

1967

Dorothy Graham and Joe Lopez v. Preferred Risk Mutual Insurance Company : Appellant's Brief

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Recommended Citation

Brief of Appellant, *Graham v. Preferred Risk*, No. 10645 (1967).
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IN THE SUPREME COURT
OF THE STATE OF UTAH

DOROTHY GRAHAM (LOPEZ)
Plaintiff and Appellant,

vs.

Case
No. 10645

PREFERRED RISK MUTUAL
INSURANCE COMPANY
Defendant and Respondent.

UNIVERSITY OF UTAH

MAR 31 1967

APPELLANT'S BRIEF
LAW LIBRARY

Appeal From Motion Summarily Dismissing Plaintiff's
Complaint With Prejudice, Without Opportunity
to Present Evidence, the Law or to Be Heard.

HONORABLE A. H. ELLETT, *Judge*

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Salt Lake City, Utah 84111
*Attorney for Plaintiff
and Appellant*

KIPP AND CHARLIER
Boston Building
Salt Lake City, Utah

FILED

AUG 8 - 1966

Attorney for Defendant and Respondent.

Clock Supreme Court, Utah

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No. 10645

APPELLANT'S BRIEF

RELIEF SOUGHT

Plaintiff is entitled to a trial on the merits. The motion dismissing plaintiff's complaint with the prejudice should be abated and set aside and the plaintiff allowed a trial on the merits.

STATEMENT OF FACTS

Parties are being referred to as the same in court below.

On April 18, 1964, at approximately midnight Dorothy Graham collided with another automobile at 3500

South 3600 West in Salt Lake County, Utah. There was no claim of intoxication, no tickets were issued by the investigating officer; in fact, he was a witness for Mrs. Graham that she was not intoxicated. The sole issue was which car ran the traffic light. Subsequently, Walter Sterzer sued Dorothy Graham (Lopez) for \$1,673.10 property damage; \$265.00 Special damage; \$2500.00 General damage; Jean Sterzer, his wife, sued Dorothy Graham for \$10,000.00 General damage and \$775.00 Special damages. She turned her summons and claims over to her insurance company, the defendants herein, and they refused to defend. They denied coverage upon the grounds that when she applied for insurance on June 3, 1960, she signed an application blank in which was printed that the applicant did not use intoxicating beverages and would not during the term of the policy. The insurance company not only informed Dorothy Graham that she had no coverage but also informed the Sterzers, their attorney Victor Sagers and the Lake Motors, the other claimants in the suit, that there was no coverage, all of which was in writing.

Upon being told that she had no coverage, she employed Mark S. Miner who defended the suit brought by the Sterzer's and who also brought this suit for damages against the Preferred Risk Insurance Co. for breach of contract on the policy. Subsequently after pretrial the Preferred Risk Insurance Co. settled with the Sterzers but refused to settle with Dorothy Graham for hospital bills for herself and her husband Joe Lopez. They also refused to pay any attorney fees to her attorney Mark S. Miner for his defense in the Sterzer case.

This case was pretried on March 9, 1966 by the Honorable Joseph Jeppson, who ruled that the plaintiff was entitled to a jury trial on the issues herein, ruling that the issue of any representations or warranties and/or their materiality were for the jury to decide.

On May 9, 1966, the day set for jury trial, Counsel was called into the chambers of Judge Ellett who, with all of the plaintiff's witnesses and the jury setting the court room, summarily granted a motion dismissing plaintiff's case on the representation of the Insurance Company counsel that Dorothy Graham (Lopez) had two drinks at approximately 7 p.m. the day of the accident, maintaining that intoxication was immaterial. Plaintiff's counsel had no notice or knowledge that any such motion would be made, he was not allowed to submit any evidence, even though his witnesses were in the court room, no affidavits or counter affidavits were allowed, on the mere representation of the Company's Counsel the plaintiff's cause was dismissed. Absolutely no evidence was before the court. Plaintiff was not allowed to introduce the policy or documents favorable to plaintiff's cause and although the adjuster who had written the document read by the Company attorney was subpoenaed the court refused to let him testify. **THE COURT RULED THAT ANY DRINKING, HOWEVER MINUTIA, ON THE PART OF DOROTHY GRAHAM AFTER THE APPLICATION BLANK WAS SIGNED VOIDED THE POLICY.**

The application upon which the Court ruled was filled out on June 3, 1960, by Preferred Risk Mutual Insurance

Company's agent. A copy is annexed hereto and by reference made a part hereof. The application provides that it is to be filed by their agent. No copy was given to Dorothy Graham Lopez. The representation which prompted the summary ruling of the Court is item 3 under REPRESENTATIONS: "I do not use alcoholic beverages and will not do so for the term of the policy."

On the basis of this application the defendant company issued a policy for collision and comprehensive coverage on a 1954 Ford automobile. This policy was renewed December 3, 1960; June 3, 1961; and then on September 21, 1961, without any new application or inquiry by the insurance company the policy was transferred to 1958 Bel Air Chevrolet and the coverage was increased to include bodily injury and medical payments. This latter policy was renewed on 12-3-61, 6-3-62, 12-3-62; then on 4-23-63 the policy was transferred to a 1963 Comet; with a subsequent renewal being made on 6-3-63 and 12-3-65, with the policy being in full force and effect on April 18, 1964, the date of the collision from which this action arose.

POINTS OF LAW

1. The Court erred in summarily dismissing plaintiff's case without notice, without allowing plaintiff to present any evidence or affidavits, without permitting the plaintiff to present any law.

2. The Court erred in holding that the representation that policy applicant did not drink and would not during the term of the policy was a warranty.

The Court erred in holding that any drinking, however minutia, of alcoholic beverage voided policy from beginning; and that the issue of intoxication was immaterial.

POINT ONE

THE COURT ERRED IN DISMISSING THE PLAINTIFF'S CASE: (1) WITHOUT NOTICE; (2) WITHOUT ALLOWING THE PLAINTIFF TO PRESENT ANY WITNESSES, EVIDENCE, OR EVEN AN AFFIDAVIT; (3) WITHOUT PERMITTING THE PLAINTIFF TO PRESENT ANY LAW.

May 9, 1966, at 10 a.m., Counsel was called into the chambers of Hon. A. H. Ellett; Judge Ellett said that there was question of coverage that should be settled if the plaintiff had been drinking. An argument ensued, part of which was taken down and part of which was not taken down. The reporter mistakenly put Mr. Miner on remarks made by Mr. Kipp. To-wit: She drank several rounds between seven thirty and midnight." This was a remark made by Mr. Kipp and Mr. Miner violently objected to same and it was Mr. Miner who said, "I don't think that is right and I doubt Mr. Kipp will claim otherwise." Mr. Kipp did produce a statement made by an insurance adjuster which stated the Plaintiff had two highballs in the area of seven o'clock. Mr. Kipp argued that intoxication was immaterial. The Plaintiff was in court, the adjuster was under subpoena, the investigating officer was available to testify that the plaintiff was not intoxicated; in fact, Mr. Kipp made no claim of intoxication but claimed a breach of warranty. Stating that

when the drinking occurred the amount was immaterial. The entire proceeding did not last 5 minutes and the Court dismissed plaintiff's complaint.

Rule 56 provides that a party is entitled to 10 days' notice before the time fixed for a hearing. Plaintiff had none. The rule also provides that the adverse party may file affidavits or produce evidence; this right was denied the plaintiff, even though the plaintiff had subpoenaed witness sitting in the court room. Plaintiff and her attorney was denied the right to submit any law to support their position; the Court arbitrarily ruled without notice, without evidence and without giving the plaintiff a right to be heard. This all overruled a previous ruling by the Honorable Joseph Jeppson who had previously held that the question of representation and/or warranty was an issue, and that the question of its materiality was one of fact to be decided by the jury. This all added to the complete surprise of the plaintiff who came prepared to try said issues on the fact and the law as was laid down by the pre-trial judge.

This Court has consistently held that a summary judgment should only be granted when taking the view most favorable to party's claim and any proof that might be properly adduced thereunder, he could in no event prevail. See *Kidman v. White*, 378 Pac. 2d 898, 14 Utah 2d 142. In the instant case on the mere remark of "All right. I will grant the motion." (This counsel knows of no motion being made nor its contents.) "I don't think this is covered. I think if they say they are not going to drink and get a reduced rate, the party doesn't cover it."

"Tell the jury they are discharged . . ." There was no evidence of a reduced rate; there was no evidence of intoxication; the only evidence of drinking was remarks by the insurance company's counsel. Every right granted the plaintiff under Rule 56 was violated. Every rule pronounced by this Court on summary judgments was traversed. Plaintiff was denied every right granted by this court, to-wit: that of notice; right to be heard and present proof; the right to present the cases and law on the points in issue.

POINT TWO

THE COURT ERRED IN ARBITRARILY RULING THAT THE REPRESENTATION ON THE APPLICATION WAS A WARRANTY IN THE POLICY.

The plaintiff had the policy in court but the Court refused to examine same. The policy has no such warranty or representation nor was it in any way included by reference. The application blank for collision and comprehensive insurance was filled out by the defendant's agent four and one-half years prior to the collision. No copy was given plaintiff nor was the representation discussed. It is true that under "Representations" there was printed "I do not use alcoholic beverages and will not do so for the term of this policy." Defendant then carefully investigated the plaintiff and then issued a policy free and clear of any such representation. No mention was ever made of it until the plaintiff suffered a loss at which time the defendants denied coverage. The law in this regard is clear that the courts are strongly against forfeitures of insurance coverage. See *Murray v. Home*

Benefit Ass'n, 9 California 402, 27 Pac. 309; *Mitiger v. New York Life Ins. Co.*, 17 Cal. 2d 834, 112 Pac. 2d 621; *Heber v. Life Ins. Co.*, 18 Calif. 2d 269, 63 Pac. 2d 318. The courts further generally hold the forfeiture should be granted unless the warranty is set forth in the policy in clear and unmistakable terms; *Bittinger v. New York Life Insurance Company*, 17 Calif. 2d 834, 112 Pac. 2d 621. Courts are opposed to forfeitures of insurance policies on technical grounds. See *Howell v. American Insurance*, 114 Calif. 660, 84 Pac. 182. It is generally held that the courts are opposed to unreasonable forfeitures and technical forfeitures on rules which are unrelated to the merits of the case. *Olds v. General Accident and Fire Ins. Co.*, 67 Calif. 2d 842, 5 Pac. 2d 676. Attempts to cancel policies after the insured has suffered a loss is not tolerated or permitted in states where compulsory insurance is required. This rule is applied equally to the insured as well as the third party, *Ohran v. National Ins. Co.*, 82 Calif. 2d 636, 187 Pac. 2d 66.

Representations are not warranties and these are written or oral statements made prior to the completion of the contract policy and usually give information to the insurer on the subject of insurance, and from these facts the insurance company determines whether or not it will issue the policy. Representations rarely qualify as an express provisions in the policy of insurance, but in some instances it may qualify as an implied warranty where active fraud is present. In matters of opinion a representation is false only when it is intended to be false. The fact that a representation is based on opinion or estimate distinguishes it from a warranty and subse-

quent fact which different from the original opinion or estimate does not necessarily render the representation untrue. In matters of health or habits a representation of fraud or of deceit are required in order to change the representation to an implied warranty. These facts must be drawn from the circumstances and it is a question for the jury. Where there is no fraud or deceit rescission or forfeiture is not allowed. In this case the defendant claims no fraud or deceit but relies solely on breach of implied warranty. The Courts are unanimous in holding not only that fraud and deceit are necessary elements, but the fraud and deceit proved must be material to the cause. In instant case the defendant has maintained that intoxication is immaterial, that any drinking of even a minutia nature would void the policy, all of which is contra to the established law. See *McClelland v. New York Life Ins. Co.*, 23 Calif. 694, 139 Pac. 2d 242; *Martin v. Mutual Benefit Health and Accident Ins. Co.*, 71 Calif. 2d 557, 162 Pac. 2d 980.

CONCLUSION

It is generally held that to render a representation a warranty there must be a misrepresentation of an existing fact, promises and opinions and estimates projected in the future are seldom if ever held to be an implied warranty in that active fraud is never present under these circumstances. Representations are matters of inducement merely, and usually relate to present existing facts or conditions and need only be substantially true and must relate to a material matter in order to qualify as an implied warranty. See *Spence v. Central Accident*

Insurance Co., 86 N.E. 104, 236 Ill. 44, 19 L.R.A. (N.S.) 88. Ordinarily, a statement made on an application blank is a representation only and must be incorporated by reference in the policy before it becomes a warranty. In the instant case this was never done. See *North America Ins. Co. v. Rehacek*, 123 Ill. App. 219. A good example of this problem often arises in cases of honesty bonds where bank officials certify that their employees are honest and will remain so in the future as an inducement to the issuance of the policy. This has generally been held to be a representation in that it is an opinion and therefore not a warranty. See *Guthrie National Bank v. Fidelity Deposit and Guarantee of Maryland*, 87 Pac. 2d 300, 14 Okla. 636, also 17 Oklahoma 397, citing *Rice v. Fidelity and Deposit of Maryland*, 103 Fed. 430 and 43 Ill. 370. In every instant in order to void policy the representation must be of a material nature.

In view of the foregoing the court erred in voiding the policy without evidence; in that the representation was one of opinion trivial in nature and not material to the accident in that Dorothy Graham Lopez was not intoxicated.

Respectfully submitted,

MARK S. MINER

210 Federated Security Bldg.
Salt Lake City, Utah 84111

*Attorney for Plaintiff
and Appellant*

CPL THE BACK OF APP

PRINCIPAL DRIVER OCCUPATION OFFICE CLERK

PERCENT OF PREMIUM

ALL CASH COD EASY PAY PLAN (To insure \$1.00 with App)

TOTAL PREMIUM **130**

REMITTANCE WITH THIS APPLICATION \$ **11.00**

OFFICE USE ONLY

CREDIT

BALANCE

COMMISSION **4**

AGENT

NAME **Wayne B. Gold** NUMBER **43 440**

ADDRESS **1852 So Main St**

CITY **SALT LAKE CITY, UT** STATE **UT**

LIST ALL OTHER MEMBERS OF HOUSEHOLD (Include all children)

AGE	27	27	27
SEX	M	M	M
MARRIED	Y	Y	Y
DRIVES CAR	Y	Y	Y

10. PREVIOUS AUTO INSURANCE CO.

NAME **None** POLICY

ADDRESS

CITY STATE

RETURN TO

TO BE COMPLETED BY AGENT:

Is any driver physically impaired? Yes (USE YELLOW FORM NO 44) No

For which territory are Liability rates quoted? _____

For which Driver Classification are rates quoted? _____

How long have you known applicant? **just**

Have you inspected applicant's car? Yes No

Does car have visible defects? Yes No

(If so, list them on reverse of page)

Has applicant or any member of immediate family ever been insured by Preferred Risk? Yes No

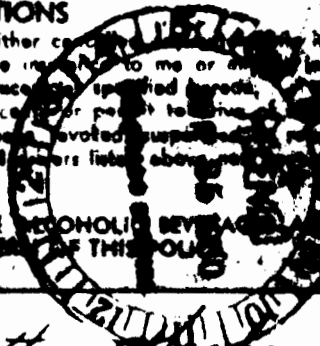
Pat. No. _____ Relationship _____



REPRESENTATIONS

No insurer has either covered or insured any automobile insured to me or any member of my household in the past three years, except as specified herein. No automobile license or permit to drive in my household has been revoked, suspended or specified herein. All drivers listed above need licenses.

3. I DO NOT USE ALCOHOLIC BEVERAGES. I DO SO FOR THE TERM OF THIS POLICY.



Signature of Applicant: **Mrs. Dorothy Graham**

OVER

Mail Policy to — Policyholder — Agent

APPLICATION FOR POLICY TO

Preferred Risk Mutual INSURANCE COMPANY

HEAD OFFICE: 610 NORTH 4, SALT LAKE CITY, UTAH
 GENERAL OFFICE: COLORADO SPRINGS, COLORADO

FROM	MONTH	DAY	YEAR	TO	MONTH	DAY	YEAR
	6	3	60		12	3	60

NAME (FIRST) *Dorothy* (MIDDLE) *Graham* (LAST)

ADDRESS *792 La Doré Drive*

CITY *Murray* ZONE STATE *UTAH*

FOR OFFICE USE ONLY

TERM	TYPE	STAT CLASS	EXPOSURE	REDUCTION	STAT AGT
1					
LINE	STAT TERM	RATE CLASS	POLICY		
1			H		

COVERAGES	OFFICE USE	LIMITS OF LIABILITY	PREMIUM
A BODILY INJURY LIABILITY		\$ 000 EACH PERSON \$ 000 EACH ACCIDENT	
B PROP DAMAGE LIABILITY		\$10,000 EACH ACCIDENT	\$
C MEDICAL PAYMENTS		\$ EACH PERSON	\$
D COMPREHENSIVE		<input checked="" type="checkbox"/> FULL <input type="checkbox"/> LESS 5% DEDUCTIBLE	\$

PERCENT OF PREMIUM

ALL CASH COB EASY PAY PLAN (to limit \$1.00 with App)

TOTAL PREMIUM *0130*

APPLICATION WRITTEN *11/5/60*

6. BINDER OF INSURANCE — this application is effective as of the date specified — or the time and date this policy is written, whichever is the latest.

6. VEHICLE

YEAR	MAKE	MODEL
<i>1954</i>	<i>Ford</i>	<i>1954 Ford</i>
BODY STYLE	PURCHASED	MODEL YEAR
<i>4DR</i>	<i>6-68</i>	<i>1954</i>

7. MORTGAGEE

NAME *Salt Lake Telephone Exch*

ADDRESS *Credit Union*

CITY *Salt Lake City* ZONE STATE *UTAH*

8. AUTOMOBILE USE AND OWNERSHIP

BUSINESS PLEASURE TO AND FROM WORK OCCASIONAL

6 MILES ONE WAY

MARKED IN JURED SOLE PARTIAL EXPLAIN ON REVERSE SIDE OF FORM

9. DRIVERS AND OTHER MEMBERS OF

APPLICANT	AGE	SEX	STATUS	REGISTERED
<input checked="" type="checkbox"/> IS ALSO PRINCIPAL DRIVER	<i>26</i>	<i>F</i>	<input checked="" type="checkbox"/> MARRIED	<input type="checkbox"/> DRIVER OF BUS
	OCCUPATION			
	<i>OFFICE CLERK</i>			

LIST ALL OTHER DRIVERS

NAME	AGE	SEX	STATUS	REGISTERED