1972

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

IN THE SUPREME CO
of the
STATE OF UT

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

vs.

THE BANKERS LIFE COMPA
DES MOINES, IOWA,
Defendant and R

RESPONDENT'S

Appeal from order gran
in favor of Defe
Plaintiff's moti
in the District Court o
Honorable James

R. K. G
James
R.A.V. S
400 D
Salt L

Walker E. Anderson
Newhouse Building,
Salt Lake City, Utah 84111
Attorney for Plaintiff
and Appellant

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	5
POINT I	
THE TRIAL COURT CORRECTLY GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	5
POINT II	
THE COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT	15
CONCLUSION	17

CASES CITED

Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924) 7

Burnham v. *Bankers Life & Casualty Co.*, 24 Utah 2d 277, 470 P.2d 261 (1970) 6-7

Burr v. *Equitable Life Insurance Co.*, 84 F.2d 781 (9th Cir. 1936) 7-8

Eklund v. *Metropolitan Life Ins. Co.*, 89 Utah 273, 57 P.2d 362 (1936) 17

First Pennsylvania Banking & Trust Co. v. *United States Life Ins. Co.*, 421 F.2d 959 (3rd Cir. 1969) 14-15

Fisher v. *Prudential Ins. Co.*, 107 N. H. 101, 218 A.2d 62 (1966) 12-13

Fisher v. United States Life Ins. Co., 249 F. 2d 879 (4th Cir. 1957) 13

Metropolitan Life Insurance Co. v. Conway, 252 N.Y. 449, 169 N.E. 642 (1930) 13

Spitz v. Continental Casualty Co., 40 Wis. 2d 439, 162 N. W. 2d (1968) 13

STATUTES CITED

Section 31-23-1, Utah Code Annotated, 1953.

Section 31-23-15, Utah Code Annotated, 1953.

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

RESPONDENT'S BRIEF

NATURE OF THE CASE

Plaintiff brought action as beneficiary of a special whole life insurance policy issued in response to a claimed conversion privilege in a group insurance plan. Defendant refused payment and tendered return of the premium based upon non-eligibility of alleged insured and misrepresentation and mistake.

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

Respondent seeks affirmation of the District Court's Summary Judgment in favor of defendant.

STATEMENT OF FACTS

On or about December 1, 1964, defendant issued its Group Life Insurance Policy No. 5376 (hereinafter called "Group Policy") to the Trustees of Music Operators of America (hereinafter called MOA). Norman W. Cragun, doing business as Cragun Music Company, was a member of MOA by reason of a small coin operated record player business which he operated out of his home in Ogden, Utah. He qualified as an "employer member" within the provisions of the said Group Policy. (R. 41, 45, and 65). On or about March 22, 1966, Ronald N. Cragun, son of Norman W. Cragun, applied for life insurance coverage under the group policy and represented himself to be an employee of Cragun Music Company (R. 41, 54, and 66). Pursuant to that application the defendant issued to Ronald N. Cragun a certificate of insurance under the Group Policy which certificate was in a form admitted by the plaintiff and hereinafter referred to as Certificate No. 185-2. (R. 42, 58-60, and 66).

The Group Policy and the Certificate No. 185-2 provided for life insurance for "actively employed employees of employer members" in the amount of $5,000.00.

Defendant sent Ronald N. Cragun a notice of termination of the entire Group Policy effective February 28, 1970. (R. 42, 61 and 66). On March 16, 1970, Ronald N. Cragun returned his certificate No. 185-2 to the defendant and requested "conversion to a Special Ordinary Life Insurance Policy in the amount of $2,000.00." (R. 41, 43, and 65). He also therein represented that he had terminated his connection with Cragun Music Company on the last day of February, 1970. On or about March 30, 1970, Ronald N. Cragun submitted an application for conversion to ordinary life in the amount of $10,000.00. (R. 41, 44 and 65). In said application Ronald N. Cragun represented that the amount of his terminated life insurance was $10,000.00. His father, Norman W. Cragun, signed as "Employer" and the employer's portion of the application stated that Ronald N. Cragun had last worked on February 28, 1970 and that the amount of insurance in force under this plan on Ronald on date of termination was $15,000.00. This application was attached to the policy issued and upon which plaintiff bases her claim.

Deposition of Norman W. Cragun taken March 4, 1971, discloses the following: In his private capacity he did business as Cragun Music Company. (P. 3) As such he didn't keep a set of books, he had no checking account and no payroll. (P. 4) He had about ten machines all located in the Ogden area and would do his own repairs, collect the moneys and change the records. (P. 6) Ronald N. Cragun was his son and when needed would assist the father in repairing the machines if asked or when he was at the father's home, provided Ronald was free at the time. (P. 7) Ronald's help was gratis so that if the father needed him

he would ask Ronald for his help. (P. 9) If the father ever gave Ronald money it was because he was his son, not by way of payment for services. (P. 11) This same relationship persisted from 1964 until June of 1970 when Ronald died. (P. 12 ,13, and 17) Norman W. Cragun worked at Hill Field Air Force Base from 1966 on and operated Cragun Music Company on the side. (P. 7 and 14) Ronald never advised the father that he was ending the relationship nor did the father ever so advise Ronald. As far as the father was concerned the relationship that persisted throughout 1969 continued up to the date of Ronald's death. (P. 17) The relationship was the same whether the month was January, February or March of 1970. If Ronald was an employee of Cragun Music Company in January 1970, he was likewise an employee in March and April of 1970 because the relationship remained always the same. There was not a bit of change. The son never advised the father that he was going to withhold his services from Cragun Music Company at any time during 1970. Until he became ill in June of 1970 Ronald responded as his father had need. (P. 18 and 19) The father's tax return made no reference to any payment made to Ronald, he reported no expense attributed to payroll and never had a withholding statement for Ronald.

Deposition of Norman W. Cragun taken May 5, 1970 discloses the following: During the first six months of 1970 he put in about 16 hours per week in the operation of Cragun Music Company besides working a forty-hour week at Hill Field. (P. 3) This was substantially the situation throughout the year of 1969. During 1969 and the first half of 1970 the largest portion of the work of Cragun Music

Company was done by him. (P. 4)

During the first half of 1970 from January through the time of Ronald's death, the amount of work Ronald would put in during the week for Cragun Music Company would vary anywhere from zero hours per week to as many as twelve hours per week. (P. 7) The father doesn't recall any weeks during the first half of 1970 that Ronald would have put in more than twelve hours per week. (P. 8)

Deposition of the plaintiff taken March 4, 1971, disclosed the following: Ronald N. Cragun worked as a full time insurance salesman for Prudential Insurance Company prior to 1960. (P. 16) He worked as a full time salesman for Blue Cross Insurance Company for about seven years ending in 1965 or 1966. (P. 5) Since leaving Blue Cross and until the time of his death his full time employment had been as district manager of the life insurance department of Safeco Insurance Company. (P. 6, 8, and 10) Plaintiff first noted Ronald's health was deteriorating about the end of May or the first part of June 1970. (P. 12) His health appeared to be good in January and February and remained so right up until the end of May. (P. 13) She noticed no change in his working or employment status or work habits including his evening work from January 1970 until the latter part of May or the first part of June. (P. 14)

POINT I

THE TRIAL COURT CORRECTLY GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

The case now before this Court primarily involves a group, rather than an individual, insurance policy. Since group insurance provides coverage for an often large and

fluctuating class of persons, rather than for the single insured, since the individual class member is rarely personally enrolled or contacted by the insurer, and since membership in the class is almost always a required condition of group insurance, coverage issues in group insurances cases raise unique questions of law peculiar to group insurance situations. As as result, such questions are perhaps best considered within the special framework of group insurance law. In such cases, the more persuasive authorities may be those addressing themselves specifically to group insurance fact situations. It should be noted that the Utah Code contains a specific chapter (Section 31-23-1 et seq.) on group life insurance policies, which chapter is separate and distinct from the regular insurance provisions of the Code, and Section 31-23-15 of that chapter specifically deals with conversion rights on termination of eligibility.

Respondent's basic theory is, that the individual life insurance policy which decedent sought to obtain was governed by the eligibility and conversion provisions of the group policy. Since the decedent was not eligible for membership in the group policy and since he was not eligible to be insured in the group or to convert that policy, he was never entitled to obtain the individual policy and that policy is void and subject to rescission by defendant-respondent.

The threshold question would seem to be whether the terms of the group contract continued into the individual policy decedent obtained, or at least, whether the terms of the prior contract governed decedent's ability to receive the later policy. This court has held that a reinstated insurance policy is a continuation of the original, rather than a separate, new agreement. *Burnham* v. *Bankers Life & Casualty*

Co., 24 Utah 2d 277, 470 P.2d 261 (1970). In the *Dunken* case cited below the United States Supreme Court held that a policy issued pursuant to the conversion provisions of an earlier policy is governed by the terms of the prior contract.

In *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389 (1924), the insurer issued an insured a term life insurance policy which pursuant to its conversion option was converted into a life policy by the insured. The prior policy was cancelled and a new policy bearing a new number was isssued. The insured received the policy but did not pay the premiums. Shortly thereafter he died. The insurer claimed the second policy never became binding and that it was separate and distinct from the earlier policy. The Supreme Court disagreed, holding and citing with approval a New York case for the proposition that, the later policy was not an independent contract, but rather a continuation of the original. *Id.* at 395. With respect to the case before it the Court noted:

> The second policy here was issued in pursuance of, and was dependent for its existence and its terms upon, the express provisions of the contract contained in the first one. By those provisions, upon the simple application of the insured, the new policy must issue. Nothing was left to future agreement. The terms of the new policy were fixed when the original policy was made. . . . It was issued not as the result of any new negotiation or agreement, but in discharge of pre-existing obligations. It merely fulfilled promises then outstanding, and did not arise from new or additional promises. *Id.* at 399-400

And in *Burr* v. *Equitable Life Insurance Co.*, 84 F.2d

781 (9th Cir. 1936), the Circuit Court of Appeals held that a term policy, an application for that policy, and a converted policy for ordinary life insurance all constituted a single policy of insurance.

In clear and unambiguous terms the Group Policy relevant to this action extended its coverage to "actively employed employees of insured employer members."

Section 1 of the Group Policy provided:

> The term "actively employed" means employment in the Phonographic Music Machines or other coin operated equipment industry for 15 hours or more per week.
>
> The terms "active work" and "actively at work," as used in this Policy with respect to any Person, mean active full-time performance of all customary duties of his occupation (for a period of at least fifteen hours per week) at his usual place of employment. (R. 46)

Section 16 of the group policy provided:

> Any person within thirty-one days after
>
> (a) the date his life insurance under this Policy is terminated because of termination of employment or of membership in a class or classes eligible for such insurance under this Policy; or
>
> (b) the date this Policy is terminated, or is amended to exclude the classification of Persons to which he belongs, if he has been so insured continuously for at least five years immediately prior thereto; or
>
> (c) the date his life insurance under Schedule No. 1 under this Policy is reduced by reason of an increase in age;

Shall be entitled to have issued to him, without evidence of insurability, an individual policy of life insurance without disability or other supplementary benefits provided written application therefor and payment of the first premium thereon is made to the Company within said thirty-one days. Any such individual policy issued shall become effective on the thirty-second day following the applicable date specified in (a), (b) or (c) above.

If the insurance is terminated as outlined in (a) above, the Person shall have the right to convert the amount of life insurance in force on his life as of the date of such termination, less any amount of insurance in force on his life pursuant to an application for an individual policy previously made in accordance with these provisions.

If the insurance is terminated as outlined in (b) above, the Person shall have the right to convert the smaller of

(a) the amount of life insurance in force on his life as of the date of such termination, less any amount for which he is or becomes eligible under any group life insurance policy issued or reissued by the Company or any other insurance carrier within thirty-one days after such termination date; and

(b) $2,000.00. (R-53).

The evidence is clear that the decedent's employment did not terminate on February 28, 1970. The decedent's father and alleged employer stated that decendent didn't ever tell him he was terminating his employment and that until June of 1970 decedent helped him with the same frequency that he always had. (Norman Cragun Dep. 3/4/71, p. 19. See also Norman Cragun Dep. 5/5/71, p. 7.) The plaintiff, decedent's wife, also testified that she noticed no

change in decedent's working status or habits from January of 1970 until late May of 1970. (Shirley Jean Cragun Dep., p. 13-14).

From the foregoing it is evident that decedent did not terminate his employment on February 28, 1970, and therefore had no right to convert pursuant to Section 16(a) of the policy.

It will be recalled that conversion rights under the group policy had to be exercised within thirty-one days after employment terminated. Since there is no evidence that decedent terminated his employment prior to his death (if he ever was "employed" by his father), the record is bereft of any termination date and therefore there is no evidence which would permit plaintiff to rely on the provisions of Section 16(a) of the group policy.

The provisions in Section 16(b) are rather complex, but not ambiguous. They provide that if the group policy is terminated *and if the decedent had been continuously insured for five years* prior to the time the group policy was terminated, decedent could convert the lesser of $2,000.00 or the amount of insurance under the group policy less the amount he became eligible for under another group policy.

Decedent first applied for membership in the group policy on or about March 22, 1966. (R-54). The application was not accepted until May 1, 1966. (*Id.*) The group policy's date of termination was February 28, 1970. (R-61). It is patent from the foregoing that even if decedent were actively employed by his father from the time decedent's coverage commenced until the termination date of the pol-

icy, he would not have been continuously insured for the requisite five year period. As a result, he was not entitled to convert to an individual insurance policy and the policy issued him was void.

Finally, Section 16 only confers a conversion right to "persons." A "person" is described in the group policy as one "actively employed." (R-46). The minimum 15 hour work week requirement for one to be "actively employed" has already been mentioned. If decedent did not work for his father sufficiently to become an active employee, he had no right to convert, and, indeed, no right at all to coverage under the group policy.

There is no suggestion whatever in the record that decedent ever worked fifteen hours per week for his father during the year of 1970. His father testified that during the first half of 1970, from January until the decedent's death, the decedent's work hours for his father would vary from zero to twelve hours per week. (Norman Cragun Dep. 5/5/70, p. 7). The father specifically testified that he could not recall any week when the decedent worked more than twelve hours a week in the first half of 1970. (*Id.* at p. 8). From the foregoing it seems clear to respondent that decedent was never an "active employee" entitled to coverage. And if he was not an "active employee," he was entitled to neither coverage nor conversion privileges under the Group Policy.

The group policy did contain a one year incontestability clause (R-47). However, respondent respectfully contends that that clause does not preclude respondent from raising the question of the decedent's status as an "active employ-

ee." Respondent contends that the decedent's application for conversion (R-44) and decedent's letter to respondent (R-43) re-represented, at least implicitly, that decedent was an active employee pursuant to the requirements of the group policy. This later representation constituted a renewed statement of insurability under the group policy and this later representation started a re-running of the incontestability period. Since the individual policy insuring decedent was rescinded within one year from its inception, the incontestability provision does not bar respondent's claim.

However, even if there was no re-representation by decedent of his active employment status, the incontestability provision does not bar a group insurer from claiming that decedent was not an employee and, therefore, not entitled to coverage. Although there appear to be no Utah cases in point, there is persuasive authority in other jurisdictions stating that where a group policy limits coverage to employees of a group policy holder, the insurer may raise the claim that a person is not an employee even after the policy's incontestability period has expired.

In *Fisher* v. *Prudential Insurance Co.*, 107 N. H. 101, 218 A.2d 62(1966) decedent's representative sought to recover benefits allegedly owing to deceased under a group health insurance policy. It appeared in that case that the deceased was enrolled in a group policy and premiums for her coverage were paid. The decedent was never, however, an employee within the language of the group policy, and even though the incontestibility time had expired, the insurer was held to be able to deny benefit payments because the deceased was never an employee.

The Supreme Court of New Hampshire cited with approval the language of a federal court in *Fisher* v. *United States Life Ins. Co.*, 249 F.2d 879, 882 (4th Cir. 1957):

> [T]he incontestable clause, after the passage of the stipulated period, proscribes defenses which go to the validity of the policy whether because of noncompliance with conditions or the falsity of representations or warranties. It was never intended to enlarge the coverage of the policy, to compel an insurance company to insure lives it never intended to cover or to accept risks or hazards clearly excluded by the terms of the policy. *Fisher* v. *Prudential, supra,* at 65.

The Court in *Fisher* v. *Prudential* also cited with approval a New York Court of Appeals decision in *Metropolitan Life Ins. Co.* v. *Conway,* 252 N. Y. 449, 452, 169 N. E. 642 (1930) (Cardozo, Chief Judge):

> The provision that a policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, "that within the limits of the coverage the policy [will] stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken. *Fisher* v. *Prudential, supra,* at 65.

In *Spitz* v. *Continental Casualty Co.*, 40 Wis. 2d 439, 162 N. W. 2d 1 (1968) plaintiff claimed to be entitled to benefits of a group policy, but the defendant, insurer, counterclaimed for rescission of the policy because the plaintiff was not an eligible member. It appeared that the incontestability time had expired. The trial court granted

defendant's motion for summary judgment and the state supreme court affirmed holding:

> Appellant contends that the incontestability clause in the insurance policy precludes the insurance carrier from contesting the right of the doctor to recover under the policy. However, the incontestability clause by its terms applies only to statements of insureds who are "eligible for coverage under the policy." *The requirement of eligibility is the threshold that must be crossed before we reach the question of representations, misrepresentations or posssible fraud.* In a group policy one's status as an eligible member of the group is the exact basis on which the company offers the policy. One must come within the definition of a member of the group to qualify for coverage. While a misrepresentation as to eligibility for coverage might also increase the risk or contribute to the loss, it is under a group policy something more than a mere statement relating to insurability. It is a certification to status as one eligible to coverage as a member of the group involved. 162 N. W. 2d at 2-3. (Emphasis Added).

And finally in upholding the position of a group insurer, a federal court of appeals noted, with respect to facts closely analagous to those now before this court:

> Additionally, it is important, in construing the facts in this case, to note that the provision that all of the employees work regularly thirty hours per week is not a static situation, but one which has continuity to it, for, assuming that no question of waiver was involved, can it be seriously contended that after one year, if it came to the attention of the defendant for the first time that some of the group had been working

only two hours a week, or had left the employ of the company, a month after the policy had become effective, the defendant could not cancel the policy, or if death ensued, it could not assert it as a defense? *Additionally, if it came to the attention of the defendant any time after the one year period that any of the group were not working thirty hours a week, it would be most unrealistic to hold that the company could not cancel the policy as to such person or, in the event of death, assert it as a defense to a beneficiary's claim for, if it were otherwise, the defendant would be required to police every member of the group continually to see if they were working thirty hours a week.* Obviously, the contract provision itself vitiates any assertion here of the incontestability clause. *First Pennsylvania Banking & Trust Co.* v. *United States Life Insurance Co.*, 421 F.2d 959, 963 (3rd Cir. 1969). (Emphasis Added).

In summation, decedent did not terminate his employment on February 28, 1970; he was not continuously insured for the requisite five year period and he was not an "active employee" or "actively employed" within the meaning of the Group Policy. Since he was therefore ineligible to convert the individual insurance policy issued to him, the individual insurance policy was entitled to be rescinded by the defendant-respondent.

On the basis of all the foregoing, respondent respectfully contends that the trial court correctly granted defendant-respondent's motion for summary judgment.

POINT II

THE COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

In answering plaintiff's amended complaint, defendant raised several defenses including the following:

1. Section 16 of the Group Policy would preclude Ronald N. Cragun from converting more than the amount of insurance in force on his life ($5,000.00) if the conversion was based upon the termination of his employment. Section 16 of the Group Policy would preclude Ronald N. Cragun from converting to any amount of insurance if based upon termination of the Group Policy since at the time of termination of said policy he had been insured under the Group Policy for less than the required five years prior thereto.

2. If Ronald N. Cragun was ever the employee of Cragun Music Company he did not terminate on February 28, 1970 contrary to his representations to that effect.

3. The Group Policy provided that it was only effective in favor of those persons who were actively at work and further defined "actively at work" as "active full time performance of all customary duties of his occupation (for a period of at least 15 hours per week) at his usual place of employment." Ronald N. Cragun was never "actively at work" as required by the Group Policy and there being no valid coverage under the Group Policy there could be no right to conversion thereof and the subsequent policy issued by the defendant based upon the misrepresentation that he had been "actively at work" is void.

4. If Ronald N. Cragun was ever an employee of Cragun Music Company as contemplated by the Group Policy he ceased to be "actively at work" as required by the Group Policy and his conversion rights, if any, had expired prior to any attempt on his part to exercise the same.

5. Ronald N. Cragun misrepresented that under the Group Policy he had in effect $10,000.00 of life insurance when in fact there could only have been $5,000.00, if any. That therefore the policy should be voided or if not voided, reformed.

Said defenses raise substantial issues of law and fact and are supported by the uncontroverted evidence. It would have been improper for the Court to rule summarily in favor of the plaintiff. As was stated in *Eklund v. Metropolitan Life Insurance Company*, 89 Utah 273, 57 P.2d 362 (1936).

> The respondent was justified in its refusal to pay the policies. The evidence that the policies were obtained by misrepresentation being uncontradicted and it being possible to draw only one inference from it, there was presented a question of law for the court and not a question of fact for the jury. *Id* at 283-284, 57 P.2d at 367.

CONCLUSION

The District Court concluded as a matter of law that the decedent was not eligible to be insured under the Group Policy and therefore had no privilege or right to convert.

The decedent misrepresented that he was eligible to be insured and was insured for $10,000.00 under the Group Policy.

Insurability was not a question in issuing a new policy. If decedent was insured under the Group Policy the defendant-respondent had a contractual obligation to convert his insurance on his timely application whether he was insurable or not.

The policy issued to a person who was not eligible and in an amount to which he would not have been entitled if eligible was properly rescinded by the defendant and the District Court should be affirmed.

Respectfully submitted,

R. M. Child and
James L. Wilde of
Ray, Quinney & Nebeker

Attorneys for Defendant and Respondent