1983

Patti Simonson v. Robert Gordon Travis : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

FAITH SIMMONS,	:	
	:	
Plaintiff and Appellant,	:	
	:	
vs.	:	Case No. 19148
	:	
ROBERT GORDON TRAVIS,	:	
	:	
Defendant and Respondent.	:	

APPELLANT'S BRIEF

Appeal from the Findings of Fact, Conclusions of Law and Judgment of Dismissal of the Second Judicial District Court of Davis County, the Honorable Douglas L. Cornaby, and Thornley K. Swan, Judges.

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MISCELLANEOUS AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT OF THE KIND OF CASE

This is a civil action commenced on April 11, 1980, by plaintiff-appellant, hereinafter called plaintiff, against the defendant-respondent, hereinafter called defendant, in the Davis County District Court for personal injury special and general damages which plaintiff claimed to have suffered as a result of a motor vehicle intersection accident caused by defendant's negligence on February 1, 1978, at Roy, Utah. The defendant answered the complaint and among other defenses affirmatively pleaded a "full, final and complete Release" executed by plaintiff on March 7, 1978. At a pretrial on March 19, 1981, the Honorable J.

Duffy Palmer presiding, it was ordered that the trial of the above entitled action be bifurcated and that the issue of the scope, construction and effect of the said Release affirmatively pleaded be first determined and ruled on by the trial court preceding a trial on the issues raised by the complaint. Throughout this brief, the appellant will refer to the transcript of evidence as (T._____) the record as (R._____), and defendant's exhibits received in evidence as (Ex._____).

DISPOSITION IN LOWER COURT

The bifurcated issue of the validity, scope and effect of the affirmatively pleaded Release was tried to the court, the Honorable Thornley K. Swan presiding, on the 19th day of May, 1981. Several weeks following said trial, the presiding judge orally communicated to the defendant's counsel his finding of facts in favor of the defendant and against the plaintiff on the issue of the scope, construction and effect of the Release, and the court directed that the complaint for personal injuries be dismissed on the merits. Subsequent to said oral findings and order, the defendant prepared and submitted written findings of fact, conclusions of law, and judgment of

[illegible] Judge Swan around June 17, 1981, but the same were never signed and filed. Upon stipulation of counsel for the respective parties and at their instance and request, the Honorable Douglas L. Cornaby, District Judge, signed and filed comparable findings of fact, conclusions of law, and judgment of dismissal on April 7, 1983, in the place and stead of Judge Swan in order to accommodate and assist the parties to crystallize this case and to enable the parties to either appeal or put the case to rest (R. 27 [illegible]). The plaintiff appeals from said findings of fact, conclusions of law, and judgment of dismissal.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks a reversal as a matter of law of the findings of fact, conclusions of law, and judgment of the trial court, and for a judgment in favor of the plaintiff as a matter of law on the bifurcated issue of the scope, construction, and effect of the release involved herein. The plaintiff does not seek a new trial because it is her belief that the present trial record encompasses all of the facts essential to a final decision herein.

STATEMENT OF FACTS

On February 1, 1978, the plaintiff was involved in a [illegible] intersection accident at Roy, Utah (R. 1,2).

Plaintiff claims that defendant's negligence caused the collision and that as a result of the collision plaintiff suffered personal injuries, medical expenses, loss of earnings and property damage (R. 1-2, and T. 19,27,28).

The defendant carried automobile liability insurance with State Farm Insurance Company, hereinafter called State Farm (T. 4,5), and shortly after the accident plaintiff contacted, or was contacted by, representatives of State Farm including a property damage repair estimator (T.6, 21) and one Homer F. Randall who was a claims adjuster in charge of managing and adjusting plaintiff's losses (T. 4-8,16,25).

Five exhibits were offered on stipulation and received in evidence (R. 22,24), namely:

EXHIBIT NO.	DATE OF INST.	DESCRIPTION
1.	2/2/78	Repair estimate prepared by State Farm reflecting cost of repairs to be $622.45.
2.	3/8/78	Release signed by plaintiff but prepared and modified by State Farm reflecting total consideration of $622.45.

3.	3/3/78	State Farm draft for $622.45.
4.	3/6/78	National Car Rental invoice for $31.50.
5.	3/13/78	State Farm draft to Jenson and Sons in amount of $31.50 for car rental.

Homer F. Randall testified, in substance, as follows: (a) that he had been employed by State Farm for 18½ years as a claims adjuster (T. 4); (b) that he managed the adjustment of plaintiff's claims (T. 5-8,15); (c) that he concluded that liability was probably against State Farm's insured (T.5); (d) that the printed matter in Exhibit 2 is a standard release form used by State Farm; (T. 7,8); (e) that the handwriting in Exhibit 2, except for plaintiff's signature, is that of Mr. Randall (T. 7,8); (f) that the typed matter on Exhibit 2 is in words selected by State Farm and inserted by staff of State Farm (T. 8,15); (g) that he had conversations with plaintiff, but he cannot remember her other than by name (T. 5), and he cannot remember the contents of conversations (T.5,16,17,35), nor whether he in fact represented that release was for property damage only (T.16, 17,35); (h) that State Farm paid $31.50 car rental about one week following the release because of an agreement outside the release (T. 10,16,27);

(i) that he knew plaintiff was receiving medical treatment (T. 10,11,25,26), but he made no inquiry concerning whether plaintiff had been released by her doctor (T. 11); (j) that State Farm paid to plaintiff the exact amount of her auto repair estimate in consideration for her release, (Ex. 1,2,3, T. 9); (k) that the release was executed some five weeks after the accident and he had no idea as to extent of plaintiff's medicals or no-fault coverage (T. 10,11,17); (l) that an insurance adjuster has a duty to deal fairly with claimants (T. 11,12); (m) that he was aware of arguments by plaintiff with office staff (T 16,33); (n) that he does not remember whether he misrepresented the scope of the release in 1978 (T. 16,17,30); (o) that State Farm paid plaintiff's insurance carrier for no-fault benefits an amount of $2,100.00, plus(T. 42); and, (p) that he has an understanding of the Utah no-fault law (T.37,38).

The plaintiff testified, in substance, as follows: (a) that she suffered personal injuries, loss of earnings, and incurred medical expenses, in excess of $1,000.00 as a result of said accident (T. 28); (b) that plaintiff argued with State Farm staff, caused insertion of typed matter, and relied on Homer Randall concerning the scope and effect of the release (T. 16, 24, 30, 31, 32, 3), and she was

assured by Homer Randall she that was releasing property damage only (T. 25, 26, 32); (c) some five days after the release plaintiff demanded car rental payment which was in fact paid March 15, 1979, (Ex. 5, T. 27); (d) that plaintiff incurred in excess of $5,000. in medical bills and she continues to owe for medical bills resulting from this accident (T. 28,29); and (e) plaintiff trusted Homer Randall and did not think he would lie to her (T. 32).

This action for personal injuries with a prayer for special and general damages was filed by plaintiff in the Davis County District Court on April 14, 1980 (R. 1,2). Plaintiff was represented by Richard Richards, Esq., who subsequently withdrew his appearance in this action (R. 15), and this writer entered his appearance as counsel for plaintiff in January 30, 1981 (R. 15). The plaintiff's counsel has diligently sought to put this part of the case in a posture for final resolution since the trial on May 13, 1981 (R. 25,26,28, and final entry in Record). The plaintiff and her counsel are grateful for the assistance of Judge Cornaby in putting this case in a condition for appeal because even an adverse determination is preferable to no determination at all.

PRELIMINARY STATEMENT

It is reported that Abraham Lincoln, exasperated with

the meaningless rhetoric of a fellow lawyer, stated: "he can compress the most words into the smallest idea of any man I ever met." This writer hopes to reverse the process and compress the most ideas into what at first blush may appear to be a case of limited evidence and issues.

Although Robert Gordon Travis appears in this proceeding as the named defendant-appellant, the real party in interest in these proceedings is State Farm Insurance Company which assumed the roll of representing defendant and is immediately involved to the almost complete exclusion of defendant in the statement of facts now before the court.

Casualty insurance companies are a structured and sophisticated industry which deal with printed "form" general releases on a daily business in their adjustment and settlement of losses. The Utah courts are going to have to meet issues concerning the construction, scope and effect of releases with increasing regularity because of the trade practices involving advance payments by insurance carriers designed to maintain control over claimants, and the many release issues developing as a result of the Utah no-fault and comparative negligence statutes and their interpretations. General releases are used by the

insurance industry like confetti without thought given by either the industry or claimants to problems such as whether they extend to third-party claims, subrogation, arbitration, and unanticipated liability policy coverages. That is, until a claim arises following a so-called general release, after which the release is raised as a defense by knowledgeable insurance carriers and their lawyers against uninformed and unsuspecting lay public who do not understand that they need an equally knowledgeable lawyer on retainer nowadays. And it is questionable whether the average lawyer is sophisticated enough in the fluctuating comparative negligence environment in Utah to predict the consequences of the printed matter of form releases and printed endorsement forms commonly found on the reverse said of insurance drafts. Some of the consequences of such releases may, or may not, develop three or four years down the road depending on this court's decisions relative to contribution and insurance policy exclusions.

Summarizing the foregoing, this case involves principles of law and social policy which extend far beyond the limited fact situation contained in the short transcript and exhibits before this court on appeal. This case also involves the comparative sophistication of State Farm as

[illegible] property damage [illegible] support [illegible] property [illegible] general [illegible]

[illegible]

ARGUMENT

POINT I.

[illegible] ERRED IN [illegible] FINDING [illegible] MEET HER [illegible] IN ASSESSING ANY [illegible] HEREIN.

[illegible] in its findings of fact, para- [illegible] (c. [illegible] Simonson did not

meet her burden [illegible] said general release..." Plaintiff argues that the finding was erroneous in two respects, namely: (a) that defendant carried the ultimate burden of proof; and (b) that there was a general release executed by plaintiff.

Rule 8 (c), Utah Rules of Civil Procedure, provides that "In a pleading to a preceding pleading, a party shall set forth affirmatively...release...and any other matter constituting an avoidance or affirmative defense." It is elementary that the burden of proof or persuasion rests on the party asserting or pleading an affirmative defense. See, 31-A C.J.S., Evidence, Section 154; Tabor v. Leavitt, 304 Ken. 346, 472 P. 2d 209. Rule 1 (4), Utah Rules of Evidence, defines "burden of proof" to mean "the obligation of a party to meet the requirements of a rule of law that he fact be proved" by the applicable standard of evidence. Rule 1 (5), U.R.E. defines "burden of producing the evidence" which is often referred to as the burden of going forward.

Appleman on Insurance, Vol. 7, Section 4261, at Pp. 534, 539, notes the divergence of holdings on the issue of burden of proof and [illegible] states as follows:

[illegible] some difference of opinion, however, as to the person bearing the burden of proof upon such a [illegible]. It has been stated the defendant pleading a [illegible] has the burden of establishing the defense. In any case, the insurer has the right [illegible] and validity of the release, and where the circumstances show an apparent undue [illegible] the insurer to show [illegible] consideration. And it has been held that a release procured by the insured's agent will be construed against the insurer.

In the case of In re Swig Estate v. Walker Bank & Trust Co., et al., 4 U. 2d 277, 293 P. 2d 682 (1956), this Court [illegible] to set forth all the distinction between "burden of proof (persuasion)" and "burden of producing evidence." The burden of persuasion remains throughout the trial on the party who [illegible] for relief depends on the existence of a fact, whereas the burden of producing evidence may shift during the trial.

Clearly, the defendant had the burden of proof on the affirmative defense of the release, and this burden remained with defendant throughout the trial. Plaintiff [illegible] her burden [illegible] going forward with the evidence as will be further elaborated in her Point following.

POINT II.

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF EXECUTED A GENERAL RELEASE.

The trial court found (paragraph 4, Findings of Fact,

R. 37) that "with full knowledge of [illegible] had sustained both property damage and bodily injury, [illegible] plaintiff executed a general and complete release..." The plaintiff submits that this finding by the court to be contrary to the undisputed evidence and the law of construction pertaining to contracts.

The undisputed evidence in this case includes: (a) that plaintiff and defendant were involved in a vehicle collision in Weber County, Utah, on February 1, 1978, which resulted in claims by plaintiff against defendant for both personal injuries and property damage (R. 1,2 and T. [illegible], 15); (b) that the defendant was insured for liability by State Farm, and an adjuster for State Farm proceeded to investigate the accident (T. 5); (c) that State Farm made a preliminary determination that liability was probably against its insured and proceeded to adjust the plaintiff's claims (T. [illegible]); (d) that State Farm prepared the release, Exhibit 2, in the form signed by plaintiff on March 8, 1978, (T. 6-8); (e) State Farm paid to plaintiff the sum of $[illegible].40 at the time plaintiff executed said release (Ex. 2, T. 9); (f) that said payment of $[illegible].4 exactly equalled the plaintiff's estimate of repairs for her vehicle, said

estimate having been prepared by State Farm (Ex. 1, T. 6); and (g) plaintiff affirmatively testified that the release extended to repair of her car only (T. 25,26), and the State Farm adjuster could not remember his representations (T. 16,17,35).

The disputed contentions in this case include: (a) the intention of the parties at the time the release was executed and payment made; and, (b) the representations made by State Farm and its representatives to plaintiff prior to and at the time the release was executed by plaintiff and $622.45 received by her.

The release (Ex. 2), prepared in its entirety by State Farm and its representatives (T. 7,8,9), is an interesting document. It is a printed standard form release customarily used by State Farm (T. 7,8), but typed on said release by State Farm preceding the printed text is the following:

> The undersigned is not releasing any part of his claim for which he has received or will in the future receive payments under personal injury protection insurance available to him. The present or future subrogation rights of any insurer for making payments under such coverage is reserved.

The plaintiff respectfully submits that the above typed reservation in and of itself qualifies the release

and reserves unequivocally any claims plaintiff may have for personal injuries in addition to any subrogation claims.

A release is contractual in nature and general principles of contract law pertaining to interpretation, effect and construction are applicable thereto, 66 Am. Jur. 2d, Release, Section 1; 76 C.J.S., Release, Section 1; 16 Couch on Insurance 2d, Section 60: 18; Horgan v. Industrial Design Corporation, (Utah)657 P. 2d 751 (1982). General contract principles and rules of construction applicable to releases include, but are not limited to, the following:

(1) It is a well settled rule of law that where part of a contract is written or typed and part is printed, and the written and printed parts are apparently inconsistent or there is reasonable doubt as to the sense and meaning of the whole the words in writing or typing will control. 17 Am. Jur. 2d, Contracts, Section 271; Holland v. Brown, 15 U. 2d 422, 394 P. 2d 77 (1964).

(2) A release should be strictly construed against the party who framed or wrote it. 66 Am. Jur. 2d, Release, Section 28; 16 Couch on Insurance 2d., Section 60: 18.
Doubtful language in contracts should be interpreted most strongly against the party who uses it or who has drawn it. Bryant v. Deseret News Publishing Co., 120 Utah 241, 233 P. 2d 355; Wingets, Inc., v. Butters, 28 Utah 2d. 241, 500 P. 2d. 1007 (1972).

(3) The primary rule of construction is that the intention of the parties shall govern, and this inten-

tion is to be determined with a consideration of what was within the contemplation of the parties when the release was executed, which in turn is to be resolved in the light of all of the surrounding facts and circumstances under which the parties acted. 66 Am. Jur. 2d, Release, Section 30.

(4) If a release is drafted to release one claim, it is not a bar to other claims. 66 Am. Jur. 2d, Release, Section 29; 3 Appleman on Insurance, Section 1711.

(5) Where the courts have to choose between conflicting interpretations in agreements, an interpretation which will bring an equitable result will be preferred over a harsh or inequitable one. First Security Bank v. Maxwell, (Utah) 659 P. 2d 1078 (1983).

(6) Although a release must be supported by consideration, the parol evidence rule does not prevent a showing of the true consideration. 66 Am. Jur. 2d, Release, 352.

(7) Grossly inadequate consideration may be considered with other evidence as tending to show mistake or fraud. 66 Am. Jur. 2d, Relase, Section 11.

(8) Ambiguity in a written contract permits parol evidence to be admitted to show the intentions of the parties. Hibdon v. Truck Insurance Exchange, (Utah) 657 P. 2d 1358 (1983).

(9) All of the provisions of a release must be construed together. 3 Appleman on Insurance, Section 1711. Also see First Security Bank v. Maxwell, (Utah) 659 P. 2d 1078, (1983), pertaining to construction of two contracts relating to same real estate transaction.

Plaintiff does not want to belabor the construction of the release, Exhibit 2, but it is obvious that it consists of printed material, a typed addition at the top of the

release, and handwritten insertions. The accepted rule of construction requires that the typed material prevail over the printed body. The first sentence of the typed material provides that "The undersigned is not releasing any part of his (sic) claim for which he has received or will in the future receive payments under personal injury protection insurance available to him." This seems to plaintiff to be an unequivocal and unambiguous reservation of plaintiff's personal injury claims. However, if this court reads that sentence differently, then it becomes inescapable that there is a patent ambiguity to which the accepted rules apply including parol evidence, intention of the parties, lack of consideration, construction against the preparer of the contract, and other rules of construction and interpretation above noted. The transcript and exhibits in this case provide a model vehicle for delineating the construction and effect of releases, although the record might have been improved on if the trial court had not, erroneously it is believed, sustained objections rather consistently on the basis of leading questions and argumentation (T. 13,14,17,18,24,26,30). Homer Randall was the adjuster in charge of this transaction (T. 4,5,8,15), the primary knowledgeable employee of State Farm to this

transaction, and he was produced without subpoena by State Farm to protect its interests in this case.

Plaintiff submits that within the facts of this case Homer Kendall was clearly a "managing agent" and adverse witness subject to cross-examination within the purview of Rule 43(b), Utah Rules of Civil Procedure. Discussion of "who is a managing agent" may be found at 1 A.L.R. Fed. 893, but the Federal Rule 43(b) has now been stricken and transferred to Rule 611, Federal Rules of Evidence, wherein it reads "When a party calls a hostile witness, an adverse witness or a witness identified with an adverse party, interrogation may be by leading questions." This discussion is not raised as a separate point of error because the record is relatively clear in spite of the interruptions in examination.

POINT III.

THE TRIAL COURT ERRED IN FINDING CONSIDERATION FOR A GENERAL RELEASE.

The findings of fact are silent on the amount of consideration paid by State Farm to plaintiff for a general release, but the conclusions of law and judgment by necessity require an implied finding that a valuable consideration was paid to plaintiff to support a general release of

personal injury [illegible] argued to the trial court that the amount [illegible] was irrelevant, [illegible] in support of the release (T. 9,56). The plaintiff respectfully submits that grossly inadequate consideration may be considered with other evidence as tending to show mistake or fraud, 66 Am. Jur. 2d, Release, Section 61, and that payment of an amount of admitted liability does not constitute sufficient consideration for a general release, 16 Couch on Insurance 2d, Section 60:11.

In this case, Exhibit 1 reflects a repair estimate of $620.45 prepared by State Farm, Exhibit 2 reflects a release reciting consideration of $620.45, and Exhibit 3 reflects a draft for $620.45. Reference in the second sentence of the typed portion of the release to reservation of subrogation rights of any insurer for personal injury protection benefits is no consideration at all to plaintiff. This court subsequently held in Allstate Insurance Co. v. Ivie and Travelers, (Utah) 608 P. 2d 1197 (1980) and its progeny that the No-fault Insurance Act does not confer the right of subrogation on the no-fault insurer.

It is clear from the typed portion of the release (Ex.

) and the testimony of the adjuster that plaintiff had not been released by her doctor (T. 10,11,25,26), and that neither plaintiff nor the State Farm adjuster had any knowledge on the date of the release as to the extent of plaintiff's injuries nor the medical costs that plaintiff might anticipate (T.11,12,25,26). Furthermore, the adjuster had some acquaintance with the Utah No-fault law, yet he expressed no concern with the no-fault limits carried by plaintiff nor whether they would be adequate to even cover medical expenses (T.12,37,38).

The plaintiff respectfully submits that there was no consideration paid by State Farm to plaintiff in this case which would support a general release extending to personal injuries and specials.

POINT IV.

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF'S RETENTION OF PARTIAL PAYMENT WAS RELEVANT TO THE COURT'S CONCLUSIONS AND JUDGMENT OF DISMISSAL.

The trial court made a finding of fact, paragraph 6 thereof (R. 38,39), to the effect that "Since executing the release of March 8, 1978, the plaintiff has retained all of the consideration she received as a condition of giving the release ..." Presumably, this finding of fact is regarded as

relevant to and supportive of the court's conclusions of law and judgment of dismissal therein. [illegible] believes this finding to be erroneous as a matter of law and not pertinent to the only issue of whether plaintiff executed a general release.

Specifically, the failure of plaintiff to not physically tender back the monies paid to her by State Farm is not pertinent nor relevant to the trial court's conclusion and judgment for several reasons, namely:

1. An offer to make a tender back was made in open court by plaintiff which was neither accepted by defendant nor determined necessary by the trial court. (T. 45), thereby making physical tender futile.

2. The adjuster for State Farm acknowledged that "liability was probably against (its) insured" (T. 5), and the release reflected a consideration of $522.45 that equalled the repair estimate and was an undisputed liability payment for property damage.

3. That the overall record disclosed by the transcript of evidence and exhibits supports a determination of fraud on the part of State Farm that negates the need of a tender back.

There are solid and settled principles of law supporting the foregoing reasons negating plaintiff's need to make a tender back of consideration paid her. First, it is settled that a return or tender back of consideration in the course of rescinding a contract is not necessary where

[illegible] tender back is futile, or it is evident it would be refused if made, for which [illegible], 44 C.J.S., Insurance, [illegible], and annotations thereto. Second, payment of [illegible] claimed to be due with respect to one feature of a transaction cannot be the basis of an agreement to forego another feature of the transaction although the latter is disputed or unliquidated, for which see, Browning v. Equitable Life Assurance Soc., 94 Utah 532, 72 P. 2d 1060 (1937) and Hall v. Utah Home Fire Insurance Co., (Idaho) [illegible] P. 2d [illegible] (1965). Third, the plaintiff submits that the record supports a finding of fraud on the part of State Farm, particularly where the release is for the exact amount of the property damage and the adjuster could not "truthfully" state that he did not make misrepresentations to plaintiff (T. [illegible] 17). This court held in Reliable Appliance Co. vs. Fidelity and Guaranty Insurance, 16 Utah 2 [illegible], 308 P. 2d 685 (1965) that a return or tender back was unnecessary on two bases, namely: (a) tender unnecessary where insured agreed at pretrial to tender and insurer admittedly owed amount insured had received; and (b) where release has been obtained by fraud, tender is not a condition precedent to disaffirmance of a release. Also see, Bowers v. [illegible], v. Fidelity Building & Loan, 94 U. 97,

79 P. 2d 669 (1938).

Plaintiff will not belabor the issue of tender because it is to some extent anticipatory of State Farm's argument in support of the release. Plaintiff submits that under any theory proposed by defendant a tender back is not necessary on the fact situation disclosed in this case by the record, transcript and exhibits.

POINT V.

AN INSURER OWES A DUTY TO THIRD PARTY CLAIMANTS TO CONDUCT ITS CLAIMS SETTLEMENT PRACTICES IN A FAIR MANNER AND IN GOOD FAITH, AND A FAILURE TO DO SO RAISES A PRESUMPTION OF FRAUD AND UNDUE INFLUENCE.

According to Section 31-1-8, U.C.A., 1953, "Within the intent of this code the business of insurance is one affected with the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters." Section 31-5-10, U.C.A., 1953, provides, among other things, that the commissioner of insurance may refuse, suspend or revoke an insurer's authority if the insurer "(4) habitually compels claimants under similar claims either to accept less than the amount due them or to bring suit against it to secure full payment of the amount due."

Section 31-19-4 (2) of said U.C.A. authorizes the commissioner of insurance to promulgate regulations defining acts of unfair or deceptive conduct in addition to such "unfair methods and unfair or deceptive acts or practices" expressly defined in the code.

The National Association of Insurance Commissioners drafted a model unfair practices act in 1947 (2-NAIC Proceedings, (1947) 392-400) which was revised in 1972 (1-NAIC Proceedings, (1972) 493-501). This model act, entitled "An Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance," was allegedly originally drafted to foreclose the Federal Trade Commission from asserting jurisdiction over insurance practices. The substance of the model act has been adopted in a number of states including by statute in California, Section 790 et seq., California Insurance Code, and by regulation in Utah for which see Utah Insurance Department Regulation 82-3, "Unfair Claims Settlement Practices Regulation," effective December 1, 1982. This writer wishes he dared to attach the whole of said Regulation 82-3 to this brief because it has received little publicity and it deserves meaningful circulation.

It is the position of plaintiff that said Utah Insurance Department Regulation 82-3 merely memorializes common

law and statutory duties noted in ¶ 9 of insurance carriers and claims adjusters to conduct their claims settlement practices in a fair manner and in good faith, particularly where there has been a reasonable determination as to liability and the adjuster assumes the roll of counselor to a claimant not represented by an attorney. Among the unfair or deceptive acts and practices defined in Section 5 of said Regulation 82-3 and pertinent to this case are the following:

(c) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

(d) refusing to pay claims without conducting a reasonable investigation;

(f) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

(g) compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds when claims or demands have been made for amounts reasonably similar to the amounts ultimately recovered;

(m) failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage or under other policies of insurance;

The insurance industry is a structured multibillion

dollar industry, sometimes referred to as then "Bankers of America", and it touches the lives and fortunes of almost every person in this country at some point in time. The economic disparity between the insurer and the average claimant is obvious, and this disparity is compounded by the relative expertise and sophistication of the insurer as compared to the average claimant. Section 2, Purpose, Utah Insurance Regulation 82-3, admirably synthesizes the areas of public policy, abuses, and statements of minimum standards the public is entitled to expect from the insurance industry. The California courts have gone further and put teeth in the California Unfair Practices Act by holding in the seminal case of Royal Globe Insurance Co. v. Superior Court, 23 Cal. 3d 880, 153 Cal. Reptr. 842, 592 P. 2d 329 (1979) that third party claims may arise where there is a breach of the duty of the insurance carrier to in good faith effectuate prompt, fair and equitable settlments in cases where liability has become reasonably clear.

It is the position of plaintiff on this appeal, based on the fact situation in the record, that State Farm violated minimum standards of conduct required of it in the adjustment of plaintiff's claims, and that said breach gives rise to a presumption of wrongful intent or fraud

which shifts the burden of persuasion to State Farm on which burden State Farm did not even have as a matter of law in this case. See, Vol. 5, Insurance Law and Practice, Appleman, 1970, p. 559. When State Farm determined the probability of liability against its insured (T.) it proceeded to the adjustment of plaintiff's claims. It thereupon assumed a relationship to plaintiff analogous to a fiduciary relationship which required State Farm to fairly and in good faith adjust plaintiff's losses. This position is analogous to that held in In re Swan Estate v. Walker Bank & Trust, 4 U. 2d 277, 293, P. 2d 682 (1956), where this Court held that when a confidential advisor benefits from a transaction that he is professionally involved in, then a presumption of fraud and undue influence arises which shifts the burden of persuading the trier of fact that there was no fraud or undue influence.

The factual background of this case is relatively undisputed as is disclosed by the record, exhibits and transcript. Claims adjustment cases similar to this one occur daily, but for one reason or another, including economic or lawyer disparity, never reach the Utah Supreme Court. It is undisputed that State Farm paid to plaintiff the sum of $622.45, the exact amount of her property damage, some five

weeks after the accident, and State Farm now stands on its claim that Exhibit 2, a form prepared and modified by State Farm, constitutes a general release. The release acknowledges on its face that plaintiff had personal injuries for which she had made application to her own carrier for no-fault benefits. State Farm acknowledges a payment subsequent to the release for car rental pursuant to an additional oral understanding (Exhibit 4 and 5, and T. 10), and payment to plaintiff's insurance carrier in excess of $3,100.00 for no-fault coverage (T. 10,11,12 and 37). State Farm made no independent inquiry into the nature or extent of plaintiff's personal injuries although it was aware of same (T. 11). State Farm has tenaciously stood on its claim of a general release, delayed plaintiff for more than five years in getting her claim for personal injuries before the trial court, and caused plaintiff extraordinary legal expense, credit jeopardy, and emotional distress.

Plaintiff respectfully submits that fraud and economic coercion are patent on the face of the record in this case and that the obvious violation of minimum standards of good faith and fair dealing by State Farm requires discussion and a holding by this court that extends beyond that of

merely holding that the release is voidable, or limited in its scope, or subject to rescission for mutual mistake. In short, plaintiff urges this Court to put some teeth in the minimum standards of good faith and fair dealing required of insurance carriers comparable to the Royal Globe decision, supra. It is true that the Utah Insurance Regulation 82-3 was adopted subsequent to the events in this case, but said regulation merely elaborates on the statutory obligations imposed on insurance carriers as noted above in the Utah Code on Insurance.

CONCLUSION

Plaintiff's counsel can only say that he is extremely concerned about this case and the system that has allowed this case to go on unresolved since February 1, 1978. Everything that can go wrong seems to have gone wrong from plaintiff's point of view, and there is merit to the cliche' that justice delayed is justice denied. It is no wonder that the whole legal system is under fire from the public.

Plaintiff respectfully submits that the undisputed record and facts in this case do not call it under any theory the trial court's findings and judgment upholding the release in this case as a general release. The plaintiff was paid for, and released, her property damage claim

...rly, and ... entitled to her day in court on her ... claims and any other derivative claims, as ... on this appeal.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing brief of plaintiff-appellant to the defendant-respondent's attorney, Wendell E. Bennett, Esq., 370 East ... South, Suite No. 100, Salt Lake City, Utah 84111, this 7th day of June, 1983, postage prepaid.

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