

1992

LeAnna Robbins v. Old Republic Surety, North Western National Insurance Company of Milwaukee, Wisconsin, Atlas Stock Transfer, Check Rite International Inc., Cardinal Energy : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Robert A. Burton, Stephen J. Trayner; Strong and Hanni; attorneys for appellants.

John Michael Coombs; attorney for appellee.

Recommended Citation

Reply Brief, *LeAnna (Broadwater) Robbins v. Old Republic Surety, a Wisconsin corporation doing business in Utah, North Western National Insurance Company of Milwaukee, Wisconsin, a Wisconsin doing business in Utah, Atlas Stock Transfer, Check Rite International Inc., Cardinal Energy Corporation*, No. 920300.00 (Utah Supreme Court, 1992).

https://digitalcommons.law.byu.edu/byu_sc1/4269

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

CKET NO.

920300

IN THE SUPREME COURT
OF THE STATE OF UTAH

LeANNA (BROADWATER) ROBBINS,

Cross-Appellant/
Appellee/Plaintiff

v.

OLD REPUBLIC SURETY, a Wisconsin corporation doing business in Utah, NORTH WESTERN NATIONAL INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, a Wisconsin corporation, doing business in Utah, ATLAS STOCK TRANSFER, a Utah Corporation, CHECK RITE INTERNATIONAL INC., f/k/a CARDINAL ENERGY CORPORATION, a Utah corporation, and SCOTT J. FLETCHER, a Utah resident,

Appellants/
Cross-Appellees/
Defendants.

REPLY BRIEF OF
CROSS-APPELLANT/PLAINTIFF
ROBBINS

Case No. ~~900508~~

Rule 29(b)(16) priority

JOHN MICHAEL COOMBS, #3639
72 East 400 South, Suite 220
Salt Lake City, Utah 84111
Telephone: (801) 359-0833

ATTORNEY FOR CROSS-APPELLANT/
APPELLEE/PLAINTIFF ROBBINS

Robert A. Burton, #0516
Stephen J. Trayner, #4928
STRONG & HANNI
Attorneys for Old Republic Surety and
Northwestern National Insurance Co.
Sixth Floor, Boston Building
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

FILED

JUL 6 1992

CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT
OF THE STATE OF UTAH

LeANNA (BROADWATER) ROBBINS,

Cross-Appellant/
Appellee/Plaintiff

v.

OLD REPUBLIC SURETY, a Wisconsin
corporation doing business in
Utah, NORTH WESTERN NATIONAL
INSURANCE COMPANY OF MILWAUKEE,
WISCONSIN, a Wisconsin
corporation, doing business in
Utah, ATLAS STOCK TRANSFER, a
Utah Corporation, CHECK RITE
INTERNATIONAL INC., f/k/a
CARDINAL ENERGY CORPORATION, a
Utah corporation, and SCOTT J.
FLETCHER, a Utah resident,

Appellants/
Cross-Appellees/
Defendants.

REPLY BRIEF OF
CROSS-APPELLANT/PLAINTIFF
ROBBINS

Case No. 900508

Rule 29(b)(16) priority

JOHN MICHAEL COOMBS, #3639
72 East 400 South, Suite 220
Salt Lake City, Utah 84111
Telephone: (801) 359-0833

ATTORNEY FOR CROSS-APPELLANT/
APPELLEE/PLAINTIFF ROBBINS

Robert A. Burton, #0516
Stephen J. Trayner, #4928
STRONG & HANNI
Attorneys for Old Republic Surety and
Northwestern National Insurance Co.
Sixth Floor, Boston Building
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

Larry G. Reed, #2709
CROWTHER & REED
Attorneys for Atlas Stock Transfer
455 South 300 East, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 531-9865

Philip R. Hughes, #4224
Attorney for Check Rite International, Inc.
844 South 200 East, Suite 100
Salt Lake City, Utah 84111
Telephone: (801) 534-1005

ATTORNEYS FOR CROSS-APPELLEES/DEFENDANTS

TABLE OF CONTENTS

Page No.

INTRODUCTION.....	1
SUMMARY OF COUNTER-ARGUMENT.....	3
COUNTERPOINT I - THE ICAs ARGUE THAT MRS. ROBBINS IS NOT A THIRD-PARTY BENEFICIARY TO THE BOND. YET EVEN IF THEY ARE CORRECT (WHICH THEY AREN'T), THIS WOULD ONLY MEAN THAT COUNT IV MIGHT FAIL, NOT COUNTS III OR V.....	5
COUNTERPOINT II - PRIVACY OF CONTRACT IS NOT A PREREQUISITE TO A CLAIM OF INSURER BAD FAITH OR FOR BREACH OF AN IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.....	8
COUNTERPOINT III - UNDER THE CIRCUMSTANCES, THE ICAs OR BONDING COMPANIES DID OWE MRS. ROBBINS A DUTY TO DEAL FAIRLY AND HONESTLY WITH HER, A DUTY THEY KNOWINGLY BREACHED. FURTHERMORE, WHATEVER DUTY AROSE, IT IS A DUTY SUFFICIENT FOR MRS. ROBBINS TO STATE A TORT CLAIM.....	10
CONCLUSION.....	12

STATUTES AND RULES

Rule 12(b)(6), <u>Utah Rules of Civil Procedure</u>	2
Rule 52(a), <u>Utah Rules of Civil Procedure</u>	2
Rule 56, <u>Utah Rules of Civil Procedure</u>	2
Rule 56(c), <u>Utah Rules of Civil Procedure</u>	1
Rule 56(f), <u>Utah Rules of Civil Procedure</u>	3
<u>Utah Code Ann.</u> §70A-1-201(40).....	8

CASES CITED

<u>Anderson v. Liberty Lobby, Inc.</u> , 106 S.Ct. 2505 (1986).....	10
<u>Beach v. The University of Utah</u> , 726 P.2d 413 (Utah 1986).....	11
<u>Beck v. Farmers Insurance Exchange</u> , 701 P.2d 795 (Utah 1985).....	4,5,6,8,11,12,13
<u>Celotex Corp. v. Catrett</u> , 106 S.Ct. 2548 (1986).....	10
<u>Culp Construction Company v. Buildmart Mall</u> , 137 Ut. Adv. Rep. 4, 795 P.2d 650 (Utah Sup. Ct. 1990).....	5,6,8,11,12,13
<u>Fleck v. National Property Management, Inc.</u> , 590 P.2d 1254 (Utah 1979).....	7
<u>Gagon v. State Farm Mutual Auto Insurance Company</u> , 92 Ut. Adv. Rep. 21, 771 P.2d 325 (Utah 1988).....	4,6,12,13
<u>General Electric Credit v. Wolverine Insurance Co.</u> , 120 Mich. App. 227, 327 N.W.2d 449, 451-52 (Mich. Ct. App. 1982), <u>aff'd</u> , 362 N.W.2d 595 (Sup. Ct. Mich. 1984).....	7
<u>Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation</u> , 106 S.Ct. 1348 (1986).....	10
<u>New West Federal Savings & Loan Association v. Guardian Title Company of Utah</u> , 170 Utah Adv. Rep. 38, 41, note 2, ___ P.2d ___ (Utah App. September 23, 1991).....	2,13
<u>Pixton v. State Farm Mutual Auto Insurance Company</u> , 158 Utah Adv. Rep. 31, 809 P.2d 746 (Utah App. 1991).....	5,8,9,12,13
<u>Schwinghammer v. Alexander</u> , 21 Utah 2d 418, 446 P.2d 414 (Utah 1968).....	6
<u>St. Benedict Dev. Co. v. St. Benedict's Hospital</u> , 160 Utah Adv. Rep. 11, 13-14, 811 P.2d 194 (Utah Sup. Ct. 1991).....	13

OTHER AUTHORITIES

<u>Vance on Insurance</u> , Ch. 2, §10, "What Is A Contract Of Insurance?: Guaranty, Fidelity, and Surety Bonds," Hornbook Series, West Publishing Co., pp. 84-85.....	7
--	---

INTRODUCTION

The opposing brief to Mrs. Robbins' August 27, cross-appeal brief was submitted exclusively on behalf of Cross-Appellees Old Republic Surety and Northwestern National (the "Insurance Company Appellees," "ICA"s or "Bonding Companies").¹ Yet part of Mrs. Robbins' cross-appeal involves Cross-Appellees Check Rite and Atlas. Because Mrs. Robbins' cross-appeal is left unopposed by Atlas and Check Rite -- parties who are in a different position than the ICAs -- the lower court's summary judgment dismissing Count III as to Atlas and Check Rite should be reversed.

The ICAs mislead the Court in their Statement of Issues. Pp. 1-2, ICAs' opposing brief. Specifically, all of the claims subject of Mrs. Robbins' cross-appeal do not "sound" in contract. Counts III and V are grounded in tort. Only Count IV is grounded in contract. Further, contrary to the ICAs' assertions, the trial court never did "find" that Mrs. Robbins lacked privity of contract with the ICAs and that, as a result, Counts III, IV, and V are fatally defective.²

The ICAs state that Rule 56(c), Utah Rules of Civil Procedure, is determinative of Mrs. Robbins' cross-appeal. P. 3,

¹ In the record below, the ICAs were referred to by Mrs. Robbins as the ICDs or Insurance Company Defendants.

² The same criticism is applicable to issue numbers one and three on pages 1 and 2, respectively, of the ICAs' opposing brief. In other words, contrary to the assertions in the ICAs' Statement of Issues, the lower court never "found" anything to be the case.

opposing brief. On the contrary, while the lower court technically handled the motion as one for summary judgment, it erroneously invoked Rule 12(b)(6) standards. See pp. 11-12 and footnote 5, Mrs. Robbins' August 27, supporting brief. Nonetheless, the lower court further erred in stating no basis for its cursory dismissal of Counts III, IV, and V under Rule 56. New West Federal Savings & Loan Association v. Guardian Title Company of Utah, 170 Utah Adv. Rep. 38, 41, note 2, ___ P.2d ___ (Utah App. September 23, 1991).³

Mrs. Robbins has no dispute with the ICAs' Statement of the Case (pp. 3-7, opposing brief) other than what is conspicuously absent therefrom.⁴ Cf. Mrs. Robbins' Relevant Facts, pp. 3-11, supporting brief. While the record is clear that the lower court stated no ground for its dismissal of Counts III through V, there was also no ruling that Mrs. Robbins had

3

Therein the Court of Appeals recently stated:

Our dilemma in this case is that the [lower] court relied generally on America's memorandum in support of summary judgment and did not "issue a brief written statement of the ground for its decision," as required by Utah R. Civ. P. 52(a). This leaves us in a position of guessing which of the fifteen different legal theories in the memorandum were accepted by the [lower] court.

The same can be said of how the lower court granted the ICAs' motion for summary judgment below.

4

There is but one exception. Contrary to the ICAs' assertions therein, the record is clear that Mrs. Robbins did not "notify Old Republic's local Salt Lake City branch office on May 20, 1988, of her potential claim." Rather, she notified them earlier. In the record below, Old Republic merely acknowledged that it was aware of her claim on or before May 20, 1988. See ¶16, p.5, Mrs. Robbins' supporting brief.

completed discovery relative to such claims or that the Rule 56(f) affidavit of her counsel was insufficient to postpone summary judgment. See Exhibits "C" and "F," Mrs. Robbins' supporting brief and Exhibits to Mrs. Robbins' Docketing Statement.

SUMMARY OF COUNTER-ARGUMENT

In the ICAs' Summary of Argument, pp. 7-9 opposing brief, the ICAs argue that Mrs. Robbins' Third, Fourth, and Fifth Claims for Relief "sound in contract." This is not true. Only Claim for Relief IV, alleging breach of an implied third party beneficiary contract, "sounds" in contract. While Mrs. Robbins was not in privity with the ICAs at the time the bond was procured by Defendant Fletcher, her direct dealings with Mr. Guardalabene (Old Republic) created a privity relationship.⁵ Furthermore, even if such direct dealings did not create either a privity or fiduciary relationship, Atlas, having directed Mrs. Robbins to the ICAs, effected an assignment of its right as obligee on the bond to her. Consequently, and by virtue of Atlas's undisputed conduct, Mrs. Robbins became a beneficiary under the open penalty indemnity bond.⁶

⁵ If not, these dealings, at a minimum, certainly created a fiduciary relationship between Old Republic and Mrs. Robbins.

⁶ While there is little in the record from Cross-Appellees on this score, no doubt Guardalabene dealt directly with Mrs. Robbins because he had discussed the matter with Atlas and/or Check Rite and he was given permission and/or authority to deal with Mrs. Robbins directly. On the contrary, if Old Republic did such on its own, such only bolsters Mrs. Robbins' argument that, at a minimum, a fiduciary relationship was created. See Conclusion below.

The ICAs further submit that a claim for breach of an implied covenant of good faith and fair dealing "sounds" solely in contract. P. 7, first sentence of Summary of Argument, opposing brief. This is not the law. In fact, since Beck, Justices Zimmerman and Durham have stated that punitive damages may be awarded when one prevails on such claim "and all of the elements of a separate tort exist." Gagon v. State Farm Mutual Auto Insurance Company, 92 Ut. Adv. Rep. 21, 771 P.2d 325 (Utah 1988).⁷ If a claim for breach of an implied covenant of good faith and fair dealing is always contractual in nature, there would never be a legal basis to award punitive damages for the breach or violation thereof. Id.

The ICAs or Bonding Companies further contend that Mrs. Robbins' "position" is that she would only be in "contractual privity" with them if she was "a third-party beneficiary to the bond." P. 8, 1st full ¶, opposing brief. This argument begs the very question of privity and it has never been asserted by Mrs. Robbins.

⁷ In Gagon, 92 Utah Adv. Rep. at p. 21, Justice Zimmerman reiterated that, when the alleged breach of an implied covenant of good faith and fair dealing involves the insurer and the insured, the claim giving rise to such a cause of action lies in contract. As previously stated, in this case, Mrs. Robbins was not the insured. Thus, the ICAs' opposing brief assumes a false premise from start to finish.

COUNTERPOINT I

THE ICAs ARGUE THAT MRS. ROBBINS IS NOT A THIRD-PARTY BENEFICIARY TO THE BOND. YET EVEN IF THEY ARE CORRECT (WHICH THEY AREN'T), THIS WOULD ONLY MEAN THAT COUNT IV MIGHT FAIL, NOT COUNTS III OR V.

The ICAs or Bonding Companies argue that Claims for Relief III, IV, and V were properly dismissed solely because of a lack of privity between them and Mrs. Robbins. Pp. 7-9, opposing brief. Again, this is not the law. The law is succinctly set forth in Culp Construction Company v. Buildmart Mall, 137 Ut. Adv. Rep. 4, 795 P.2d 650 (Utah Sup. Ct. 1990). Therein, this Court stated:

. . . our holding in Beck does not preclude the bringing of a tort claim independently of a contract claim . . . Furthermore, "privity of contract is not a necessary prerequisite to liability."

137 Utah Adv. Rep. at p. 6, notes 9 and 12. What is remarkable is that while Culp Construction is dispositive of this appeal in Mrs. Robbins' favor and while it was cited repeatedly in Mrs. Robbins' supporting brief, the same is conspicuously ignored by the ICAs. Further, rather than either cite or distinguish Culp Construction, the ICAs rely exclusively on Pixton v. State Farm Mutual Auto Insurance Company, 158 Utah Adv. Rep. 31, 809 P.2d 746 (Utah App. 1991), a recent Court of Appeals decision which eviscerates Beck and Gagon and which fails to distinguish Culp.

The ICAs further rely on an illustration from Corbin On Contracts. Pp. 11-12, opposing brief. This analogy, like many analogies, is inapposite. For instance, the Corbin analogy involves the mere payment of money, not the replacement of specific stock subject of a bond; it also does not involve a situation where those like Atlas and Check Rite are totally under the thumb of an insurance company and, as a result, could not settle with the third party even if they had wanted to.⁸ Further, Mrs. Robbins is not in the same position as the homeowner in Schwinghammer v. Alexander, 21 Utah 2d 418, 446 P.2d 414 (Utah 1968). Schwinghammer is distinguishable in that the homeowner there was neither a donee nor a creditor beneficiary.⁹ Mrs. Robbins, on the other hand, is the beneficiary of a bond that was posted to protect her (the public) in the event that Certificate No. 258 resurfaced. In Schwinghammer, it was certainly not intended that the house would not be built and, as a result, a third-party claim on an escrow agreement -- which is not a bond -- was either foreseeable or necessary. Schwinghammer does not involve a situation where a

8 In other words, if Atlas and Check Rite had settled directly with Mrs. Robbins, they risked compromising their own crossclaims against the ICAs. Neither desirous of nor being able to afford protracted litigation with the ICAs, Atlas and Check Rite thus had little choice but to do what the ICAs wanted.

9 One might also argue that based on Atlas's "bowing-out" and instructing Mrs. Robbins to deal directly with the ICAs constitutes an assignment which renders Mrs. Robbins at least a "donee beneficiary" under the bond.

house would not be built (or was lost) and an escrow agreement was subsequently entered into in order to furnish the buyer thereof with a "replacement" house.

The ICAs cite Fleck v. National Property Management, Inc., 590 P.2d 1254 (Utah 1979), for the proposition that because Mrs. Robbins was not expressly named in the bond, she cannot recover. Mrs. Robbins submits that the language of the bond overrides this general statement of the law in that, under the express terms of the bond, the ICAs agreed to incur "absolute liability." See p. 13, Mrs. Robbins' supporting brief. Saying it another way, Mrs. Robbins' right to pursue the ICAs is governed by insurance law, not the law of suretyship. See Vance on Insurance, Ch. 2, §10, "What Is A Contract Of Insurance?: Guaranty, Fidelity, and Surety Bonds," Hornbook Series, West Publishing Co., pp. 84-85. In short, the ICAs are not gratuitous sureties as they might have this Court believe. As a result, their liability extends beyond the strict letter of the agreement. Id. at p. 85; see also General Electric Credit v. Wolverine Insurance Co., 120 Mich. App. 227, 327 N.W.2d 449, 451-52 (Mich. Ct. App. 1982), aff'd, 362 N.W.2d 595

(Sup. Ct. Mich. 1984).¹⁰

COUNTERPOINT II

PRIVITY OF CONTRACT IS NOT A PREREQUISITE TO A CLAIM OF INSURER BAD FAITH OR FOR BREACH OF AN IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

The ICAs misconstrue what this Court has held relative to maintaining a claim of either insurer bad faith or breach of an implied covenant of good faith and fair dealing. This Court has never stated that such a claim only lies in contract. On the contrary, Beck v. Farmers Insurance Exchange, 701 P.2d 795 (Utah 1985), unequivocally holds that in a third-party situation, the obligations of the insurer would have to be fiduciary, thereby giving rise to a tort cause of action. This is confirmed in Gagon and Culp Construction. The ICAs entice this Court into inconsistency by relying on Pixton, a recent Court of Appeals decision which, as aforesaid, wholly ignores Culp and misreads Beck. As opposed to Pixton, Mrs. Robbins is not claiming that the ICAs, like State Farm in Pixton, merely bungled the handling

10

Therein the court held that where a surety for hire gives a bond to afford protection to the general public, if its terms so permit, the bond should be construed so as to accomplish that purpose. Id. at p. 451. The court further stated that if a bond is susceptible to construction, one favorable to the insured and one favorable to the insurer, that construction will be adopted which favors liability of the insurer for the act or default in question. Id. at p. 452. In addition, assuming the law of suretyship applies to this case, Mrs. Robbins is unaware of anything under such law which would prevent her from maintaining an action against the Bonding Companies. On the other hand, suretyship law would not appear to apply to this case inasmuch as the Bonding Companies would not be considered "guarantors" of Atlas and Check Rite's non-monetary obligation(s) to Mrs. Robbins. See Utah Code Ann. §70A-1-201(40).

of her claim. This case goes far beyond that, approaching both fraud and misrepresentation. Simply put, the facts of Pixton, even if adopted by this Court on its own facts, are inapplicable to this case.

Since privity of contract is not essential to maintaining a claim of insurer of bad faith or breach of an implied covenant of good faith and fair dealing, the ICAs' opposing brief makes no sense.

The ICAs proceed to argue that the doctrine of estoppel is inapplicable. On p. 17, opposing brief, they state:

Plaintiff did not forego any right which might have otherwise existed by relying on the Bonding Companies' conduct.

This again is not true. Based on the representations of Guardalabene, the ICAs' agent and employee, Mrs. Robbins did indeed forego rights and remedies which she might have otherwise exercised immediately. For instance, Mrs. Robbins could have immediately brought suit and forced delivery of her stock at a preliminary injunction hearing, something she was told or reasonably assumed was completely unnecessary. Unfortunately, when she finally knew otherwise, it was too late: the stock had become virtually worthless. Thus, privity, while only relevant to Count IV, was in fact created by conduct. Accordingly, by virtue of Mrs. Robbins' detrimental reliance, the ICAs are estopped from denying liability.

COUNTERPOINT III

UNDER THE CIRCUMSTANCES, THE ICAs OR BONDING COMPANIES DID OWE MRS. ROBBINS A DUTY TO DEAL FAIRLY AND HONESTLY WITH HER, A DUTY THEY KNOWINGLY BREACHED. FURTHERMORE, WHATEVER DUTY AROSE, IT IS A DUTY SUFFICIENT FOR MRS. ROBBINS TO STATE A TORT CLAIM.

The ICAs further argue that they owed no duty and assumed no duty of care to Mrs. Robbins.¹¹ Pp. 18-20, opposing brief. While this "sounds" in negligence, the lower court has never dismissed Mrs. Robbins' separate negligence claim below, Count VII, amended complaint. At the same time, if the ICAs neither owed nor assumed a duty of any kind to Mrs. Robbins, why did they try to settle with her directly, let alone talk to her repeatedly and for several months. Are they merely officious intermeddlers? Furthermore, if a duty arose by virtue of the ICAs' conduct, the existence of such -- or even the consequences thereof -- should be put to a jury: it should not be disposed of upon a motion.¹²

¹¹ Mrs. Robbins wonders why an argument along these lines has been posed by the ICAs. A "special duty" relates to negligence, not a fiduciary duty. A fiduciary duty is based on a relationship of trust, confidence and the ability to overbear -- a relationship that Guardalabene had -- or was able to garner -- with Mrs. Robbins before the stock dropped and before, for want of a better phrase, he "lowered the boom," informing her he could no longer help her and that she should go consult a lawyer.

¹² The lower court's summary judgment does not meet the standards enunciated by the U.S. Supreme Court in its 1986 trilogy of cases encouraging resolution by summary judgment. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, 106 S.Ct. 1348 (1986); Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986); Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986). That is to say, a reasonable juror could conceivably conclude differently than the lower court in this case (especially when we don't know why the lower court ruled as it did). Id.

The ICAs repeat the assertion that for a duty to exist under tort law, Mrs. Robbins is obligated to prove that a "special relationship" existed between her and the Bonding Companies.¹³ P. 18, opposing brief. Again, this is not the law. In a tort context, Beck only requires a "fiduciary relationship." Because no trial was had below, Mrs. Robbins has been deprived of establishing the requisite "duty." At the same time, a "special relationship" did exist as a matter of law because the ICAs negotiated directly with Mrs. Robbins in order to settle her claim. Such a relationship under the facts set forth in Mrs. Robbins' affidavits is indeed "fiduciary," let alone "special," particularly when Old Republic had the ability to overbear and when the insured (Atlas) had deliberately "bowed-out" of the equation.

The ICAs' singular reliance on Beach v. The University of Utah, 726 P.2d 413 (Utah 1986), a negligence case, is misplaced. Were the issue in Counts III, IV, and V one of negligence, then Beach -- which goes beyond Beck -- might have some bearing. Thus, while the ICAs argue that Mrs. Robbins has never alleged a "special relationship" between her and them, pleading is not the issue. On the contrary, the nature of the "relationship" is a jury issue and only underscores why the summary judgment dismissing Counts III-V should be reversed.

¹³ It is not clear whether the ICAs are talking of mere negligence or whatever duty is apparently necessary to give rise to a tort claim as contemplated in Culp and Beck.

Prior to their Conclusion, the ICAs argue that "Plaintiff sustained no damage as a result of the conduct of the Bonding Companies." Once again, this is false. Had the ICAs or Bonding Companies done what they were supposed to have done as fiduciaries, Mrs. Robbins would have had eight thousand (8,000) shares of Check Rite stock to sell at July end/August beginning 1988 and this lawsuit would not exist. Certainly this is damage, particularly when there is no guarantee that this Court will not, for some unknown reason, reverse the summary judgment as to Counts I and II (i.e., the separate appeal of appellants/defendants).¹⁴

CONCLUSION

This case presents a tremendous opportunity for this Court to clarify Beck and Culp Construction and eliminate the error and confusion certain to occur as a result of the Court of Appeals' Pixton decision. Culp and Beck are dispositive of Mrs. Robbins' Cross-Appeal. If she is not a creditor or donee beneficiary under the bond -- a bond which provides for "absolute liability" -- then the lower court only properly dismissed Claim for Relief IV. Counts III and V lie in tort under Culp, Beck, and Gagon. On the other hand, if this Court determines that Mrs. Robbins did have some kind of privity relationship with the

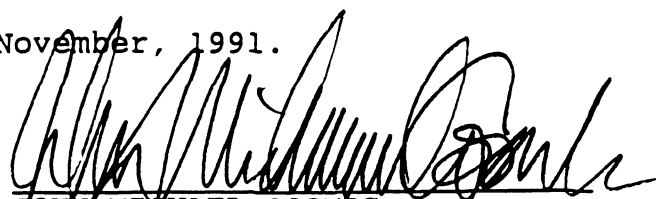
¹⁴ If this were to occur, the supersedeas bond presently in place would no doubt be released and, for all Mrs. Robbins knows, Check Rite and Atlas might soon thereafter go out-of-business.

ICAs as a result of their conduct or otherwise, then Claims for Relief III and V would naturally lie in contract under Beck, Culp, Gagon, or even the Court of Appeals' Pixton decision.¹⁵

The lower court failed to issue a statement for the basis of its dismissal of Claims for Relief III, IV, and V and therefore, it further erred under the dictum articulated in New West Federal Savings & Loan supra.¹⁶

Based on the foregoing, more especially Mrs. Robbins' supporting brief, the lower court's summary dismissal of Counts III, IV, and V is a miscarriage of justice and it should be reversed.

DATED this 27th day of November, 1991.


JOHN MICHAEL COOMBS
Attorney for Cross-Appellant/
Appellee/Plaintiff LeAnna
(Broadwater) Robbins

¹⁵ See also St. Benedict Dev. Co. v. St. Benedict's Hospital, 160 Utah Adv. Rep. 11, 13-14, 811 P.2d 194 (Utah Sup. Ct. 1991).

¹⁶ The Court should also note that the Honorable Leslie A. Lewis has replaced the Honorable Raymond S. Uno. Thus, if this case were sent back so that the lower court could "issue a brief written statement of the ground for its decision," Judge Lewis might view the matter quite differently.

In re: LeANNA (BROADWATER) ROBBINS v. OLD REPUBLIC SURETY, et al., Case No. 900508

REPLY BRIEF OF CROSS-APPELLANT/PLAINTIFF ROBBINS

PROOF OF SERVICE

The undersigned hereby certifies that on the 27th day of November, 1991, (s)he mailed sufficient true and correct copies of the foregoing REPLY BRIEF OF CROSS-APPELLANT (BROADWATER) ROBBINS by regular mail, postage prepaid to:

Robert A. Burton, Esq.
Stephen J. Trayner, Esq.
H. Burt Ringwood, Esq.
Attorneys for Defendants Old Republic
Surety and Northwestern National
Insurance Company of Milwaukee,
Wisconsin
STRONG & HANNI
Sixth Floor, Boston Building
Salt Lake City, Utah 84111

Larry G. Reed, Esq.
Attorney for Defendant Atlas
CROWTHER & REED
445 South 300 East, Suite 300
Salt Lake City, Utah 84111

Phillip R. Hughes, Esq.
Attorney for Defendant Check Rite
884 South 200 East, Suite 100
Salt Lake City, Utah 84111

