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Shirley J. Cragun, Aka Mrs. Ronald N. Cragun v. The Bankers Life Company, Des Moines, Iowa : Appellant's Brief

IN THE SUPREME COU
OF THE STATE OF U

SHIRLEY J. CRAGUN, aka
MRS. RONALD N. CRAGUN,
Plaintiff and Appellant,

vs.

THE BANKERS LIFE COMPANY,
DES MOINES, IOWA,
Defendant and Respondent.

APPELLANT'S

Appeal from the Order gran
in favor of Defendant and
for Judgment, in the District C
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U. R. C. P.

IN THE SUPREME COURT OF THE STATE OF UTAH

SHIRLEY J. CRAGUN, aka
MRS. RONALD N. CRAGUN,
Plaintiff and Appellant,

vs.

THE BANKERS LIFE COMPANY,
DES MOINES, IOWA,
Defendant and Respondent.

Case No.
12750

APPELLANT'S BRIEF

NATURE OF THE CASE

Plaintiff is the beneficiary under life insurance Policy No. 2401522 issued April 1, 1970 and delivered by defendant to plaintiff's husband, Ronald N. Cragun in his lifetime, and this action is to recover $10,000.00, the amount of the Policy, Ex. P-1, plus interest from the date of his death, June 22, 1970.

DISPOSITION IN LOWER COURT

Plaintiff moved the Court to enter judgment on her behalf in the amount of $10,000.00, plus interest. Defendant moved for Summary Judgment.

The Court heard oral arguments on October 19, 1971 and admitted in evidence plaintiff's Exhibits 1, 2, 3, 4, and 5. On November 19, 1971, the Court entered an Order granting Summary Judgment in favor of defendant and denied plaintiff's motion for Summary Judgment.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Order granting Summary Judgment in favor of Defendant and reversal of the denial of plaintiff's motion for Judgment, with this case remanded with directions for the Lower Court to enter Judgment for Appellant in the amount of $10,000.00 together with interest from June 22, 1970, the date of death, or, in the alternative remand the case with directions that the case be tried on the merits.

STATEMENT OF FACTS

Ronald N. Cragun was an Agent, R86, for defendant in 1968, 1969 and until his death by heart attack, R20, on June 22, 1970.

He had life insurance coverage with defendant under a, R45, group life insurance policy — certificate, from 1966, R54, until defendant terminated, R55, that policy coverage, R61, as of February 28, 1970. Ronald exercised his conversion, R53, privilege in that group life policy, wrote, R43, to defendant for life insurance and paid the $24.73 semi-annual premium by his check dated 16 March 1970, Ex. P-2.

On or before 16 March 1970 the Company *assigned* Policy No. 2401522 to Ronald, as the Policy No. *appears* on Ex. P-2 and Ex. P-5 which is the bank microfilm copy of that check.

Ronald submitted his application, R44, dated March 30, 1970 to defendant for the $10,000.00 life insurance and paid the balance of the premium, Ex. P-3 and R25. Defendant *accepted* and *modified,* R44, his application at its Home Office, R44, and *issued* and *delivered* the $10,000.00 life insurance policy to Ronald, dated April 1, 1970, Ex. P-1. The Policy, Ex. P-1, provides for payment to the beneficiary at the insured's death.

The policy was in full force and effect with premiums fully paid, R25, covering Ronald when he died on June 22, 1970 from a heart attack, R20.

After his death, plaintiff *delivered,* R19, the policy to defendant and requested the $10,000.00 but defendant refused and failed to pay plaintiff the $10,000.00 and refused, R34, to return the policy to her. Plaintiff brought this action, R15, against defendant for recovery of the $10,000.00 under the terms of the policy and for tortious, R18, conversion of the policy from plaintiff.

ARGUMENT

POINT I

JUDGMENT SHOULD HAVE BEEN GRANTED TO PLAINTIFF FOR $10,000.00, THE AMOUNT OF THE POLICY, PLUS INTEREST FROM THE DATE OF DEATH, OR THE CASE TRIED ON THE MERITS.

Ronald N. Cragun, an Agent, R84 and 86, for defendant, applied, R33, to defendant and paid, R25, Ex. P-2 and P-3, for $10,000.00 of life insurance; and he *agreed* on his application, R33, that the Company was authorized to *modify* his application and *issue* and *deliver* a policy to him. Defendant *modified,* R33, the application and *issued* and *delivered* to Ronald the $10,000.00 life insurance policy No. 2401522, dated April 1, 1970. The policy was in his possession and in full force and effect when he died June 22, 1970.

The Utah Supreme Court should *reverse* and *remand* with directions for the lower court to enter judgment for plaintiff in the amount of $10,000.00 together with interest from the date of death.

Dr. Prince, in his lifetime, had no notice of any rejection and no return of his premiums paid and he had no inclination that he was not insured, and the Utah Supreme Court in *Prince vs. Western Empire Life Insurance Company,* 19 U2d 174, 428 P2d 163, reversed and remanded that case with *directions* for the lower court to enter judgment for Marian G. Prince, plaintiff-appellant-beneficiary, in the amount of $50,000.00, together with interest from the date of Dr. Prince's death. In *Christensen vs. Farmers Insurance Exchange,* 443 P2d 385, 21 U2d 194, the Court stated,

> "In interpreting an insurance policy, courts have uniformly resolved ambiguities, if any there be, in a policy strictly against the insurer and in favor of the insured. Browning vs. Equitable, 94 Utah 532, 72 P2d 1060; Jorgensen vs. Hartford Insurance Co., 13 U2d 303, 373 P2nd 580".

"We are of the opinion that the court was in error in granting a summary judgment to the respondent".

The court went on to state that when there are no issues of fact to be determined and the only dispute involves a question of law, we think that the Supreme Court has the *duty* and the *power,* when a matter is before it, to direct the lower court to enter a judgment according to the law of the case. The court remanded this case to the trial court with *directions* to set aside the summary judgment granted to the insurance company and to enter a summary judgment in favor of the plaintiff-appellants "declaring the defendant's policy affords coverage to the automobile driven by Christensen and that such coverage is primary".

Defendant alleges in its Amended Answer, R30, misrepresentation, inequitable conduct of decedent and/or mutual mistake. This is defendant's smoke screen attempt to hide from plaintiff the benefits of the $10,000.00 life insurance policy. The Utah Supreme Court *dissolved* that smoke screen attempt in *Wootton vs. Combined Insurance Co. of America,* 16 U2d 52, 395 P2d 724, where it affirmed a summary judgment for the plaintiff and stated that unless the misrepresentations in the negotiation for an insurance policy are made with the intent to deceive and *materially* affected *either* the *acceptance of the risk* or the *hazard assumed* by the insurer, the insurance contract cannot be avoided by an insurance company, citing Utah Code Section 31-19-8, and "mere falsity of answers

to questions propounded are insufficient if not knowingly made with intent to deceive and defraud". Also,

> "Appellant had sufficient knowledge of the physical disability of respondent's husband to ascertain all the facts it needed as to its extent, if it had deemed it important, by either asking further questions or conducting an investigation; and it cannot blind itself from ascertaining the truth and then claim willful misrepresentation of the truth on which it relied in order to avoid payment under a policy". * * * "From the pleadings, affidavit and depositions, it is apparent respondent is entitled to a judgment as a matter of law".

In the present case, the insurance company had sufficient knowledge about its agent-applicant-insured because it had covered Ronald since 1966 under its group life insurance policy, R54. Also the insurance company *assigned,* Ex. P-2 and P-5, the present *policy No.* 2401522 to Ronald, their agent, on or before March 16, 1970, and before defendant *issued* and *delivered* the policy to Ronald.

The defendant *intended to* and *did insure* Ronald for $10,000.00 under the policy and should pay plaintiff.

In *State Farm Automobile Insurance Company vs. Wood,* 483 P2d 892, the Utah Supreme Court stated that the insurance company *owed a duty* to the insured "as well as to the public to make a reasonable investigation of the insurability" of applicant within a reasonable time after accepting his application for a liability policy and that,

> "An insurer cannot neglect its duty to make a reasonable investigation of insurability or postpone that investigation until after it learns of a probable claim and still retain its right to rescind. To permit an insurer to avoid its duty to make a reasonable investigation within a reasonable time would permit it to retain the premiums and avoid all risk under the policy".

Defendant issued and delivered the $10,000.00 life insurance policy and the policy was in full force and effect when Ronald died. Therefore, defendant is liable on the policy and should pay the $10,000.00 benefits, plus interest, to plaintiff.

It is *too late* for the defendant to allege fraud, misrepresentation, error or mistake. Such allegations are not material to the *risk.* In *Pritchett vs. Equitable Life & Casualty Ins. Co.,* 18 U2d 279, 421 P2d 943, "the court concluded that the concealments complained of were not material to the risk assumed by the appellant."

"The general judicial attitude toward insurance policies is to sustain them on grounds of public policy whenever possible," *Ross vs. Producer's Mutual Insurance Co.,* 4 U2d 396, 295 P2d 339. Also, the court stated that it is apparent that the Utah Legislature *intended* to make contracts of insurance *valid* wherever possible. Every insurance contract shall be construed in the entirety, including the application, Utah Code 31-19-36.

Defendant knew the *risk* and assumed the *risk,* R44, of insuring their 38 year old agent and has *waived* the

right to deny the claim and liability and is *precluded* and *estopped* from denying payment. Equity and justice require that payment in full be made to the plaintiff, plus interest.

Utah follows the *liberal* construction of the *rules* as outlined in Volume 13, Appleman, Insurance Law & Practice;

> Section 7401. "It has been almost the unanimous holding of all courts that insurance contracts must be liberally construed in favor of a policy holder or beneficiary thereof, wherever possible, and strictly construed against the insurer in order to afford the protection which the insured was endeavoring to secure when he applied for the insurance. The courts have felt that the language of insurance policies is selected by one of the parties alone, and the language employed by that party should be construed against it".

Also, from Section 7401 it is stated that the courts will *protect the insured* when the policy conveys one meaning to lawyers and another to the laymen. Appleman also cites the case of *Browning vs. Equitable Life Assurance Society,* 94 Utah 532, 72 P2d 1060, where the court stated,

> "Insurance policies, while in the nature of written contracts, are not prepared after negotiations between the parties, to embrace the terms at which the parties have arrived in their negotiations. They are prepared beforehand by the insurer, and the company solicitors then sell the insurance idea to the applicant. Normally, the details and provisions of the policy are not discussed except that the particular form of policy is best

> suited to give the applicant the protection he seeks. If he reads the policy he is generally not in a position to understand its details, terms, and meaning except that, in the event against which he seeks insurance, the company will pay the stipulated sums. He seldom sees the policy until it has been issued and is delivered to him. He signs an application blank in which the policy sought is described either by Form number or by a general designation, pays his premium, and in due course, thereafter, receives, either from the agent or through the mails, his policy. Many of its terms and all of its defenses and super refinements he has never heard of and would not understand them if he read them".

Appleman, Section 7582, states the *general rule* is that the application becomes a part of the agreement between the parties and that the policy and application, taken together, constitute the contract of insurance. The doctrine has, therefore, been laid down that the application and policy should be read and construed together in order to ascertain the *intention* of the parties. "If the provisions of the policy and application are not ambiguous or inconsistent, the court cannot extend them by construction", Section 7583. "Where the application becomes a part of the contract of insurance, the *insurer is bound by the application* to the same extent and with like effect as the *insured by the policy",* Section 7584. The insurance company was under no obligation to accept the application for insurance, but having done so was *bound* by what appeared in the application, *Metropolitan Insurance Company of New York vs. Munford,* 126 SW2d 282.

Appleman, Volume 13, Section 7585,

> "A beneficial association, in resisting payment of a death claim, cannot rely on part of the answers made by the decedent in the application for membership and ignore his answers to other questions, but the answers must be taken as a whole in determining their truth or falsity. Similarly, in construing statements in an application, the interrogatories and answers must be construed together."
>
> "The same rule of construing an insurance policy or bond strongly against the insurer and favorably to the insured applies to an application, or matters contained therein, as to the policy itself, the instrument having been prepared by the insurer. The insurance company is also under a duty to frame questions in the application so that they will be free from misleading interpretations. When it has failed to do so and ambiguity or doubt arises, questions and answers thereto will be construed most favorably to the insured."

The insured also receives the benefits of this *rule* where there is a conflict between statements in the application and in the policy, Section 7585.

From Appleman, Volume 13, Section 7601, we find that when an insurance contract has been completely executed, it is capable of modification only by an agreement in writing or an executed oral contract; and "After the rights of the insured and insurer have been fixed by written contract, subsequent letters or notices have been held ineffective to change or alter the contract, and cannot affect the rights of the parties under the contract".

Defendant *modified,* Ex. P-1 and R33, the application and *issued* and *delivered* the policy to Ronald. Defendant is not entitled to a summary judgment. Defendant should pay $10,000.00, the face amount of the policy, to plaintiff, plus interest.

The terms of the application, Ex. P-1, and policy, P-1, are plain on their face and there are no doubts or uncertainties as to the *meaning* or affect of the application-policy and defendant is liable for the face amount of the policy to plaintiff. "Any doubts or uncertainties as to the meaning or affect of the policy must be construed so as to resolve said doubts or uncertainties against the defendant who prepared the contract", *Stout vs. Washington Fire & Marine Insurance Co.,* 14 U2d 414, 385 P2d 608, and see the numerous Utah cases cited in West Pacific Digest, Volume 21A p. 148. The California case *Crane vs. State Farm Fire & Casualty Company,* 485 P2d 1129 states the general *rules* as follows: Any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer; and the contract will be given such construction as will fairly achieve its manifest *object* of securing indemnity to the insured for the losses to which the insurance relates; and any reasonable doubt as to uncertain language will be resolved against the insurer whether that *doubt* relates to the peril insured against *or other relevant matters;* and the policy should be read as a *layman* would read it and not as it might be analyzed by an attorney or an insurance expert.

The defendant insurance company refused to pay benefits to the plaintiff and alleged misrepresentations in

applying for insurance in the case of *Ruth Marks vs. Continental Casualty Co.,* 19 U2d 119, 427 P2d 387, however, the Utah Supreme Court stated that where this whole transaction was carried on through the *mails,* it presents a situation from which the trial court could reasonably believe that the plaintiff *did not intend* to deceive the company. In the present case it appears that some or all of the transactions were carried on through the *mail,* and there is *no intent* to deceive or defraud the insurance company according to the application-policy. Defendant *knew* its agent Ronald and *intended* to insure him and *assume* the $10,000.00 life insurance *risk.*

Judgment should be entered here for the plaintiff in the amount of $10,000.00 as was similarly entered in *Walker vs. Occidental Life Insurance Co.,* 432 P2d 741, as that court said the privilege of *converting* the policy is a valuable property right, and that the company's *duty,* under the group life insurance-certificate was to issue a policy, *upon application,* in the amount sought; and that trial court was *directed* to enter judgment for plaintiff in the amount of $10,000.00, being the amount of insurance *applied for.*

In *Peterson vs. Continental Casualty Company,* 483 P2d 445, 25 U2d 408, the court affirmed the lower court in holding that the farmer was a "pedestrian" on his farm and his death was covered by the terms of the policy. Here, and with stronger reason, Ronald was covered by the policy and plaintiff is entitled to judgment of $10,000.00 plus interest.

POINT II

THE SUMMARY JUDGMENT FOR DEFENDANT SHOULD BE REVERSED.

In *Holbrook vs. Webster's, Inc.,* 320 P2d 661, 7 U2d 148, the court stated that the plaintiff was granted summary judgment in spite of defendant's affidavit, since defendant *could not vary the terms* of the written release by parole evidence. In the present case, defendant cannot vary the terms of the insurance policy that it *issued* to Ronald. The answers by Ronald in his application, Ex. P-1, was information *known* to defendant. Defendant *had* all this information as it had insured Ronald in a group life policy *since 1966.*

If there is the "slightest doubt" as to the facts, a motion for summary judgment should be denied, *Shafter vs. Reo Motors, Inc.,* 205 F2d 685. Summary judgment should be denied if conflicting inferences could be drawn from the evidence, or if reasonable men might reach different conclusions on the basis of the evidence introduced, Barron and Holtzoff, Section 1234, and the cases cited therein; also, one who moves for summary judgment has the *burden* of proving clearly that there is no issue of fact, Section 1235 and cases cited therein. A summary judgment is supported by evidence, admissions and inferences which when viewed in the light most favorable to the loser, show that "there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law," *Bullock vs. Deseret Dodge Truck Center, Inc.,* 354 P2d 559, Utah 1960 case. In determining the sufficiency of such a showing, the Court

must "view the evidence and inferences therefrom in a light most favorable to the party against whom such judgment is sought"; "so unless there is a showing that the disfavored parties cannot produce evidence which would reasonably support a finding in their favor on a material or determinative issue of fact, a summary judgment is erroneous", *Bridge vs. Backman, Reversed,* 353 P2d 909, 10 U2d 366. In *Greenhalah vs. Green,* 16 U2d 221, 398 P2d 691, the court stated, "This court is well aware that a summary judgment cannot be given if there exists a genuine issue of fact".

The affidavits in the present case by defendant in order to prove or disprove the existence of a genuine issue of material fact, must contain statements which would be admissable in evidence, therefore, parole testimony and/or affidavits in trying to vary the terms of the insurance policy, will not support a motion for summary judgment in favor of the defendant, *Wier vs. Texas Co.,* 79 F. Supp. 299. Heresay statements contained in defendant's affidavit cannot be considered, *Dyer vs. Macdougall,* 201 F2d 265.

Utah Rule 56(e) states that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissable in evidence, and shall show affirmatively that the affiant is competent to testify in the matters stated therein". The affidavit must be based upon the underlying personal knowledge of the affiant, and the affidavit based upon belief is insufficient, *Zampos vs. U.S. Melting, Refining & Mining Co.,* 206 F2d 171, 10th Cir. 1953. In *Hatch vs. Sugarhouse Finance Co.,* 20 U2d 156, 434 P2d 758, the court stated,

"We are of the opinion that there was an issue of fact raised by the pleadings and the counter affidavit of the defendant in opposition to the plaintiff's motion for a summary judgment, and that the defendant is entitled to have his day in court in respect to the quantity and the reasonable value of the services rendered by the plaintiff. Rule 56 URCP should not be used where there are issues of fact in dispute."

"The judgment of the court below is reversed and the matter is remanded for a trial upon the merits."

The plain language of the insurance policy-application, P-1, cannot be twisted by the defendant to satisfy its motion for summary judgment. The *burden* of proving any error or errors in the application-policy is upon the defendant. Allegations cannot support a summary judgment for defendant. Defendant alleges mistake, or fraud, or error, but these questions may *not* be settled on defendant's motion for summary judgment. The policy and plaintiff's exhibits and affidavits show that Ronald was covered and defendant is liable to plaintiff for $10,000.00 plus interest.

The plaintiff is *entitled to have her day in court* and not be turned away. In *Reliable Furniture Co. vs. Fidelity and Guaranty Insurance,* 16 U2d 211, 398 P2d 685, the trial courts summary judgment for the Insurance Company was reversed and the case remanded *for trial. Diamond T Utah, Inc. vs. Travelers Indemnity Co.,* 21 U2d 124, 441 P2d 705, was an action to recover on an automobile insurance policy. Both parties moved for summary judgment and summary judgment was entered in favor of the

insurance company with the plaintiff-insured appealing. The Supreme Court stated that "the language of this insurance contract appears to be clear and not susceptible of more than one interpretation by a reasonably intelligent person", and that "the insurance contract in question is not ambiguous". The case was sent back for *trial.*

In the present case, there is *no ambiguity* in the application-policy, Ex. P-1, and plaintiff should have been granted judgment for $10,000.00, the amount of the insurance policy, plus interest from the date of death, June 22, 1970. Utah is *committed to rule* that "any doubts or uncertainties as to the meaning or effect of the policy must be construed so as to resolve such doubts or uncertainties against the defendant who prepared the contract", *Stout,* supra.

In the interest of justice and good cause, plaintiff would *at least* be entitled to her *trial day* in court.

The court reversed a summary judgment for the defendant and sent the case back *for trial* in *Willden vs. Kennecott Copper Corporation,* 25 U2d 96, 476 P2d 687. The court stated that upon the basis of the record thus far developed in the case, and the *inferences* that fairly could be drawn therefrom, "it appears to us that reasonable minds may well reach different conclusions on the disputed issue", and that "the situation thus presented falls within the purpose for which a trial by court or jury was created; the resolving of such disputed issues of fact".

A summary judgment was "inappropriate because there were disputed issues of material facts", *Burnham vs. Bankers Life & Casualty Co.* (Utah), 470 P2d 261.

Utah is *committed* to the *liberal doctrine* that before misrepresentations of *material facts* will void a policy of insurance, it must be established that they were *not only knowingly made, but also willfully* and *intentionally,* with intent to deceive and defraud, *N.Y. Life Insurance Co. vs. Grow,* 103 U. 285, 135 P2d 120.

Defendant *knowingly* modified, Ex. P-1, the *application* and issued the $10,000.00 life insurance policy to its agent-Ronald, therefore, plaintiff is entitled to judgment, not defendant.

The general philosophy of the Rules of Civil Procedure is that *liberality* should be indulged "to secure the just, speedy, and inexpensive determination of every action. In construing and applying these rules it should be the *purpose* of the courts to afford litigants every reasonable opportunity to be *heard* on the *merits* of their cases", *Bunting Tractor Co. vs. Emmett Ford Contractors,* 2 U2nd 275, 272 P2nd 191.

CONCLUSION

The summary judgment for defendant should be reversed and the lower court *directed* to enter judgment for plaintiff for $10,000.00 plus interest from June 22, 1970, or, *try* the case on the merits.

Respectfully submitted,

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Plaintiff and Appellant