1965

Citizens Casualty Company v. George L. Hackett : Brief of Respondent

IN THE SUPREME COURT
of the
STATE OF UTAH

CITIZEN'S CASUALTY COMPANY,
Plaintiff and Respondent,

vs.

GEORGE L. HACKETT,
Defendant and Appellant,

Case No. 10334

BRIEF OF RESPONDENT

Appeal From the Judgment and Order of the Third District Court for Salt Lake County, Honorable Ferdinand Erickson, Presiding

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STATEMENT OF FACTS

The Respondent will set out a more detailed statement of the facts than has the Appellant, as the statement of facts by the Appellant is sketchy, and in some particulars inaccurate.

The plaintiff, Citizens Casualty Company is an insurance company of the State of New York, writing public liability and property damage insurance on motor vehicles. The company was represented in Utah by George Hackett, the defendant, as an agent or broker.

George Hackett solicited insurance from Paul W. Nielson, d/b/a Nielson Trucking Company. On or about October 24, 1958, Nielson placed an order with Hackett for a policy of insurance for coverage of bodily injury liability and for property damage. Hackett placed a telephone call to a Mr. Blum of Los Angeles who represented the Citizens Casualty Company and requested him to contact the New York Office of the plaintiff and obtain liability and property damage coverage for the Nielson Company. On the same date, plaintiff sent a telegram to the defendant (Ex. P-14) stating that at the request of Blum, plaintiff would accept the risk and were "binding Nielson Trucking Company as of October 27, 1958 with Policy CGA 1103" and the telegram also stated that the Citizens Casualty Company, on that date, wired the Interstate Commerce Commissison and the Utah Public Service Commission to that effect. Copies of the telegram sent to the Interstate Commerce Commission and the Utah Public Service Commission are a part of Exhibits P-14. The telegram also stated that on Monday, October 27, 1958 the plaintiff would telegraph the regulatory bodies in the remaining states in which the Nielson Trucking Company was operating its trucks and inform the regulatory bodies of those states, that it was binding this risk.

At about the same time Nielson requested cargo insurance from Hackett. Cargo insurance was placed by Hackett with the Firemen's Fund Insurance Com-

pany (Ex. 7). The insurance coverage provided by that policy, MTR 11181, is "for loss or damage to lawful goods and merchandise while on vehicles operated by Nielson". The policy called for a premium rate of 60¢ per $100.00 of gross receipts. The liability and property damage coverage provided by the plaintiff was in effect from October 27, 1958 to April 7, 1959.

The premium rates on both policies was based on gross receipts of the Nielson Trucking Company in its trucking operations. Hackett obtained a premium deposit of $1000.00 cash and a promissory note for $4137.60 on December 4, 1958 (Ex. D-18) providing for monthly payments of $689.60.

In order that the monthly premium could be computed, the Nielson Company made monthly reports of its gross receipts beginning with the date October 25, 1958. A tabulation of the premiums developed on both the liability and property damage policy and the cargo insurance measured by these gross receipts appears in Exhibit P-13 and are as follows:

October, 1958	$ 391.95
November, 1958	1397.72
December, 1958	1560.32
January, 1959	1529.37
February, 1959	2275.84
March, 1959	777.50
Total	$6932.70

In this Exhibit P-13, Hackett acknowledges that he

received these sums from Nielson to be applied to the two original policies, based on gross receipts. The cargo policy rate was 60¢ per $100.00 of gross receipts. The total gross receipts for the period October 25, 1958 to April 7, 1959 was $157,670.15 (See adding machine tape attached to Ex. D-9) producing a premium of $943.00 on the cargo insurance leaving premiums on the policy in question of the difference or $5989.70. This premium belonged to the plaintiff but the defendant did not pay this over to the plaintiff. If the amounts had been paid over to the plaintiff, the plaintiff would have been obliged to pay the defendant a commission of 22% or $1317.74. Allowing this commission to the defendant, the defendant should have paid over to the plaintiff the net amount of $4671.96. Accordingly, the lower court entered a judgment in favor of the plaintiff for the sum plus interest.

A notice of cancellation of the coverage of the plaintiff was sent on March 6, 1959 becoming effective on April 7, 1959 (Ex. P-16). Notice of this cancellation was sent to all of the regulatory agencies to which binders had been sent and these are listed in this exhibit, being the Interstate Commerce Commission and the regulatory bodies of the states of Arizona, California, Colorado, Idaho, Nevada, Oregon, Utah and Wyoming.

We wish to direct the court's attention to some incorrect statements which Appellant has inter-

spersed in his argument. They are:

1. That *all* monies received by defendant from Nielson were in fact ultimately applied on insurance coverage with companies *other* than the plaintiff. (Appellant's Brief - Page 24).

2. That at the termination of Appellant's dealings with the Nielson Trucking Company, the Appellant had in fact expended some $3,000.00 more on insurance coverage than Nielson paid for. (Appellant's Brief - Page 25).

Each of these statements purporting to be facts, is incorrect. A correct statement of fact would be that all monies *in excess* of $5989.70 were in fact utimately applied on insurance coverage with companies other than the plaintiff. This will be demonstrated in the discussion that follows.

Appellant's counsel states that it is a fact that "at the termination of defendant's dealing with Nielson Trucking Company, defendant had in fact expended some $3,000.00 more on insurance coverage than Nielson paid and was compelled to file a claim for said amount with the Receiver of Nielson Trucking Company". (Appellant's Brief - - Page 25). That statement is in essence a repitition of the statement made by Appellant in his Brief at Page 5, as follows: "Nielson Trucking Company in 1960 went into involuntary receivership and Exhibit P-12 which constitutes a running ledger of Nielson's truck account with George L. Hackett & Company,

shows a balance due and owing by Nielson in the amount of $3285.75 for which defendant made a claim in the Receivership (Exhibit P-12)". (Appellant's Brief, Page 5). The fact is that Hackett's claim against Nielson was for only $363.08. This overcharge results from the fact that when Hackett filed his claim in the Receivership Proceedings, he made a charge of $2922.67 that should not have been made. This is evident from on inspection of the last entry on Page 1 of Exhibit P-12 which reads: "4-7-59, Reference 2197, Gross Receipts deposit premium $2922.67". On that date, namely, April 7, 1959 the Citizens Casualty policy was cancelled and Mr. Hackett replaced that policy with one issued by another company. He then charged the monthly premiums on the account as they accrued. Since the premiums during the entire period when the policy was in force have been charged as debits on Page 1 of Exhibit 13, it is improper to add the deposit premium of $2922.67 as a charge. This results in the overcharge of the sum of $2922.67.

Thus, the total charged to Nielson should be reduced by $2922.67 making the correct figure for total charges $17,023.32 and the total payments by Nielson were $16,660.24 leaving Nielson owing Hackett just $363.08.

The facts then are that Hackett was paid his entire premium charges down to the last charge of $1110.02 that accrued for the month of November, 1959 on the successor liability and property

damage policy and Hackett even received $746.94 to be applied against that final charge, leaving only an outstanding balance due to him of $363.08.

ARGUMENT

REPLY TO APPELLANT'S POINT 1-A

Appellant in his Point I argues that his Motion to Dismiss should have been granted (a) on the grounds of res judicata. The basis of the Motion was that a judgment had been entered in a case entitled *Citizens Casualty Company v. Keith J. Coons and George Hackett,* #127263 in the Third District Court and that judgment was an adjudication of the issues in this case. In that case plaintiff sued Keith J. Coons for the premiums on a policy of insurance written through the defendant Hackett's Agency, on Policy Form 380C-3-58. The defendant Coons, had pleaded that he had paid Hackett and that was the reason for joining him as a party defendant in that suit. A judgment was entered in favor of Coons on finding being made that he had paid Hackett. The court made a finding in that case that there was no evidence of an insurance binder having been issued by the plaintiff and the court's conclusion of law was that no contract of insurance ever became effective and plaintiff was, therefore, not entitled to collect the premium. (Page 9 of Appellant's Brief) In this case the court made a finding that: "The plaintiff wired the defendant that it was binding the Nielson Trucking Company" (R-11). The facts in the two cases are different. In

the Coons case the finding was that there was no policy of insurance — in the instant case that there was an effective binder.

In the Coons case, plaintiff made a Motion for a new trial which has never been disposed of. Accordingly, there is no final judgment in the Coons case which may be used as evidence for the purpose of establishing a plea of res judicata. See *Sweetser v. Fox*, 43 Utah 40, 134 P. 599 at 602[1] —

> It has accordingly repeatedly been held in that state that a judgment roll may not be used as evidence for the purpose of establishing pleas of estoppel or res judicata pending an appeal or during the time an appeal can be taken. The correctness of that doctrine may be conceded, and yet it in no way militates against the fact that a judgment may nevertheless be used as evidence for some purpose other than estoppel and res judicata. The reason why a judgment roll pending an appeal or during the time when one may be taken may not be used as evidence of an estoppel or res judicato of any particular fact or facts involved in the litigation which terminated in the judgment evidenced by the judgment roll is palpably obvious. So long as the judgment may be modified or reversed upon a direct proceeding on appeal or otherwise, the facts that were involved in the litigation cannot be said to be res judicata. That is, they are not finally fixed and determined, but are still subject to be changed or entirely overthrown.

This is a complete Answer to Appellant's Point 1-(A).

1-B — Appellant quotes Section 31-19-9 (1) UCA 53 evidently contending that if a policy of insurance is written on a policy form which has not been approved by the Insurance Commissioner, that an insurance company cannot collect the premiums from the insured. This case is not a suit by an insurance company to recover a premium from its insured. The insured paid the premium to Hackett, the defendant, who, instead of paying it over to the insurance company, kept the premium as his own and the insurance company is here only asking for the insurance premium which the agent, Hackett, has kept as his own. Before proceeding to a statement of the law on this point, we quote the concluding sub-division of this section of the Statute:

> Sub-Division 5 — The Commissioner may, by order, exempt from the requirements of this section, for so long as he deems proper, any insurance document or form or type thereof as specified in such order to which in his opinion this section may not practicably be applied or the filing and approval of which are, in his opinion, not desirable or necessary for the protection of the public.

We quote this section only to show that no great significance is attached to this particular requirement of the insurance code.

If this case were one for the recovery of a premium from the insured, the failure to file a form with the Insurance Commissioner would not bar the insurance company's right to recover. See *Ross*

v. Producers Mutual Insurance Company, 4 Utah 2d, 396, 295 P. 2d, 339. This court has held that even though there be sanctions imposed for a violation of the insurance code, Section 31-1-6 UCA 53 nevertheless holds the violation of the statute does not void the contract of insurance. The court at Page 342[1] of 295 P. 2d, states:

> Williston concludes that no agrement should be held void in toto unless no other result is possible from the words of the statute. Otherwise, blind and unreasoning forfeitures would result in depriving one party of his entire investment, or effort in performance, because of some technical violation of statute, and reward the other, perhaps equally guilty party with an undeserved and unearned benefit. This probably explains the actual attitude of the court which have considered various aspects of contracts which violate some statutory provision. Originally a distinction was often drawn between statutes that were malum in se (contracts violating such statutes were void); and those which were malum prohibitum (such contracts were not void); but it is now recognized that whether a malum prohibitum contract is void is to be determined from an examination of the statute as a whole. Among the factors to be weighed are whether the enactment was passed primarily as a revenue measure or whether it was a policing measure, and whether the statute contains an express provision making the contract void. But the primary consideration, of course, is what does the statute construed as a whole indicate?
>
> "Turning to our statute, we think it is appar-

ent that our Legislature intended to make contracts of insurance valid wherever possible. For example Section 31-19-35, UCA 53 reads:

> "Any insurance policy, * * * * * otherwise, valid, which contains any condition or provision not in compliance with the requirements of this code, shall not be rendered invalid thereby, but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this code."

See also *Kidder v. Hartford Accident & Indemnity Company,* 126 Wash. 475, 219 P. 220 at 221:

> The appellant contends that under the Insurance Code of this state all insurance companies dealing in accident insurance were required to file with the insurance commissioner rate schedules or a manual of risks and a copy of its form of policy that it had complied with the law, and that it could not obligate itself except upon the issuance of a written policy at the rate filed. In the case of Way v. Pacific Lumber & Timber Co., 74 Wash. 332, 133 P. 595, 49 L.R.A. (N.S.) 147, there was called in question the provisions of the Insurance Code making it unlawful to sell insurance at less than the scheduled rate. It was held in that case that error lies in the assumption that the contract between the agent and the insured was void, whereas the rule is that a contract which violates a statutory regulation of itself is not void unless made so by the terms of the act.

We quote from the Kidder case because there reference is made to the particular alleged violation of the code, namely the failure to file a copy of the form of the policy. The Utah Insurance Code does not treat the failure to have a policy form approved a serious violation. In fact, the authority of the Commissioner to disapprove a form is strictly limited by the provisions of 31-19-10 which reads:

> 31-19-10 — Restrictions upon right of commissioner to disapprove form. The commissioner shall disapprove any such form of insurance policy, application, rider or endorsement, or withdraw any previous approval thereof, only
>
> (1) if it is in any respect in violation of or does not comply with this code; or
>
> (2) if it does not comply with any controlling filing theretofore made and approved; or
>
> (3) if it contains or incorporates by reference any inconsistent, ambiguous or misleading clauses, or exceptions and conditions which unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the contract; or
>
> (4) if it has any title, heading, or other indication of its provisions which is likely to mislead; or
>
> (5) if purchase of insurance thereunder is being solicited by deceptive advertising.

Appellant concludes the discussion of Point 1-B by referring to an allegation in plaintiff's complaint which states "that the Utah Commissioner of Insur-

ance did not recognize the authority of the defendant Hackett to countersign policies on behalf of the plaintiff, but nevertheless, the plaintiff was bound to provide the coverage even though the defendant Hackett was not authorized to countersign policies." The only material part of that allegation is that the policy did provide insurance coverage to Nielson. That allegation cannot be tortured into an allegation or admission that the plaintiff insurance company did not have a certificate of authority to do business in Utah. The allegation that the plaintiff had such authority was pleaded (R-1) and not denied and it was not made an issue by the Pretrial Order. (R. 5) Appellant's entire discussion under Point 1-B appears to be foreign to the issues in this case.

DISCUSSION OF APPELLANT'S POINT 2 "THAT NO CONTRACT OF INSURANCE WAS EVER CONSUMMATED GIVING RISE TO A CAUSE OF ACTION."

In our discussion under Point 1-(a) we have already stated that the court in the instant case made a finding that the insurance policy in question became binding. Appellant in his argument on this point in his Brief sets out approximately five pages of testimony which he no doubt considers as establishing that no contract of insurance was ever consummated. It is Respondent's view that none of the testimony is germane to the question as to whether a policy of insurance became effective with the ex-

ception of the following evidence quoted by the defendant on Page 16:

> "No, I didn't issue the binders. They would happen, Mr. Arnovitz. I flew to Los Angeles and met with their general agent on 1-24-58. Mr. Blum and in a three-way conversation between him and with myself listening on the line to Mr. R. M. Bishop at the home office in New York. Mr. Bishop as a result of that telephone call, which I paid for, and the receipt of which is right here, caused a wire to be sent to our office in Salt Lake City, saying that they would bind the coverage pending receipt of the completed signed application on the part of Nielson Trucking Co. for their review and consideration."

The last sentence of that testimony is interesting in that the defendant is there evidently trying to establish that the binder would be effective only "pending receipt of the completed signed application on the part of Nielson Trucking Company for their review and consideration". We include herewith the testimony of the defendant which preceded that statement and which followed it.

BY MR. ARNOVITZ:

Q. State your name please?

A. George L. Hackett.

Q. And are you the defendant in this action?

A. I am.

Q. Were you engaged in the insurance business as broker or agent during the period October 1, 1958 to April 30th, 1959?

A. Yes.

Q. Under what name?

A. G. L. Hackett & Company.

Q. In connection with the operation of that business did you have occasion to contact Mr. Paul Nielson with respect to writing insurance for him?

A. I did.

Q. When did you first contact him?

A. Some part of the first, around the first part of October, 1958?

Q. And did you as a result of that conversation do anything about issuing binders on public liability and property damage on his fleet of trucks?

A. I did.

Q. To whom did you issue the binders?

A. Nielson Trucking Co.

Q. And to whom were the binders delivered?

A. There was a binder delivered to Nielson Trucking Company and to certain states in which the Nielson Trucking Company operated.

Q. Had you caused those binders to be delivered?

A. I did.

Q. And in that connection did you contact the Citizens Casualty Co. of New York, the plaintiff in this action?

A. Contacting their general agent, Mr. Robert Blum.

Q. And after contacting him did you receive any communications like a telegram or letter from Citizens Casualty Company of New York?

A. I did.

Q. Will you produce those communications?

A. Yes.

Your Honor, I must have that in another file.

MR. MADSEN HERE,

A. Thanks. No, I didn't issue the binders. They would happen, Mr. Arnovitz. I flew to Los Angeles and met with their general agent on 10-24-58. Mr. Blum and in a three-way conversation between him and wiith myself listening on the line to Mr. R. M. Bishop at the home office in New York, Mr. Bishop as a result of that telephone call, which I paid for, and the receipt of which is right here, caused a wire to be sent to our office in Salt Lake City, saying that they would bind the coverage pending receipt of the completed signed application on the part of Nielson Trucking Co. for their review and consideration.

Q. I see. And did you send in that application?

Q. Let me look at that?

A. I don't know if that's it. Let me look at that and see if that is part of the file here. I think it might be. Let's see. It isn't here. This is the telephone call here. It must be here.

Q. Let me ask you another question.

A. That application, Mr. Arnovitz, was sent New York and I don't know if I ever got it back. I do not find it in the file.

Q. And after that application went in and binders had been sent, then what did you do about collecting premiums on that policy?

A. I didn't do anything about collecting premiums on that policy because the company had not advised us that their rate would be, but on deposit of the rate that we had with Nielson pending receipt of the premium to be charged by company, we waited for their information on what those rates would be and receipt of a policy. They had to formulate the rates in New York. I had nothing to do with that.

The defendant was not able to produce the alleged applications in response to counsel's demand nor did he present from his files the telegram which constituted the binder. Counsel for the Respondent sometime later in the examination again inquired whether Hackett could produce the telegrams and Hackett stated that he had not been able to find them but would continue to hunt them. Counsel for Respondent then produced copies of the telegram and Appellant acknowledged that Exhibit 14 was a copy of the telegram binding this insurance. Nielson testified (R-42) that after these telegrams were sent that he operated in the various states without any further requests for these states for him to post

evidence of liability and property damage insurance. In response to a question placed by the court as to whether this binder telegram satisfied the regulatory bodies in the states in which the trucking company operated, Nielson answered (R-42) "it must have done, otherwise, we would have notification. The minute you are without insurance they usually let you know 30 days before hand so that if you are out of insurance you had better replace it or quit running".

We have already quoted another interesting part of the defendant's testimony which he offered evidently to show that there was no policy in effect and he stated: "I didn't do anything about collecting premiums on that policy, because the company had not advised us what that rate would be - - - - ". (R-96) He made this statement after there had been introduced in evidence checks showing payment to him of over $9,000.00 in premiums on this policy. The rest of the testimony quoted by Appellant's Counsel to support the proposition that no policy of insurance was ever consummated is actually testimony regarding the determination of the amount of the premium and the collection of the premium. It all appears immaterial in the light of the positive fact that Hackett collected over $9,000.00 on that insurance policy which his counsel now argues did not become effective.

It is hardly necessary to comment upon the authority cited by counsel to support the proposi-

tion that no insurance contract was consummated other than to refer to the quoted portion of the authorities cited. The quotation from 29 Am. Jur. 587 at Section 196 simply states that there could not be a contract of insurance without an acceptance, a legal truism. Here the evidence is clear that there was a binder and that Nielson accepted the policy.

We respectfully submit that a contract of insurance was consummated.

REPLY TO POINT 3 OF APPELLANT'S ARGUMENT

There never was any issue in this case as to whether any claims had been made under this policy of insurance. A premium is due and payable when a policy is effective regardless of whether a claim is made under the policy. We see no materiality of that discussion at Page 23 of Appellant's Brief. Likewise, there is no issuance here as to the refund of the premiums to the insured.

The remainder of Point 3 is not at all germane to the headnote. We have already replied to that part of Point 3 which appears on Pages 24, 25 and 26 of Appellant's Brief (Pages 5-7). In the final paragraph, counsel for the Appellants makes a gratuitous statement on an issue which was not considered in the case at all, namely as to whether Hackett would have had liability personally. The reason it could not have been an issue is because the plaintiff at all times recognized that it had

the liability of an insurer under this policy. Respondent's Counsel respectfully submits that he is unable to see how the fact that no claim was ever made under this policy or the fact that Nielson did not request Hackett to refund to him the more than $9000.00 he paid to Hackett can effect the issue in this case.

Appellant, under Point 3, challenges the Finding of Fact which determines the amount of the judgment in plaintiff's favor.

The Appellant's Brief at Page 26 claims that this amount due to the plaintiff was "arrived at by inference" but makes no effort to establish that the finding of the court as to the amount due to plaintiff is in any way erroneous.

Appellant there seeks to convey the impression that the record does not support the findings as to the amount of the premiums that defendant collected on the policy in question. The court made a finding that the defendant collected total premiums of $5989.70 on this policy. The fact is that the defendant Hackett collected a greater sum as premiums on the policy of the Citizens Casualty Company than the amount stated in the Findings of Fact. (Ex. P-1) This is shown by a group of checks paid by Nielson to Hackett totalling $9224.06 to be applied to the policy in question and to the cargo policy of the

Firemen's Fund. These payments and their dates follow:

October 3, 1958 — Deposit Premium	$1000.00
December 23, 1958	689.60
December 23, 1958	391.95
January 9, 1959	689.63
January 10, 1959	689.63
January 10, 1959	1397.72
March 15, 1959	1560.32
March 31, 1959	1529.37
May 1, 1959	1275.84
Total	$9224.06

Since this sum of $9224.06 was the total of the premiums paid on both the policy in question and the cargo policy issued by Firemen's Fund, it is a simple arithmetical calculation to deduct the amount of the premiums paid on the cargo policy to arrive at the amount paid on the policy in question. Exhibit P-3, P-6 and D-7 show the original premium rate on the Cargo policy at 50¢ per $100.00 of gross receipts. An endorsement added to Exhibit D-7 increases the rate to 60¢ per $100.00 of gross receipts, Exhibit D-9 which is summarized on the adding machine tape attached thereto shows the gross receipts during the period October 25, 1958 to April 1, 1959 to be $157,607.15. The 60¢ rate, therefore, required the payment of $943.00 as the premium on the cargo policy leaving $8281.06 as the premium actually collected on this policy. The court made a finding that $5989.70 was collected on this policy.

This difference of $2291.36 between the facts as just stated and the findings as made by the court, is that at the Trial the Respondent did not take the position that the deposit premium of $3068.86 was to be applied as against this policy but instead took the position that only $777.50 of that amount, on deposit, or enough to cover the March premium, should be considered as having been paid on the Citizens Casualty policy (R-10). The difference between these figures is as just stated, exactly $2291.36. This demonstrates that not only is the finding amply supported but the court could have well made a finding that the defendant was chargeable with collecting $2291.36 more than he was held liable for. We did not urge the court to charge the defendant with this greater sum although the court did make a finding (P-12) "That Nielson Trucking Company paid the defendant, George Hackett, a sum greater than $5289.70 as owing for the premiums on this policy of liability insurance." The reason for our solicitude toward Hackett at the time of the Trial for not requesting a judgment for all of the monies he had received as premiums on the Citizens Casualty policy was because Hackett had not collected the full premium on the other policy which supplanted the Citizens Casualty policy. That successor liability and property damage policy was written by Central Casualty after Citizens Casualty cancelled.

DISCUSSION OF APPELLANT'S POINT 4

Appellant quotes Section 31-19-21 (2) UCA 53 as authority for his conclusions that this binder was invalid because no policy was delivered within 150 days. This section provides that the binder shall be valid for 150 days from the effective date. The statute is evidently a recognition of the fact that at times it may be difficult to issue the policy before the expiration of 150 days. To provide for such contingency, sub-division 3 of Section 31-19-31 UCA 53 provides:

> (3) If the policy has not been issued a binder may be extended or renewed beyond such 150 days upon the commissioner's written approval, or in accordance with such rules and regulations relative thereto as the commissioner may promulgate.

On March 6, 1959, some 21 days before the expiration of the 150 day period, the plaintiff sent Nielson Trucking Company a Notice of Cancellation. Nielson testified that the cancellation could not become effective for a period of 30 days because the regulatory bodies of the states required a Notice of 30 days and therefore, it would have been futile to issue a policy at that point since the Notice of Cancellation had already been sent out on March 6, 1959. Clearly the binder was effective and was considered effective both by the insurance company and by the insured.

POINT 5

PLAINTIFF FULLY MET ITS BURDEN OF PROOF

Defendant complains that the plaintiff did not meet its burden of proving the facts necessary to establish a claim against the defendant. The evidence abundantly establishes that the plaintiff provided bodily injury liability and property damage insurance to the Nielson Trucking Company; that a binder was issued and accepted by the Nielson Trucking Company; that the Nielson Trucking Company acknowledged that it had the benefit of this coverage; that Nielson paid Hackett for the coverage in an amount in excess of the judgment; that Hackett received the premiums and failed to pay the premiums over to the plaintiff. Proof of those facts provide all of the elements necessary to establish a cause of action and to sustain the judgment.

Plaintiff pleaded in Paragraph 1 of its Complaint that "Plaintiff is an insurance corporation of the State of New York and has a Certificate of Authority from the State of Utah" (R-1) and defendant admitted the allegations of Paragraph 1 of the complaint although he did allege a conclusion of law that the certificate was not valid. The Certificate of Authority stated that the plaintiff had authority to do business in the State of Utah. The court recited in the Findings — "That the Pretrial

Order did not make any issue as to plaintiff's authority to transact business in the State of Utah".

The Appellant did not object to the Pretrial Order which was served on Mr. Madsen, counsel for the Appellant, and that Pretrial Order set forth that "The sole issue is whether or not defendant has misappropriated monies to which the plaintiff claims it is entitled to". Appellant misstates the record when he states: "As also indicated heretofore, the undersigned, at the outset of the trial referred to the inconsistency of said Pretrial Order and moved that the issues of fact be broadened sufficiently to include those raised by the pleadings (Appellant's Brief - Page 28). Counsel's reference is to Page 2 of his Brief where he stated: "Counsel for defendant also, at that time, made reference to the Pretrial Order which reference is in part reported but not in its entirety (R-32). We can agree with counsel's later statement that he *made reference* to the Pretrial Order but that reference at the Trial was simply the following statement by counsel for the Appellant: "We would like to make a Motion that the court take judicial notice of the proceedings held in this case, the Pre-trial that was held in Judge Hansen's Office and other matters". (R-32) Thus, it appears that counsel did not request the Court to amend the Pretrial Order to include other issues than the single issue set up in the order.

The only Motion made by Appellant's Counsel was to consolidate three cases for Trial (R-32 Line 10)

"Mr. Madsen's Testimony: — I am asking the court to take judicial notice of the record of this same court. I think that this case and the two companion cases #127044 and #127263 should be tried together. I am sure it would be correct for the court to try these cases at one time".

The final paragraph of Appellant's Point 5 complains: "There is no evidence of any *dealings* by the plaintiff with the State Insurance Commissioner". Having dealings with the Insurance Commissioner is not a prerequisite to recovery by the plaintiff of monies belonging to the plaintiff and misappropriated by the defendant. As either an agent, solicitor or broker, one of which the defendant certainly was, he is guilty of larceny by embezzlement when, "not being lawfully entitled thereto, he appropriated such funds or any portion thereof to his own use". Section 31-17-22 (3) UCA 53. Subdivision 2 of the same Section requires that all funds representing premiums received by an agent shall be held by him in his fiduciary capacity and shall be promptly accounted for and paid to the company, just as it requires that return premiums shall be held in his fiduciary capacity and returned to the insured.

We respectfully submit that the plaintiff has met the burden of proof as abundantly appears from the transcript of evidence.

CONCLUSION

We regret that the inaccuracy with respect to the Statement of Facts in the Appellant's Brief has required us to lengthen the Statement of Fact. The facts all boil down to this: That the plaintiff insurance company issued its policy of insurance to the Nielson Trucking Company through the George Hackett Insurance Agency; that the policy provided coverage to the Nielson Trucking Company for a given period of time; that an insurance premium of $5989.70 accrued on this policy; that George L. Hackett, the agent, collected an amount in excess of $5989.70 as insurance premiums on this policy; that he did not remit the insurance premium to the Citizens Casualty Company; that the Citizens casualty Company is entitled to that sum of $5989.70 less a commission earned by Hackett of $1317.74 or a net sum of $4671.96.

We respectfully submit that there is no reason in law why Hackett should not be obliged to remit the sum of $4671.96 to the Citizens Casualty Company and that the judgment of the Lower Court should be affirmed.

Respectfully submitted,

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