1970

Patricia M. Burnham v. Bankers Life & Casualty Company : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

PATRICIA M. BURNHAM,
Plaintiff and Appellant,

vs.

BANKERS LIFE & CASUALTY COMPANY, an Illinois corporation,
Defendant and Respondent.

Case No. 11924

BRIEF OF RESPONDENT

Appeal from Judgment of the District Court of the Third Judicial District in and for Salt Lake County, State of Utah
Honorable Merrill C. Faux, *Judge*

HANSON & GARRETT
DON J. HANSON
520 Continental Bank Building
Salt Lake City, Utah 84101
Attorneys for Respondent

MULLINER, PRINCE & MANGUM
Robert M. Yeates, Esq.
Denis R. Morrill, Esq.
Kenneth W. Yeates, Esq.
206 El Paso Natural Gas Bldg.
Salt Lake City, Utah 84111
Attorneys for Appellant

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NATURE OF THE CASE

This is an action commenced by Mrs. Patricia M. Burnham seeking recovery on a reinstated life insurance policy issued by defendant, Bankers Life & Casualty Company, to her husband, Dr. Preston J. Burnham, deceased.

DISPOSITION IN THE LOWER COURT

The court below granted defendant's Motion For Summary Judgment.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the Summary Judgment granted by the District Court below.

STATEMENT OF FACTS

On January 21, 1962, Bankers Life & Casualty Company issued to Dr. Preston J. Burnham a $10,000.00 whole life insurance policy with a $40,000.00 fifteen year decreasing term rider attached thereto.

On April 1, 1967, the term rider lapsed due to failure to pay premiums, however, the basic $10,000.00 policy continued in force past the date of Dr. Burnham's suicide, being supported by premium payments from cash reserves.

During the period of time from February 13, 1963, to November 9, 1965, Dr. Preston J. Burnham and his wife, the plaintiff, herein, consulted with Dr. Herbert B. Fowler, a doctor of psychiatry at the University Medical School, regarding marital problems. During that three year period Dr. Burnham, either alone or in company with his wife, saw Dr. Fowler in his professional capacity a total of 80 times; 31 times in 1963, 19 times in 1964 and 30 times in 1965 (Dep. Dr. Herbert B. Fowler, p. 11).

Dr. Fowler claimed that the consultations were for marital counseling only and that there was no psychotherapy given and there was no medication administered (Dep. Dr. Fowler, pp. 18-19). Dr. Fowler further claimed that the counseling he gave might have been given by a professional marriage counselor (Dep. Dr. Fowler, p. 35), and noted that physicians with marital problems generally tend to seek out

other medical doctors for advice (Dep. Dr. Fowler, p. 33).

Dr. Fowler noted that Dr. Burnham was subject to mood swings and that at times the doctor's mood shifted alternatively from depression to elation (Dep. Dr. Fowler, p. 21). During the periods of depression Dr. Burnham would say, "I wish I were dead" or "I would be better off dead" (Dep. Dr. Fowler, p. 24). Dr. Fowler indicated that although this reaction is standard for people having severe conflicts, the suicidal expressions are real and are not given in a humorous vein (Dep. Dr. Fowler, p. 38). Dr. Fowler further stated that even though Dr. Burnham had expressed to him ideas such that he wished he was dead, he (Dr. Fowler) did not consider these expressions serious; rather he considered them quite normal for persons in the marital situation of Dr. Burnham (Dep. Dr. Fowler, pp. 24-27) and that had he considered such expressions serious he would have hospitalized Dr. Burnham (Dep. Dr. Fowler, p. 26). Dr. Fowler did note, however, that although persons making such suicidal expressions generally do not commit suicide, the pressures causing the outburst of suicidal threats could lead to suicide (Dep. Dr. Fowler, p. 25).

Dr. Fowler further testified that although a trained and experienced marriage counselor could have engaged in the same type of consultation that he, himself, had engaged in with Dr. Burnham (Dep. Dr. Fowler, p. 35), because of his more extensive

training he would be of more help, particularly when dealing with a fellow physician. (Dep. Dr. Fowler, p. 37).

Dr. Fowler also indicated that when people express suicidal threats the judgment as to the seriousness of the threats is a value judgment to be made by the consulting psychiatrist. (Dep. Dr. Fowler, p. 38). Wrong judgments do occur, and patients not believed suicidal do in fact commit suicide (Dep. Dr. Fowler, p. 38).

On February 20, 1968, Dr. Preston J. Burnham did in fact commit suicide by self inflicted gunshot.

On June 28, 1967, Dr. Burnham applied for reinstatement of the $10,000.00 face policy, accompanied by the term rider. An application for policy reinstatement was filled out and certain reinstatement questions were asked, among them the following:

> "6. State every physician or practitioner whom you have consulted or who has treated you during the past five years: (If none, so state)"

Dr. Burnham failed to list Dr. Herbert B. Fowler as a physician with whom he had consulted prior to applying for reinstatement of his insurance policy, despite the over 80 visits made by Dr. Burnham to Dr. Fowler during the period of consultation.

On July 21, 1967, defendant, Bankers Life & Casualty Company relying on the Answers given in the reinstatement application, accepted the premiums

and reinstated the insurance policy. On February 20, 1968, Dr. Burnham died of apparent suicide. On January 9, 1969, formal demand for payment was made upon the insurance company and it refused to pay the $30,440.00 claimed due under the decreasing term rider. The $10,000.00 whole life policy, however, was paid and the premiums applied to the decreasing term rider were returned without prejudice to the plaintiff's right to bring this action.

Defendant, Banker Life & Casualty, moved for a Summary Judgment based on the pleadings; an Affidavit by Don J. Hanson, attorney for Bankers Life & Casualty; and the depositions of Dr. Herbert B. Fowler and Mrs. Patricia M. Burnham, wife of the decedent and the plaintiff in this action. The District Court granted the Motion based on the failure of Dr. Burnham to reveal information material to the risk.

ARGUMENT

POINT I.

THE LOWER COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR DEFENDANT, BANKERS LIFE & CASUALTY COMPANY.

The District Court below properly framed the issue before it as follows:

> "The governing issue presented to the court seems to be whether upon request by de-

cedent that his life insurance policy be reinstated, his failure to disclose numerous visits to Dr. Fowler constituted a fraud upon the insurance company."

That court held, with regard to the above framed issue, as follows:

> "It is the view of the court that Dr. Burnham's failure to disclose prevented the insurer from exercising its right to evaluate what it might have learned from Dr. Fowler and to apply the restriction to the reinstated policy, and that this failure to disclose was a misrepresentation by omission and a fraud upon the insurer. Accordingly, defendant's Motion For Summary Judgment will be granted."

In reaching its decision that the misrepresentation by omission of important psychiatric consultations amounted to a fraud on the insurance company and, therefore, justified as a matter of law the Summary Judgment sought by defendant insurer, the court was clearly supported by the general rule of law in this and a majority of jurisdictions. That rule provides generally that

> ". . . A material false representation is a ground for the avoidance of an insurance policy . . ." 43 Am. Jur. 2d, Insurance, Sec. 735, p. 721

The materiality of a false statement in an insurance policy application is generally determined by the following test:

> ". . . If the knowledge of a consultation

> with a physician for a certain ailment would have led a reasonably prudent insurer to decline the application, a false statement by the applicant which in effect conceals from the insurer the knowledge that the applicant had such consultation is material to the risk, otherwise it is not." 43 Am. Jur. 2d, Insurance, Sec. 792, pp. 776-777.

This court has articulated the above test in the following cases: *Prudential Insurance Company of American vs. Johnson*, 22 Utah 2d 66, 448 P. 2d 722 (1968); *Chadwick vs. Beneficial Life Insurance Company*, 56 Utah 480, 191 P. 240 (1920).

In *Prudential* the defendant counterclaimed for benefits under a policy in an action to cancel an insurance policy by the insurer. The Supreme Court held that the incontestable clause of the policies previously held by the insured did not continue in effect with respect to fraud in the application for successor policies which contain no incontestable clauses. The case sets out the generally accepted rule of materiality and noted that falsity of an insured's answers in applying for a life insurance policy in that the insured had consulted a doctor on five occasions and that the doctor had diagnosed his trouble as heart failure and prescribed digitalis and rest and even suggested surgery, amounted to fraud, invalidating the policy.

In *Chadwick* the evidence showed that the insured had been a rancher by occupation and was strong and vigorous until on or about February 1, 1916,

when he became afflicted with some malady causing him pain in his back. He sought treatment for the malady and also made application for a life insurance policy to the defendant, on which application he failed to answer a number of questions regarding his state of health and diseases which he had contracted. Among those questions was one which asked him to give the name and address of the physician last consulted to which he answered "none". The court reversed a jury verdict for the plaintiff and directed the entry of a verdict for the defendant saying:

> "If the insured at the time of making his application for a policy has knowledge or good reason to know that he is afflicted with a disease that renders his condition serious and that thereby his longevity will be prejudicially impaired, his statements and representations to the contrary in reply to specific inquiries constitute a fraud practiced upon the insurer and which when successfully proven invalidates the policy." 191 P. at 245.

Other cases supporting respondent's position include *McDonald vs. Northern Ben. Association*, 131 P. 2d 479 (1942 Montana) and *American National Insurance Company vs. Caldwell*, 70 Ariz. 78, 216 P. 2d 413 (1950 Arizona). In the *McDonald* case an application for a life insurance policy included the question of whether or not the applicant had ever consulted a physician for any other diseases or disability named including high blood pressure. The applicant answered "no" and further answered in the negative

the question as to whether or not he had consulted a doctor for any cause within the last five years. He answered in the affirmative questions as to his good health and freedom from disease. The court below rendered a judgment for the plaintiff under a directed verdict, and the defendant appealed. The court held as a matter of law even under a requirement that the defendant prove fraud (quoting from a previous Montana case, *Par and Bro. vs. Turner*, 37 Montana 521, 97 P. 950 (1908):

> ". . . The concealment of the material fact is equivalent to a false representation that it does not exist. We cannot escape the conclusion that the insured made false statements with knowledge of their falsity; that the defendant accepted his representations as true, acted upon them, and was prejudiced . . . The evidence upon this feature of the case being uncontradicted and it being possible to draw only one inference from it there is presented *a question of law for the court and not a question of fact for the jury*. The fraud being conclusively established, the evidence was insufficient to sustain a verdict in favor of the plaintiff." (Emphasis added).

The case then was reversed and remanded with directions to enter judgment in favor of the defendant.

In *American National Insurance Company*, the jury returned a verdict of $1,000 for the plaintiff in an action on a policy of life insurance issued on the life of the deceased. Defendant had denied liability on the grounds that deceased knowingly made material misrepresentations of the facts in his application

for the insurance. There was no question that the deceased had not disclosed to the defendant that he had a duodenal ulcer at the time of the application. The only question was, did he know that he was afflicted with such an ulcer? The evidence showed that a doctor had made an examination of the deceased prior to his death and had gone over the x-rays with him and informed him of his findings — that he had a duodenal ulcer. The trial court instructed the jury to answer interrogatories as to whether the deceased had knowledge that he had been treated for such an ulcer prior to his application to the defendant. The jury answered the interrogatories "no" and found for the plaintiff. The court reversed the jury's finding and said:

> "The law is well settled in this state that failure to disclose material facts with no intent to deceive in an application for a life insurance policy where the insured knew of those facts at the time of his application constitutes legal fraud and voids the policy."

Appellant attempts to avoid the application of the general rule regarding misrepresentation in an insurance application by drawing a dichotomy between fraud and misrepresentation. Such a severance is of little persuasion when on the facts of the case before this court there was clear failure to answer a question vital to the respondent's acceptance of the insurance risk. It is obvious that when such information as psychiatric visits to a licensed psychiatrist at which suicidal exclamations were heard is omitted,

a clear misrepresentation has occurred and in the words of the lower court"creates a fraud on the insurance company". Since the insurance company has been deprived of its right to know what physicians the deceased has consulted and for what reasons, by simple logic it follows that when an applicant fails to disclose facts which would materially affect the risk, fraud has been committed.

Utah by statutes among numerous other jurisdictions, has indicated its adherence to the rule that intent is unnecessary to establish misrepresentation and fraud in insurance policy applications and reinstatement situations. Utah Code Ann. 31-19-8 (1953) regarding representations in applications puts Utah in line with the majority of states providing that the insurer need not prove fraud or intent to deceive but only that the misrepresentations were material to the acceptance of the risk or to the hazards assumed by the insurer.

Utah Code Annotated (1953) Section 31-19-8, provides:

> "Representations in applications. — (1) All statements and descriptions in any application for an insurance policy or annuity contract, or for the reinstatement or renewal thereof, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless:
>
> (a) fradulent; or

(b) *material either to the acceptance of the risk, or to the hazard assumed by the insurer; or*

(c) the insurer in good faith either would not have issued the policy or contract, or would not have issued, reinstated or renewed it at the same premium rate, or would not have issued, reinstated, or renewed a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

(2) If, in any action to rescind any policy or contract or to recover thereon, any misrepresentation with respect to a medical impairment is proved by the insurer, and the insured or any other person having or claiming a right under the contract shall prevent full disclosure and proof of the nature of the medical impairment, the misrepresentation shall be presumed to have been material."

There is in Utah Code Annotated, Section 31-19-8 (1953), *no requirement of intent to deceive.*

Although Utah has no cases dealing precisely with this issue, other jurisdictions have articulated the rule clearly. In *Anaheim Builders Supply, Inc. vs. Lincoln National Life Insurance Company,* 43 Cal. Rep. 494 (1965), it was held that false representations or concealments of fact whether intentional or unintentional which were material to the risk, vitiates the life policy, and the presence of an intent to

deceive is not essential. In line with the above reasoning, *All Amer. Life & Casualty Company vs. Krenzelok*, 409 P. 2d 766 (Wyoming, 1966), held that fraudulent intent on the part of the insured is not a requisite of a concealment defense to a life insurance policy. See also *Rael vs. American Estate Life Insurance Company*, 79 N.M. 379, 444 P. 2d 290 (1968), where it was held that if misrepresentations are made or information is withheld and the misrepresentations or information is material to the policy, it makes no difference whether the party acted fraudulently, negligently or innocently, accord see *Prudential Insurance Company of America vs. Anaya*, 78 N.M. 101,428 P. 2d 640 (1967).

In *Wissner vs. Metropolitan Life Insurance Company*, 395 F. 2d 204 (1968), it was held that fraud or bad faith is not necessary to invalidate a policy for material misrepresentation, omission or concealment of the policy application. Accord see *Thomas-Yelverton Company vs. State Capitol Life Insurance Company*, 238 N.C. 278, 77 S.E. 2d. 692 (1953).

The above authorities provide ample support to render appellant's dichotomization of fraud and misrepresentation invalid.

The effectiveness and validity of the defendant insurance company's position regarding material misrepresentations was mirrored further in the opinion of the lower court where it was pointed out that under Utah Code Annotated, Section 31-22-18

(Amend. 1953) cited Infra at p. 25. Bankers Life & Casualty may well have had the power to exclude the policy on suicide clause grounds as well, in that a man who evidences suicidal tendencies is not a good insurance risk whether seeking an original or a reinstatement policy. The obviousness of that conclusion is illustrated by the inclusion in most insurance policies of a standard suicide clause.

The court's treatment of the suicide clause under the code serves to clearly illustrate the validity of the material misrepresentation rule and the court's holding. The appellant argues that because the lower court commented on the power defendant insurance company had to set suicide clause standards and force the reinstated policy to begin the suicide clause exemption running anew that they were in some way prejudiced. The argument suffers in light of the clear holding of the lower court which held:

> "Disclosure by the insured of the numerous visits to Dr. Fowler would have enabled the insurer to evaluate what they might have learned from Dr. Fowler bearing upon the option to insert again the two year contestability restriction in connection with the death due to suicide."

Reference by the judge to the suicide clause provision serves only to illustrate and emphasize the material misrepresentation defense asserted by the respondent Bankers Life & Casualty Company. There was clearly no abridgement of the Appellant's rights by the Lower Court and Respondent was entitled to a Summary Judgment as a matter of law, no triable

issue of law or fact having been raised by the Appellant at trial. The doctor's failure to fully answer questions as to his visit to physicians clearly prejudiced the insurance company and amounted to a material misrepresentation and a fraud upon the insurer.

Respondent submits that the court can take judicial notice that if a "reasonably prudent insurer" as set out in the test, *Supra*, at p. 7, had received information that a prospective insured had visited a psychiatrist eighty times in a three-year period and had on a number of those visits expressed suicidal tendencies in verbal form to the psychiatrist, that such insurance company acting reasonably and prudently would not have accepted the risk. Don J. Hanson's Affidavit to that effect is competent to assert that such action would have been taken by Bankers Life & Casualty Company.

POINT II.

THE AFFIDAVIT PRESENTED BY THE DEFENDANT WITH THE OTHER SUPPORTING EVIDENCE WAS CLEARLY SUFFICIENT UNDER RULE 56 (e), UTAH RULES OF CIVIL PROCEDURE.

Rule 56 (e) provides:

> "(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or

certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Appellant argues that the Affidavit of Don J. Hanson, attorney for Bankers Life & Casualty Company was irregular and insufficient under the Rule. An analysis of the Affidavit in light of the Rule should provide clear evidence of its validity.

It is a well established principle of law that a business entity must of necessity act through its agents and officers since it cannot act personally. 2 C.J.S. Affidavits, Section 8 articulates the Rule as follows:

> *Ordinarily an attorney for a corporation may make an Affidavit on its behalf under the same circumstances as would authorize him to make it for a private person* and a statute permitting parties to make Affidavits through its attorneys or agents applies to corporations, but under a statute requiring a party to make the Affidavit, only the corporate officers can make the Affidavit." (Emphasis added)

In accord 3 Am. Jur. 2nd, Affidavits, Section 5, Page 384 provides:

> "It is quite apparent that a corporation is incapable of taking an oath except through some individual acting in its behalf. That is through its officers or agents. Consequently, *it must necessarily be inferred that an officer, agent or attorney of a corporation may make a requisite Affidavit in its behalf*, even though the statute regulating the making of Affidavits makes no provision or exception in favor of corporations." (Emphasis added)

In *Re*: *Ben Weiss*, 271 F. 2nd 234 (1959), the Court cited the above reference to 2 C.J.S., Section 8, Affidavits, noting that it must necessarily be inferred that an officer or agent of a corporation may make an Affidavit in its behalf even though the statute regulating the making of the Affidavit makes no provision or exception in favor of corporations.

See also *Southern Attractions, Inc. vs. Grau*, 93 Southern 2nd 120 (1957) wherein the Court discussed the construction of statutes dealing with Affidavits, and noted at Page 124 of the opinion . . .

> "The statute in question does not say the party must file an Affidavit signed by himself. Nor do we believe that the statute requires him to do so . . ."

Then referring to 2 C.J.S.Affidavits the Court further commented that an attorney may make an Affidavit for the party if he knows the facts and it is within the discretion for the Courts to receive the

Affidavit of an agent or attorney in situations where a different construction of the statute might defeat the ends of justice.

Citing 3 Am. Jur., Affidavits, Section 5:

As counsel for Bankers Life & Casualty Company, Don J. Hanson possessed and included in the Affidavit all the requisite items necessary for a valid Rule 56 (e) Affidavit. He stated in that Affidavit that he was acting as attorney for the defendant, Bankers Life & Casualty — that he had investigated the facts in the case and as the agent for Bankers Life & Casualty Company was making the Affidavit on behalf of the defendant. Mr. Hanson then went on to recite the facts of the case as set out in this Brief, *Supra*, indicating the premiums charged for the coverage of the insurance policies involved, face amounts of the principal policy and the decreasing term rider, the incidents of lapse under the privilege of the policy on April, 1967; various other policy clauses regarding renewal, default in premium payment, reinstatement and the application of Preston Burnham for reinstatement of the policy. The Affidavit also included the reinstatement agreement included in the policy:

> "The applicant hereunder and the company hereby agree that reinstatement of said policy, as granted by the company at its home office upon this application, shall be contestable on account of fraud or misrepresentation in material facts herein stated at any time within two years from the date of approval hereof."

The Affidavit then recited the physician, L. Bert Green, whom Dr. Preston Burnham had consulted as being the only physician listed on the reinstatement application. The Affivadit also outlined Dr. Burnhams visits with Dr. Herbert B. Fowler, the number of these visits and that had the insurance company, Bankers Life & Casualty, known that Dr. Burnham had expressed suicidal tendencies to Dr. Fowler, that the policy of insurance here under consideration would not have been renewed. The Affidavit then concluded by a restatement of the day on which Dr. Burnham died and indicated the copies of death certificates attached to the Affidavit. The Affidavit concluded by noting that the principal policy sum of $10,000.00 had been paid to the beneficiary and that the premiums in the amount of $427.53 collected to support the $40,000.00 term rider had been returned and accepted.

Respondent submits that the Affidavit by Don J. Hanson satisfied in full the requirements of Rule 56 (e) of the Utah Rules of Civil Procedure in that the Affidavit was made on personal knowledge setting forth facts that would be admissible in evidence (and which provide the background to this suit). In the affidavit Mr. Hanson indicated his competence to testify as an agent of Bankers Life & Casualty Company and as a result, the affidavit supported by the other evidence submitted at the time, was sufficient to sustain the Summary Judgment.

An annotation at 115 ALR 100 indicates that in

almost one half of the comparatively few cases involving the admissibility or materiality of misrepresentation testimony on the part of officers or employees of an insurer to the effect that an application would not have been accepted but for the misrepresentation — the courts have generally held that officers or employees of insurers are entitled to testify to the effect of such misrepresentation and such testimony has generally been approved under the particular circumstances of the case.

POINT III.

THE TRIAL COURT DID NOT ERR IN GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGMENT IN THAT THERE WAS NO MATERIAL ISSUE OF FACT TO BE DECIDED AT TRIAL.

Appellant centers her contention as to triable issues on whether Dr. Burnham was required to inform the insurance company of his visits to a psychiatrist for marriage counseling and whether the failure to so inform the company amounted to material misrepresentation and a fraud on the company. It is Appellant's contention that the issues are jury questions, while Respondent contends that they are issues of law for the Court and were properly so treated by the District Court below.

Appellant further makes extensive reference to the questions on the reinstatement application arguing that the questions, including No. 6, did not require the deceased to reveal he had been consulting a psychiatrist.

Respondent submits that question No. 6 was designed to prevent precisely what occurred in this case, namely, misrepresentation by omission. That question reads:

> "State every physician or practitioner whom you have consulted or who has treated you during the past five years. (If none, so state.)"

The reason for question No. 6 is obvious and is illustrated by the following statement from 43 Am. Jur. 2nd, Insurance, Section 792, Page 776:

> "The importance of a false statement by an applicant for a policy of insurance as to whether he has consulted physicians lies in the fact that he conceals from the insurer the fact of such consultations and thus deprives it of the opportunity of making an independent investigation and of obtaining further information so as to enable it to decide for itself in the light of the additional information whether to enter into the proposed contract or what premium to charge."

See also an Annotation at 131 ALR 617 regarding the materially of false representations in an application for a policy of insurance as to whether the Appellant has consulted physicians.

The above illustrates the general Rule that an insurance company before taking on a new insured or reinstating an old one, has a right to know every physician who has treated or consulted that applicant for whatever reason.

It is difficult to believe that a doctor who has been visited 80 times in his professional capacity as a psychiatrist would not qualify as a physician under the general rule. It is clear that had the insurance company known of the visits to the psychiatrist it would have at least been able to inquire as to the purpose of the visits. However, because of the failure by Dr. Burnham to furnish the information it was precluded from doing so. To assert, as does the Appellant, that such consultations refer only to *physical examinations* defeats the purpose behind the policy question, namely that of aiding the company in determining whether it wishes to assume the risk of insuring the applicant.

Appellant further takes the position that if the insurance company had wanted to know about marriage counseling sessions it should have included a question asking for that type of information. Such position is unpersuasive in that to require an insurance company to elicit information as to strange and exotic forms of maladies by precise questions and to be forced to assume risks with regard to those maladies if precise questions are not directed to them is an intolerable burden and one clearly unjustified. Question No. 6 is general in nature for the precise purpose of forcing an applicant to give information about all of the physicians whom he has consulted. Once that information is obtained, the insurance company then is free to investigate and examine the risk and to accept or reject that risk.

Had the decedent, Dr. Burnham, answered Question No. 6 truthfully and revealed his visits to a psychiatrist (from whom the company could have learned of his threatened suicide) the policy would not have been issued. Reasonably prudent insurance companies simply do not accept applicants who make suicidal threats. In refusing to tell the company every physician and practitioner whom he had consulted or been treated by within the past five years, the decedent deprived the company of valuable underwriting information regarding his mental state, and in doing so committed fraud and misrepresentation. If insurance companies are required to stand behind risks on whom they can obtain no information and who withhold valuable information, then they soon will be able to accept no risks at all.

Therefore, the only question which the court had to decide below is whether or not a jury might reasonably conclude from the evidence that Dr. Burnham's failure to disclose the foregoing information would be material either to the "acceptance of the risk or the hazard assumed by the insurer." Utah Code Annotated, Section 31-19-8 (1953). It is submitted that no jury of reasonable men could reach a verdict saying that failure of the decedent to inform the insurance company of 80 psychiatric visits (during which time he made statements suicidal in nature) was not material when the decedent later committed suicide. They could only find that such information was vital to company acceptance of the risk. The question then

was a legal one, and was properly decided by the lower court.

The final point made by the Appellant is that Question No. 6 is within itself ambiguous. Respondent submits that nothing could be more clear than requiring an applicant to "state *every* physician or practitioner whom you have consulted or who has treated you during the past five years." *Every* means *every*, and that includes psychiatrists. Question No. 6 may require an extensive list of physicians, but that is its only fault. It is not ambiguous.

Therefore, in that there was no question presented upon which reasonable men could disagree, the trial court was completely justified in granting the summary judgment for defendant, Bankers Life & Casualty Company .

POINT IV
DEFENDANT WAS ENTITLED TO A SUMMARY JUDGMENT AS A MATTER OF LAW.

Appellant in the final point of her brief reiterates more exhaustively points handled in the first point of her brief. The fraud issue has been exhaustively discussed and answered, and further analysis is unnecessary. However, it may be helpful to the court to further analyze the Appellant's contention that the court erred in concluding that the suicide clause could be reinstated upon reinstatement of the policy.

Citing *Williston on Contracts*, the Appellant contends that the weight of authority holds that re-

instatement of an insurance policy does not begin anew the period of a suicide clause, and then argues that the provision of Utah Code Annotated, Section 31-22-18, (1953), excludes the suicide clause and that even if the suicide clause were reinstated (since in Utah reinstatement is a continuation of the original contract) the suicide clause two year limitation has still expired since it is part of the original contract. Appellant further argues that when Sections 31-22-15 and 31-22-18, Utah Code Annotated (1953) are read together *suicide* is not one of the exclusions covered under Section 31-22-18.

Utah Code Annotated (1953), Sections 31-22-15 and 31-22-18, provide:

> "31-22-15. *Suicide.* — From and after the effective date of this act, the suicide of a policyholder after the second policy year of any policy written by any life insurance company doing business in this state shall not be a defense against the payment of a life insurance policy, whether such suicide was voluntary or involuntary and whether such policyholder was sane or insane; provided, that this section shall not apply to policies insuring against death by accident only, nor to the accident or double indemnity provisions of an insurance policy."
>
> "31-22-18. *Reinstated life insurance policy or annunity contract.* — (1) A reinstated policy of life insurance or annuity contract may be contested on account of fraud or misrepresentation of facts material to the reinstatement only for the same period following reinstatement and with the same conditions

and exceptions as the policy provides with respect to contestability after original issuance.

(2) When any life insurance policy or annuity contract is reinstated, such reinstated policy or contract may exclude or restrict liability to the same extent that such liability could have been or was excluded or restricted when the policy or contract was originally issued, and such exclusion or restriction shall be effective from the date of reinstatement."

The obvious failing of treatise law i.e. *Williston*, is that it is persuasive only, and when confronted by a statute such as Section 31-22-18, Utah Code Annotated (1953) it has little value. Even a cursory examination of the two statutes mentioned above clearly indicates that the suicide provision (Section 31-22-15, Utah Code Annotated (1953)) refers to suicide clauses in policies continued without lapse. Reflection of that policy is obvious in that had the drafters of the statute wished to exclude suicide clauses they would have made Section 31-22-18, Utah Code Annotated (1953) subject to that exception. They did not choose to do so but rather made the language all inclusive.

An analysis of the policy behind the suicide clause (which is a standard insurance policy provision) may be helpful in bringing understanding to the statute here in question.

The most obvious reason for insurance companies to include the standard two year suicide clause is to prevent applicants from buying insurance, intend-

ing to commit suicide, thereby increasing the risk factor and obliterating underwriting percentages.

In light of that policy it would seem absured to allow insurers to put such a clause in the *original policy*, let the insured lapse the policy and then force the insurer to pick up the risk on reinstatement when the insured reinstates *contemplating suicide.* The company necessarily needs the right to reinstate the policy subject to a new two year suicide period to protect itself against reinstatements contemplating suicide. The reasons behind such reinstatement protections are the same as those in the original policy. Utah law, as pointed out by the District Court below, recognizes the above policy considerations and drafted Section 31-22-18, Utah Code Annotated 1953 to meet that policy. The only logical conclusion therefore is that suicide clauses were intended to be included in the reinstated policies and that the two year period was to begin anew at the option of the insurer. It would not be illogical to argue that the suicide clause may have been the primary reason for the all inclusive language of Section 31-22-18, Utah Code Annotated (1953).

The lower court, recognizing the impact of Section 31-22-18, chose to refer to the statute in strengthening its Memorandum Decision regarding material misrepresentation. It noted in the Memorandum Decision that Bankers Life & Casualty Company had a right to reinstate the policy under the conditions set out in Section 31-22-18 had it chosen

to do so. The court commented that the disclosure by the insured of the visits to Dr. Fowler would have enabled the insurance company to evaluate information obtained from Dr. Fowler and decided whether or not to insert again the two year contestability restriction in connection with death due to suicide as well as to conclude that the risk was either acceptable or unacceptable. The lower court's analysis of the insurance company's power and position was accurate and representative of the intent of the framers of Section 31-22-18.

Therefore, there was no error created by the lower court substantiating and illustrating its holding of material misrepresentation by referring to the authority under Section 31-22-18 to reinstate the suicide clause of the original policy with a new time period.

Defendant, therefore, was clearly entitled to a Summary Judgment as a matter of law.

CONCLUSION

The District Court below had only one question to decide: whether or not a jury might reasonably conclude from the evidence that Dr. Preston J. Burnham's failure to disclose 80 visits to Dr. Herbert B. Fowler in his professional capacity as a psychiatrist would be material either to the acceptance of the risk or the hazard assumed by the insurer. The issue was one of law for the court, and it properly granted a summary judgment on that issue as outlined in its

Memorandum Decision. The Affidavit presented by the defendant was timely and sufficient under Rule 56 (e) of the Utah Rules of Civil Procedure, and that Affidavit combined with the pleadings and depositions on file illustrated conclusively that there were no material issues of fact which should have been submitted to the jury. Defendant was, therefore, entitled to a summary judgment as a matter of law and respondent respectfully requests an affirmance of the District Court's decision below.

HANSON & GARRETT
DON J. HANSON

520 Continental Bank Building
Salt Lake City, Utah 84101
Attorneys for Respondent