

1963

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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

AUG 19 1963

MEREDITH PAGE,
Plaintiff, Appellant and
Respondent on Cross Appeal,
vs.
UTAH HOME FIRE INSUR-
ANCE
COMPANY, a Utah corporation,
Defendant, Respondent and
Cross Appellant.

Clark, Supreme Court, Utah
Case No. 9903

RESPONDENT'S BRIEF

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

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RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

The plaintiff, an agent of the defendant insurance company, seeks to recover the actual cash value of a war surplus building destroyed by fire in February, 1961, under two fire insurance policies issued by the defendant company to the agent.

DISPOSITION IN LOWER COURT

The case was tried to a jury and submitted on two special interrogatories. The jury found that the actual cash value of the building was \$10,000 and also found that the plaintiff failed to make a full and honest disclosure to the defendant fire insurance company of the material facts regarding the nature

and intended use of the burned fourplex. The trial court thereupon entered judgment for the defendant of no cause of action. It then granted plaintiff's motion for a new trial and upon reconsidering granted a partial new trial only on the issue of the validity of the second insurance policy. From this judgment the plaintiff has appealed and defendant has cross appealed.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment and a new trial. Defendant seeks reversal of the trial court's order granting a partial new trial and asks that the trial court's judgment of no cause of action be reinstated. In the alternative that plaintiff have a new trial only on the issue of whether the plaintiff violated his fiduciary duty, when the policies of insurance were written, by not disclosing to the company the actual condition and use of said building.

STATEMENT OF FACTS

Plaintiff has not included many facts which the defendant considers important in the fair presentation of its case and will, therefore, set out its own statement of facts.

The plaintiff Meredith Page had been a soliciting agent for Utah Home Fire Insurance Company for over 30 years (R104) and worked through Heber J. Grant and Company, a general agent for Utah Home Fire Insurance Company. He also owns 22

rental units in Salt Lake, Riverton and Draper which he manages. (R105)

In December of 1958 Mr. Page purchased a war surplus building used for Air Force officers quarters located at the Salt Lake Airbase, from LaVell Webster, a professional house mover. The building had 22 rooms (R116) and approximately 4670 square feet of floor space. (R108). On December 31, 1958 he went to Heber J. Grant and Company where he met with Mr. Ove C. Inkley, secretary and treasurer of Heber J. Grant and Company, who had known Mr. Page for 25 years (R. 284) and discussed with him the matter of taking out a fire insurance policy on the building. There is a dispute in the evidence with respect to what Mr. Page said he told Mr. Inkley and what Mr. Inkley says Mr. Page told him concerning the building. The jury found that Mr. Page failed to make an honest disclosure of the material facts pertaining to the nature and intended use of the building and defendant will point out the differences in testimony. Mr. Page stated that he told Mr. Inkley he had purchased a building of approximately 5,000 square feet and that he was going to move it out in the county on U.S. 91 at 14610 South, immediately south of the Utah State Prison, (R.113) and put it on property there as a fourplex (R. 103); that he had paid approximately \$2,000 for it, to be exact \$1,800 (R. 109). He said it would be moved within two weeks to a month (R. 135); that it would be cut up into three or five

pieces when moved (R. 140); that the wiring would have to be cut and the pipes (R. 140); that it had a 90 weight tar paper roof; that many of the windows had been broken (R. 142); that this was an Air Force officers' living quarters and a few minor repairs would put it in good condition (R. 143); that the floors were good and tiled throughout (R. 144); that the plumbing was all in and very little would have to be done to the plumbing (R. 144); that it was built for a central heating system and that he was going to make individual heating systems for each apartment; the pipe was already in, most of it, and it would be very little work on that (R. 144 & 145); that he told Mr. Inkley there were closets in each apartment (R. 145) and that the building was in good condition (R. 146); he also told him the type of floor joists on the building and explained pretty well the construction and condition (R. 157).

Mr. Inkley on the other hand testified that Mr. Page told him the building had a good roof, it had a good floor and there was tile on the floor as well as on the walls. The walls were hard walls, good substantial walls. The building was substantial all the way through (R. 285); he said it would be heated by gas, it was wired already, the plumbing was in it, he would just have to connect with the plumbing and the wiring; that after he repaired some little damage he would have four nice rental units; that he was putting it on a cement foundation (R. 286). Mr. Inkley said Page did not mention they would

cut up the building in units for moving (R286) and that if he had told him he would not have forgotten it (R. 297). Mr. Page did not tell him a large number of windows were out of the building (R. 286 & 297). He said Mr. Page told him that there would be a little wall repair near the baseboard where there had been some wearing, nothing extensive, however, (R. 286). Page also told him that the light fixtures, plumbing fixtures and heating fixtures were in, the building had been occupied and he was purchasing the building just as it stood when it was vacated and that everything was in the building when he bought it. (R. 287).

Mr. Inkley on cross examination by Mr. Dahl stated as follows with respect to his conversation with Mr. Page and the question of insurability of the building:

“Well, when Mr. Page first mentioned it, I was in somewhat of a doubt but as he went on to explain what he had there, my doubts left me, he apparently had a good property.”
(R. 293 L30, 294 L 1 & 2)

When Mr. Inkley referred the matter to the underwriter he states he told the underwriter what Mr. Page had told him and that he understood the building would be moved intact (R. 89). He further testified that if he had known the building was to be cut in pieces to move, that many of the window panes were missing, that some of the walls were in poor repair, that some of the plumbing was missing; that the heating unit was not in the building, the wiring

was not complete and that the building would be vacant for some time, he would have told Page that it was doubtful the building could be insured and that he would have passed the information along and that it would be referred to their underwriter, Mr. Everett, and probably also Mr. Neil Mann, the underwriter for Utah Home Fire Insurance Company.

Mr. Mann testified that had the matter been referred to him with the information that the building was being cut into pieces to be moved, that many of the windows were out, that the wiring would be cut, roofing, plumbing and heating lines cut, that some of the walls were in poor condition with holes in them and that the building was going to be moved 20 miles, the policy would not have been written

“It would not have been written because the rate used wouldn’t reflect the hazards involved. The rate used was 97 cents per \$1,000. Insurance companies statistically compute rates based on hazards, based on experience. The experience involved in buildings cut up, vacant, unoccupied, with broken windows is so much worse than a completed building that we could not. The rate we would quote would be so high that the insured would not ask for insurance. In other words, the rate of 97 cents is based on a completed fourplex with no repairs needed; that we would quote.” (R. 299 & 300).

Mr. Everett, the underwriter for Heber J. Grant and Company, also testified that the risk would

have been rejected if the information **that the building was to be cut up, moved, many of the window panes missing, the walls damaged and the wiring and plumbing cut**, had been conveyed to him at the time the application for insurance was made.

After some discussion as to the amount of insurance to be placed on the building plaintiff applied for \$20,000 with the statement that after he did some more work on it he would take more insurance (R. 110). The policy was issued Dec. 31, 1958 showing the building located at 14610 South State Street and signed by Meredith Page as agent (R. 3) (Exh. 1P).

The building was moved in about April of 1959 (R. 149 & 150) to a point just south of the State Prison and within 12-15 feet of another fourplex owned by Page. (R. 177)

After it was moved and set on a foundation of cement and cinderblocks, with the blocks just being laid one on top of the other without cement (R148), the plaintiff had the window panes put in, covered up the cuts on the roof with tin and had a neighbor teen-age boy paint the outside (R. 173 & 273). He also started to extend the eaves on the building and had them about one-half done when the building burned (R. 246). There were some holes in the floor, other than the cuts and within a few feet of them. He claimed to have done a lot of work on the building including installation of some new doors on inside and outside (R. 117-119).

However, Mr. Welchman, a tenant of Mr. Pages's who lived immediately next to the burned building and resided there at the time of trial (R. 174) who was the only one who did any carpentry work on the building (R. 159 & 249) and the only person who had a key to the building other than Mr. Page (R. 177 & 253), testified that he did the work on the roof (R. 244); that he patched the seams on the roof where the cuts were made by nailing tin strips over the roof cuts to keep the rain out (R. 249); that some of the walls were badly damaged (R. 248); that they were just repaired enough to plug up holes so one could store things in them and keep the kids out (R. 246) and that no permanent repairs had been made on them at all (R. 246 & 249). The floors had not been repaired so that they hold together where they had been cut; that three-fourths of the window panes were out (R. 247 & 265) which he and Mr. Page installed (R. 249) and that about one-half of the extension on the eave had been completed at the time of the fire. No roofing had been put on the eaves that had been completed (R. 246). The doors on the building could not be locked and kids ran through the building, but the doors and locks were eventually repaired (R. 246); possibly two were replaced (R. 247). No plumbing work was done on the building (R. 252). Some of the cupboards in the apartments were in very bad shape (R. 252). The floors had coverings on them. How-

ever, in some places it was torn up and in pretty bad shape (R. 253). No work had been done on the rafters of the building (R. 252). Mr. Page and Mr. Welchman had a falling out and Mr. Welchman quit working for Mr. Page. However, later Mr. Page gave Mr. Welchman his key back and Mr. Welchman did a little more work for Mr. Page. He continued to live in the building next to the burned fourplex and was around there all the time as he was unemployed. He stated he didn't know of any additional work being done during this period (R. 272).

In accordance with Mr. Page's statement at the time he took the first policy, he applied for an additional \$10,000 which was written on June 27, 1960. He stated that he called the order in on the phone, told the person he talked to that he spent a considerable amount of money and work and at the time he took out the original policy he was going to add to the insurance on the building. He stated that they then okayed the policy (R. 110 & 137). The company did not send anyone out to see the property but relied on Mr. Page's examination and representation as to the condition of the building (R. 137 & 151). Mr. Page was the only one who made any appraisal or inspection of the building (R. 137). He again signed the policy as agent (R. 5) (Exh. P. 2).

A fire occurred involving a small outbuilding about 40 feet from the fourplex. The small building had been constructed before the Air Force building

was ever moved to the site where it later burned (R. 264). Mr. Page had a policy of insurance on the building next to the fourplex which burned (See Exh. 7, 8 & 11P) but he as agent told the agent from General Adjustment Bureau, an independent adjusting agency, who came out to adjust the loss, which policy to charge the loss of the small building to. Mr. Page said it was closer to the fourplex that later burned so he attached the loss to the policy on it (R. 152 & 156).

After the pre-trial on March 6, 1962, defendant filed a motion for leave to amend the pre-trial order to include a defense of fraud and misrepresentation, pursuant to admissions in Mr. Page's deposition. The pre-trial Judge after discussion between counsel and the court ruled that part of the claimed fraud, if it existed, was against the state and would not be admissible in this case but that the question of whether Mr. Page violated his fiduciary duty to the company would be an issue in the case and as noted in the amended pre-trial order, dated March 30, 1962, counsel agreed that the issue could be presented at the trial (R. 17, 18 & 19).

Each party had three expert witnesses testify concerning the actual cash value of the building: Ronald Sylvester for the plaintiff, \$38,430.00 (R. 188 & 193) John W. New, for the plaintiff, \$33,718.39 (R202 & 222); Sam F. Soter, for the plaintiff, \$27,804.24 (R. 222 & 230). The plaintiff's witnesses were all contractors and none of them were qualified ap-

praisers. The defendant's expert witnesses were Alex Gray, \$24,780.16 (R. 274 & 283 & 297-298); Raymond S. Fletcher, \$7,500 (R. 308 & 334); and Guy D. Adler, \$7,500 (R. 335 & 343). Mr. Gray's bid did not take into consideration depreciation but was only the cost of rebuilding the structure with new materials (R. 277 & 298), and was not claimed to be the actual cash value of the building at the time of the fire. The witnesses Fletcher and Alder were qualified appraisers both being members of the American Institute of Real Estate Appraisers and both with many years of experience in the field of appraising (R. 309-310) (Exh. 2D). Mr. Alder was also president of the Utah Society of Residential Appraisers, S.R.A. (R. 335). Each of them made a thorough study of the structure of the building and took into consideration the various elements of depreciation and obsolescence in arriving at the actual cash value of the building.

ARGUMENT

POINT I.

THE ISSUE OF FRAUD, OR THE ISSUE OF WHETHER OR NOT MR. PAGE VIOLATED HIS FIDUCIARY DUTY WAS A PROPER ISSUE BEFORE THE TRIAL COURT AND JURY AND A PROPER MATTER OF DEFENSE.

It is discretionary with the pre-trial judge as to whether additional issues not pleaded in the original pleadings may be added at time of the pre-trial hearing. In this case the plaintiff not only was put on notice in plenty of time, 26 days, before the actual

trial, but as stated in the amended pre-trial order:

“Counsel have agreed that the following issue may be presented at the trial***”

“It is stipulated that the plaintiff Page was the agent of the insurance company at the time of the placement of this policy and worked through the general agent Heber J. Grant and Company. Defendant contends that in so dealing he owed a fiduciary relationship (duty) to the insurance company and thus being interested in the result of the transaction he violated his duty towards them.”

The record is clear that the pre-trial judge listed as one of the issues the question whether Mr. Page violated his fiduciary duty in the placement of the policies. This was, therefore, a proper issue before the trial court.

Defendant claimed in its motion that Page purchased the building and placed it on an area of land which he knew was going to be taken by the State Road Commission for a highway and that he purchased the policies of insurance in large amounts to try to substantiate the values which he proposed to collect from the State. Mr. Page's deposition contained admissions pertaining to this but the pre-trial judge ruled that this proposed fraud, if any, would not constitute a defense to the defendant on the policies issued to Page.

The fiduciary duty of Mr. Page as an agent was discussed and Judge Van Cott, the pre-trial

judge, said he would make the question of the violation of the fiduciary duty an issue in the case, which was done.

It has been common practice in pre-trial procedure in Salt Lake County to set up additional issues not set up in the pleadings when the facts warranted it. Rule 16 of the Utah Rules of Civil Procedure authorizes the court to do so and a proper order was made in this case.

Plaintiff was not surprised or should not have been concerning this defense in this case because although he objected to the original pre-trial order being amended he did consent to the issue being presented at trial (R. 19). The trial judge readily recognized that this issue had been raised by the amended pre-trial order (R. 94-95). Counsel for defendant prepared an instruction on the issue which was presented to the court prior to the commencement of the trial (R. 30) and plaintiff's counsel also recognized that it was an issue because he stated to Judge Faux:

"The plaintiff objects again as it did in the amended pre-trial order of the inclusion of the question as to whether or not the fiduciary capacity of the insured and the agent creates a defense on the policy itself." (R. 94).

Defendant never did waive this defense. The defendant contended that the agent made his own appraisal or in other words inspection or surveillance of the building and the policies were issued on his representation as agent. Valuation with re-

spect to the amount to be paid under the policy is governed by the terms of the policy and is based on actual cash value.

Section 13 of the Restatement of the Law of Agency states as follows with respect to an agent's fiduciary duty:

“An agent is a fiduciary with respect to matters within the scope of his agency.”

Comment A.

“The agreement to act on behalf of the principal causes the agent to be a fiduciary; that is, a person having a duty created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking. Among the agent's fiduciary duties to the principal is the duty to * * * * deal fairly with the principal in all transactions with him.”

Secton 390 of the Restatement of the Law of Agency states as follows in connection with the agent acting as an adverse party with the principal's consent:

“An agent in dealing with the principal on his own account in regard to subject matter as to which he is employed is subject to a duty to deal fairly with the principal and to communicate to him all material facts in connection with the transaction of which he has notice, unless the principal has manifested that he knows such facts or that he does not care to know them.”

Comment A. Facts to be disclosed.

“One employed as agent violates no duty

to the principal by acting for his own benefit if he makes a full disclosure of the facts to an acquiescent principal and takes no unfair advantage of him. Before dealing with the principal on his own account, however, an agent has a duty, not only to make no misstatements of fact but also to disclose to the principal all material facts fully and completely. A fact is material within the meaning of the rule stated in this section if it is one the agent should realize would be likely to affect the judgment of the principal in giving his consent to the agent to enter into the particular transaction on the specified terms. Hence, the disclosure must include not only the fact that the agent is acting on his own account, but also all other facts which he should realize have or are likely to have a bearing upon the desirability of the transaction from the viewpoint of the principal."

Comment B. Facts which agent should know.

"The duty is positive so that although the agent is inadvertent and non negligent in failing to reveal material facts in his possession the transaction is voidable by a principal ignorant of them."

Section 387 of the Restatement of Agency covering duties of loyalty states as follows:

"An agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with the agency."

Comment B. Scope of duty.

"The agent's duty is not only to act solely

for the benefit of the principal in matters entrusted to him but also to take no unfair advantage of his position in the use of things acquired by him because of his position as agent or because of the opportunities which his position affords."

Comment F, under Section 390, states as follows:

"The burden of proof is on the agent to show that the principal was informed of all material facts and that the transaction was fair."

In the case of *Renshaw vs. Tracy Loan & Trust Company*, Utah 1935, 87 Ut. 364 49 P(2) 403, the Utah court in analyzing the case stated:

"it is true that upon the establishment of certain fiduciary relationships and transactions between the parties to that relationship equity will presume fraud, the abuse of confidence, and will place the burden of proving good faith and fairness upon the dominant party in the relationship. In such cases, the presumption of fraud may be based upon the relationship alone, and relieves the party from proving the fraud, but the fraud is, nevertheless, an essential element. By the presumption equity supplies that element. The relationship wherein such presumptions have been indulged are * * * principal and agent. In other cases the presumption of fraud has been given effect when there has been a relationship of confidence plus other circumstances tending to show that some advantage has been taken by the dominant party with the consequent abuse of confidence."

Plaintiff has cited on Page 10 of his brief 20A Appleman on Insurance Law and Practice, 11978, concerning misrepresentations and the burden of proof. The rule set forth therein is not applicable where an agent in fiduciary capacity deals with the principal on his own account. As set forth in the Restatement of Agency, Section 390, Comment F, Supra:

“The burden shifts to the agent to show that the transaction was fair in all respects and that he did not take unfair advantage of his principal.”

Utah has followed this principle of law in several cases: In addition to the Renshaw vs. Tracy Loan & Trust Company, Case, Supra, see Hawkins vs. Perry, Utah, 123 Ut. 16 253 P(2) 372, Peterson vs. Budge, 35 Utah 596, 102 P. 216, In Re Swans Estate, (4 Utah (2) 277) (293 P(2) 682).

The authorities which plaintiff has cited with respect to imputing the knowledge of the agent to the insurer are not applicable where the insured is the agent himself. If the rules quoted by plaintiff were applicable to this situation, then one could not rely upon or trust ones own agent. Mr. Page had been an agent for over 30 years. The general agent had a right to rely on him to disclose fully all material facts pertaining to the transaction at all times.

Page's duty in acting as an agent in selling this

policy on his own property was to get for the insurance company the terms most favorable for the company considering the risk involved. For himself, he was interested in getting the best rate he could for himself. There was a definite conflict of interests. Under the circumstances it was his duty to fully disclose every material fact which would affect the company's judgment with respect to whether or not they would write the risk at all and if so, the rate that would be charged. Mr. Page secured an agent's commission for selling those policies to himself.

In the case of Fireman's Fund Insurance Company vs. McGreavy, 118 Fed. (2) 115, an insurance agent issued a policy to himself on a warehouse purchased by him a few days before for \$500. He reported the insurance to the company with the statement that the building was worth from \$3,500 to \$4,000 but did not disclose his recent purchase nor the fact that the building had been erected as a creamery and had been put to various uses, none of which proved profitable. The company's instructions to its agents were to consider risks with reference to their moral hazard and not to issue a policy for an amount the insured would rather have than the risk covered, and if a building was badly located, too large or in a business not adapted to it, not to write it. In that case they held in an action on the policy after the loss that the materiality of the agent's concealment was so obvious as to be decided

as a matter of law and it was error to submit it to a jury. In our case the jury found that Page knowingly failed to make a full and honest disclosure of the material facts. His concealment makes the policy voidable.

Plaintiff contends that even though he may have been guilty of fraud or violated his fiduciary duty as an agent, the general agent, even though it wasn't advised by Page of all the facts, waived the fraud or violation of duty on behalf of Utah Home Fire Insurance Company and in addition was put on notice of all facts which Page as soliciting agent failed to reveal to the general agent. The soliciting agent and the general agent were both under a duty to reveal facts to Utah Home Fire Insurance Company and Utah Home Fire Insurance Company had a right to rely on both agents.

Section 9104 of Volume 16, Appleman Insurance Law and Practice, pertaining to local, soliciting and sub-agents states as follows:

“Ordinarily, notice to or knowledge of a soliciting agent of an insurance company received while acting within the scope of his authority and performance of his duties, is chargeable to the insurer. Acts and knowledge of a local agent concerning property insured against fire at the time the policy was executed is imputable to the insurer. And the rule of imputed knowledge is applied with particular force as to such information a soliciting agent receives while engaged in soliciting insurance or preparing the applica-

tion, prior to the execution of the policy. The insurer is not only bound by his knowledge at such times, but also by his acts and representations in connection therewith.

It is the duty of an agent authorized by an insurance company to solicit and transmit applications for insurance, to prepare such applications, so as accurately to state the result of the negotiations, and his failure so to do is in legal effect the fault of the company. The knowledge of an agent soliciting and collecting premiums of facts justifying the insurer in forfeiting a policy is binding upon it, though not communicated. So, when a soliciting agent has knowledge of facts, received by him prior to the execution of the policy, which would render the policy void ab initio or justify the insurer in declaring a forfeiture thereof, a company thereafter issuing the policy cannot avoid liability at some subsequent date upon such ground."

Mr. Page was a soliciting agent without any question, and he signed the policies which were issued to him as agent. The rule just quoted by counsel is similar to the rule pertaining to a general agent. On the basis of Mr. Dahl's argument, the knowledge of Page would, therefore, be imputed to the insurance company, but certainly this could not be so because this would protect the agent in perpetrating and accomplishing a fraud upon the insurance company. The rule is that the agent must disclose every material fact to the company in order to clear himself of any imputation of fraud. While there may not

have been any actual fraud upon the part of Heber J. Grant and Company, certainly there appears to be some collusion here if the facts as stated by the witnesses were true. This collusion would not relieve Mr. Page from the fraud upon his part of the violation of his fiduciary duty. In Volume 16, Appleman on Insurance, Section 9104 beginning on Page 646, it is stated:

“The rule of imputed knowledge is generally followed, in the absence of fraud or collusion between the agent and **those taking insurance.**” (Boldface ours.)

Under the circumstances of the Page case it is submitted that neither Mr. Page's knowledge nor the knowledge of the Heber J. Grant and Company would be imputed to Utah Home Fire Insurance Company in view of the violation of the fiduciary duty upon the part of Mr. Page and upon the part perhaps of the Heber J. Grant and Company.

In the case of Harland vs. Liverpool and L. & G. Insurance Company, 192 Mo. App. 198, 180 S.W. 998, an agent's failure to make a full disclosure of all the facts rendered the policy voidable at the option of the insurer. The agent bought a stock of certain goods at an administrator's sale for \$425 or \$450; he was one of the appraisers who had appraised the stock for the administrator, and this appraisement fixed the value thereof at \$555.35; after purchasing the stock and adding thereto other goods of a comparatively small amount in value, he

issued a policy to himself for \$900 on the stock, admittedly worth that much and more; he sent a copy of the policy to the insurer, and it with knowledge that he was the insured, assented to his having insured himself; and while he had shown the stock to the insurer's general agent, at whose suggestion he issued the policy, and had told the latter the stock invoiced at \$700 or \$800, but that he bought it at administration sale for less, he did not disclose that he had appraised the property, nor the amount of such appraisal, nor the price he paid. It was held that neither the partial disclosure of these facts made by the agent to the insurer's general agent, nor the fact that the property may have been in reality worth more than \$900, the amount for which it was insured, absolved him from his duty as an agent to make a full disclosure of what he did pay and all the facts concerning the stock.

Plaintiff claims on page 14 of his brief that 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 that Mr. Inkley's memory was bad. Mr. Page's testimony as set forth on pages 108-110 of the record was changed greatly on cross examination (R. 135-183). Mr. Welchman's testimony was also greatly in conflict with Mr. Page's testimony as to the condition of the building (R. 244-253). Defendant's counsel would also point out to the court that a demand was made at the time of the taking of his deposition for the invoices and

checks covering Mr. Page's expenditures on the building (R. 163) which he claimed was in the neighborhood of \$6,000 (R. 165). He acknowledged he received invoices for his purchases at the time of the purchase but stated that he threw the invoices away at the end of each year and kept his cancelled checks (R. 161, 162). However, he was unable to identify the particular checks with any particular purchase and on cross examination admitted the following discrepancies: Claimed that he paid LaVell Webster \$1,800 for the building including the moving thereof, when in fact the checks totalled \$1,600 (R. 136); claimed he paid Welchman \$1,000 (R. 166); his checks, however, totaled \$153 (R. 167), but he claimed then that he had allowed him credit on rent for a few hundred dollars, not to exceed \$500; he furnished two checks for having gas run in the vicinity of the premises totaling \$163.50 but on cross examination admitted that only \$100 was for this building and that the balance was for the fourplex in the vicinity of the one that burned, and also that a refund was made to him from the amount paid (R. 169); a check was also furnished payable to an E. Moreau for \$40 which Page also admitted was not for the building (R. 169); there was another check for sand and gravel which was issued almost a year after the building was burned which Page also admitted could not be traced to the building (R. 169). Plaintiff's counsel admitted that the checks might not be the ones for the particular building as

did Mr. Page (R. 162, 163). There were many other points where Mr. Page's testimony conflicted with the testimony of other witnesses and his own previous testimony, and it was not surprising that the jury found that he failed to make an honest disclosure of material facts to the defendant company.

POINT II.

THE TRIAL COURT DID NOT COMMIT ERROR IN ITS INSTRUCTIONS TO THE JURY.

The court's instruction 11 (a) was not erroneous but properly instructed the jury of the elements to take into consideration in determining actual cash value. As stated by appellants counsel, the definition of actual cash value as it applies to fire insurance policies on buildings has not been decided by the Utah Supreme Court.

The instruction as given is as follows:

"In determining the actual cash value of the burned fourplex you may consider the following factors based upon the evidence which has been presented and accepted during the course of the trial: The size of the building, the kind and quality of material of which it was constructed, the replacement cost with proper allowance for depreciation and deterioration from use, age and other like causes, the manner of wear and tear to which the building had been subjected, its state of repair at the time of the loss, the obsolescence, both structural and functional, the neighborhood in which the building was located, the rental value and all other relevant facts and circum-

stances in evidence which affected the value of the property." (R. 45)

Plaintiff's experts all testified as to the value by taking the cost of constructing the building new, on the basis of materials of which Mr. Page said it was constructed, less depreciation on the basis of a chart. On cross examination Mr. Page had to admit that many of the materials he claimed were used in the building were in error. None of the plaintiff's witnesses took into consideration the actual condition of the building at the time of the fire as developed by the various witnesses, but determined the value based on a building in good condition. They likewise did not take into consideration the location of the building just south of the prison immediately adjacent to an automobile salvage yard and many other factors. In order to arrive at the actual cash value it would be necessary to properly consider these various elements and the court properly advised the jury that they could take into consideration these factors.

The appraisers Fletcher and Alder called by the defendant to testify concerning the actual cash value each testified that they approached the problem using three different methods of valuation, to-wit: Cost approach, market approach and income approach, and that from these three they correlated the values and arrived at a final figure. (R. 310, 311, 337, 338). The value of the building was not based on market value as claimed by counsel for plaintiff

but on actual cash value as determined by their appraisals using the three methods of approach. The factors set forth in the instruction were all covered by various witnesses and properly admitted as evidence. The instruction was, therefore, proper.

“In recent years there has been a tendency on the part of a substantial number of courts to reject reproduction or replacement cost or market value as the sole test or criteria of the actual cash value of the buildings. These courts have relied upon what might be termed the ‘broad evidence rule’ under which the courts will receive any evidence logically tending to show actual cash value.” (61 ALR (2) 729, sub paragraph C.)

There follows after said paragraph a number of jurisdictions following this rule. On page 728 of 61 ALR (2) it is stated:

“Many courts although rejecting reproduction or replacement cost less depreciation as the sole test of the actual cash value of an insured building, have recognized that it constitutes evidence of such value.”

The states following the Idaho decision of *Boise Association of Credit Men vs. U. S. Fire Insurance Company*, 256 Pac. 523, appear to be in the great minority and this Idaho case is an old case. The rule sought to be invoked by plaintiff would be manifestly unfair if used under circumstances involving a building in a state of disrepair and poor location as the building of the plaintiffs herein.

The jury did not accept as the actual cash value

what any one witness testified to but arrived at their own figure in between plaintiff's and defendant's figures. Defendant submits that there was no error with respect to the court's instruction on actual cash value.

It is discretionary with the court as to whether to submit the case on special interrogatories or on a general verdict. Rule 49 Utah Rules of Civil Procedure provides that the court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact and further that if the court omits any issue of fact raised by pleadings or the evidence each party waives the right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury or as to an issue omitted without such demand the court may make a finding, or if it fails to do so it shall be deemed to have made a finding in accord with the judgment on the special verdict.

The plaintiff was not deprived of a jury trial by reason of the court's submission of the case to the jury on special interrogatories.

The second special interrogatory required the jury to make a special finding as to whether or not Page knowingly failed to make a full and honest disclosure to the defendant fire insurance company of the material facts regarding the nature and intended use of the burned fourplex.

Plaintiff now complains that the court did not distinguish in this interrogatory between the nature or condition of the building at the time of the issuance of the first policy and the condition at the time of the second policy. It was not until after the trial was completed that plaintiff attempted to distinguish between policies at all.

As far as Meredith Page was concerned he took out the original policy and as he explained originally when he took out the first policy he would do some work on the building and then take some more insurance. (R. 110). At the time he took the \$10,000 policy he told whoever he talked to on the phone that he spent a considerable amount of money and work and at the time he took out the original policy he was going to add to the insurance on the building. This policy was not to replace the original policy. In fact, Mr. Page himself said that the policy was issued on the basis of what he had represented to them (R. 157). His testimony was as follows:

“Q. Now at the time you requested the second policy all you did was telephone it in, was it not, and ask them to put an additional \$10,000 on the building.

A. Yes.

Q. Do you recall who you talked to on that occasion?

A. No, I don't. It was never anyone who—Ove Inckley, or it could be Mr. Taylor, it could be Mr. Everett or anyone in the office.

Q. Now that policy then was put on by you as an agent, you were the only one who made any inspection of the building down to that time?

A. Yes, I explained over the phone that I did spend a considerable amount of money and work and at the time I took out the original policy that I was going to add to the insurance on this building, when I did some work and they said that was okay.

Q. That would be on the basis still of what you had represented to them?

A. That's right." (R. 156, 157)

There was no reason for the court to distinguish between the policies especially in view of the fact that counsel for the plaintiff had made no attempt to distinguish between them. However, Mr. Page still owed a fiduciary duty to the insurance company at that time and by his own statement as to what he told the person to whom he talked he did not disclose the condition of the building. According to the evidence the building at that time had only about half of the eaves constructed, no roofing paper had been put on the extended eaves, some of the walls were still badly damaged, no permanent repairs had been made, tin had been placed over roof cuts, the floor cuts had not been repaired, the wiring had not been repaired no plumbing work had been done, some of the cupboards were in bad shape, no work had been done on the rafters in the building, and the coverings on the floors were torn up and in pretty bad shape

in some places (R. 244-253). Mr. Page himself admitted many of these things but he still failed to reveal this information to the company or its general agent.

The instructions submitted to the jury had to be based on the relationship that existed between Mr. Page and the defendant company and the instruction properly presented to the jury the question of whether or not Mr. Page made a full and honest disclosure to the defendant company of the material facts which it was his duty to do. However, plaintiff is asking that this relationship be disregarded and that rules of law applicable to the usual policyholder, not an agent of the company, be applied. The trial court did not mention fraud in its instruction although the acts of the agent did in fact constitute a fraud on the company and make the policy voidable under the terms of the policy itself which provided that:

“This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.” (Exhibits 1 P, 2P).

The defendant was entitled to a directed verdict as a matter of law on the basis of the evidence and the plaintiff was certainly not prejudiced by the instructions given to the jury which though perhaps

not as complete as may be desirable, nevertheless fairly presented the issues to the jury.

POINT III.

THE TRIAL COURT DID NOT ERR IN ITS JUDGMENT IN REFUSING TO GRANT A NEW TRIAL.

The trial court did not invade the province of the jury by making its own findings of fact with respect to violation of plaintiff's fiduciary duty as to the issuance of the second policy. Neither counsel asked for an instruction with respect to the second policy. As previously stated, rule 49 of the Utah Rules of Civil Procedure provides that if counsel fails to request an instruction on an issue raised by the pleadings or the evidence the court may make its own findings. On the basis of this rule the court properly made a finding that Meredith Page failed to disclose the condition of the building to the defendant company at the time of the issuance of the second policy and that the policy was, therefore, voided as was the first policy. (R. 49, 50).

Subsequently the court announced it would grant a new trial but the order was never entered and on motion to reconsider the court entered an order granting a partial new trial on the issue of the second policy only.

The defendant contends that there was clear evidence that the plaintiff violated his fiduciary duty with respect to both policies and that the court's judgment of no cause of action was proper

and should stand, but that if plaintiff is entitled to have any part of the case reconsidered that the question of the actual cash value of the building has been fairly determined by the jury, and that this issue should no longer be in doubt. A good portion of the trial time, and much of the trial expense was incurred in connection with the six expert witnesses called to testify as to this phase of the case.

Our Rule 59 (a) of the Utah Rules of Civil Procedure states as follows:

“Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and **on all or part of the issues.**” *****
(Boldface ours.)

In Moore’s Federal Practice, Second Edition, Volume 6, Page 3761, under Rule 59.06, Partial New Trials, it is stated as follows pertaining to the rule involved:

“On a motion for new trial, therefore, the trial court has discretion in both jury and non-jury cases to order that the new trial be had on all or part of the issues and as to all or any of the parties. As we shall see, this may only be done, however, if the issues as to which the new trial is ordered are so distinct and independent from the rest of the case that they may be separately tried without injustice. If the determination as to a certain issue or as to less than all of the parties is not fairly severable from the rest of the case, but is interwoven with the remaining issues, the court may not order a partial re-trial. A

constructive analysis of the use of the partial new trial in jury cases appears in *Yates vs. Dann*. In this case a seaman sued his employer for personal injuries sustained in the course of employment. The case was submitted to the jury with instructions to answer certain interrogatories. The jury rendered a verdict for the plaintiff in a sum representing past earnings, but no award was made for pain and suffering and future impairment of earning capacity. The plaintiff's motion for new trial limited to the issue of damage was granted. Chief Judge Leahy, in an excellent opinion, stated: 'Under Federal Rules of Civil Procedure, Rule 59, the trial judge has discretion to order a partial new trial as to one or more issues where it appears the issue in question is severable from and not interwoven with the remaining issues.' The theory behind this rule is a party who has already had his day in court as to a particular issue may not have another opportunity to relitigate the same point unless a partial new trial will result in a miscarriage of justice. I think FR 59 was intended to prevent the re-trial of any issue already properly decided, and to limit any new trial only to those issues which are incorrectly decided or not decided at all. Since the adoption of the Federal Rules of Civil Procedure, courts have indicated a trend to limiting re-trials to specific issues whenever possible, particularly in personal injury cases where the issue of damages is independent from that relating to liability.

Defendant here has had a fair trial on the issue of liability, and it would be, I think, obviously grossly unfair to plaintiff as well as

contrary to the spirit of FR 59, to require a re-trial of the question of defendant's culpability which has already been decided by the jury in plaintiff's favor. Moreover, as Judge Kirkpatrick pointed out in the Tompkin's case, a grave injustice would appear to a plaintiff if, having submitted the question of liability to a jury, and having obtained a favorable verdict, plaintiff should be compelled to risk another trial, with a possibility of an adverse verdict, solely because the jury failed to make into consideration all of the elements of damage as clearly instructed by the court.'

As was done in *Yates*, supra, the partial new trial device is often used to limit the new trial to the issue of damages where liability has been competently determined by the jury, and the damage issue is not interwoven with the liability issue. On the other hand, if the amount of the damages may not be determined without a redetermination of the liability issue a new trial as to all of the issues must be ordered.

Where the issue of damages is determined satisfactorily to the trial court, the court may order a new trial limited to the issue of liability. In *Calaf vs. Fernandez*, the suit was for breach of contract for the sale of land, and the jury awarded plaintiff approximately \$21,000 in damages. The trial court ordered a new trial limited to the issue of the title to the property. On appeal, the first circuit affirmed, and stated: 'It is not an unusual thing to order a new trial upon a particular branch of a controversy. It often happens, where a defeated party is aggrieved by the phase of a trial which had to do with the

damages, that the verdict is set aside in that respect and a new trial ordered upon the question of damages only; and it sometimes happens, where the grievance has reference to the primary right — that of recovery — and where there is no substantial controversy as to the question of damages, if the right of recovery is established, that the verdict is set aside upon the question of right of recovery only, and the scope of the trial limited accordingly. The question as to what should be done in a given case under a motion for new trial, in whole or in part, is always largely a question of discretion. The practice of not going over unnecessary grounds which at the end of the first trial and the verdict are found not to involve substantial dispute, and trying again questions that are not in substantial controversy through the instrumentality of a new trial, granted in the exercise of discretion, is a salutary one, and the authorities and the textbooks sufficiently sustain it.”

CROSS APPEAL

POINT I.

THE COURT ERRED IN GRANTING A PARTIAL NEW TRIAL WITH RESPECT TO THE VALIDITY OF THE SECOND POLICY PURCHASED BY THE PLAINTIFF FROM THE DEFENDANT.

The issue raised by the defendant in this cross appeal has been discussed in respondent's brief under the points argued therein but in summary the defendant contends that the two policies should be treated as only one, as the plaintiff did in purchasing the insurance. The evidence is clear that the building was in very poor condition at the time the second

policy was secured by Mr. Page; that he failed to disclose to the defendant, Utah Home Fire Insurance Company, its general agent, the nature or condition of the building at that time or its immediate intended use, and in that regard violated his fiduciary duty to fully disclose all material facts to the insurance company, and the policy was, therefore, voidable by the company as a matter of law. It was, therefore, error for the court to grant a new trial on this issue.

CONCLUSION

The defendant submits that the plaintiff has had a fair trial upon all the issues of the case and that a new trial should not be granted on any issues but that if a new trial is granted on any issues that it should not be granted on the issue of actual cash value of the burned fourplex as that has been fully and fairly decided on the basis of proper instructions.

On the basis of the evidence it is clear as a matter of law that Page violated his fiduciary duty and that the defendant company is entitled to a judgment of no cause of action which should be the judgment of this court.

Respectfully submitted,
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