insurer for bad faith refusal to pay a claim until insured establishes absence of reasonable basis for denying coverage. *Id.* at 1000. Nothing in the record of this case even suggests that Mid-Continent was dilatory or otherwise unreasonable in its investigation of the claim of J & C Enterprises or in its determination to deny coverage for storage expenses. To the contrary, as soon as plaintiff finally complied with the undisputed requirements of the policy regarding valuation and appraisal, and an agreed upon an appraisal of \$55,000, Mid-Continent tendered the balance of full payment. Junior Lewis flatly refused the payment and persisted in his unreasonable and excessive demand for payment of storage expenses which were not incurred.

ARGUMENT

I

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT DISMISSING PLAINTIFF'S CLAIM FOR STORAGE EXPENSE BASED UPON CLEAR AND UNDISPUTED EVIDENCE THAT PLAINTIFF HAD NOT INCURRED NOR PAID ANY STORAGE EXPENSE

Plaintiff's complaint alleges in paragraphs 12 and 13 that plaintiff has incurred costs for for storage of the wrecked crane at the rate of \$50.00 per day, accruing since the day after the accident. The deposition testimony of Junior Lewis, even when considered in a light most favorable to plaintiff, directly contradicts these allegations. Mr. Lewis admits in his testimony that J & C Enterprises has never paid any storage fees and is not be obligated to do so. Deposition of Junior Lewis, Page 41, lines 1-25, Page 42, lines 1-13. Record at 222, Exhibit B. As trustee of the Julie Ann Lewis Trust, Junior Lewis lives in a residence on the trust property without paying rent and has complete control over the property. Junior Lewis Deposition, Page 85, lines 11-17, Page 89, lines 1-5. Record at 222, Exhibit B. Moreover, Mr. Lewis testified further that an informal arrangement exists pursuant to which J & C Enterprises pays the annual property taxes on the Julie Ann Lewis Trust Property in exchange for storage of equipment on the property. Deposition of Junior Lewis, Page 91 Record at 222, Exhibit B. The annual property taxes on the property, according to the records of Uintah County, were \$713.47 for 1997. Record at 222, Exhibit C. Accordingly,

while the principals of J & C Enterprises are permitted to store whatever they chose to put on the property for \$713.47 per year, including the wrecked crane at no additional charge, Junior Lewis, decided to demand that Mid-Continent Casualty Company pay over 25 times this amount (\$18,250.00) per year for the storage of one truck and crane.

By the time of his deposition, the amount demanded was over \$50,000. As of March 14, 2003, the date of filing of this brief, the total amount claimed by plaintiff, exclusive of interest, is up to \$102,750. For plaintiff to argue that the insurance company is receiving a windfall is unfounded. It is clearly the plaintiff who seeks a windfall.

Despite the fact that there is no evidence plaintiff ever incurred any storage expense, Junior Lewis, repeatedly delayed the settlement of the claim by demanding payment of storage charges in the amount of \$50.00 per day from the date of the loss, as an absolute condition to resolution of the claim. Incredibly, his own trial testimony in this case established that he knowingly attempted to charge the defendant double the rate allowed by the Public Service Commission (\$25.00/ day) for an uncovered truck stored outside. See trial exhibit 51. Record at 516.

It is evident from the testimony of Junior Lewis that the storage expense has been fabricated by J & C Enterprises as part of an effort to inflate the insurance claim. Plaintiff should not be allowed to claim grossly exaggerated expenses which were not incurred, have not been paid, and are not legally owed to any person or entity. The undisputed evidence

made these facts abundantly clear to Judge Payne and he properly concluded that defendant was entitled to summary judgment dismissing plaintiff's claim for storage expense.

Plaintiff's argument that the claimed storage expense is somehow similar to the claims for clean up and debris removal is unfounded. There is a clear distinction between the two, which was ably articulated by Judge Payne in his ruling on the motion for partial summary judgment. He stated:

HOWEVER, THERE IS AN ADDITIONAL ISSUE AS TO WHETHER OR NOT THERE HAVE BEEN ANY EXPENSES INCURRED. I REALLY THINK THE ESSENCE OF THE CONTRACT IS TO INSURE AGAINST LOSS AND EXPENSES WHICH WERE INCURRED AS A RESULT OF THE LOSS. AND I WOULD TAKE A DIFFERENT VIEW OF THIS IF THERE WERE ACTUAL OBLIGATIONS INCURRED. IN THIS CASE IT IS CLEAR TO ME THAT THE PLAINTIFF INCURRED NO ADDITIONAL COSTS OR EXPENSES BY REASON OF THE FACT THAT THE INSURANCE--THAT THE PLAINTIFF HAD A RIGHT UNDER AN EXISTING AGREEMENT THAT THEY HAD WITH THE TRUST TO STORE PROPERTY ON THE PLACE WHERE THE--WHERE THE EQUIPMENT WAS TAKEN. AND AS WE HAVE DISCUSSED WITH MR. SAM, THERE WERE NO ADDITIONAL EXPENSES. **AND UNLIKE THE PREVIOUS ISSUE OF CLEAN UP COSTS WHERE THE PLAINTIFF COULD SAY, LOOK I HAD EMPLOYEES WORKING AND I HAD--YOU KNOW--EQUIPMENT WORKING. IN THIS CASE THERE HAD BEEN NO ACTUAL EXPENSES INCURRED RELATING TO THE STORAGE AND NEITHER IS THE PLAINTIFF LIABLE TO A THIRD PARTY FOR STORAGE. BECAUSE THE STORAGE OF THE CRANE CLEARLY COMES WITHIN THE PRIOR AGREEMENT TO STORE EQUIPMENT ON THE PROPERTY. THEREFORE UNDER THE FACTS**

OF THIS CASE NO ADDITIONAL EXPENSES HAVE BEEN INCURRED AND I BELIEVE THAT PLAINTIFF IS NOT ENTITLED TO A WINDFALL HERE. THAT PLAINTIFF IS NOT IN THE BUSINESS OF STORING CRANES. AS I INDICATED, IF HE WOULD HAVE BEEN IN THE BUSINESS OF STORING I SUPPOSE THERE COULD'VE BEEN AN ARGUMENT THAT SINCE I'M IN THE BUSINESS OF STORING CRANES, AND I STORED THIS CRANE, I LOST INCOME AND I'M ENTITLED TO IT SO I'M GOING TO--THE LONG AND SHORT OF IT IS THAT ALTHOUGH I THINK THAT THE CONTRACT DOES PROVIDE FOR STORAGE IN THE APPROPRIATE SITUATION I DON'T THINK THIS IS AN APPROPRIATE SITUATION BECAUSE I DON'T THINK THERE'S BEEN ANY DAMAGES INCURRED.

Transcript of summary judgment hearing, Pages 28-29. Record at 595, emphasis added.

It was plain to the trial court based upon an undisputed lack of evidence to support plaintiff's claim that it was plaintiff who sought a windfall in this case. At the time of the hearing on the motion the amount of the windfall sought was well over \$55,000, exceeding the actual cash value of the truck and crane. At present, the amount of the windfall sought by plaintiff is over \$100,000, exclusive of interest.

Plaintiff argues that USF&G 's payment of a storage claim on the wrecked trailer which was being pulled by the truck and crane at the time of the accident somehow legitimizes the claimed storage expense. Payment of a fabricated storage bill submitted by Junior Lewis to USF&G on a relatively minor claim of about \$3,000 does not make the bill legitimate. On the contrary, it underscores Mr. Lewis' pursuit of an illegitimate claim.

As argued in additional detail below, it was clear to the trial court that Mr. Lewis' relentless demand that Mid-Continent pay fabricated and grossly exaggerated storage expense prevented the claim from being resolved, despite Mid-Continent Casualty Company's effort to promptly investigate plaintiff's loss and resolve it in a timely manner. Judge Payne also correctly determined, based upon the undisputed evidence and applicable law that there was no basis to support plaintiff's claims for bad faith, punitive damages and attorneys fees.

II

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT DISMISSING PLAINTIFF'S CLAIMS FOR BAD FAITH, PUNITIVE DAMAGES AND ATTORNEYS FEES, BASED UPON UNDISPUTED FACTUAL EVIDENCE BEFORE HIM AND APPLICABLE LAW

Plaintiff has misconstrued the issue which was presented to the court on the motion for summary judgment with regard to the claim for clean up and debris removal. The trial court was never called upon to determine whether debris removal and clean up expenses were covered under the insurance contract. Mid-Continent Casualty has always conceded that an appropriate claim for debris removal and clean up would be covered under the policy. Judge Payne did not even have to consider this issue from a legal stand point. The motion for summary judgment asserted only that plaintiff had not proven that it had incurred any expense for debris removal and cleanup. See defendant's memorandum in support of motion

for summary judgment, Pages 9-11. Record at 222. The evidence on this point was undisputed that plaintiff's had not actually incurred any expense for debris removal. Mr. Lewis admitted in his testimony that the debris removal and cleanup were all done "in-house" by J & C Enterprises, and that the claimed expense was based upon his own calculation of the value of the equipment used and employee labor. The unaddressed, untitled, hand written invoice he created one month after the accident was prepared solely for submission to Mid-Continent Casualty Company. Trial Exhibit 11, Record at 516. J & C Enterprises never actually incurred or paid any expense for cleanup and debris removal. Deposition of Junior Lewis, Page 40, lines 1-16. Record at 299. Based upon these facts, defendant, Mid-Continent argued that plaintiff had not proven that it had incurred expenses for debris removal and clean up.

The trial court denied this part of the motion, concluding that there was an issue of fact to be resolved at trial as to the reasonable value, if any, of plaintiff's "in house" clean up and debris removal. Specifically, Judge Payne began his ruling on this matter by stating:

"THE COURT NOTES THAT DEFENDANT DOES ACKNOWLEDGE THAT THE PROPERTY [SIC] (he clearly meant to say "policy") DOES COVER CLEAN UP EXPENSES BUT MAINTAINS THAT BECAUSE PLAINTIFF USED ITS OWN RESOURCES IT DOES NOT INCUR EXPENSE, . . .
.."

Transcript of hearing on motion for summary judgment, Page 27. Record at 595. The

question of the amount claimed for debris removal and clean up was vigorously debated at trial and in post-trial memoranda submitted by counsel. Record at 540. Mid-Continent presented argument based upon undisputed trial testimony that plaintiff had failed to prove the amount cleanup and debris removal expense. Junior Lewis admitted at trial that (1) the equipment and labor reflected on the invoice were created from his memory, as late as one month after the loss, and (2) that the invoice includes equipment and labor for the clean up and towing of the trailer and cargo, which were not covered under the policy and (3) that he cannot itemize or apportion the charges which apply to the towing and clean up of the trailer and cargo, as opposed to the truck and crane. Defendant's post trial memorandum, page 8. Record at 558. The trial court was required to consider this evidence and determine the amount, if any, of the reasonable value of the clean up and debris removal operation for the truck and crane, exclusive of that portion of the towing and cleanup operation which pertained to the trailer and cargo. The court had the option of determining that plaintiff was not entitled to recover for towing and clean up, because Junior Lewis was unable to determine the portion of the towing and clean up invoice which pertains to the truck and crane exclusive of the trailer and cargo. Also, there was substantial confusion as to the invoice for debris removal clean up. The total amount reflected on the invoice is \$2,940.00. Record at 323. When Mid-Continent representatives received the invoice they did not deny the claim but questioned it. Plaintiff did not respond and when towing and cleanup first came up again eight months later, plaintiff demanded for \$2, 367.75 including interest,

almost \$600.00 less than the total reflected on the invoice. Mid-Continent offered to pay it. Defendant's post trial memorandum, page 9. Record at 558. Plaintiff's complaint, demands only \$2,100.00 for towing and cleanup. Record at 3-10.

It was not until one month after the trial that Judge Payne finally determined that plaintiff was actually entitled to clean up an debris removal expense and made a determination as to the reasonable amount, after his review of fairly debatable evidence as the trier of fact. Final Order and Judgment, Page 2. Record at 574.

The record supports Judge Payne's conclusion that Mid-Continent's questioning of plaintiff's debris removal and cleanup claim was the subject of fair debate. Mid-Continent paid plaintiff \$30,000 in timely fashion. After an agreed upon appraisal was reached in January of 1998, Mid-Continent repeatedly tendered payment of the full amount of the claim. During the course of negotiations, Mid-Continent even offered to pay the amount of the alleged clean up and towing expense as part of a good faith effort to resolve the claim. Plaintiff, on the other hand, refused to accept the final payment, refused to release the salvage because of an unreasonable demand for fabricated storage expense. The undisputed facts simply did not begin to support plaintiff's claims for bad faith, punitive damages and attorneys fees, and they were properly dismissed by the trial court.

Billings v. Union Bankers Ins. Co., 918 P.2d 461 (Utah 1996), is directly on point. There the Utah Supreme Court stated "[W]hen an insured's claim is fairly debatable, the

insurer is entitled to debate it and cannot be held to have breached the implied covenant [of good faith] if it chooses to do so.” *Id.* at 465. The claims for clean up and debris removal were fairly debatable. If anything, it was the claim for storage expense was not fairly debatable and it was plaintiff who acted in bad faith in pursuing a fabricated storage claim.

Other jurisdictions agree. In *Bartlett v. John Hancock Mutual Life Ins. Co.*, 538 A.2d 997, 1000 (R.I. 1988), the Rhode Island Supreme Court held that there can be no cause of action against insurer for bad faith refusal to pay a claim until insured establishes absence of reasonable basis for denying coverage. *Id.* at 1000.

Nothing in the record of this case suggests that the Mid-Continent Casualty Company was dilatory or otherwise unreasonable in its investigation of the claim or in its determination to deny coverage for the storage expense claim or to question the debris removal and cleanup expense claim. To the contrary, as soon as plaintiff finally complied with the undisputed requirements of the policy regarding valuation and appraisal, and agreed upon a value of \$55,000, Mid-Continent tendered full payment. Junior Lewis, refused the payment and persisted in his patently unreasonable demand for payment of storage expense.

Pugh v. North American Warranty Services, 1 P.3d 570 (Utah App. 2000), is clearly distinguishable from this case. There, the trial court specifically found that the insurance company “delayed unreasonably in paying for covered repairs.” In this case there is no evidence of unreasonable delay. Contrary to plaintiff’s unfounded assertion, the undisputed

evidence in this case establishes that \$10,000 balance on the truck and crane was not withheld, but tendered. A check was sent to plaintiff by Mid-Continent as soon as the appraised value was reached in January of 1998. In spite of the agreement on the valuation of the truck and crane, Junior Lewis rejected Mid-Continent's check for the final \$10,000. He persisted in his demand that J & C Enterprises is entitled to \$50.00 per day for storage and advised Mid-Continent repeatedly that he would not release the salvage unless Mid-Continent agreed to pay the \$50.00 per day. See Exhibit A to defendant's memorandum in support of motion for summary judgment. Deposition of Junior Lewis, Page 72, lines 4-13, Page 74, lines 11-14, Page 32, lines 6- 10, Page 45, lines 23-25, Page 46, lines 1-7, Page 47, lines 7-11. Record at 222.

In this case, based upon the substantial undisputed evidence referred to above which was presented at the time of the summary judgment motion, Judge Payne correctly dismissed plaintiff's claims for bad faith, punitive damages and attorneys fees arising therefrom with prejudice. He specifically determined that all of the issues before him, including issues relating to Mid-Continent's factual assertion that plaintiff had not incurred clean up and debris removal expense, were fairly debatable, stating:

WITH RESPECT TO THE ISSUE OF BAD FAITH, THAT
WILL BE ALSO DISMISSED. I THINK THAT THESE
MATTERS WERE--AS A MATTER OF LAW I THINK THAT
THEY WERE ALL FAIRLY DEBATABLE, AND
ESPECIALLY WHEN IT'S CLEAR THAT EVEN AFTER
THE AGREEMENT WAS MAINTAINED THAT PLAINTIFF

CONTINUED TO HOLD TO THE IDEA THAT THEY WERE ENTITLED TO STORAGE COSTS AND REFUSED TO SETTLE. I DON'T THINK THAT THERE'S AN ACTION HERE FOR BAD FAITH, AND PUNITIVE DAMAGES, OF COURSE, RELY UPON THE BAD FAITH, AND SO THAT WILL BE DISMISSED."

It is clear that Judge Payne acted correctly in dismissing with prejudice plaintiff's unfounded claims for bad faith, punitive damages and attorneys fees.

CONCLUSION

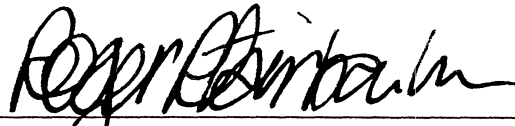
Based upon the foregoing, defendant and appellee, Mid-Continent Casualty Company, respectfully requests that the court affirm in all respects the trial court's summary judgment dismissing plaintiff's claims for storage expense, bad faith, punitive damages and attorney's fees with prejudice.

ADDENDUM

Appellee does not believe that an addendum is necessary.

DATED this 14TH day of March 2003.

LARSON, TURNER, FAIRBANKS & DALBY, L.C.



Roger R. Fairbanks

Attorneys for defendant/appellee,
Mid-Continent Casualty Company

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing BRIEF OF APPELLEE
was mailed, postage prepaid, this 14TH day of March 2003, to the following:

Daniel S. Sam
DANIEL S. SAM, P.C.
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Vernal, Utah 84078

