1972

Ida Long And Ida Long, Administratrix of the EState of Harry W. Long v. Glenn Mckensie, John Hulick, Mutual of Omaha Insurance Company, Life Insurance Affiliate of United of Omaha; United Benefit Insurance Company : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

IDA LONG and IDA LONG, ADMINISTRATRIX OF THE ESTATE OF HARRY W. LONG,
Plaintiff and Appellant,

—vs.—

GLENN McKENSIE, JOHN HULICK, MUTUAL OF OMAHA INSURANCE COMPANY, Life Insurance affiliate of United of Omaha; UNITED BENEFIT INSURANCE COMPANY,
Defendants and Respondents.

Case No. 12844

BRIEF OF APPELLANT

Appeal from Judgment of District Court of Salt Lake County, State of Utah, Ernest F. Baldwin, Jr., Judge

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CASES CITED

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NATURE OF THE CASE

The above cause was submitted to the Jury via a special verdict and on written Interrogatories. The Jury unanimously found facts in favor of beneficiary, Ida Long, and against United Benefit Insurance Company, to-wit: That Defendant Insurance Company did insure Harry W. Long for $13,000.00, and while said insurance was in full force and effect, he was killed in an automobile accident and that said policy was never revoked until after his death.

DISPOSITION OF CASE IN LOWER COURT

Ernest Baldwin, District Judge, reversed the Jury's Findings of Fact and granted Judgment in favor of the Defendant against the Plaintiff, Ida Long, beneficiary of Harry W. Long.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of Order granting Judgment in favor of the Defendant and against the Plaintiff; that the Court re-instate the Findings of Fact as made by the Jury and enter Judgment in favor of the Plaintiff, Ida Long, and against the Defendant insurance Company in accordance with the facts found by the Jury. Said Judgment being in the amount of $13,000.00, as was agreed and stipulated by all parties as the amount to which the Appellant, Ida Long, is entitled should Appellant, Ida Long, prevail. (Tr. 315)

STATEMENT OF FACTS

Harry W. Long was an insurable man, forty six years of age, in excellent health; and, worked for West Chemical Company, and lived with his wife and two children in Kearns, Utah.

Mr. Long was contemplating a vacation trip to California which was to commence on or about the 3rd or 4th day of July, 1970. He was shopping for life insurance to protect his wife and family and he answered an inquiry

sent him by the Mutual of Omaha Insurance Company; in the attached reply card, he requested insurance. (Tr. 186)

In response to a brochure with the reply card which was returned by Long, thereon, the Salt Lake office of Mutual of Omaha, which is the parent company of the United Benefit Insurance Company, an affiliate company, sent one John Hulick and one Glenn McKensie, both duly licensed agents of Mutual of Omaha, to respond to the inquiry card and they proceeded to the Long residence in Kearns, Utah.

On June 16, 1970, the agents arrived and presented themselves to Harry W. Long, his wife, and his son, Fred Long. The agents were informed by Harry W. Long that he was going to take a trip and that he wanted life insurance to protect his family and he was seeking the best policy that he could get for the least money. The agents represented to Mr. Long that they were experts in the business and that they had the policy that he was seeking. They presented to him the policy identified under the mortgage protection plan. This policy would insure the Long home in the amount of $11,000.00 and, in addition thereto, would insure the life of Harry W. Long for $2,000.00. All parties hereto agreed and stipulated that should beneficiary of Harry W. Long, be entitled to recover, she would be entitled to Judgment against United Benefit Life Insurance Company in the amount of $13,000.00. (Tr. 315)

Harry W. Long, Mrs. Long, Fred Long, McKensie and Hulick all sat down in the living room of the Long residence and the agents made out an application for the insurance. Mr. McKensie made it out, Mr. Hulick assisted, and all questions were honestly answered. (Tr. 192) The binding application provided for $13,000.00 insurance. Ida Long was designated as the beneficiary and the Long children as contingent beneficiaries. Hulick and McKensie, in addition to fully accepting Mr. Long's honest answers, completely filled out the application and then stated to Mr. Long that there would be premiums due in the amount of $13.83 per month during Mr. Long's life for $13,000.00 coverage. All parties agreed thereto. Premiums were paid, a binding receipt was given to Mr. Long. (Tr. 270)

At the conclusion thereof, and at the request of McKensie and Hulick, Mr. Long made out two checks in the amount of $13.83, (Tr. 269), and a receipt was given therefor. One check was dated the 17th day of June, 1970, and the other check was dated July 10, 1970. The two checks totalled $27.66. (Tr. 228 (2-p; 3-p)). The check of June 17, 1970, was cashed immediately, cleared the bank and the insurance company was promptly paid.

In addition to the two checks as set forth above, Harry W. Long did execute and give to Hulick and McKensie, a bank service agreement in which it was contracted that United Benefit Insurance Company was

to take and receive from the checking account of Harry W. Long, the monthly premium of $13.83, for the rest of his life. (Tr. 313 (6-p) (7-p))

Hulick and McKensie, at that time, gave him a binding receipt for $27.66, which he placed in his purse. (Tr. 257) They did tell and represent to Harry W. Long that he was fully and completely insured; that his family was protected from the time that he completed and signed the application for insurance and to proceed on his vacation. They said, "You are insured, don't worry about it, go ahead, (Tr. 269) and go on your trip." (Tr. 270)

Glenn McKensie and John Hulick told Harry W. Long at the time that he completed and signed the application for insurance with the United Benefit Insurance Company on June 16, 1970, that he was insured from that date and until the application was thereafter accepted or denied by the company. (Tr. 362 and Tr. 313)

The Jury specifically found that the Defendant, United Benefit Life Insurance Company at no time rejected the binding application for insurance of Harry W. Long, during the lifetime of Harry W. Long, and it wasn't until after the death of Harry W. Long that said binding application was rejected by the United Benefit Life Insurance Company. (Tr. 362)

Harry W. Long proceeded on his trip to California, on the 3rd day of July, 1970, with his two sons and, while traveling through Barstow, California, his car rolled over and Harry W. Long and his fifteen year old son were killed. (Tr. 263)

The night before the funeral of Harry W. Long, on or about July 9, 1970, Richard Hulick and Glenn McKensie again appeared at the Long home and tendered back to Mrs. Long, the check dated July 10, 1970, in the amount of $13.83, and a check for and on behalf of the United Benefit Insurance Company in the amount of $13.83, which they claimed was a tender-back of the premiums paid herein. These checks were refused by Mrs. Long and are in evidence herein. (Tr. 231)

The United Benefit Insurance Company gave no reasons for denying the binding application of Harry W. Long, it being admitted that he was in excellent health and insurable. Undoubtedly the accidental death of Harry W. Long was a factor, as Mr. Long was a family man, lived with his family, was in excellent health, and a total abstainer of the use of alcohol. (Tr. 184)

One month's premiums were sufficient to issue application, receipt, and place insurance in effect. (Tr. 199)

POINT I

WHERE INSURED COMPLETED AND SUBMITTED APPLICATION FOR LIFE INSURANCE AND PAID PREMIUMS; APPLICANT WAS AN INSURABLE RISK; RECEIPT WAS ISSUED, CONTRACT OF INSURANCE WAS CREATED.

POINT II

INSURANCE COMPANY CANNOT REJECT APPLICATION AFTER DEATH ON GROUNDS THAT A LOSS HAS OCCURRED.

ARGUMENT

POINT I

WHERE INSURED COMPLETED AND SUBMITTED APPLICATION FOR LIFE INSURANCE AND PAID PREMIUMS; APPLICANT WAS AN INSURABLE RISK; RECEIPT WAS ISSUED, CONTRACT OF INSURANCE WAS CREATED.

Mutual of Omaha, United Benefit's parent company mailed a fancy brochure to Harry W. Long, soliciting his insurance business. Harry W. Long responded, indicating that he needed insurance to protect his wife and family as he was going on a vacation to California. United

Benefit Insurance Company was requested to produce the brochure at the deposition and also at the trial, and in each instance, they failed to do so.

Binding Receipt Agreement for life insurance provided that the insurance would take effect on the date of the application blank; premiums were promptly paid, application was honestly answered; Harry W. Long was insurable in all respects; bank payment plan was issued by which United Benefit Insurance Company was entitled to collect monthly premiums from Long's bank account for the rest of his life. Long was accidently killed before the policy was formally issued.

NO NOTICE OF REJECTION WAS EVER GIVEN TO HARRY W. LONG; THE JURY CONCLUSIVELY FOUND THAT THE COMPANY REJECTED APPLICATION AFTER DEATH.

In support of the Plaintiff's cause, it is urged that it is the established law of this State that in interpretation of binding receipts, the intention of the parties should be the controlling factor, and this intention is the mutual intention of the parties and not the intention of only one of them, unless the other party was aware of the intention and understanding of the one allowed him to contract him without advising him of the other inter-

pretation. See *Prince vs. Western Empire Life Insurance,* 19 Utah 2d, 174, 428 Pac. 2d, 163. Harry W. Long honestly believed that he was insured and the Jury so found.

In this regard, the Jury was entitled to the advantage of seeing and hearing all of the witnesses testify. After which, they carefully deliberated, and they unanimously found that Glenn McKensie or John Hulick executed and delivered to Harry W. Long, upon delivery to them of a premium check, a receipt which had been attached to the application for insurance to the United Benefit Insurance Company and further that Glenn McKensie and John Hulick told Harry W. Long, at the time he completed and signed the application for insurance with the Defendant company, that he was insured from that time until the application was therefor accepted or denied by the company.

The United Benefit Insurance Company was plenty willing to accept the application and was plenty willing to insure Harry W. Long, take his money and his payment plan, and oblige him to pay premiums for the rest of his natural life but now refuses to be bound as Harry W. Long was accidently killed before a policy issued.

It is obvious from the facts herein that Harry W. Long wanted his wife and family protected while he was on his trip to California. United Benefit Insurance

Company, by and through their agents, told Harry W. Long, that he was insured and to "go ahead and go on his trip." Similar issues were presented in the case of *Prince vs. Western Empire Life Insurance Company, Supra,* and under similar facts, this Court held that insurance companies, knowing and realizing that a layman fully intends to be bound by the application and binding receipt as of the date of the application, but the insurance company could either cover the application with insurance pending the investigation or could make him think he was covered so that he would *not* demand his money back and, *seek* other insurance which would cover him and his family while he was on his vacation.

To permit the insurance company to wait until the vacation trip is over to see if the man came back alive prior to being bound on the binding receipt and application, would result in permitting them to avoid completely, their part of the contract and bargain. As stated in the Prince case:

> ". . . If the applicant dies in the meantime, the company loses nothing. If the applicant lives, the company has received the premium for the period that has elapsed since the purported effective date of the binding receipt."

The Court continues:

> "The Courts have generally read into such binding receipt agreements, an obligation on the part of the company to pay when the loss occurs for the

issuance of the policy, if, except for the loss, the company would have issued the policy. In doing so, the courts have not departed from the regular rules of the construction of an ordinary contract."

The Court's attention is called to page 192 of the Transcript where agent John Hulick testified:

"Q. Alright. Now, do you have any knowledge of any type or nature that the answers to the application blank were not honest and truthful?

A. I have none. I have no reason to know that they were not true and honest.

THE COURT: Mr. Faust, do you claim that these answers were not honest and truthful at the time?

MR. FAUST: No, your Honor.

MR. MINER: May the record show then—

THE COURT: Mr. Faust does not claim that there is any falsity to be given in the application."

The United Benefit Insurance Company and Mutual of Omaha at no time raised any issue of of insurability, in fact, both Hulick and McKensie testified that in their opinion, Harry W. Long was insurable.

The United Benefit Insurance Company raised the defense that the application was not binding by reason of the fact that the first premium was not paid in cash. In

this regard, the Court's attention is called to the pai check endorsed by the Insurance Company and furthe to the Jury's finding that said first premium *was* pai in cash. Further defense is asserted with regard to th fine print of the application blank. In this regard, thi matter has been before the Court, not only in the cas of *Prince vs. Western Empire Insurance Company supra,* but recently in the case of *Moore vs. Prudentia Insurance Company of America,* 491 Pac. 2d 227, 2 Utah 2nd 493. In both cases, it was held that where th insurance applicant has given and done all he agreed t do which will benefit the insurer, such constitutes his consideration for a contract of insurance, and that an application for the issuance of an insurance policy is a matter of contract and is governed by the rules thereof.

The Moore case further laid down the law that it is the Jury's exclusive perrogative to judge credibility o the evidence and to find the facts. Such was done in thi case.

It is interesting to note:

1. That the Defendant insurance company concede binding receipt and application bound Harry W. Lon to pay a monthly premium for the rest of his natural life

2. That the policy was to be effective as of the dat of the application blank. The Jury found that Harr W. Long went to his death honestly believing that he wa covered by $13,000.00 of insurance and that his wife an

minor children were protected. It is admitted that no return of premium was tendered until the night before the funeral of Harry W. Long, at which time first notice of denial of coverage was given.

Regardless of the foregoing, the Defendant insurance company contends that they have a right to deny payment without any notice to Harry W. Long that he was not insured and without giving Harry W. Long any opportunity to purchase other insurance prior to going on his vacation trip and that by a silent, secret revocation, known only to themselves, Harry W. Long should be denied the right of recovery. This contention was put at rest in the Prince case when this Court adopted the established law and on page 181 held:

> "The understanding of an ordinary person is the standard which must be used in construing the contract, and such a person upon reading the application would believe that he would secure the benefit of immediate recovery by paying the premium in advance of the delivery of the policy, there is an obvious advantage to the company in obtaining payment of the premium when the application is made, and it would be unconscionable to permit the company, after using language to induce payment of the premium at that time, to escape the obligation which an ordinary applicant

would reasonably believe had been undertaken by the insurer."

POINT II

INSURANCE COMPANY CANNOT REJECT APPLICATION AFTER DEATH ON GROUNDS THAT A LOSS HAS OCCURRED.

The Jury specifically found on Special Interrogatory number 3, that the Defendant, United Benefit Insurance Company, did not revoke the application for insurance of Harry W. Long prior to his death. In this regard, the Court's attention is called to Exhibit "11-D." This Exhibit is a mimeographed letter signed by no one, authenticated by no one, the record is completely devoid of any evidence of any type or nature which would show why the letter was typed or mimeographed, from where it was mailed, or to whom it was mailed, when it was received, by whom it was received. There is no evidence stating who G. D. Bender is, whether he works for United Benefit Insurance Company, whether he has the authority to terminate applications. This Exhibit (11-D) is heresay evidence of the rankest nature. This counsel was deprived of cross examination of the document.

The only evidence in the record or before the Court is Hulick, McKensie and W. P. Toohey, all of which testified that they never saw Exhibit "11-D" until four to

five days after Harry W. Long had been killed. In addition thereto, the Jury specifically found that Exhibit "11-D," was not received at the Salt Lake office until after the death of Harry W. Long; and under the rule as set forth in the case of *John B. Moore vs. Prudential Insurance Company, supra,* this Court held that it is the Jury's perrogative to judge credibility of evidence and to find the facts.

The United Benefit Insurance Company, without producing one witness to prove the authenticity of Exhibit "11-D," is seeking to have this Court adopt a rule that a secret memo from one department to another in an insurance company is sufficient to revoke application for insurance after death without stating any reasons therefor and thereby revoke and deny recovery under a valid, existing and binding application for insurance. The only witnesses for the Defendants were Toohey, Hulick and McKensie, who all testified that the first time they saw Exhibit "11-D," was after they had full and complete knowledge of the death of Harry W. Long. (Tr. 293) Toohey, Hulick and McKensie all testified that they have no knowledge of who G. D. Bender was (Tr. 292) and that they have never seen the envelope in which Exhibit "11-D" was supposedly mailed and that they had no knowledge of who stamped July 2, 1970, thereon. It is submitted that the permission of the introduction of Exhibit "11-D" violated all of the rules of evidence concerning the introduction of such a purported document.

The Court will note that the reason for revocation was stated as confidential and should be considered in light of the testimony of Hulick, McKensie and Toohey, and that they knew of no reason why Harry W. Long was not an insurable risk, and that they firmly believed that all of his answers to the application were honest and truthful.

The established law is that an Insurance Company cannot reject a binding application which would have been accepted, solely upon the ground that a loss has occurred.

See: *Prince vs. Western Empire Insurance Company, supra;*

Moore vs. Prudential Insurance Company, supra.

Northwestern Mutual L. Ins. Co. v. Neafus (1911) 145 Ky 563, 140 SW 1026, 36 LRA NS 1211;

Indiana Nat. L. Ins. Co. vs. Maines (1921) 191 Ky 309, 2300 SW 54;

American L. Ins. Co. v. Hutcheson (1940, CA6th Tenn) 109 F2d 424, cert den 310 U.S., 25, 84 L ed 1397, 600 S Ct 898.

The case of *Winger vs. Gem State Mutual Insurance Company,* 22 Utah 2d 132, has no application to the instant case for the following reasons:

1. In the instant case, there was a full-fledged trial, all of the witnesses testified, all evidence was duly sub-

mitted to the jury on special interrogatories, and the Jury, after due consideration, found that United Insurance Company, accepted the premiums, issued a receipt, issued binding application for insurance.

2. The Jury further found that the application was effective as of the day it was written and that Harry W. Long was told that he was insured on the date of the application from the date of application until the application was thereafter acceped or denied by the company.

3. The Jury further found that United Benefit Insurance Company never rejected the application until after the death of Harry W. Long and that said binding application was in full force and effect at the time of his death.

4. The Winger case was submitted to the Court on conflicting evidence and this Court ruled that Findings of Fact made by the Court should not be disturbed.

5. The Winger case does not apply to the instant case upon the further grounds that the evidence was that Grant A. Winger was not insurable.

6. The Winger case does not apply on the additional grounds that Harry W. Long informed United Benefit Insurance Company and their agents that he was going on a vacation trip and that he wanted his family protected while he was gone and in response thereto, the Jury found

that the agents told him that he was fully insured and to go on his trip. (Tr. 362) In this regard the Court's attention is called to Tr. 269, line 24.

> "A. They gave a receipt, he said he was going on a vacation; they said, 'you are insured. You don't have to worry about it, go ahead.'"

All of the foregoing facts completely distinguish this case from the Winger case, and it is submitted that the Winger case has no application to the instant case.

CONCLUSION

Harry W. Long bought and paid for binding insurance, paid his premiums, was told that he was covered and to go on his vacation. While he was duly covered, he was killed. After his death, the binding application was rejected by the company for reasons known only to them.

The Jury's solemn findings should be sustained, the application should be found to be in full force and effect, and Ida Long should be awarded $13,000.00 as provided in the contract.

Respectfully submitted,

MARK S. MINER
Attorney for Appellant and Plaintiff