

1963

# Meredith Page v. Utah Home Fire Insurance Co. : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

Brief of Appellant, *Page v. Utah Home Fire Insurance Co.*, No. 9902 (Utah Supreme Court, 1963).  
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IN THE SUPREME COURT

of the  
STATE OF UTAH L E D

JUL 22 1963

MEREDITH PAGE,

Clerk, Supreme Court, Utah

*Plaintiff, Appellant and  
Respondent on Cross Appeal,*

vs.

Case No.  
9902

UTAH HOME FIRE INSURANCE  
COMPANY, a Utah corporation,

*Defendant, Respondent and  
Cross Appellant.*

APPELLANT'S BRIEF

Appeal from the Judgment of the  
Third District Court for Salt Lake County  
Honorable Merrill C. Faux, Judge

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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MEREDITH PAGE,

*Plaintiff, Appellant and  
Respondent on Cross Appeal,*

vs.

UTAH HOME FIRE INSURANCE  
COMPANY, a Utah corporation,

*Defendant, Respondent and  
Cross Appellant.*

Case No.  
9903

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APPELLANT'S BRIEF

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STATEMENT OF THE NATURE OF THE  
CASE

This is an action by which plaintiff seeks to recover the actual cash value of a fourplex building totally destroyed by fire on or about the 11th day of February, 1961 under two fire insurance policies issued by the defendant.

## DISPOSITION IN LOWER COURT

The case was tried to a jury and submitted on two special interrogatories. The lower court originally rendered judgment for the defendant. Thereupon the lower court granted plaintiff a new trial pursuant to plaintiff's motion for new trial. Upon defendant's motion to reconsider the court's order granting a new trial, the lower court in a memorandum decision granted a partial new trial pertaining to the second insurance contract and vacated the original order granting a new trial. From the judgment for the defendant, plaintiff appeals.

## RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment and a new trial.

## STATEMENT OF FACTS

Meredith Page, the plaintiff, has been engaged in the business of rental properties as well as an insurance agent for Utah Home Fire Insurance Company, defendant, for a period of approximately thirty years. He worked through Heber J. Grant and Company, the general agent for defendant corporation. (R 104-105). On or about the 31st day of December, 1958, plaintiff purchased a surplus air force officers' quarters located at the Salt Lake Air Base from LaVell Webster, a professional moving man. (R 108). Said build-

ing was a fourplex consisting of 22 rooms, excluding closets and bathrooms (R 116) and of about 4,670 square feet. (Exhibits 3 and 4). Thereupon plaintiff went to the office of the general agent, Heber J. Grant and Company, for the purpose of obtaining fire insurance on the building. (R 108). He talked to a certain Ove C. Inkley, Secretary-Treasurer of Heber J. Grant and Company, office manager and assistant manager of the general agent, (R 108, 281) and explained that he was going to move the building some 20 odd miles out to 14610 South State (across the street from the State Prison), fix it up as a rental unit of four apartments. He explained generally the condition of the building. (R 108-110). After a discussion as to the amount of insurance to place on the building, plaintiff applied for \$20,000.00 with the statement that after he did some more work on it he would take more insurance. (R 108-110).

Mr. Inkley had serious doubts as to whether insurance could be written and said he would have to refer it to the underwriter for approval. (R 292-294). Thereupon a policy for \$20,000.00 with extended coverage was issued to plaintiff. (Exhibit 1-P).

Sometime in the Spring of 1959 the building was moved and placed on a foundation at 14610 South State. The building was closed in by replacing all broken windows, new doors where needed, locks replaced and installed, cuts in the building caused when moved were covered and some damaged walls were repaired, addi-

tional width of eaves were being constructed, the building was painted and arrangements made with a plumber to connect the plumbing to the sewer and prospective tenants were interviewed. (R 117-120).

On June 27, 1960, pursuant to a telephone call from plaintiff to Heber J. Grant and Company, another policy in the sum of \$10,000.00 with extended coverage was issued to plaintiff. (Exhibit P-2) (R 110).

Prior to the issuance of the second policy, defendant paid a fire claim under the first policy to fire damage to an out building which burned. Defendant had sent an adjuster out to the property to adjust the claim. (R 110-112).

During the period in which the building was being prepared for rental, the plaintiff had permitted a certain George Welshman without compensation to store certain items in the building such as a small light power plant without fuel tank or carburetor; saws, hand tools and carpenter tools used in construction of the building; a pillow slip; Christmas tree stand; a bundle of aluminum; a couple of car generators; a washing machine; kitchen table; dining room table; and some iron scraps. (R 266-271). The said items were not in the area of the source of the fire. (R 266).

On or about the 11th day of February, 1961, said fourplex was totally destroyed by fire.

Suit was filed to recover under the two insurance policies after failure of satisfactory adjustment. De-



defendant answered generally by denial and set up an affirmative defense that company was not liable because of increased hazard because of materials stored in the building and non-occupancy. (R 1-11).

Discovery procedure was used and demand for jury trial was filed by plaintiff. (R 12-15). A pretrial was held on the 6th day of March, 1962 and pretrial order made and issues framed as to the amount payable under policies and whether or not the premises had been used in violation of policies. Jury trial was set for April 25, 1962. (R 16).

On the 23rd day of March, 1962, defendant filed a motion for leave to amend pretrial order by adding the additional defense that policies were issued by fraudulent representations of overvaluation of the building and use for which the building was to be used. (R 17-18).

On the 30th day of March, 1962, over plaintiff's objections the pretrial order was amended to apparently cover defendant's requested issue of over valuation of the property. (R 19).

Again at the opening of the trial the defendant again sought to enlarge the issues of the trial now to include misrepresentations as to the condition of the building at the time the insurance was written. This enlargement was again vigorously objected to by plaintiff. (R 93-96).

Each party had three agents testify as to actual

cash value of the buliding at the time of the fire as follows:

Ronald Sylvestor, for plaintiff	\$38,430.00	(R 188-193)
John W. New, for plaintiff	\$33,718.39	(R 202-222)
Sam F. Soter, for plaintiff	\$27,804.24	(R 222-230)
Alex Gray, for defendant	\$24,780.16	(R 274-283)
Raymond S. Fletcher, for defendant	\$ 7,500.00	(R 308-334)
Guy D. Alder, for defendant	\$ 7,500.00	(R 335-343)

## ARGUMENT

Point 1. THE ISSUE OF FRAUD SHOULD NOT HAVE BECOME AN ISSUE OR A MATTER OF DEFENSE.

Fraud or misrepresentation on the part of the plaintiff was not a proper issue to be tried or submitted to the jury for the following reasons:

1. The defense was not pleaded, nor included in any pretrial order and not timely raised.
2. The defendant waived any defense and was estopped from raising said defense.
3. The issue served to confuse the jury, prejudice

the jury and detracted the jury from concentrating on the only true issue of what was the actual cash value of building at the time of trial.

The Utah Rules of Civil Procedure and modern court decisions have stressed the need for fairness and complete discovery in the preparation and trial of cases so as to eliminate surprise and offer counsel an opportunity to prepare his case to meet framed issues. The including of a defense of fraudulent misrepresentation as to the condition of the fourplex at the beginning of the trial violated the rule of fairness, was a surprise and provided no means of preparation concerning the issue.

Rule 8(c) of the *Utah Rules of Civil Procedure* provides "In pleading to a preceding pleading, a party shall set forth affirmatively . . . fraud . . . and any other matter constituting an avoidance or affirmative defense." The defendant's claim that plaintiff made fraudulent misrepresentations of material facts in the procuring of subject insurance policies has never been pleaded even after the conclusion of trial and at this stage of the proceedings. See also *Rees v. Archibald*, 6U(2d) 264, 311 P2d 788, where the Utah Supreme Court held that an affirmative defense must be pleaded and proved.

The defendant did not raise the issue even when he asked the court leave to amend the pretrial order. See defendant's motion (R 17) wherein he claimed a misrepresentation as to the purpose and use of buildings and the valuation of said building. The amended pre-

trial order is ambiguous but apparently follows the same theory. During the trial the defendant offered no evidence to rebut plaintiff's testimony and evidence that the intended use of the building was for rental purposes. As to the over valuation issue, defense counsel at beginning of the trial said, "I don't think the over valuation is particularly an issue in the case, Your Honor. The policy provides that the company will pay the actual cash value and that is the third issue in this case as I have set them out or it is one of the issues." (R 96). The defendant thereby abandoned the defense he asked to have inserted in the amended pretrial order and confirmed the position of plaintiff recited in the amended pretrial order.

Mr. Appleman in 20 A, *Appleman on Insurance Laws and Practice*, 11978, concerning Subject Matter of Insurance—Misrepresentations, says:

"The burden is upon the insurer, relying upon a defense of misrepresentation or breach of warranty, to plead and prove such defense. The same result follows where the insurer defends upon concealment of material matters or fraud in the procurement of the policy. It has thus been stated that the insurer must prove the representations made, their falsity, materiality, and reliance thereon by the insurer, plus in some cases, the fact that they were knowingly made by the insured with the intent to deceive."

In reference to the waiver of the defense of fraud and estoppel, this writer will briefly refer the court to the record concerning certain undisputed facts testified

to by defendant's own witnesses. See R 284 as to the fact that Heber J. Grant and Company is a general agent for defendant company. See the cross examination of Mr. Inkley, the Secretary-Treasurer of Heber J. Grant and Company (R 291-296) wherein he admits among other things, that plaintiff came into the office and advised him that he had purchased a surplus building at the Air Base and that he was going to move it, place it on a foundation and there were four large apartments and that he referred the matter to the underwriter. He said in part as follows: "There was still some question in my mind as to whether the underwriter ought not pass on it. It was out of the ordinary, a building being moved and set up again on new property and I thought he should know these things before he O.K.'d the order." (R 294). See also the cross examination of Norman Everett, the fire insurance underwriter of Heber J. Grant and Company, as follows: (R 306).

Q. Were you advised that this building was going to be moved from the air base out to about 20 miles out to Draper?

A. No.

Q. If you had been advised of that what would you have done?

A. We would not have accepted the risk.

Q. Let me put it this way, if you were advised that it was to be moved only, what information do you people have to have before you leave the office and go out and investigate something that has to be insured, don't you investigate things that are questionable?

A. Yes, sir.

Q. All right now, if you were advised that this building was vacant and sitting out on the air base for an apartment building and was to be moved out some 20 miles out to the Point of the Mountain and placed on a foundation, your testimony is that you would have rejected it at that instant?

A. Yes, sir.

Q. In other words, if you were given that much information, you then were put on notice that this may be a bad risk?

A. Yes, sir.

Q. Did Mr. Inkley make any recommendations to you or do you recall?

A. No, I don't recall for sure on that about any recommendations.

Q. As a matter of fact, if you were given any information at all that a building was to be moved from one location to another, what would your reaction be?

A. Not to accept it.

Q. Just with that information alone?

A. Yes, sir.

With the above facts in mind, this writer now quotes at length from 16 *Appleman*, 9103—General Agent or officer:

“Following the definition of general agent previously adopted as one having power to issue a policy for the insurer or to bind the insurer by

his contract, it is the accepted rule that knowledge acquired by such agents within the scope of their duties is the knowledge of the insurer. It has been otherwise stated that the knowledge of an officer or agent of the insurer, which is acquired within the scope of his duties of employment or agency as to facts material to the insurance, is imputed to the insurer, in the absence of collusion between the insured and the agent. And this is true regardless of whether such information is communicated to the insurer."

"An insurance company is charged with the knowledge of a general agent issuing a policy relative to the insurable condition of the properly insured. . . . "

"Knowledge on the part of a general agent of facts rendering the policy voidable, or of a breach authorizing a forfeiture, is imputed to the company, for the purpose of effecting a waiver or an estoppel to rely upon such forfeiture."

"Notice acquired by a departmental manager of the insurer's general agents regarding facts within the scope of his authority is imputable to the corporate insurer, though the manager was unauthorized to alter or waive any policy processed."

Many cases are cited in support. This writer also quotes Mr. Couch at 7 *Couch on Insurance* 2d 35:252, Constructive Knowledge:

"While knowledge of the true facts is essential to the existence of a waiver or a breach of a policy provision or the falsity of a statement of the insured, it is not necessary that the insurer had

actual knowledge. It is sufficient if the circumstances are such that the insurer should have known the actual facts because it had knowledge of such matters as would have put a reasonable man on inquiry, that is, that it had had constructive knowledge. Thus knowledge which is sufficient to lead a prudent person to inquire about the matter, when it could have been ascertained conveniently constitutes notice of whatever the inquiry would have disclosed and will be regarded as knowledge of the facts, and the insurer may not deliberately disregard the circumstances which put it on notice."

And also 7 *Couch on Insurance* 2d 35:271:

"Where the insurer had knowledge of such facts as should have put it on inquiry and such inquiry would have disclosed the true facts, it is estopped to assert the falsity of the insured, statements when the latter were made in good faith."

In substance, even if defendant had properly raised the defense of fraud or misrepresentation, said defendant as a matter of law has waived its claimed defense or is estopped from making it an issue. The only conflict in testimony is between the two officers for the general agent as to what transpired between them. Over this the plaintiff had no control. As a matter of fact, the only testimony opposing Mr. Page's testimony as to the condition of the building as recited in R 108-110 is the testimony of Mr. Inkley and Mr. Inkley's testimony is founded on bad memory.

All of this testimony based on ~~reported~~<sup>repeated</sup> and repeat-



ed hypothetical questions served only to confuse the jury and detract it from the main issue involved as to the actual cash value of the fourplex at the time of the fire.

## **Point 2. THE TRIAL COURT ERRED IN INSTRUCTIONS GIVEN TO THE JURY.**

The plaintiff respectfully asserts that the trial court erred in its instructions to the jury in the following specific matters:

1. Instruction 11a, defining actual cash value, is erroneous and the trial court should have given plaintiff's requested instruction No. 2, which is the correct definition.
2. The trial court should have instructed the jury as to a general verdict as set forth in plaintiff's requested instruction No. 1 rather than by two interrogatories.
3. The trial court erred in the giving of the second interrogatory.

The definition of "actual cash value", as it applies to fire insurance policies, has not ever been decided by the Utah Supreme Court to the knowledge of this writer and is therefore one to be decided. There is by no means any uniformity of definition in other jurisdictions. Some courts have adopted the definition as set forth in plaintiff's requested instruction No. 2 as follows:

“Actual cash value of the property at the time of the loss means the replacement cost of the building less items specifically excluded from coverage such as underground pipes and foundation under the ground, less depreciation for wear and tear.”

Some courts have defined actual cash value as being synonymous with “market value” and have adopted a broad evidence rule permitting all evidence to be admitted in arriving at this definition.

The trial court did neither in its definition of actual value in instruction No. 11a. The instruction did not define what actual cash value meant, but substituted the broad evidence rule as a definition. The instruction as given gave no guidance to the jury as demonstrated by the jury returning to the court asking what was meant by actual cash value. (R 354).

61 ALR 2d 725 et seq. sets forth an excellent discussion of the cases involving actual cash value of buildings. See also 6 *Appleman* 3823.

Plaintiff urges the adoption of the rule set forth by our sister State of Idaho as to the definition of actual cash value as it pertains to buildings. See *Boise Ass'n. of Credit Men v. U.S. Fire Insurance Company*, 256 Pac. 523. On page 527 the court says:

“The actual cash value of the property at the time of loss is not ordinarily the same as the cost of replacing the property with new property of like kind or quality. As to a building, it is the cost of a new building of the same material and dimensions of the one destroyed, less the amount

the destroyed building had deteriorated by use —4 Cooley, Briefs on Insurance, p. 3082. On the other hand, the market value of a building cannot be used as a test in determining the amount of recovery for the destruction of a building for various reasons. If there was no market value for the property, so it could not be sold, it would not have any value, and consequently there would be no loss. . . . Again the market value of some buildings (as for instance tenement houses) may be much greater than their actual cash value. . . . 4 Cooley, Briefs on Insurance, p. 3981; Wall v. Platt, 169 Mass. 398; 48 N.E. 270; 3 Sutherland on Damages (4th Ed.) pp. 3042, 3043.”

What is used as definition for actual cash value can have a wide range of effects as to the compensation paid to the insured. An example of this is the variance of appraisals in this case. John New, one of plaintiff's experts, used replacement cost new, less depreciation for wear and tear, less items such as foundation and the like and arrived at an actual cash value at time of fire of \$33,718.39. For depreciation he used the same depreciation tables as used in the insurance industry, to wit: Marshall Valuation Service. (Exhibit 14-P). On the other hand two of defendant's witnesses, Raymond S. Fletcher and Guy D. Alder, used market value basis and arrived at \$7,500.00. The latter two appraisers' figures amounted to about \$1.60 a square foot, which is hardly enough to compensate for a chicken coop. Under cross examination both Fletcher and Alder admitted they would place a different figure if the building had been located at Midvale or say Salt Lake

City. They also admitted that if there were two houses side by side, of equal cost and square footage, they would arrive at different figures if the room arrangements were different. (R 330-331, 342).

The definition of actual cash value should be one that can be understood and one that justly and adequately compensates the insured for his loss.

The trial court should have submitted the entire case to the jury rather than by two special interrogatives so that plaintiff would have full benefit of demanded trial by jury. The case was not complicated requiring interrogatories and would have not required the court to make certain findings itself, which is contrary to the basic principles of a jury trial.

The second special interrogatory submitted to the jury concerning failure to make a full and honest disclosure to defendant insurance company is vague, ambiguous and made without definition and not worded to encompass facts argued by defendant. The interrogatory submitted was as follows:

“Did plaintiff Meredith Page knowingly fail to make a full and honest disclosure to defendant Fire Insurance Company of the material facts regarding the nature and intended use of the burned fourplex?”

To which policy is the court directing the jury's attention, the first policy issued when the fourplex was at the air base, or the second policy concerning disclosures made at the time the building was situated at the location where it was at the time of the fire?

The status of the building at these different times when the two policies were issued were entirely different. The special interrogatory appears to direct the jury's attention to whether or not a full and honest disclosure was made to defendant fire insurance company of the material facts regarding the underlying nature and intended use of the burned fourplex. The record clearly discloses there was no conflict of evidence that the nature and intended use of the fourplex was for rental purposes. The special interrogatory did not ask of the jury any questions relative to a finding of fraud concerning scienter, reliance by defendant, and whether or not defendant was damaged by failure of plaintiff to make a full disclosure.

### Point 3. THE TRIAL COURT ERRED IN ITS JUDGMENT.

The trial court clearly invaded the province of the jury by making its own findings of fact, contrary to the evidence, by forming an issue that was not properly before the court, to wit: fraud, and by rendering a judgment adverse to plaintiff.

The trial court properly granted a new trial in the first instance and then erred by granting a partial new trial.

## CONCLUSION

This has been a case where the defendant has had a field day shot gunning the plaintiff with one defense

after another up to and including the trial with the purpose of confusing the only real and true issue of the case—what was the actual cash value of the burned fourplex at the time of the fire? An issue of fraud has found its way into the trial after repeated objections by the plaintiff. The evidence even refutes that it is a good defense even if it were properly presented, in that defendant insurance company waived its defense and is estopped from raising it. The trial court erred in its instructions, confused the jury and then after discharging the jury began to make its own findings of fact and invaded the province of the jury. The trial court properly acted when it initially granted plaintiff a new trial. Both parties now have an excellent deposition and it makes good sense and is fair and just to send the matter back to be retried in its entirety. The new trial should, however, be on only one issue and that is actual cash value at the time of loss with a definition that is clear of meaning and will render just and adequate compensation to the insured.

Respectfully submitted,

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