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 Respondent

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 RESPONDENTS

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BRIEF OF RESPONDENTS

NATURE OF THE CASE

Defendants and Respondents disagree with the nature of the case, as set forth in Appellant's Brief. Respondents contend that the case involved an action filed to recover on an Application for Life Insurance.

The Defendants and Respondents made a Motion for a Directed Verdict after having rested at the close of the Defendants' evidence, which Motion the Court took under advisement and reserved its ruling thereon until after special verdicts were returned by

the Jury. The Court thereafter granted Defendants' and Respondents' Motion for a Directed Verdict.

DISPOSITION OF CASE IN LOWER COURT

Ernest F. Baldwin, Jr., District Judge, granted Defendants' and Respondents' Motion for a Directed Verdict.

STATEMENT OF FACTS

Defendants and Respondents disagree substantially with the Statement of Facts as set forth by Plaintiff and therefore desire to make their own statement of facts.

On June 16, 1970, the Defendants, Glenn McKensie and John Hulick, Agents for the Defendant Life Insurance Company, went to the home of Harry W. Long, in response to a post card mailed by Mr. Long in which he invited them to discuss the possibility of writing insurance for him. Mr. Long explained the kind of insurance he wished to apply for and an Application was completed by Glenn McKensie in response to questions on the Application. The actual Application is Exhibit No. 25 D. Mr. Long gave the agents a check for $13.88, together with a post-dated check, dated July 10, 1970, also for $13.88, which were tendered as the first premium. The agents, McKensie and Hulick denied that a receipt was given, because under the Company's rules on a Bank Service Plan, which Mr. Long requested (Exhibit 6-7P), two full months' premiums were required to be tendered with the Application.

Exhibit 20 D, which is a copy of the Regulations, states:

> "A full premium must be collected at the time the Application is taken."

Full premium means annual, semi-annual, quarterly, or in the case of the Bank Service Plan, "two B.S.P. premiums — nothing less."

Because of the post-dated check, two full payments had not been paid. The next day, the Application was turned into William B. Toohey Agency, general agents for the Defendants, insurance company in Salt Lake City, Utah. On June 20, 1970, the Toohey Agency forwarded the Aplication to the home office in Omaha, Nebraska. The regular insurance investigation was made at the request of the home office by the local office of American Service Bureau, an investigating firm. On June 30, 1970, the Defendant, insurance company, rejected the Application and a Notice of Terminated Application issued as of that date. No policy of insurance was written. Exhibit 11 D, which is the Notice of Terminated Application, was date stamped in the Salt Lake Office of the William B. Toohey Agency on July 2, 1970 and stated that the premium collected at the time of solicitation was to be returned at once.

The next day, July 3, 1970 was a Friday, and part of the official long Fourth of July weekend and William B. Toohey Agency was closed as it was on Saturday, July 4th and Sunday, July 5th. On Mon-

day, July 6th, the Toohey Agency received a call from McDougal's Funeral Home and the notice of the death of Mr. Long appeared in the paper, advising of Mr. Long's death on July 3rd.

On July 6th, which was the first business day following the long Fourth of July weekend, the soliciting agents, Hulick and McKensie, tendered the refund check, together with the post-dated check to Mrs. Long, which she refused.

On Tuesday, July 7, 1970, the refund check and the post-dated check were mailed to Mrs. Long, with a return receipt requested and was received by her on July 8, 1970.

The soliciting agents, Hulick and McKensie, first saw the rejection notice on July 6, 1970, (T. 140-159) and learned of the death of Mr. Long no the same day. Both agents testified that they told Mr. Long that he would be covered for insurance upon acceptance of the Application by the Company. (T. 101 - T. 169).

At the close of the Defendants' evidence, Defendants made a Motion for a Directed Verdict and the Court reserved its ruling on the Motion for a Directed Verdict until after the jury had returned Answers to special questions as follows:

> "We the Jury find on a preponderance of the evidence in this case, the following answers to questions propounded to us:
>
> 1. Glenn McKensie or John Hulick executed and delivered to Harry W. Long, upon delivery to them of premium checks, the re-

ceipt, which had been attached to the Application for Insurance to the United Benefit Life Insurance Company.

Answer: Yes.

2. Glenn Mc Kensie or John Hulick told Harry W. Long at the time he completed and signed the Application for insurance with the Defendant, that he was insured from that time and until the Application was thereafter accepted or denied by the Company.

Answer: Yes.

3. The Defendant, United Benefit Life Insurance Company rejected the Application for insurance by Harry W. Long and sent the Notice of Termination or rejection on the Application to its Salt Lake General Agent, the W. B. Toohey Agency, prior to the death of Harry W. Long.

Answer: X.

Subsequently, the Court granted the Defendants' Motion for Directed Verdict previously made.

POINT NO. I

AS A MATTER OF LAW, THE TRIAL COURT WAS CORRECT IN SUSTAINING THE DEFENDANTS' MOTION FOR A DIRECTED VERDICT, BECAUSE THE APPLICATION MADE IT CLEAR THAT THE INSURERS' OBIGATION WAS CONDITIONAL UPON ACCEPTANCE BY THE COMPANY.

POINT NO II

THE APPLICATION FOR INSURANCE WAS MERELY AN OFFER FOR A CONTRACT OF INSURANCE, WHICH OFFER WAS UNCON-

DITIONALLY REJECTED WITHIN A REASONABLE TIME BY THE DEFENDANT COMPANY PRIOR TO MR. LONG'S DEATH, AND NO INSURANCE CONTRACT EVER CAME INTO BEING.

ARGUMENT

POINT NO. I

AS A MATTER OF LAW, THE TRIAL COURT WAS CORRECT IN SUSTAINING THE DEFENDANTS' MOTION FOR A DIRECTED VERDICT, BECAUSE THE APPLICATION MADE IT CLEAR THAT THE INSURERS' OBIGATION WAS CONDITIONAL UPON ACCEPTANCE BY THE COMPANY.

This case is governed by the case of *Winger vs. Gem State Mutual*, 22 U.2nd 132, 449 P.2d 982, where insurance coverage was declined before fatal injuries and no insurance contract came into being despite the agent's inability to communicate the insurer's rejection prior to the fatal injuries.

In the first interrogatory submitted to the Jury, as to whether or not the Agents gave a receipt, the Jury found that they had, despite the fact that none was introduced. It is Defendants' and Respondents' position that as a matter of law, it makes no difference whether one was given or not, because the language in the Receipt, (Exhibit 24 D). was almost identical to the language of the Receipt in the *Winger* case, where it was admitted that even though a receipt was given, the clear wording of the Receipt made it conditional upon finding the Applicant insurable under its usual rules.

The face of the Receipt (Exhibit 24 D), even if one had been given, would have acknowledged the receipt of the money for the full first premium and provided,

> "The insurance applied for shall be effective on the date of application or the date of any medical examination required by the Company, whichever is the later, subject to the requirements stated on the reverse side of this receipt.
>
> "If the application is not approved, full refund of premium will be made on surrender of this receipt. If you are not advised regarding the application within 60 days, please notify the Company at its Home Office in Omaha, Nebraska."

The conditions on the reverse side of the Receipt (Exhibit 24 D), provide:

> "Requirements for Insurance to Become Effective."
>
> "Insurance will be effective as stated in this receipt provided that:
>
> 1. The proposed insured and, if Family Plan Insurance is being applied for, each of the family members named in the application is determined by the Company at the Home Office in Omaha, Nebraska, to be insurable, in accordance with its usual rules and practices, on the basis and for the policy applied for, effective on the date of application or the date of any medical examination required by the Company, whichever is the later;

2. The full first premium is paid in cash on the date of application;
3. The policy is issued exactly as applied for within 60 days from the date of application;
4. The total life insurance in force with the Company on the proposed insured, including the amount now applied for, will not exceed $125,000."

This is practically identical to the language of the receipt which was admittedly given in the *Winger case*, supra, wherein the Supreme Court, speaking through Justice Tuckett, stated at Pages 982-983:

> " 'Conditional Receipt.' The face of the receipt acknowledged receipt of the money amounting to two months' premium and also included language 'subject to conditions on reverse side.' The conditions on the reverse side of the receipt form provide in part as follows:
>
> The affective date of the policy will be the later of: date of application, or date of medical examination, if required, provided that the 1. *Proposed insured is determined by the Company at its Business Office in accordance with its rules and practices, to be insurable on such date for the policy exactly as applied for;* 2. *Full first premium is paid in cash on date of application;* 3. *Policy is issued exactly as applied for within thirty days from this date;**** No medical examination was required in the case of Winger."

As in the *Winger case*, no examination was required of Mr. Long.

As to the finding in the second interrogatory,

the fact that the jury found that the agents told Mr. Long that upon signing the Application, he was insured until the Application was accepted or denied, still is not governing.

Assuming the facts as found by the jury to be correct, the Company still had a right to accept or reject the Application, because of the express language contained in the Application as set forth above.

Again, in the *Winger case*, it was admitted that the agent told Winger that he was covered. The Court held that the agent did not have authority to bind the Company finally in a contract of insurance, and that no contract of insurance had come into being.

The Application states, in paragraph 1:

> "The Company is not bound by any statements made by or to any agent, unless such statements are written in this Application."

With respect to Interrogatory No. 3, it is Defendants' and Respondents' position that the only effect this has is that the evidence to the Jury's mind, did not preponderate on the issue as to whether or not the rejection notice was received by the Toohey Agency prior to Mr. Long's death. The rejection notice, with the date stamped by the Toohey Agency, as of July 2, 1970, under the evidence, stands unchallenged and uncontroverted by the Appellant. There is not one shred of evidence that the rejection notice was not mailed out on the date it bears and received by the Toohey Agency on the date which shows on its face.

Both Hulick and McKensie saw it on the next business day following the date it was stamped in.

It is Defendants' and Respondents' position that even assuming that the notice was not received in the Toohey agency, it would be immaterial to the result, because the date of the rejection notice is uncontroverted.

Considering the days over the long 4th of July weekend that the office of the Toohey agency was closed for mail, the rejection notice had to have been mailed out of Omaha on the 30th day of June and received in Salt Lake on July 2nd. Hulick and McKensie who both had a financial interest in the policy being issued, saw the rejection notice on Monday, July 6th.

POINT NO. II

THE APPLICATION FOR INSURANCE WAS MERELY AN OFFER FOR A CONTRACT OF INSURANCE, WHICH OFFER WAS UNCONDITIONALLY REJECTED WITHIN A REASONABLE TIME BY THE DEFENDANT COMPANY PRIOR TO MR. LONG'S DEATH, AND NO INSURANCE CONTRACT EVER CAME INTO BEING.

A contract of insurance is governed by the same rules as governs the formation of any contract. There must be an offer, and an acceptance or meeting of the minds, as is essential to the formation of any contract. 43 Am. Jur. 2nd, Sec. 203, at page 259 states:

> "A contract of insurance must be assented to by both parties either in person or by

their agents. There must be a meeting of the minds of the parties on the essential terms and elements of the contract."

The Application, itself, was not a contract, but was a mere offer, a proposal for a contract of insurance. It is merely a step in the creation of an insurance contract. 43 Am. Jur. 2d, Sec. 208, page 265 states:

> "In the ordinary effectuation of a policy of insurance, negotiations therefor are initiated by an application by the person seeking such insurance. The application itself is not the contract, but is a mere offer or proposal for a contract of insurance. It is merely a step in the creation of the insurance contract. Before the contract of insurance is effected and any contractual relationship exists between the parties it is necessary that the application be accepted by the insurer, since it is well settled that insurance companies are not compelled to accept every application presented and may stipulate upon what terms and for what period of time the risk will be accepted.
>
> "The application may be withdrawn at any time before it is definitely accepted by the insurance company, even though at the time of making the application the applicant pays or gives a note for the payment of the premium."

43 Am. Jur. 2nd, Section 210, page 267 states:

> "Until the application is accepted, no contractual relationship exists between an aplicant for insurance and the insurance company.

The acceptance of the application or proposal

for insurance is necessary to make the policy of insurance founded thereon binding and effective, especially where by the terms of the application its approval is required before the risk shall attach.

"As a general rule and apart from express stipulations to a contrary effect, a contract of insurance is consummated by and not until the unconditional acceptance of the application or proposal for such insurance, and this is the rule even though the aplication or proposal is accompanied by the payment of the premium. The acceptance must be in the lifetime of the applicant. If the death of the applicant intervenes, no contract is effected."

In this case the application was *rejected* prior to the death of the aplicant.

Paragraph 3 of the Application (Exhibit 25 D) specifically states in part, immediately above the signature of the applicant:

"The Company shall have no liability until the policy is issued, delivered and accepted."

The Company is entitled to accept or reject the risks which it will insure, even arbitrarily. 43 Am. Jur. 2nd, Section 213, page 269 states:

"As a general rule, and since a contract of insurance rests upon the assent of the parties, an insurance company is not bound to accept an application or proposal for insurance, but may reject it for any reason or arbitrarily."

An insurance company cannot be forced even

by statute to accept all applications and in effect thereby to be required to waive its right to select risks. 43 Am. Jur. 2nd., Sec. 213, page 270.

In this case on the next business day after receipt of the notice of termination, the applicant's family was notified of the rejection.

The Court, in the *Winger case*, supra, at page 983, clearly stated the law governing this case as follows:

> *"It is clear from the wording of the receipt that the obligation of the defendant was conditional upon its determination that the applicant was insurable according to its rules and practices. The defendant having made its determination that Winger was not insurable and having elected to decline his application, we are constrained to the view that no contract of insurance existed in favor of the plaintiff.* The plaintiff cites the case of *Price v. Western Empire Life Insurance Company* recently decided by this court, but it appears to us that that case is distinguishable upon the ground that in that case the insurer did *not decline coverage prior to the time of the fatal injuries being suffered by the applicant, but that it was seeking further medical information for the purpose of determining the premium to be charged."* (Emphasis ours).

Appellant, in her Brief at page 12, cites, in addition to the case of *Price v. Western Empire Insurance Company*, supra, which the Court distinguished from *Winger vs. Gem State Mutual of Utah*, as above set forth, the further authority of *Moore vs. Pruden-*

tial Insurance Company of America, 491 P.2d 227, 25 U. 2nd 493.

The *Moore case*, supra, is distinguishable from the instant case, because under the facts of the *Moore case*, the Company approved the application and a policy isued prior to the death of the insured. As has been pointed out in the case before the Court, the Application was rejected prior to the death of the applicant, and no policy of insurance issued.

The recently decided Utah case, *Fabrizio vs. Fidelity and Guaranty Life Insurance*, 494 P.2d 953 is consistant with the holding of the *Winger case*, supra.

There are a number of statements in Appellant's Brief, which in the opinion of the Respondent, are both contrary to the facts and the law. The Respondent will not answer each statement and contention with which it disagrees, but is willing to submit the matter to the Court. One such misstatement ,is the statement on page 8: "The jury conclusively found that the company rejected application after death." Presumably, Appellant is referring to Interrogatory No. 3, which simply asked if the Defendant Company sent the notice of termination or rejection to its Salt Lake General Agent, and the notice was received by the W. B. Toohey Agency, prior to the death of Harry W. Long. The jury's answer was "X," simply meaning that the proof did not preponderate with respect to the time when the notice was received by the Too-

hey Agency (Jury Instruction 14 R. 98). As has been pointed out in this Brief, if in fact the application was rejected prior to the applicant's death, the fact that the notice was not received until after his death, is not material, because of the requirement of an affirmative acceptance.

Another such statement is that on page 9, where it is represented that the Defendant "was plently 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." It is elementary that an insured is obligated for the remainder of his life, only if he wishes to keep the insurance in force and can terminate it at any time.

CONCLUSION

The law is well established in Utah that if the insurance company declines to accept coverage under an application, within a reasonable time prior to the time of the fatal injury, no contract of insurance comes squarely under this rule of law and the trial court was correct in sustaining the Motion for a Directed Verdict.

Respectfully submitted,

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