

1992

Liberty Mutual Insurance v. Jaren Baxter, Joanne Baxter, Mary Ellen Boulter, Daryl Crape and John Does : Reply Brief

Utah Court of Appeals

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Robert M. McRae; McRae & DeLand; Attorney for Appellants.

Michael P. Zaccheo; Richards, Brandt, Miller & Nelson; Attorney for Appellee.

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

LIBERTY MUTUAL INSURANCE GROUP,	:	
	:	Case No. 920301-CA
Plaintiff/Appellee,	:	
	:	
vs.	:	
	:	
JAREN BAXTER, JOANNE BAXTER, MARY ELLEN BOULTER, DARYL CRAPE and JOHN DOES,	:	
	:	Priority No. 16
Defendants/Appellants.	:	

REPLY BRIEF OF APPELLANT

AN APPEAL FROM THE FINAL ORDER AND JUDGMENT
GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
The Honorable James S. Sawaya, Presiding

ROBERT M. McRAE, #2217
McRAE & DeLAND
209 East 100 North
Vernal, UT 84078
Telephone: (801) 789-1666

Attorney for Appellants Baxter
and Boulter

MICHAEL P. ZACCHEO, #A4450
RICHARDS, BRANDT, MILLER & NELSON
50 South Main Street
~~Ken. Bank Tower~~ Suite 700
Salt Lake City, UT 84110
Telephone: (801) 531-1777

Attorney for Appellee

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COURT OF APPEALS

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ROBERT M. McRAE, #2217
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209 East 100 North
Vernal, UT 84078
Telephone: (801) 789-1666

Attorney for Appellants Baxter
and Boulter

MICHAEL P. ZACCHEO, #A4450
RICHARDS, BRANDT, MILLER & NELSON
50 South Main Street
Key Bank Tower, Suite 700
P.O. Box 2465
Salt Lake City, UT 84110
Telephone: (801) 531-1777

Attorney for Appellee

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	:	

STATEMENT OF THE CASE

This case is stated in the Brief of Appellant at pages 2-3.

STATEMENT OF FACTS

The facts are set forth in the Brief of Appellant and all supplemental facts are included in the argument below.

ARGUMENT

POINT I

LIBERTY MUTUAL DID NOT DEAL FAIRLY AND PROMPTLY WITH BAXTERS AND BOULTER

1. BAXTERS AND BOULTER MADE A VALID CLAIM

Liberty mutual asserts that no "claim" was being made by the July 12, 1989, letter from Baxters and Boulter's counsel. (Appellee's Brief at 19) Elsewhere in its brief,

however, Liberty Mutual refers to this letter as a "claim". (Appellee's Brief at 9, 28). Further evidence can be found in the record indicating that Liberty Mutual stated it was treating the July 12, 1989 letter as a claim. In a letter dated August 24, 1989, Liberty Mutual wrote Baxters' and Boulter's counsel stating "If I understand your intentions, you are interested in placing an uninsured motorist claim on behalf of each of these two claimants . . ."(R. at 345) Liberty Mutual was notified of the accident on April 28, 1989. (R. at 239) The letter in question was dated July 12, 1989. It took Liberty Mutual 43 days to respond to the letter, when it sent a letter to Baxters' and Boulter's counsel. (R. at 346) On October 30, 1989, after hearing nothing more from Liberty Mutual, Baxters' and Boulter's counsel sent Liberty Mutual notice of a default judgment and inquired as to whether Liberty Mutual was going to pay on the claim. (R. at 348) On January 4, 1990, about 67 days later, with no further contact, Liberty Mutual filed a Declaratory Complaint seeking a declaration as to whether the default judgment against Crape was binding for purposes of the uninsured motorist claim and also to set aside the default judgment. (R. at 02-08)

Liberty Mutual seeks to have the definition of a "claim" as found in the Unfair Claims Settlement Practices Rule R540-89-4(b) apply here. (Appellee's Brief at 26) The

rule defines a "claim" as being a "request or demand for payment." Liberty Mutual states that in no way could the July 12, 1989 letter from Baxters' and Boulter's counsel be construed as making a "claim". (Appellee's brief at 19). Assuming, arguendo, that Liberty Mutual's assertion is correct, the next claim or "demand for payment" by Baxters and Boulter was made on October 30, 1989 when their counsel sent a letter notifying Liberty Mutual of the default judgment and asked whether Liberty Mutual was going to pay the claim. If this date is construed as being the "claim" date, it took Liberty Mutual about 67 days to respond in any form, when it filed the Declaratory Complaint on January 4, 1990. Thus, Liberty Mutual breached the 15 day response standard as set forth in the Insurance Rules R540-89-10(A), with greater culpability under its own argument of when the claim was made.

2. IT WAS LIBERTY MUTUAL'S DUTY TO INVESTIGATE THE CLAIM

Liberty Mutual also argues that it is the insured's duty to investigate whether a tort feasor is insured in an uninsured motorist claim. (Appellee's Brief at 20) Liberty Mutual however either overlooks or intentionally omits controlling authority on the issue. Beck v. Farmers Ins. Exchange, 701 P.2d 795 (Utah 1985) much like this case, involved a bad faith insurance suit for the insurer's denial

of an uninsured motorist claim brought by its insured.

Speaking for the Court, Justice Zimmerman stated:

The implied obligation of good faith performance contemplates at the very least, that the insurer will diligently investigate the facts to enable it to determine whether a claim is valid, will fairly evaluate the claim, and will thereafter act promptly and reasonably in rejecting or settling the claim.

701 P.2d at 801 (citations omitted)

See also Filasky v. Preferred Risk Mut. Ins. Co., 734 P.2d 76 (Ariz. 1987) (Insured's lengthy delay in settling insured's claims under homeowner's and automobile policy resulted from insurer's failing to adequately investigate each claim, constituting a breach of the insurer's duty to deal with its insured in good faith.)

Further evidence of the insurer's duty to investigate claims is found in the Unfair Claims Settlement Practices Rule. The pertinent section of the rules states:

R540-89-11 STANDARD FOR PROMPT INVESTIGATION OF CLAIM
Every insurer shall complete investigation of a claim within 45 days after notification of a claim

Moreover, Liberty Mutual in its Brief indicates that the duty to investigate a claim is that of the insured. (Appellee's Brief at 26). Certainly an insurer is in a better position to investigate whether a tortfeasor is uninsured than its insured. Insurance companies have wide access to credit reporting companies, insurance company information pools and monies to higher claims adjustors or investigators.

3. LIBERTY MUTUAL'S REQUIREMENT THAT ITS INSURED FIRST OBTAIN ITS PERMISSION BEFORE BRINGING AN ACTION SHOULD BE HELD TO BE UNENFORCEABLE.

Liberty Mutual argues that it was not bound by the default judgment against Daryl Crape, as it was obtained without written consent of Liberty Mutual, which is required under the insurance contract. (Appellee's Brief at 29) This provision as applied in this case is unconscionable and should be construed as violating public policy. The reason Baxters and Boulter were forced to take the default judgment against Crape was because of Liberty Mutual's inaction. To allow an insurance company to take advantage of a provision of this nature after it caused unwarranted delay and therefore inflicted greater injury on its insureds, surely goes against notions of fairness and justice. See also Ainsworth v. Combined Ins. Co. of America, 763 P.2d 673 (Nev. 1988), rehearing denied 774 P.2d 1003, Cert. denied 110S. Ct. 376, 107 L.Ed.2d 361. (Insurer may not rely on its own ambiguous contract as sole basis for denial of coverage.)

Liberty Mutual raised this very issue before Judge Rokich in their Motion to Set Aside the Default Judgment. This motion was denied. (R. at 407) Liberty Mutual never appealed this ruling and therefore should not be allowed to raise the issue here.

4. BAXTERS AND BOULTER DO NOT BASE THEIR CAUSE OF ACTION ON THE UNFAIR CLAIMS SETTLEMENT PRACTICES RULE

Liberty Mutual also argues that the insurance rules specifying various time limits within which insurance companies have to act do not create a cause of action for

private parties. (Appellee's Brief at 25) As was set forth in their Brief, Baxters and Boulter do not argue that the insurance rules give a cause of action, but rather the rules help define the standard of good faith. (Baxters' and Boulter's Brief at 15) Baxters and Boulter base their action on Liberty Mutual's breach of its duty of good faith and fair dealing that was recognized in Beck. (Id.) As Section R540-89-2 of the Unfair Claims Settlement Practices Rule states, the purpose of the rule is to "establish standards of equity and good faith to guide licensees (insurance companies) in the settlement of claims."

POINT II

BAXTERS AND BOULTER HAVE SUFFERED COMPENSABLE DAMAGES

1. BAXTERS AND BOULTER HAVE SUFFERED DAMAGES RESULTING FROM LIBERTY MUTUAL'S BREACH OF ITS DUTY OF GOOD FAITH AND FAIR DEALING

Liberty Mutual argues that Baxters and Boulter have suffered no compensable damages as a result of its alleged breach of its duty of good faith and fair dealing. (Appellee's Brief at 29-32) Baxters and Boulter, however, in their brief stated that they have sustained numerous damages resulting from Liberty Mutual's breach of its duty of good faith and fair dealing. (Baxters' and Boulter's Brief at 17). These damages include, but are not limited to pain and suffering, mental anguish, economic hardship, psychological damages, emotional distress, loss of enjoyment of life, attorney fees. (Id.)

These damages are all compensable under Beck. Justice Zimmerman writes:

There is no reason to limit damages recoverable for breach of a duty to investigate, bargain, and settle claims in good faith to the amount specified in the insurance policy.

701 P.2d at 801

Beck also recognizes attorney fees, mental anguish, bankruptcy, loss of home, business, etc., for a breach of the insurer's duty of good faith and fair dealing. 701 P.2d 801, 02. See e.g., Bevan v. J.H. Construction Co., 669 P.2d 442 (Utah 1983), Reichert v. General Ins. Co., 428 P.2d 860 (Cal. 1976), Lambert v. Sine, 256 P.2d 241 (Utah 1953). Beck states: "Nothing inherent in the contract law approach mandates this narrow definition of recoverable damages". 702 P.2d at 801. This broad range of damages was also recognized in Crookston v. Fire Exchange, 64 Utah Adv. Rep. 3, 10 (Utah 1991).

In this case, Baxters and Boulter incurred damages of pain and suffering, emotional distress, loss of enjoyment of life because of mountain family bills which began running delinquent because of Joanne Baxter's loss of employment. Jared Baxter, Ms. Baxter's husband had to obtain additional employment to try and satisfy creditor demands because of the debtor/creditor relationship resulting from loss of income not compensated for by a general damage settlement by Liberty

Mutual with its insureds. Joanne Baxter is an athletic type person, but because of the anguish and anxieties of the continued first party claims, which took more than two and one-half years to settle, she had no desire to participate in any family activities outdoors, nor team sporting activities. Additionally, the breach of its duty of good faith and fair dealing by Liberty Mutual has caused extreme emotional distress to Baxters and Boulter. Moreover, Joanne Baxter has suffered psychological damage as the result of Liberty Mutual's unnecessary delay and prolonged litigation and inability to seek out necessary medical assistance because of economic limitations. (R. at 431,36) Substantial attorney fees have also been incurred in pursuing the claim. (Baxters' and Boulter's Brief at 17.)

These damages and more suffered by Baxters and Boulter rise far beyond the mere disappointment, frustration and anxiety normally experienced in the process of filing an insurance "claim" as Liberty Mutual would have this Court believe. (See Appellee's Brief at 33, fn 13). It should also be pointed out that in numerous areas in its brief Liberty Mutual states that it has satisfied the default judgment amounts to Baxters and Boulter. (Appellee's Brief at 14, 19, 17, 29, 30). This is not true. Liberty Mutual has satisfied only policy limits with Joanne Baxter.

2. THE RECORD SUPPORTS A FINDING OF PUNITIVE DAMAGES AGAINST LIBERTY MUTUAL

Liberty Mutual alleges that Baxters and Boulter are not entitled to punitive damages under the facts of this case. (Appellee's Brief at 33,34)

The standard for punitive damages is found in Utah Code Ann. §78-18-1(1)(a), which states that before any punitive damages can be awarded, the finder of fact must be shown by "clear and convincing evidence that the acts or omissions by the tort feisor are the result of wilful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and disregard of, the rights of others." Id.

Both Beck and Crookston recognize that punitive damages may be awarded for acts by an insurer in a bad faith action, although Beck states that the insurer's acts must rise to the level of tort to sustain a punitive damages award. 701 P.2d at 800. In Beck, from the date of accident to the date of payment by the insurance company was completed in about nine months. (Id. at 797) As in this case, there was also litigation involved in Beck. (Id.)

This case took more than two and one-half years before Liberty Mutual finally paid its policy limits. This delay was due to Liberty Mutual's disregard and indifference towards

the rights of its insureds, Baxters and Boulter. Further evidence of Liberty Mutual's reckless indifference towards its insureds is also present here. An example of this is when Liberty Mutual misrepresented the law on how long it had to decide whether it was going to pay the claim. A Liberty Mutual representative on numerous occasions told its insureds that it had no obligation to act on the claim until the passing of one year. (R. at 432) Another example of this type of behavior by Liberty Mutual occurred when Liberty Mutual cancelled insurance coverage for Baxters for excessive claims. (R. at 436) Other examples of Liberty Mutual's reckless behavior can be found in the record. (R. at 431-37) These acts and others like them along with Liberty Mutual's repeated instances of failing to respond, acknowledge communications, investigating, etc., all comprise a punitive damages claim in this case. Baxters and Boulter should be allowed to have the trier of fact to decide this issue.

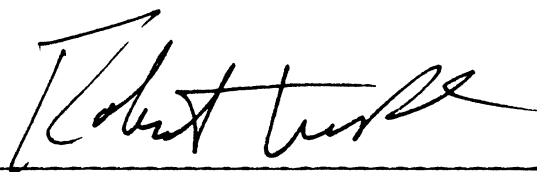
CONCLUSION

Baxters and Boulter have shown that Liberty Mutual has breached its duty of good faith and fair dealing throughout the history of the claim. The failure to timely acknowledge, investigate and correspond to the claim all manifest a display of gross indifference for the rights of Baxters and Boulter by Liberty Mutual. Baxters and Boulter have suffered substantial

damages as a result of Liberty Mutual's acts and failures to act. Liberty Mutual would have this Court believe that its inaction and dilatory tactics were all proper and that there are no facts and arguments to the contrary that would justify the trier of fact to hear the case. This Court must review the facts in a light most favorable to Baxters and Boulter, the Appellants here. In so doing, this Court should order the case to be heard for a trial on the merits.

RESPECTFULLY SUBMITTED this 5 day of June, 1992.

McRAE & DeLAND




ROBERT M. McRAE

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, four copies of the foregoing to the following on this 8 day of June, 1992.

Mr. Michael P. Zaccho
Attorney for Plaintiff
P.O. Box 2465
Salt Lake City, UT 84110-2465



ROBERT M. McRAE