1964

Wilma W. Wootton v. Combined Insurance Company of America : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

WILMA W. WOOTTON,
Plaintiff and Respondent,

vs.

COMBINED INSURANCE COMPANY OF AMERICA,
Defendant and Appellant.

CASE NO. 10108

APPELLANT'S BRIEF

Appealed from the Judgment of the Fourth District Court
for Utah County
Honorable Joseph E. Nelson, Judge

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STATEMENT OF KIND OF CASE

This is an action by plaintiff, as beneficiary of a life insurance policy issued by defendant on the life of her deceased husband, which action defendant resists on the grounds that it was fraudulently induced to enter into said insurance contract by the misrepresentations of plaintiff.

DISPOSITION IN LOWER COURT

A Motion for Summary Judgment filed on behalf of plaintiff was granted by the court.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment entered and that the case be remanded to the lower court for trial

STATEMENT OF FACTS

On or about the 24th day of September, 1962, plaintiff executed an Application for Hospital or Medical-Surgical Policy for and on behalf of Harold Wootton and herself. Said application included an application for an Accidental Death Rider in the principal sum of $5,000.00, covering the life of Harold Wootton only. (Exhibit 1 in deposition of Wilma W. Wootton) The application was taken by Leo Albert Bowen, an insurance agent, who was a longtime friend of plaintiff and her deceased husband. (Deposition of Leo Albert Bowen, P. 3) Mr. Bowen asked the questions which appear on the application and the answers were written in his handwriting. (Bowen Dep., p. 7) The answers were written by him just as they were given by plaintiff. (Bowen Dep., p. 9) Certain questions were asked concerning the physical condition of the parties proposed to be insured, and the answers given by paintiff were written on the application. (Items 5, 6, and 7 of the application) The application was examined by plaintiff after it was completed and before it was signed. (Deposition of Wilma W. Wootton, P. 12) It was then signed by plaintiff as "Mrs. Harold Wootton". (Application and Wootton Dep., p. 11) The completed application was forwarded to defendant, Combined Insurance Company of America, and in reliance thereon an insurance policy was issued, the same being dated September 24, 1962, to coincide with the

date on which the application was signed. (A copy of said insurance policy is included in the record) Subsequently, on the third day of December, 1962, Harold Wootton died as a result of injuries sustained in an automobile-pedestrian accident. Plaintiff made demand upon the defendant for the payment of the principal sum of $5,000.00 provided for in the Accidental Death Rider. (Plaintiff's complaint) Defendant declined to pay said claim, on the grounds that it was induced to enter into the said insurance contract by reason of intentional misrepresentation of material facts and contending further that had defendant been informed of the true physical condition of plaintiff's deceased husband, defendant would not have entered into said insurance contract. (Defendant's Answer) The misrepresentations claimed by defendant are based on plaintiff's answers to questions five, six and seven in the application, specifically with respect to the physical condition of Harold Wootton. The specific nature of the misrepresentations was later set forth in Answers to Interrogatories which are a part of the record. A Motion for Summary Judgment was filed by plaintiff, based on the pleadings, depositions, interrogatories and an affidavit of plaintiff. By stipulation of counsel, the depositions of Leo Albert Bowen and Wilma W. Wootton were published in total at the time of the argument of the Motion for Summary Judgment. From a decision granting said Motion, defendant appealed.

STATEMENT OF POINTS

POINT I

THE RECORD DISCLOSES GENUINE ISSUES OF MATERIAL FACT, AND UNDER THESE CONDITIONS

THE GRANTING OF A MOTION FOR SUMMARY JUDGMENT WAS IMPROPER.

POINT II

THE PHYSICAL CONDITION AND MEDICAL HISTORY OF AN APPLICANT FOR LIFE INSURANCE ARE MATTERS MATERIAL TO THE RISK ASSUMED BY THE INSURER, AND MISREPRESENTATIONS AS TO SUCH MATTERS FORM THE BASIS FOR AVOIDANCE OF AN INSURANCE CONTRACT INDUCED BY SUCH MISREPRESENTATIONS.

ARGUMENT

POINT I

THE RECORD DISCLOSES GENUINE ISSUES OF MATERIAL FACT, AND UNDER THESE CONDITIONS THE GRANTING OF A MOTION FOR SUMMARY JUDGMENT WAS IMPROPER.

As has been stated by this Court on many occasions, a summary judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact, and that the moving party is entitled to a judgment as a matter of law. If there is any genuine issue as to any material fact, the motion should be denied. (In re Williams' Estates, 10 Utah 2d 83, 348 P2d 683; Young vs. Felornia, 121 Utah 646, 244 P2d 862)

Both in the lower court and on appellate review, the party against whom the summary judgment is granted is entitled to the benefit of having the court consider all of the facts presented and every inference fairly arising there-

from in a light most favorable to him. (Morris vs. Farnsworth Motel, 123 Utah 289, 259 P2d 297). This Court has recently reiterated this proposition in the case of Kidman vs. White, 14 Utah 2d 142, 378 P2d 898, in the following language:

> ". . . a summary judgment, which turns a party out of court without an opportunity to present his evidence, is a harsh measure that shoud be granted only when, taking the view most favorable to a party's claims, and any proof that might properly be adduced thereunder, he could in no event prevail."

Based on these criteria, defendant respectfully contends that the record which was before the trial court and is now before this Court, amply discloses that there are genuine issues of material fact which can only properly be resolved upon a trial of this matter on its merits. Such issues of material fact concern the question of whether plaintiff intentionally misrepresented the physical condition of her husband, Harold Wootton, in the application for insurance. An examination of her answers to questions five, six and seven on said application disclose that she revealed that Harold Wootton had polio at the age of three, that he had a slight limp resulting therefrom, that he had completely recovered from said condition and had had no recurrences, and that he was now in good health and free from any physical defect, injury or disease, and was not now under medical care.

When plaintiff's deposition was taken, she was asked if she had signed a written report of an interview which she had with a Mr. Gibson on January 9, 1963. She admitted that the report bore her signature, and did not

deny that she read it before signing it. The statement which she signed concerned the death of her husband, Harold Wootton, and was as follows:

> "On 12/3/62 he walked out of cafe, crossing the road to pick up his car, and was hit by a car. The driver said he never even saw my husband until too late. He said he just saw a shadow and didn't even know what he hit. My husband's correct date of birth is 1/16/07, and he was employed as plant operator for the Provo River Water Users **until 7/15/62, when he retired, going on aid for disabled due to his polio. He was advised to retire by Dr. Smith, Provo, Utah, and I understand he said my husband might lose the use of his good leg if he didn't stay off of it."** (Emphasis ours) (Wootton Depos., P. 18 and 19.)

In the same deposition, plaintiff stated that she married Harold Wootton in 1951 (Wootton Dep., P. 5) and that his condition remained the same from the time of said marriage until the time of the death of Harold Wootton. (Wootton Dep., P. 17) Also, that there was no substantial change in the condition of Harold Wootton from September 24, the date on which the application was signed, to December 3, the date of his death. (Wootton Dep., P. 16)

With that foundation as to the physical condition of Harold Wootton, the following exchange of questions and answers appears on Page 20 of the said deposition:

> "Now, Wilma, on November 27, 1962, Harold filed an application with the Social Security Administration claiming to be completely and totally disabled, did he not?
>
> A. I don't know .
>
> Q. You mean to say that you had no knowledge

of that application, if there was such an application made?

A. I don't say I don't have no knowledge of it. What I am saying is that the last five years I have been under an emotional strain and things don't come back clear to me. And Harold's death never done it any good either, even then. I have been under Dubois until I couldn't afford it any longer.

Q. So what you are saying is you don't remember this at this time, but you might have known it at the time?

A. I might have known it at the time . . ."

If in fact the condition of Harold Wootton had not changed from September 24, 1962, to the date of his death, and if in fact he, with the knowledge of the plaintiff, filed an application on November 27, 1962, claiming to be completely and totally disabled, it would seem to follow, as the night the day, that he could not have been in "good health and free from any physical defect, injury or disease" as represented by plaintiff at the time of the signing of the application on September 24, 1962.

Again, referring to the physical condition of Harold Wootton, the following appears on Pages 13 and 14 of the deposition of Wilma W. Wootton:

"Q. When did Harold terminate his employment with the Provo River Water Users . . .

A. I think it was July 15.

Q. Why did he terminate?

A. Well I don't exactly know why he terminated, other than the change-over on the job up there. The job was too much for him . . .

Q. Did you discuss why the job was too much for him?

A. Yes. When he first went up there he had

control over the powerhouse. That is all he had to do. And then they put him in charge of the chlorinating station and house cleaning and cutting the lawns. And in his condition he couldn't hold his end up.

Q. You say "in his condition". What was there about his condition?

A. This condition existed then.

Q. What condition?

A. The polio. He had restricted work that he could do. He could not be on his legs all day.

Q. Isn't it true, Mrs. Wootton, that for about a year or two prior to the time that he terminated that he had been having a lot of trouble with falling?

A. Harold had trouble with falling all his life."

Again referring to Item 7 of the application, we fail to see how a person who "had trouble with falling all his life" could be "free from any physical defect, injury or disease" especially if such falling were caused by residuary muscle weakness as a result of polio.

It is of extreme sgnificance that the statements made to the agent who completed the application concerning the condition of Harold Wootton were markedly different from the statements made by plaintiff in her deposition. In this connection, the following appears on Page 14 of the deposition of Leo Albert Bowen:

"Q. (By Mr. Paulson) If I understand you correctly, Mrs. Wootton told you in substance that her husband had had polio when he was three years old; that he now had a limp which you already knew, but that limp wasn't causing him any particular problem at the time this application was taken.

A. That is right.

Q. Is this correct?

A. Yes."

We have quoted at some length from the depositions primarily for the purpose of showing that even the plaintiff's own testimony, when compared with the representations made in the application, indicates some material misrepresentations of the physical condition of Harold Wootton at the time the application was signed by plaintiff. This comparison of the depositions with the application, supplemented by the balance of the record, and viewed in a light most favorable to defendant clearly indicates that there are genuine issues as to material facts herein which issues can only be properly resolved by a trial of this matter on its merits.

POINT II

THE PHYSICAL CONDITION AND MEDICAL HISTORY OF AN APPLICANT FOR LIFE INSURANCE ARE MATTERS MATERIAL TO THE RISK ASSUMED BY THE INSURER, AND MISREPRESENTATIONS AS TO SUCH MATTERS FORM THE BASIS FOR AVOIDANCE OF AN INSURANCE CONTRACT INDUCED BY SUCH MISREPRESENTATIONS.

The law is well established that the health of an applicant for insurance on his life, health or bodily condition is of vital importance to the insurer, and questions to elicit information on the subject and in regard to illnesses and ailments of such person are proper to be asked and should be truthfully answered. The general rule with respect to the effect of an untrue statement concerning these matters is stated as follows:

> "The rule is unanimous that an untrue statement in regard to a material matter affecting the health or phys-

ical condition of an applicant for life insurance, who knows the statement to be untrue, will allow the insurer to avoid the policy . . ." (29 Am. Jur., Insurance, Sec. 742, P. 999)

This general rule is implicitly recognized in this State by the presence of the following statutory provision in our Insurance Code:

> 31-19-8. "Materiality of misrepresentations - Warranties - Presumptions and burden of proof. - (1) Except as provided in subsection (2), no oral or written misrepresentation or warranty made in the negotiation of an insurance contract, by the insured or in his behalf, shall be deemed material or defeat or avoid the contract or prevent it attaching, unless such misrepresentation or warranty is made with the intent to deceive.
>
> The insured shall have the burden of proof that such misrepresentation or warranty was not made with intent to deceive.
>
> (2) In any application for life or disability insurance made in writing by the insured, all statements therein made by the insured shall, in the absence of fraud, be deemed representations and not warranties. The falsity of any such statement shall not bar the right to recovery under the contract unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer." (This provision was amended in 1963, but the language quoted herein was the statute as it existed at the time of the signing of the application in this case.)

Two questions are suggested by the statute in its application to the case at bar, i.e., the question of materiality

of the misrepresentations and the question of intent. These will be discussed in that order.

Many courts in many jurisdictions have attempted to define the materiality of representations made to induce the issuance of an insurance contract. Without multiplying cases, it would appear that the definition of this Court in Fidelity & Casualty Company vs. Middlemiss, 103 Utah 429, 135 P2d 275 is as complete as any we have examined. Therein, the Court said:

> "A material representation is one which ordinarily would influence the prudent insurer in determining whether to accept or reject a risk, or in fixing the amount of the premium in the event of such acceptance, or in excepting some risk or part thereof from coverage . . . a material fact is any fact, the knowledge or ignorance of which would naturally influence the insurer's judgment in making the contract, in estimating the degree and character of the risk, or in fixing the rate of insurance."

The same general principle has been stated by the Delaware court in Prudential Insurance Company of America vs. Gutowski, 113 A2d 579, as follows:

> "And a condition or disease is sufficiently serious to justify the Court in finding it material to the risk if it would naturally have persuasive influence upon the insurer's determination with respect to undertaking an insurance contract."

It should be abundantly clear that the facts concerning the physical condition of Harold Wootton would have naturally influenced the judgment of the defendant in the case at bar as to whether an accidental death insurance

policy should be issued by said defendant. It is the contention of defendant that had it been apprised of the facts that Mr. Wootton "had trouble with falling all his life", had terminated his employment on the advice of a physician, had gone "on aid for disabled due to his polio" and was in such condition that he made an application with the Social Security Administration for total disability benefits, that said defendant, as stated in its Answer to the Complaint of plaintiff, "would not have entered into said insurance contract with said decedent and plaintiff."

With respect to the question of an intent to deceive as referred to in Title 31-19-8, Utah Code Annotated, 1953, **Supra,** it was stated in Prudential Insurance Company of America vs. Willsey, 10 Cir. 1954, 214 F2d 729:

> "Therefore it seems that Utah is firmly committed to the rule that no misrepresentations or warranties made in the negotiation of an insurance contract shall defeat or avoid that contract unless such representations are made with an intent to deceive."

This conclusion was reached in the case cited above as a result of an analysis of several previous cases, concluding with New York Life Insurance Company vs. Grow, 103 Utah 285, 135 P2d 120. In those cases (all decided prior to 1947) it had been uniformly held that in order to avoid an insurance contract, the insurer must prove that material misrepresentations were made with an intent to deceive. The insurer had the burden of proof on all of those issues. This was stated by the court in New York Life Insurance Company vs. Grow, **Supra,** as follows:

> "It was the burden of plaintiff to establish actual fraud on the part of the insured, that he made the material

misrepresentations shown by the application knowingly and with intent to deceive and defraud the plaintiff insurance company."

A very significant change in the law occurred when in 1947 the legislature of Utah passed the statute cited as Title 31-19-8, **Supra,** which contained the following provision:

"The insured shall have the burden of proof that such misrepresentation or warranty was not made with intent to deceive." (Emphasis ours)

This statutory change in the law with respect to the burden of proving intent or lack of intent to deceive becomes more significant in light of a recent decision of the United States District Court for the District of Utah. In the case of Castagno vs. Occidental Life Insurance Company of Raleigh, North Carolina, D. C. Utah, 151 F. Supp. 781, a case similar to the case at bar in that a plaintiff was suing on a life insurance policy and the defense was a claimed misrepresentation, the court states the following, pertaining to the matter of intent:

"There is a presumption of intent to deceive from the knowing concealment of material facts, unless such presumption is overthrown by substantial evidence." (Citing Zolintakis vs. Equitable Life Assurance Society of the United States, 10 Cir. 1938, 97 F2d 583, See also Id., 10 Cir., 108 F2d 902.)

Applying these principles to the case at bar, the record, viewed in a light most favorable to defendant, would certainly permit the indulgence of the presumption of an intent to deceive from the knowing concealment of the ma-

terial facts heretofore mentioned. At this point, the burden shifts to plaintiff to establish by a preponderance of the evidence that she had no such intent to deceive. The record (again viewed in a light most favorable to defendant) certainly does not sustain plaintiff's burden of proof on this issue. Hence, another genuine issue of material fact is shown to exist ,the resolution of which can be accomplished only by a trial of this matter on its merits.

To plaintiff's anticipated contention that the presumption cannot be indulged because of insufficient evidence of concealment of material facts, a judicial definition of some of the terminology used in the application would appear to support the contention that such concealment was done by plaintiff. It will be noted that in item seven of the application, an affirmative answer was given to the question as to whether the proposed insured was in "good health". This term was defined in Braddock by Smith vs. Pacific Woodmen Life Association, 89 Utah 75, 54 P2d 1189 as follows:

> "The general rule appears to be that the term "good health" when used in a policy of life insurance means that the applicant has no grave, important or serious disease, and is free from any ailment that seriously affects the general soundness or healthfullness of the system."

It is readily apparent from the testimony of plaintiff in her deposition that her deceased husband was not in "good health" as so defined at the time the application was signed by her, and it is likewise apparent that she knew that he was not in good health.

CONCLUSION

The trial court erred in granting plaintiff's Motion for Summary Judgment. The decision should be reversed and remanded for trial.

Respectfully submitted,

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