

2005

Liberty Mutual Insurance Company v. Burdene Shores and Unior Shores : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Liberty Mutual Insurance Company,

Plaintiff and Appellee,

vs.

Burdene Shores and Unior Shores,

Defendants and

Appellants.

**BRIEF OF THE APPELLANT
BURDENE SHORES**

No. 20050291-CA

Fourth District Court, American Fork
Civil No. 050100099

APPEAL FROM FINAL JUDGMENT OF THE FOURTH DISTRICT

COURT, UTAH COUNTY

JUDGE DEREK PULLAN

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UTAH APPELLATE COURTS

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JURISDICTION

The Utah Court Of Appeals has jurisdiction of this appeal pursuant to Utah Code §78-2a-3(2)(j), by transfer from the Utah Supreme Court. The Utah Supreme Court has original jurisdiction of this appeal pursuant to Utah Code §78-2-2(2)(j).

STATEMENT OF THE ISSUES

Issue No. 1 - Improper Dismissal of the Bad-Faith Refusal to Settle Counterclaim

Did Judge Pullan improperly dismiss Burdene Shores' counterclaim against Liberty Mutual for bad faith refusal to Settle in violation of an obligation to act in good faith and deal fairly with their insureds under the Liberty Mutual insurance policy issued to the Shores (hereinafter the "insurance policy")?

Standard of Review: Correctness. *Phone Directories v. Henderson*, 8 P.3d 256 (Utah 2000).

Issue No. 2 - Improper Dismissal of Counterclaims for Declaratory Relief

Did Judge Pullan improperly dismiss Burdene Shores' and Unior Shores' (the Shores) claims for declaratory relief by finding as a matter of law, that the Shores' claims that the family exclusion (or step down, hereinafter the "family exclusion") provision, limiting the liability of Liberty Mutual to statutory minimums complies with Utah law? Was it proper for Judge Pullan to ignore the reasonable expectations of the Shores, based on the false representations of the Liberty Mutual agent? Is the family exclusion void and against Utah public policy?

Standard of Review: Correctness. *Phone Directories v. Henderson*, 200 UT, 8 P.3d 256 (Utah 2000).

Issue No. 3 - Improper Granting of Summary Judgment Finding the Liberty Mutual Family Exclusion Provision Valid and Enforceable

Did Judge Pullan improperly grant Liberty Mutual Insurance Company's motion for summary judgment on their Declaratory Judgment action finding as a matter of law, without allowing appropriate discovery or inquiry into related facts, that the family exclusion was valid and enforceable against the Shores?

Standard of Review: Correctness. *Sittner v. Schriever*, 22 P.3d 784, 2001 UT App 99 (Utah App 2001). *Speros v. Fricke*, 98 P.3d 28, 2004 UT 69, ¶20 (Utah 2004). Summary judgment is appropriate only "if the pleadings, . . . and admissions on file, together with the affidavits, if any, 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."

Issue No. 4 - Improper Denial of Discovery

Did Judge Pullan improperly deny the appellant's Rule 56(f) motion to allow further discovery on issues related to Liberty Mutual's motion for summary judgment and motions to dismiss; and, was the trial court's failure and refusal to require Liberty Mutual to go forward with discovery proper?

Standard of Review: either abuse of discretion or correctness, *Roundy v. Staley*, 984 P.2d 404 1999 UT 229 (Utah App 1999).

STATEMENT OF THE CASE

Nature of the Case

Burdene Shores and Unior Shores (the Shores) are aged, retired persons in their 70's and 80's.

The Shores purchased an automobile insurance policy from Liberty Mutual as a result of advertising targeted at retired military personnel. The Shores are co-insureds under the insurance policy.

This case involves a simple automobile accident in which Burdene Shores was severely injured. Burdene Shores was a passenger in an automobile driven by her husband, Unior Shores. Unior Shores was primarily at fault in the accident.

The accident caused permanent disability to Burdene Shores; and, she incurred direct medical and medical related expenses significantly in excess of \$25,000.

As the PIP insurer for Burdene Shores, Liberty Mutual received copies of all direct medical expenses and most other medical-related expenses.

At the time of the accident, the Shores had in force a policy of insurance from Liberty Mutual (hereinafter the "insurance policy") with declared policy limits for liability of \$100,000 per person and \$300,000 per accident. The Shores should have been adequately insured, including coverage at least sufficient to cover Burdene Shores' medical and medical-related expenses for her injuries in the accident.

Buried within the insurance policy is a conflicting, ambiguous, family exclusion provision which Liberty Mutual claims limits its liability to Burdene Shores under the liability provisions of the insurance policy to \$25,000 for the negligence of Unior

Shores.

The insurance policy was delivered to the Shores some time after the policy was purchased and coverage was bound.

The family exclusion and consequent reduced limits of liability for insureds is not stated or otherwise mentioned in the policy declarations. No information (materials or otherwise) provided by Liberty Mutual to the Shores prior to the Shores' receipt of the insurance policy referred to the family exclusion. The family exclusion was never pointed out to the Shores by Liberty Mutual in any fashion other than the delivery of a 46-page insurance policy to the Shores some time after the insurance coverage was purchased and after the insurance coverage was bound. The family exclusion was never meaningfully disclosed to the Shores until after a liability policy limits claim of \$100,000 was made by Burdene Shores.

Liberty Mutual has not disputed that it is obligated to pay \$25,000 to Burdene Shores under the liability provisions of the policy for Unior Shores' negligence. However, Liberty Mutual has failed and refused and continues to refuse to pay the \$25,000 to Burdene Shores as a partial settlement, even though it was demanded. Liberty Mutual, as a part of continuing to pressure Burdene Shores to drop all other claims, paid the \$25,000 into the court at the time they filed the declaratory judgment action underlying this appeal.

Liberty Mutual has failed and refused to make any payments under the liability portion of the policy unless and until Burdene Shores provides a complete release of all claims against Liberty Mutual.

Liberty Mutual asserts, and Judge Pullan found as a matter of law, that Burdene Shores is only entitled to recover the family exclusion liability limits amount hidden in the insurance policy.

Course of the Proceedings

The course of proceedings in the trial court is as follows:

1. Liberty Mutual filed suit for declaratory judgment against Burdene Shores on February 9, 2004, seeking to limit their liability for damages to Burdene Shores to \$25,000 as a result of the negligence of Unior Shores.
2. On February 13, 2004 the trial court, on Liberty Mutual's ex parte request, ordered the deposit of \$25,000 into the court trust fund by Liberty Mutual, to be held pending the outcome of this litigation.
3. On February 26, 2004, pursuant to request of Liberty Mutual, Burdene Shores, as the only defendant, waived service of the summons and complaint.
4. On March 12, 2004 (filed on March 17, 2004), Liberty Mutual filed an amended complaint adding Unior Shores as a defendant in their declaratory judgement action.
5. On March 25, 2004, Burdene Shores served and filed her answer and counterclaims against Liberty Mutual.
6. On May 25, 2004, Burdene Shores moved for a scheduling and management conference because of Liberty Mutual's failure and refusal to begin discovery or hold a scheduling and management conference as required by Rule 26(f) of the U R C P.
7. On May 28, 2004, Liberty Mutual filed a motion to dismiss Burdene Shores' bad faith counterclaim (Count Two of her Counterclaim).

8. On June 22, 2004, Judge Lynn Davis, at the request of Liberty Mutual and over the objection of the defendants, stayed all discovery until August 9, 2004.
9. On August 9, 2004, oral argument was held on Liberty Mutual's motion to dismiss Burdene Shores' bad faith counterclaim before Judge Derek Pullan. At the hearing, and on August 27, 2004, by written judgment, Judge Pullan dismissed the bad faith counterclaim of Burdene Shores.
10. At the August 9, 2004 hearing, Judge Pullan did not enter a discovery or scheduling order as requested by the Shores, but did order that the parties confer to work out the outstanding discovery issues.
11. On September 16, 2005 Liberty Mutual filed a motion for summary judgment on its declaratory judgment claims in its complaint; and, for dismissal of the declaratory judgment claims of Burdene Shores' counterclaim.
12. On October 4, 2004, Burdene Shores served requests for admission and requests for production of documents upon Liberty Mutual. Liberty Mutual responded to the requests for admission but failed and refused to respond appropriately to the requests for production.
13. On December 10, 2004 Unior Shores filed and served a motion for Summary Judgment.
14. On December 10, 2004 oral arguments were held on Liberty Mutual's Motion for Summary Judgment; and, some arguments were had on Unior Shores' Motion for Summary Judgment.
15. At the December 10, 2004 hearing, the Shores requested that the court defer its

decision and allow completion of and additional discovery pursuant to Rule 56(f) of the U R C P.

16. Judge Pullan denied the request to complete and obtain additional discovery; and, ruled in favor of Liberty Mutual on the Motion for Summary Judgment and motion to dismiss. The formal judgment was signed January 24, 2005 granting Liberty Mutual's motion for summary judgment and dismissing all counterclaims.

Disposition at the Trial Court

The trial court failed and refused to enforce the Shores' discovery rights.

Judge Pullan dismissed Burdene Shores' bad faith counterclaim.

Judge Pullan granted Liberty Mutual's Motion for Summary Judgment on Liberty Mutual's claims for declaratory relief; and dismissed the Shores' counterclaims for declaratory relief against Liberty Mutual on the same issue – the validity of the family exclusion reduced liability limits in Liberty Mutual's insurance policy with the Shores. With no evidence and essentially no discovery, Judge Pullan ruled as a matter of law that the family exclusion in Liberty Mutual's insurance policy was valid and enforceable.

Judge Pullan refused to defer summary judgment until after further discovery. He refused to require Liberty Mutual to go forward with discovery at the time it should initially have gone forward; and, then refused to defer summary judgment to allow discovery long after the discovery should have occurred and been properly responded to by Liberty Mutual.

RELEVANT FACTS

A review of the transcripts of the hearings which are at issue in this case reveal a number of transcription errors. Most of those errors relate to the improper identification of the person speaking. It is hoped that these transcription errors will have no impact on this appeal.

The transcripts contain only arguments, no testimony and no evidence.

Background Facts

1. The Shores are an elderly, retired couple. Burdene Shores was born on June 17, 1929, making her 76 years old at this time. Unior Shores was born on November 1, 1921, making him 83 years old at this time. Affidavit of Burdene Shores in Opposition to Liberty Mutual's Motion for Summary Judgment (hereinafter "Affidavit of Burdene Shores"), para. 3 and 5. Record on Appeal (hereinafter RoA), pgs. 367 and 368.
2. Unior Shores is retired from the Army. Affidavit of Burdene Shores, para. 3 and 5. RoA, pgs. 368 and 367.

Facts about the Case

3. In late 2002, the Shores received direct mail solicitations from Liberty Mutual advertising the availability of preferred rates of insurance for retired military personnel. After receiving several of these solicitations and seeing other advertisements from Liberty Mutual for automobile insurance they invited a local insurance agent of Liberty Mutual to make a presentation to them. Affidavit of Burdene Shores, para. 3 and 5. RoA, pgs. 368

and 367.

4. Burdene Shores and her husband Unior Shores purchased an automobile insurance policy from Liberty Mutual on about January 10, 2003. Affidavit of Burdene Shores, para. 3 and 5. RoA, pgs. 368 and 367

5. The Shores physically received the insurance policy from Liberty Mutual sometime after January 16, 2003. Answer and Counterclaim, Exhibit "A", Cover letter . RoA, pg. 66. Answer and Counterclaim, Counterclaim, Count One, para. 9, RoA, pg. 78.

6. The purchase occurred as a result of advertising directed at retired military persons by Liberty Mutual. Affidavit of Burdene Shores, para. 8 and 9. RoA, page 367.

7. There were no terms of the insurance policy discussed by Liberty Mutual agents, or otherwise disclosed to the Shores prior to the purchase of the insurance policy, except that the Shores required the same coverage (including limits of liability) they had under their then existing Met Life policy. Affidavit of Burdene Shores, para. 9 through 17. RoA, pgs. 368 and 367.

8. In order to close the sale, the Liberty Mutual salesman assured the Shores they would have the same coverage under the Liberty Mutual insurance policy as the Met Life policy for which the Liberty Mutual salesman was selling a replacement policy. Affidavit of Burdene Shores, para. 10 through 16, RoA, pgs. 367 and 366

9. On September 9, 2003 the Shores were involved in an automobile accident in which Unior Shores was driving a vehicle owned by the Shores which was then insured by Liberty Mutual. Amended Complaint, para. 6 and 7. RoA, page 17. Answer and Counterclaim, Counterclaim, Count One, para. 15, RoA, pg. 77.

10. Unior Shores was primarily at fault in causing the accident. Answer and Counterclaim, Counterclaim, Count One, para. 16, RoA, pg. 77.
11. Burdene Shores was a passenger in the vehicle at the time of the accident, and was without fault in the accident. Answer and Counterclaim, Counterclaim, Count One, para. 15, RoA, pg. 77.
12. Burdene Shores incurred severe and substantial medical and medical-related expenses as a result of the accident. Answer and Counterclaim, Counterclaim, Count One, para. 17, RoA, pg. 77.
13. Those medical and medical related expenses are substantially in excess of \$25,000. Answer and Counterclaim, Counterclaim, Count One, para. 18, RoA, pg. 77.
14. As a result of the accident, Burdene Shores is now severely and permanently disabled. Answer and Counterclaim, Counterclaim, Count One, para. 17, RoA, pg. 77.
15. The Liberty Mutual insurance policy as delivered to the Shores is 46 pages long. Answer and Counterclaim, Exhibit "A", RoA, pgs. 66 through 21.
16. Except for the limits of coverage purchased and rates charged for that coverage there was no discussion nor disclosure of the terms of the insurance policy to the Shores prior to the issuance of the insurance policy. Answer and Counterclaim, Counterclaim, Count One, para. 14, RoA, pg. 77.
17. The Shores had no input into the drafting or terms of the insurance policy. Answer and Counterclaim, Counterclaim, Count One, para. 13, RoA, pg. 77.
18. Other than the above, the family exclusion liability limits of the Liberty Mutual insurance policy were never disclosed in any meaningful fashion to the Shores until after

the insurance policy was purchased by, issued to, and delivered to the Shores; and, a claim had been made by Burdene Shores. Answer and Counterclaim, Counterclaim, Count One, para. 19, RoA, pg. 77.

19. The Liberty Mutual insurance policy is a contract of adhesion.

20. The Liberty Mutual insurance policy contains declarations listing various types of coverage and the maximum amounts of those coverages (limits of liability). RoA, pgs. 65 through 63.

21. The Liberty Mutual insurance policy at pages 2 and 3 includes the declarations pages (RoA, pgs. 65 through 63) which prominently list limits of coverage, including:

Liability \$100,000 per person, \$300,000 per accident.

Uninsured Motorists (Utah Specific) \$25,000 per person, \$50,000 per accident

Underinsured Motorists (Utah Specific) \$25,000 per person, \$50,000 per accident

Personal Injury Protection (PIP - Utah Specific) \$3,000 medical single limit

22. Nowhere in the insurance policy declarations is there any listing of reduced limits of coverage for any persons insured under the Liberty Mutual insurance policy. RoA, pgs. 65 through 63

23. There is a listing of principal rating factors used in establishing rates in the Liberty Mutual insurance policy listed at pages 28 and 29 RoA, pgs. 39 and 38.

24. The differing limit of liability for insureds is not a differing risk within the meaning of Utah Code §31a-21-308; and, is not clearly stated as required by Utah Code §31a-21-308. Answer and Counterclaim, Counterclaim Count One, para. 22 through 28, RoA, pgs. 76 and 75.

25. None of the listed rating factors include any reference to different rates or risks based on whether or not a claimant is an insured. Insurance Policy, RoA, pgs. 39 and 38.
26. Buried on page 22 of the policy (RoA, pg. 45) is the family exclusion (or step down) liability limit provision which Liberty Mutual claims limits the liability of Liberty Mutual under the insurance policy to \$25,000 for any liability claims by Burdene Shores.
27. The family exclusion liability limit provision was hidden on page 22 of the policy with the intent to hide the provision and prevent the Shores' discovery of the family exclusion and thereby deny them the coverage which they reasonably believed they had purchased. Answer and Counterclaim, Counterclaim, Count One, para. 20, RoA, pg. 76.
28. The family exclusion liability limit for insureds is ambiguous, and not phrased in a manner that is understandable by ordinary people, and was so phrased and not disclosed in the declarations with the intent to hide the provision from the Shores and other similar insureds. Answer and Counterclaim, Counterclaim, Count One, para. 25 through 27, RoA, pgs. 76 and 75.
29. If the family exclusion provision is valid, the Liberty Mutual insurance policy is not equivalent in coverage to the Met Life insurance policy of the Shores, which the Liberty Mutual insurance policy replaced.
30. If the family exclusion liability limit provision is valid, there were false representations made by Liberty Mutual as to the coverage provided when the Liberty Mutual agent sold the Liberty Mutual insurance policy to the Shores.

SUMMARY OF ARGUMENTS

Improper Dismissal of the Bad-Faith Counterclaim

Judge Pullan should have allowed the bad faith counterclaim of Burdene Shores to go forward. Dismissal, without discovery, was not proper. Burdene Shores was a first party bad faith claimant in direct privity of contract with Liberty Mutual. Liberty Mutual owed Burdene Shores a duty of good faith and fair dealing, which they violated by refusing to settle part of the claim for the \$25,000 which all parties agreed was due to Burdene Shores.

The bad faith counterclaim of Burdene Shores was improperly dismissed by Judge Pullan by misinterpreting Utah Appellate case law as Liberty Mutual requested.

Improper Granting of Summary Judgment to Liberty Mutual and Dismissal of the Shores' counterclaims for Declaratory Relief, by finding the Family Exclusion reduced liability limits in Liberty Mutual's Insurance Policy Valid and Enforceable

The Liberty Mutual family exclusion liability limits provision in the insurance policy is not valid and is contrary to the public policy of Utah.

If the court finds the Liberty Mutual family exclusion provision valid in Utah, Liberty Mutual did not properly make the provision a part of its policy, falsely represented the terms of its policy at the time of sale, and there are substantial factual questions which preclude summary judgment or dismissal of the counterclaims on the issue.

The Liberty Mutual insurance policy violates Utah Code §31a-21-308 by having differing policy limits of liability for insureds and claimants in general. The statute allows differing policy limits if there are different risks to be covered. There are no differing

risks associated with insureds under the insurance policy; and, the insurance policy does not clearly identify those differing risks even if such did exist.

Failure to allow appropriate Discovery

The trial court failed to require Liberty Mutual to properly engage in discovery, but allowed it to stall discovery in the case.

There are substantial factual questions as to marketing practices to the Shores and specific false representations to the Shores which Judge Pullan should have allowed discovery regarding before ruling on any motion for summary judgment.

If this court finds the Liberty Mutual family exclusion valid, the Shores should nonetheless be able to inquire into the marketing practices directed at the Shores and similar persons, and the false representations of policy provisions made by Liberty Mutual to the Shores in the sale of the insurance policy to them.

DETAILED ARGUMENTS

The issues in this appeal are intertwined. Because of the state of the facts, the state of the law, and Judge Pullan's decisions, it is not possible to nicely separate the issues for purposes of argument.

The underlying and overriding issues controlling all other issues in this case are

- Whether the family exclusion reduced liability limits of Liberty Mutual's insurance policy in this case are valid and enforceable in general, and
- If enforceable in general, is the family exclusion enforceable in specific application to the Shores under the facts of this case? Or stated differently, did Liberty Mutual validly include the family exclusion in the policy delivered to the Shores such that the Shores are bound by that provision?

These issues were argued in Liberty Mutual's motion to dismiss the bad faith counterclaim, although that was not the basis chosen by Judge Pullan for granting the motion to dismiss.

A finding that the family exclusion of the insurance policy was generally valid and enforceable was the sole basis for Judge Pullan granting Liberty Mutual's Motion for summary judgment, and, dismissal of the Shores' declaratory judgment counterclaims against Liberty Mutual.

The family exclusion was hidden on page 22 of the 46-page insurance policy packet delivered to the Shores. The family exclusion was not disclosed in the sales presentation. The family exclusion is not listed in the declarations or anywhere else in the policy except in a Utah specific amendatory provision buried on page 22 of the 46-page insurance policy.

This family exclusion will be discussed in greater detail throughout the arguments.

The underlying moral issue presented by this appeal is the question as to whether the Utah courts will assist a multi-billion dollar insurance company in victimizing the aged and vulnerable who find themselves in situations they believe they have paid Liberty Mutual to protect them against?

There are many facts which cannot be properly presented in this appeal because Liberty Mutual, though it filed the case, successfully stalled and prevented meaningful discovery by the Shores.

Liberty Mutual is no white knight protecting their insureds as presented in insurance company advertisements. They prey on the aged and injured to bloat their profits, while denying benefits to those same aged and injured who have paid for protection and peace of mind promised by Liberty Mutual, but which Liberty Mutual had no intention of delivering if they could wiggle out of it.

The legal arguments will be cast in differing lights by well-paid defense counsel, but the moral question is aptly framed.

Improper Dismissal of the Bad-Faith Counterclaim

Factually, there is no dispute that Burdene Shores is in actual direct privity of contract with Liberty Mutual. She was a co-insured under the policy of insurance issued by Liberty Mutual to she and her husband, Unior Shores – the Shores.

Judge Pullan, relying upon Sperry v. Sperry 990 P.2d 381, 1999 UT 101 (Utah 1999), dismissed Burdene Shores' bad-faith counterclaim against Liberty Mutual by

finding, as a matter of law, that Burdene Shores was a third-party claimant, and there was therefore no privity of contract between Burdene Shores and Liberty Mutual. Judge Pullan found as a matter of law that as a third party claimant, no bad-faith claim could be asserted against Liberty Mutual by Burdene Shores under Sperry.

It is obvious in both fact and reality that Burdene Shores is in direct privity of contract with Liberty Mutual as a co-insured under the insurance policy in this case.

Judge Pullan misread Sperry. Judge Pullan ruled that no bad-faith claim could be asserted, regardless of any other factors. In Sperry the Utah Supreme Court adopted the position of the insurer (AMCO) that the factors which determine whether a claimant is a first-party or third-party claimant are transaction specific. Sperry, supra, ¶10 and ¶11.

In Sperry, the Utah Supreme Court specifically did not decide the issue as to whether, as in this case, Liberty Mutual could make false representations to its insureds to induce purchase of a contract and thereafter avoid liability as a consequence of those false representations based upon the falsely represented state of the insurance policy. See Sperry, footnote 1.¹

¹ Footnote 1 of Sperry, states in part: “Annette also made a claim that AMCO misrepresented the terms of the insurance policy to her and Robert at the time the policy was purchased. The trial court dismissed this claim against AMCO after its determination that Annette was a third party. However, Annette's status as a third party in the wrongful death action and the misrepresentation and bad-faith actions based on the settlement negotiations should have no bearing on her claim that AMCO misrepresented the terms of the policy when the policy was purchased. In that context, Annette was a first-party purchaser. However, this issue was not briefed by either party and, as a general rule, we will not address issues that are not briefed on appeal. . . Additionally, we understand that the parties, during settlement negotiations, agreed that the household exclusion would not apply and eventually settled the wrongful death claim for the \$100,000 policy limit. In light of that circumstance, it is difficult to see how Annette could prove any damages under her misrepresentation claim. Therefore, we decline to address this issue. “

A comparison of the facts in the Sperry case and this case is instructive – remembering footnote 1 (quoted above) in Sperry – in considering the transaction specific facts under which this case should be viewed.

Factors which are the same in Sperry and this case:

1. There is a family exclusion provision in the insurance policy in both cases.
2. The claimant is a named co-insured in both cases. There was thus direct and actual existing privity of contract in both cases.
3. An adverse party for the underlying cause of action was the spouse of the claimant and a co-insured in both cases
4. The claims against the adverse spouses in the underlying cause of action were presented based (at least partially) on tort theories in both cases.

Factors which are different between Sperry and this case:

1. In Sperry, the family exclusion was total, meaning it excluded all insureds. In this case the family exclusion is a step down provision limiting liability to insureds to \$25,000.
2. In Sperry, there was no apparent claim of a first party nexus or relationship underlying the challenged provision of the insurance policy. In this case, Liberty Mutual relies on the first party relationship of Burdene Shores to Liberty Mutual in enforcing the family exclusion provision of the insurance policy.
3. In Sperry, the claimant successfully challenged the family exclusion provision in the insurance policy; and, the insurer abandoned the family exclusion defense and paid the full amount of the policy limits liability claim before the bad-faith claim was presented to the court.

In this case, Liberty Mutual relies on the family exclusion as a defense to the bad-faith claim of Burdene Shores and asserts its validity for all purposes and has refused to pay anything without a full release of all claims.

4. In Sperry, because the family exclusion was not an issue, in the underlying case the parties occupied totally adverse positions based solely on tort theories. The claimant had the same benefits of, and was entitled to be defended against, by the same methods as any other claimant.

In this case, because the validity of the family exclusion liability limits is the real issue with those liability limits being based upon the privity of contract between Burdene Shores and Liberty Mutual, Burdene Shores has vastly reduced rights of recovery based on an adhesion contract provision governing the relationship between Liberty Mutual and Burdene Shores.

Because of this issue, Liberty Mutual and Burdene Shores occupy both tort and contractual relationships in the underlying case.

5. In Sperry, the bad-faith claim was based on the refusal of the insurer to pay what the claim was worth up to the maximum declared liability policy limits of \$100,000.

In this case, the bad-faith claim is based on the refusal of Liberty Mutual to pay the contractually claimed shield amount of the family exclusion liability limit of \$25,000.

Additional factors:

1. The statutorily mandated minimum liability which both parties agree Burdene Shores is entitled to receive is the \$25,000 which Liberty Mutual has failed and refused to pay to Burdene Shores. This is evidenced by the fact that Liberty Mutual has paid the

\$25,000 into the trial court in this action, pending outcome of this case That statutorily mandated minimum is also the maximum Liberty Mutual insists it is obligated to pay

2. Liberty Mutual has repeatedly refused to pay the \$25,000 family exclusion amount which there is no question is due to Burdene Shores under any liability theory unless and until Burdene Shores gives a full and complete release for all claims against Liberty Mutual – particularly any liability claims exceeding the family exclusion liability limit

3 This action by Liberty Mutual was and is being done in knowing and intentional violation of the public policy of Utah as stated in the statutes and rules of the Utah Insurance Department which govern Liberty Mutual's conduct in settlement activities with persons with whom they are in privity of contract

4 In this case, Liberty Mutual made false representations to the Shores to induce them to purchase the insurance contract which Liberty Mutual now claims shields it from liability beyond the \$25,000 family exclusion liability limit

5 Judge Pullan refused to consider the Utah public policy or the false representations of Liberty Mutual, which are taken as true on a motion to dismiss and under his assumed state of facts on the motion for summary judgment in making his rulings There are still factual issues of great significance before a ruling on summary judgment could be proper, and dismissal was inappropriate

In dismissing the bad-faith counterclaim against Liberty Mutual, Judge Pullan relied exclusively on finding as a matter of law that Burdene Shores was a third party as opposed to a first party bad-faith claimant for all purposes

If Liberty Mutual had abandoned the family exclusion liability limits in this case,

then this case would be directly on point with Sperry. Liberty Mutual relies on the first party relationship with Burdene Shores to avoid payment of the declared policy limits, and using that same first party relationship claims that the family exclusion limits Liberty Mutual's liability to Burdene Shores to \$25,000. A first party bad-faith claim is therefore proper by Burdene Shores against Liberty Mutual.

Burdene Shores occupies positions both as a first party and third party claimant.

In Black v. Allstate, 2004 UT 66 (Utah 2004) the Utah Supreme Court held that Black could pursue a bad-faith claim against Allstate under a fact situation with similarities to both Sperry and this case, wherein the court held:

“¶16 When handling the Gallagher claim, Allstate acted in its capacity as Black's liability insurer and, therefore, potentially owed duties to Black based on Black's insurance policy. Hence, Black properly asserted a cause of action against Allstate based on his own contractual relationship with Allstate, and not on any alleged mishandling of the Black claim, which would only have implicated Allstate's contractual relationship with Gallagher.”

In this case Liberty Mutual refused to pay the \$25,000 due to Burdene Shores based on the family exclusion liability limit founded on the contractual relationship between Liberty Mutual and Burdene Shores limiting liability to \$25,000. The refusal to pay was not based on the lack of liability or arguable lack of liability of Unior Shores for Burdene Shores' injuries.

Judge Pullan refused to consider that there was any first party contractual duty owed to Burdene Shores by Liberty Mutual based on the misapplication of Sperry, that there are no first party issues in this case.

Under Black, where there are both first and third party issues, Burdene Shores is

entitled to pursue first party issues in a bad-faith claim against Liberty Mutual.

The false representations to the Shores as to the terms of the insurance policy also make appropriate a bad-faith claim based on those false representations for purposes of the first party bad-faith claim.

Because of the false representations of Liberty Mutual in negotiating the insurance policy, they support a first party claim for bad-faith against Liberty Mutual.

There is also the issue as to whether the legislative requirements, as interpreted by the Utah Insurance Department, mean anything.

Utah Administrative Rule R590-190-9, titled “Unfair Methods, Deceptive Acts and Practices Defined” in subsection (8) in further clarification of Utah Code §31A-26-303(2)(c) and (3)(h), specifies the following to be misleading, deceptive, unfairly discriminatory or overreaching in the settlement of claims:

“ the failure to settle (and pay) claims by persons in privity of contract with an insurer within 30 days of the claim being made when liability is reasonably clear under one coverage in order to influence settlements under other portions of the insurance policy coverage.”

The public policy of Utah thus declared, while not providing a separate cause of action, provides guidance as to what Utah requires of Liberty Mutual when there is privity of contract with a claimant such as Burdene Shores.

Burdene Shores is in actual direct privity of contract with Liberty Mutual about the insurance contract provision which is the primary subject of this case. Liberty Mutual seeks to enforce that provision based on that contractual privity.

The fiction that persons in actual direct privity of contract are not in such privity was

created to allow an insurer to pursue all proper tort (non-contractual) defenses against liability to a claimant. In this case, Liberty Mutual has all proper tort defenses intact and additionally, Judge Pullan found that Burdene Shores, because of privity of contract with Liberty Mutual, cannot pursue any claims beyond the contractually limited family exclusion liability limit maximum which Liberty Mutual claims is due.

In this case, following the fiction that there is no privity between Liberty Mutual and Burdene Shores is unfair and results in Liberty Mutual taking advantage of both tort and contractual defenses against Burdene Shores without any recourse by Burdene Shores.

To sustain the fiction in this case, unfairly deprives Burdene Shores of her rights, and allows Liberty Mutual to defeat the declared public policy of Utah by contract.

Improper Granting of Liberty Mutual's Motion for Summary Judgment and Dismissal of the Shores' claims for Declaratory Relief

Liberty Mutual's motion for summary judgment deals directly with the issue of the family exclusion liability limits provision of the insurance policy.

Judge Pullan refused further discovery and ruled that the claims of Burdene Shores against her husband Unior Shores were governed by the family exclusion liability limits provision of the insurance policy.

Judge Pullan refused to consider any factual issues, the failure of Liberty Mutual to follow Utah statutes and regulations in drafting its contract of adhesion, case law, or any matter other than the language of the family exclusion buried on page 22 of a 46-page insurance policy, the terms of which were only provided to the Shores after the insurance

policy was purchased; and, the terms of which were contrary to the express representations made by Liberty Mutual in selling the policy to the Shores.

The Insurance Policy Fails to Clearly State the differing risks and Limits of Liability as required by statute

Without specifically so stating, Judge Pullan implicitly ruled that Liberty Mutual is not required to follow Utah statutory law.

Utah Code §31A-21-308 (enacted in 1985 in its present form) provides:

“Limitations on loss to be borne by insurer. (1) An insurance policy indemnifying an insured against loss may by clear language limit the part of the loss to be paid by the insurer to a specified or determinable maximum amount, to loss in excess of a specified or determinable amount, to a specified proportion of the loss which may vary with the amount of the loss, or to any combination of these methods. If the policy covers various risks, different limitations may be provided separately for each risk, if the policy clearly states that.” [Emphasis added]

In this case, Liberty Mutual has provided different limits of liability between the general class of claimants, and the class of insured claimants. \$100,000 for the general class of claimants – \$25,000 for insured claimants, such as Burdene Shores.

The insurance policy (on pgs. 28 and 29; RoA, pgs. 39 and 38) contains a long list of differing risks or rating factors which Liberty Mutual used in setting its rates in the insurance policy. None of those risks or rating factors include any reference to or relate in any way to an insured, by being an insured, as a risk or rating factor different from any other classification. Nowhere in the policy is there a statement that an insured, by being an insured, is a differing risk or rating factor.

Looking at the insurance policy itself provides no information about how the different limitations and risk rating for “insureds” as Liberty Mutual has done was

determined..

Liberty Mutual argued in the trial court that differing risks under the statute are only differing types of coverage such as liability, uninsured motorist, underinsured motorist, PIP, etc. And, therefore that the differing coverage or limits of liability provided for insureds were not governed by this statute.

By its plain language, Utah Code §31A-21-308 only allows differing limits of liability for differing risks if those differing risks and limits of coverage are clearly stated. Conversely, the statute does not allow differing limits of liability where there are no differing risks or the limits of such differing risk coverage are not clearly stated.

Differing types of coverage are certainly differing risks and their differing risks and coverage limits are clearly stated in the insurance policy declarations.

The statute only allows differing limits of coverage if there are differing risks associated with those differing limits of coverage and those differing limits and risks are clearly stated.

This issue turns on the definition of a “risk”.

Black’s Law Dictionary, Seventh Edition (1999), p. 1328, among many definitions defines “risk” as:

“1. The chance of injury, damage or loss, damages or hazard

* * *

3. *Insurance*. The chance or degree of probability of loss to the subject matter of an insurance policy <the insurer undertook the risk in exchange for a premium>.

4. *Insurance*. The amount that an insurer stands to lose <the underwriter took steps to reduce its total risk>.

5. *Insurance*. A person or thing that an insurer considers a hazard; someone or something that might be covered by an insurance policy <she’s a poor risk for health insurance>.

6. *Insurance*. The type of loss covered by a policy; a hazard from a specific source <this homeowner's policy covers fire risks and flood risks>."

In the Funk & Wagnalls Standard College Dictionary (1963) p. 1160, "risk" is defined as:

"In insurance, hazard of loss, as of a ship or cargo, or of goods or other property; also, degree of exposure to loss or injury. An obligation or contract of insurance on the part of an insurer to take a risk . . . An applicant for an insurance policy considered with regard to the advisability of placing insurance upon him. . ."

In Webster's Third New International Dictionary (1971) p. 1961, among many definitions, "risk" is defined as:

"**3 a.** (1) : The chance of loss or the perils to the subject matter of insurance covered by a contract. (2) : The degree of probability of such loss. . . . **c.** person or thing judged as a (specified) hazard to an insurer (a poor ~ for insurance) **d.** an insurance hazard from a (specified) cause or source (war ~) (disaster ~)."

Many other similar definitions could be cited.

The usually accepted definition of a "risk" can thus be a line of insurance coverage as claimed by Liberty Mutual, and can also be an applicant or class of applicants considered with regard to the advisability of placing insurance upon them. This latter definition is appropriate to this issue in this case.

The Utah Insurance Code does not directly define what is meant by a "risk", but does give definition by implication in other definitions.

Utah Code §31A-1-301. Definitions. States in part:

'(135) (a) "Rate" means:

- (I) the cost of a given unit of insurance; or
- (ii) for property-casualty insurance, that cost of insurance per exposure unit either expressed as:
 - (A) a single number; or
 - (B) a pure premium rate, adjusted before any application of

individual risk variations based on loss or expense considerations to account for the treatment of:

- (I) expenses;
 - (II) profit; and
 - (III) individual insurer variation in loss experience.”
- (Emphasis added)

Utah Code §31A-19a-102. Definitions, states in part:

“(12) (a) "Rate" means that cost of insurance per exposure unit either expressed as:

- (I) a single number; or
- (ii) as a pure premium rate, adjusted before any application of **individual risk variations**, based on loss or expense considerations to account for the treatment of:

- (A) expenses;
- (B) profit; and
- (C) individual insurer variation in loss experience.

(b) "Rate" does not include a minimum premium.

(13) "Rating tiers" means an underwriting and rating plan designed to **categorize insurance risks** that have common characteristics related to potential insurance loss into broad groups for the purpose of establishing a set of rating levels that **reflect definable levels of potential hazard or risk**.

It is apparent that both of the above statutes and Utah Code §31A-21-308 closely relate rates to their associated risks.

In *West Jordan v. Morrison*, 656 P.2d 445 (Utah 1982) the court stated:

“We have frequently stated that this Court's primary responsibility in construing legislative enactments is to give effect to the Legislature's underlying intent. See, e.g., *Millett v. Clark Clinic Corp.*, Utah, 609 P.2d 934 (1980). We have also said that a statute should be applied according to its literal wording unless it is unreasonably confused or inoperable. See *Gord v. Salt Lake City*, 20 Utah 2d 138, 434 P.2d 449 (1967). We must assume that each term in the statute was used advisedly by the Legislature and that each should be interpreted and applied according to its usually accepted meaning. Where the ordinary meaning of the terms results in an application that is neither unreasonably confused, inoperable, nor in blatant contradiction to the express purpose of the statute, it is not the duty of this Court to assess the wisdom of the statutory scheme.”

Many cases state this same principle. See, for example, *Alternative Options v.*

Chapman, 2004 UT App 488, 106 P 3d 744 (Utah App 2004), Alliant Techsystem, Inc. v Tax Comm , 2003 UT App 374 80 P 3d 582 (Utah App 2003)

In absence of a clear contrary definition of “risks” in the statute, the ordinary and usually accepted meaning prevails

The statutes clearly require rates to be set based on risks By setting differing limits of liability for insureds, as opposed to the limits for the general public, Liberty Mutual has created a separate risk classification for insureds Liberty Mutual failed to clearly identify that risk or the rating factors associated with that risk in its insurance policy

Because of the failure of Liberty Mutual to base the differing limits of liability for insureds under the insurance policy on differing risks, the limits of liability structure violates Utah Code §31A-21-308

Judge Pullan refused to allow further discovery to determine how Liberty Mutual set its rates and what risks and other factors were considered in setting the liability limits and rates for insureds as opposed to the liability limits and rates that were different from those applied to claimants in general

At a minimum, the issue of risk and rating factors invites and requires significant further discovery which Liberty Mutual has refused to provide, to determine how or whether the class of insureds is a valid basis of a differing risk and rate structure by Liberty Mutual

Hidden (on page 22, RoA, pg 45) in the insurance policy, are the different liability limits or family exclusion liability limits applicable to liability claims made by the class of insureds under the policy There is no differing risk or rating factor identified as the

differing risk associated with being an insured. Even if there were in fact differing risks, those rates and risks are not clearly stated as the statutory structure requires.

The statement of differing policy limits for insureds is not clearly stated in the insurance policy.

All other policy limits given in the insurance policy refer to the declarations of the policy. Looking at the declarations (pgs. 2 through 4 of the insurance policy – RoA, pgs. 65 through 63), there is a list of policy limits for:

Liability – both bodily injury and property damage stated as simple dollar amounts.

Uninsured Motorists – both bodily injury and property damage stated as simple dollar amounts.

Underinsured Motorists – bodily injury stated as simple dollar amounts.

PIP stated as simple dollar amounts.

Comprehensive stated as actual cash value less a deductible.

Collision stated as actual cash value less a deductible.

Towing stated as a simple dollar amount.

All policy limits – except the liability limits under the family exclusion for insureds only, buried on page 22 of the insurance policy, are stated in the declarations in an easily found, easily read and easily understandable fashion. In most cases, and as appropriate, these limits are stated as simple dollar amounts.

Why is the liability limit for insureds stated in a very obscure location and in an obtuse fashion? It is difficult for an attorney, let alone a normal person or the aged Shores in this case to understand what is being said in the family exclusion liability limits

provision of the insurance policy. It is not clearly stated.

The Liberty Mutual insurance policy was marketed to elderly, retired veterans. They are responsible to know the market and generally reduced mental capacities of that group.

The question is thus, what does the Utah Code §31A-21-308 requirement of being “clearly stated” mean?

Simple dollar amounts are clearly stated. Actual cash values are clearly stated.

All of the coverage limits of the insurance policy stated in the declarations appear clearly stated.

Are the different exclusionary liability limits for insureds clearly stated? Judge Pullan found that they were, without allowing any factual inquiry.

Was the placement of the family exclusion – buried deep within the insurance policy where almost no-one, except lawyers – dare to tread, done to obscure the provision and make sure insureds would not know about it unless there was a claim? That is a fact question which a jury should decide, after the opportunity for appropriate discovery.

The issue as to whether the limit of liability for insureds is clearly stated, is a fact question for the jury. However, further examination of the issue is helpful.

A recitation of the family exclusion buried on page 22 (RoA, pg. 45) of the insurance policy illustrates the lack of clarity. The insurance policy states, under the page caption of “**Amendment of Policy Provisions – Utah**”:

1. Part A. Liability Coverage.

Part A is amended as follows:

“Paragraph A of the Insuring Agreement is replaced by the following:

A. We will pay damages for “bodily injury” or “property damage” for which any “insured” becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for

these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted by payment of judgment or settlements. We have no duty to defend any suit or settle any claim for “bodily injury” or “property damage” not covered under this policy.

B. The following exclusion is added:

We do not provide Liability Coverage for any “insured” for “bodily injury” to you to the extent that the limits of liability for this coverage exceed the applicable minimum limits for liability specified by UTAH CODE ANN. Section 31A-22-304. The applicable minimum limits are:

1. \$65,000 for each accident, if the limits of liability for this coverage is a single limit that applies for each accident; or
2. \$25,000 for each person / \$50,000 for each accident, if the limit of liability for this coverage is indicated as a split limit.”

An attorney must read through the above family exclusion several times before there is any certainty about what is being said.

How would a normal 50 year old understand the provision? How would a normal 75 year old understand it? How would a normal 81 year old understand it?

Judge Pullan’s apparant finding, as a matter of law, that the liability limits for insureds are clearly stated in the insurance policy is clearly erroneous.

Liberty Mutual’s physical construction of the insurance policy is intended to confuse and create a lack of clarity

All the limits of coverage for the insurance policy are contained in the declarations, except for the family exclusion liability limit for insureds. Liberty Mutual used the family exclusion to deny proper coverage to Burdene Shores.

In absence of the family exclusion, plainly stated in the insurance policy declarations (pg. 3; RoA, pg. 64) there is a coverage limit of liability for bodily injury to

Burdene Shores in this case of \$100,000.

In absence of the family exclusion, clearly stated on page 8 of the insurance policy (RoA, pg. 59) there is a reference to the policy limits of liability, as stated in the declarations, as the maximum Liberty Mutual is obligated to pay in this case to Burdene Shores.

Stated on pgs. 8, 9 and 10 of the insurance policy (RoA pgs. 59, 58 and 57) is a list of clearly stated exclusions from liability coverage for a number of actions and situations. They are true exclusions, not the confusing step down family exclusion provision hidden on page 22 of the insurance policy.

Plainly stated on page 10 of the insurance policy (RoA, pg. 57) is the contractual definition of the “**Limit of Liability**” Liberty Mutual is obligated to pay to Burdene Shores in this case. It states:

“LIMIT OF LIABILITY

- A. The **Limit of Liability shown in the Declarations** for each person for Bodily Injury liability is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of the “bodily injury” sustained by any one person in any one auto accident. Subject to this limit for each person, the **limit of liability shown in the Declarations** for each accident for Bodily Injury Liability is maximum limit of liability for all damages for “bodily injury” resulting from any one auto accident.” [Emphasis added]

This contract definition of the “**limit of liability**” is the definition which controls the insurance policy in this case. That limit of liability is clearly the limit of liability stated in the declarations. Nowhere in the insurance policy is the definition of limit of liability modified from the above.

The definition repeatedly makes absolute reference to the policy limits specified in

the declarations as the most Liberty Mutual is obligated to pay to Burdene Shores.

Hidden on page 22 (RoA, pg. 45) of the insurance policy is the family exclusion, a Utah specific amendment which is first a reference to the policy limits of liability (as specified in the declarations) which is substantively identical to the provision on page 8 of the insurance policy, with an added obtuse and confusing, part ‘B’ exclusion that Liberty Mutual will not provide coverage to the extent that the applicable policy limits exceed the applicable minimum limits for liability specified by Utah Code §31A-22-304, and then states that those applicable minimum limits – not the maximum, or policy limits to be paid, are \$25,000 for an insured. The policy does not call this a policy limit, but calls it an exclusion or minimum limit. That is ambiguous and it is not plain to a non-elderly and certainly not an elderly person of ordinary intelligence. At worst, this ambiguity is a factual question for the jury, not for a pronouncement of law by Judge Pullan.

A clearly stated limit of liability would have been \$25,000 per person, \$50,000 per accident, stated in the declarations to the insurance policy with all other limits of coverage – including other Utah specific limits. That did not occur.

The Structure of the insurance policy and placement of Liberty Mutual’s family exclusion limits of liability statements in the insurance policy were intended to confuse and mislead purchasers of insurance.

The structure of the insurance policy has:

1. A set of limits of liability stated in the declarations on pages 2 and 3.
2. A reference to the limits of liability of the declarations stating that is the

maximum Liberty Mutual is obligated to pay on page 8.

3. A definition of limits of liability referring to the declarations, stating those are the limits of liability on page 10.
4. An amendment (the Utah specific family exclusion), which first refers to the limits of liability stated in the declarations, followed by a confusingly worded exclusion which reduces those limits of liability to something only one-fourth (1/4) of that stated in the declarations. This is located on page 22 of the insurance policy.

Liberty Mutual created the structure of the policy.

Liberty Mutual stated affirmatively at least four (4) times in the insurance policy that the liability limits were as stated in the declarations.

By a confusing exclusionary amendment, Liberty Mutual then changes those policy limits for insured to something different than that stated in the declarations.

Liberty Mutual created the policy – including its confusing structure.

The format of the insurance policy follows something which might have been necessary in the late 1800s, where, because of the printing technology of the time, it was arguably necessary to attach amendments so that an agreement could be created with variations without having a secretary laboriously retype or rewrite everything, each time with the likelihood of many errors creeping in.

In the technology of the 21st century, or the mid-20th century, it is trivial to prevent conflicting amendments and provisions in an insurance policy when it is originally issued.

There is an argument for amendments after original insurance policy issuance to be

as additional non-included pages. There is no valid argument for the original issue of an insurance policy to include multiple and conflicting definitions of the same terms.

The simplest level of that technology which would be more than adequate to avoid confusing and conflicting separate amendments is word processing – perhaps a merge document. The correct provisions could easily be included in line in the policy in one appropriate place without duplication and without conflicting provisions.

What Liberty Mutual has done in the insurance policy would be equivalent to this brief being prepared as a stock document with a cover sheet having the names of the parties, and the issues on appeal. Then a core having allegations of jurisdiction, the statutes and rules which are relevant to this appeal in New York and California. The case law that is relevant in New York and California and a conclusion. Then, at the back of the brief, is an attachment with Utah statutes and cases which really control and a statement that the New York and California law presented at the beginning doesn't mean anything. It is just added to pad the document because that's the way it done and to make it confusing.

Then this court is supposed to ignore all arguments which don't apply to the case. The court would then be required to sift through all non-relevant arguments and find the real arguments in the brief.

The above hypothetical is stretching things. But actually not as much as exists in the insurance policy. At least in appeals there are lawyers who probably have seen many appellate briefs or court arguments, and know to look at the back to find the real law. With insurance consumers, they don't have that experience, education or training with multiple insurance contracts and don't know that the amendments are hidden at the back or in the

middle, and what they mean.

With a simple word processing merge type document, there is no need for any conflicting provisions in an originally issued insurance policy, or contradictory limits of liability in more than one place.

It would not be reasonable for Liberty Mutual to allow its billing and accounting practices to exist in the fashion common in the 1800s – the manual use of quill and pen to track payments, underwriting and liabilities. Neither is it reasonable for Liberty Mutual to mislead innocent consumers by purposefully using the confusing lack of document creation technology of the 1800s in the 21st century and then claim innocent purchasers should understand that clearly stated limits of liability are reduced by a hidden, obtuse, ambiguous, and conflicting exclusion.

Liberty Mutual can choose any method in creating its insurance policy forms. However, Liberty Mutual is bound by and liable for the reasonableness of the method chosen, the conflicting provisions, ambiguities and problems created by failing to use current technology which is readily available to eliminate intentional ambiguities, confusion and problems which it has thus created.

The controlling case law in Utah is *Farmers v. Versaw*, 2004 UT 73, 99 P. 3d 796 (Utah 2004), wherein the Utah Supreme Court held that an insurance contract was ambiguous and stated:

“¶8 To communicate its terms with adequate clarity, a contract of insurance must use language and grammar capable of understanding by a reasonable insurance purchaser. *U.S. Fid. & Guar. Co. v. Sandt*, 854 P.2d 519, 521-22 (Utah 1993). We have formulated the test for insurance contract clarity this way:

‘Would the meaning [of the language of the insurance contract] be plain to a

person of ordinary intelligence and understanding, viewing the matter fairly and reasonably, in accordance with the usual and natural meaning of the words, and in the light of existing circumstances, including the purpose of the policy[?]' *LDS Hosp. v. Capitol Life Ins. Co.*, 765 P.2d 857, 858 (Utah 1988) (quoting *Auto Lease Co. v. Cent. Mut. Ins. Co.*, 7 Utah 2d 336, 339, 325 P.2d 264, 266 (Utah 1958)).

¶9 This test is supplemented by our observation that ambiguities typically appear in two forms: 'An ambiguity in a contract may arise (1) because of vague or ambiguous language in a particular provision or (2) because two or more contract provisions, when read together, give rise to different or inconsistent meanings, even though each provision is clear when read alone.' *Sandt*, 854 P.2d at 523. Both types of ambiguity infect the terms of Farmers's E-Z Reader Car Policy . . ."

In this case, the existing circumstances are that the insurance policy was marketed to elderly, retired, veterans. Liberty Mutual intentionally used the technology of the 1800s to create an ambiguous, conflicting and confusing insurance policy when a simple non-confusing policy could easily have been created using mid-20th century technology.

The concepts stated in *Versaw* should be expanded, if necessary, to include ambiguities caused by confusing and contradictory insurance policy structure intentionally created by Liberty Mutual when such structure is ambiguous, contradictory, obtuse and not easily understood by a person of ordinary intelligence.

In this case the vague and obtuse family exclusion liability limits do not clearly state liability limits for insureds. They state an exclusionary minimum limit. They are hidden deep within the insurance policy. Exclusions are not easily understood by a person of ordinary intelligence unless clearly stated and placed to be easily found. In this case the exclusion was not clearly stated so as to be understood by a person of normal intelligence, and it took diligence to even find the family exclusion.

In *USF&G v. Sandt*, 1993.UT.146, 854 P.2d 519 (1993) at 522 the Utah Supreme

Court stated:

“The extent of USF&G's liability in this case turns on the language of USF&G's policy and the rules of construction that apply to insurance policies. Since 1921 this Court has expressed its commitment to the principle that ‘insurance policies should be construed liberally in favor of the insured and their beneficiaries so as to promote and not defeat the purposes of insurance.’ . . .

* * *

In the usual situation the insured makes application for a policy which is described to him in general terms. He seldom sees it until it is issued and delivered to him. He is not acquainted with its numerous refinements and particularly the exclusions from coverage. For this reason the rule of strictissimi juris has been applied almost universally to insurance contracts, giving a liberal construction in favor of the insured toward the coverage which the insured reasonably could assume he is buying and for which he pays his premium. We have heretofore held that the insured is entitled to the broadest coverage he could reasonably understand from the policy.

It follows that ambiguous or uncertain language in an insurance contract that is fairly susceptible to different interpretations should be construed in favor of coverage. . . . It also follows that if an insurance contract has inconsistent provisions, one which can be construed against coverage and one which can be construed in favor of coverage, the contract should be construed in favor of coverage. . . .”

In this case there are directly contradictory provisions created by Liberty Mutual’s intentionally confusing structure of the insurance policy.

Four statements are made in the insurance policy that the limit of liability is stated in the declarations.

There is one ambiguous, obtuse and confusing exclusionary statement that the policy liability limits for insureds is not as stated in the declarations.

Liberty Mutual seeks to enforce the exclusionary statement which it has hidden deep in the insurance policy with the apparent intent to hide it’s meaning from its insureds to whom it has specifically marketed the insurance policy – elderly, retired veterans.

If the family exclusion provision is valid at all, the Liberty Mutual insurance policy

in this case violates Versaw, and the intent expressed in Versaw.

Validity of the Family Exclusion Provision of Liberty Mutual's insurance policy.

The Utah Supreme Court addressed the issue of the validity of the family exclusion in insurance policies in Utah. In Farmers v. Call, 1985.UT.229, 712 P.2d 231 (1985) at II:

“The next issue is whether a household exclusion clause in an automobile policy is valid as to the policy limits in excess of the statutory minimums. The defendant offers two alternative theories. First, she claims that the exclusion clause is void as against public policy. Secondly, she argues that in the event the household exclusion clause is found to be void as to minimum coverages, it should be voided entirely since neither she nor her husband ever had notice of the existence or import of the household exclusion. We agree with the defendant's second theory and **decline to address at this time the validity of the household exclusion clause in excess of the statutory minimums.**

* * *

[A]utomobile insurance is generally sold through adhesion contracts that are not negotiated at arm's length. Purchasers commonly rely on the assumption that they are fully covered by the insurance that they buy. Because of this, **public policy requires that persons purchasing such policies are entitled to be informed, in writing, of the essential terms of insurance contracts, especially exclusionary terms.**

We therefore hold that where the insurer fails to disclose material exclusions in an automobile insurance policy and the purchaser is not informed of them in writing, those exclusions are invalid. Without disclosure, the household exclusion clause fails to ‘honor the reasonable expectations’ of the purchaser, rendering the exclusion clause invalid as to the entire policy limits.” [citations omitted, emphasis added]

A good discussion of the general factors underlying the family exclusion is presented in Meyer v. State Farm, 689 P. 2d 585, 52 ALR4th (Colorado 1984) wherein the court held the family exclusion invalid. The statutory structure in Colorado was similar to Utah's structure. The court first found the family exclusion invalid as to limits below the

minimum mandatory (no fault) coverage amounts, and then went on to find at page 13:

“In summary, we hold that the household exclusion is invalid. The exclusion is neither authorized by statute nor in harmony with the legislative purpose mandating liability insurance to provide coverage for bodily injury and property damages to avoid inadequate compensation to victims of accidents.

* * *

An additional issue is raised . . . State Farm argues that if the household exclusion clause is invalid, the limits of liability should be restricted to . . . the minimum amount of liability coverage required by the Act . . . rather than the full amount of liability coverage provided by the policy. In order to resolve this issue, we must choose between two equally compelling arguments.

The view which supports the position advanced by State Farm can be summarized as follows: Where an automobile insurance policy contains an exclusion which is declared invalid because it conflicts with a statute mandating liability coverage and the policy limits exceed the minimum statutory requirements, the carrier’s liability is limited to the minimum coverage required by statute. . . .

However, we are more persuaded by the insured’s argument. The Act specifically provides that insurance policies may provide greater coverage than the minimum specified in the Act. . . . This provision is consistent with the legislative intent to avoid inadequate compensation to victims of automobile accidents. . . . Here the insured purchased more coverage than required by the Act. We hold that where the household exclusion has been held invalid because it violates the Act, the limits of the carrier’s liability are those provided by the policy and not the lesser limits required by the statutory standard.”

(Citations Omitted)

In Call there was no evidence that Farmers ever delivered the policy to its insureds.

The variant factual question presented in this case is whether Liberty Mutual materially failed to deliver (or actively hid) the family exclusion policy provision on which they rely in denying appropriate coverage; and, whether the Shores were therefore not substantively informed of the exclusion in writing.

A corollary issue in this case is whether placing the family exclusion liability limits for insureds in an obscure location of a lengthy policy – without being specified in the declarations, defeats any written notice the insurance policy may arguably provide.

In this case, there was no substantive written notice to the Shores of the family

exclusion liability limits for insureds. Call covers the situation of this case, or if it does not, should be extended to cover this situation.

Liberty Mutual owes a duty of reasonable disclosure, especially when it intentionally markets its products to elderly, retired persons. It may be reasonably inferred that Liberty Mutual relied on the confusion and trust of elderly, retired insureds to misrepresent the facts regarding coverage provided by its insurance policy in this case.

Liberty Mutual knew that few, if any, insureds – especially elderly insureds, would ever read a lengthy policy, or understand it if they read it. Liberty Mutual relied on that. At a minimum, the Shores should have been allowed to conduct discovery on this issue.

In State Farm v. Mastbaum 1987.UT.331, 748 P.2d 1042 (Utah 1987), the Utah Supreme Court upheld a family exclusion for automobile insurance policies issued pre-1986. However, in Mastbaum, two justices (Howe joined by Hall) wrote the main plurality opinion; two justices (Zimmerman joined by Stewart) wrote a concurring opinion with the statement that if the insurance policy which was the basis of the case had been issued post the 1986 amendments to the Utah Statutes, then the family exclusion would have been entirely invalid. Justice Durham dissented also arguing that the family exclusion was entirely invalid both post and pre-1986.

Judge Pullan refused to follow Mastbaum by stating that the comments of Justice Zimmerman in the concurring opinion were simply dicta and were not controlling.

Since “dicta” is any statement not necessary to the decision immediately before the court, Justice Zimmerman’s statements in the concurring opinion were dicta as were the statements of Justice Durham in the dissenting opinion. However, that dicta and that

dissenting opinion combined constituted a majority of the court and was given to guide future cases, including this case. The concurring opinion dicta and dissenting opinion of Mastbaum is controlling law which this court should uphold and follow in this case.

Mastbaum is consistent with the arguments and holding of Meyer v. State Farm, supra, and should be followed as the law in Utah.

Judge Pullan improvidently relied on Calhoun v. State Farm, 96 P.3d 916, 2004 UT 56 (Utah 2004) and Allstate v. U.S.F.&G., 1980 UT 223, 619 P.2d 329 (Utah 1980) for the proposition that parties are free to have any exclusions agreed to in excess of the minimum statutory limits required by law. These two cases are factually not in point with this case. Both cases involve coverage for specifically excluded drivers under insurance policies. Utah Code §31A-22-303(7) specifically provides for the exclusion of named drivers under specified circumstances. Such exclusions are valid if the statutory requirements are satisfied. In these cases the statutory requirements were satisfied and the exclusions were therefore valid.

Because specific statutorily authorized exclusions are permissible does not equate to the Liberty Mutual family exclusion being valid in this case. There is no statutory approval for the family exclusion.

The family exclusion provision of Liberty Mutual in this case is invalid as against the public policy of Utah post-1986 under Mastbaum, supra

Liberty Mutual's false representations, that the Liberty Mutual insurance policy contained the same coverage as the Shores' prior insurance policy, make the family

exclusion liability limits for insureds unenforceable.

Liberty Mutual, through their agent Ryan Farnsworth, falsely represented to the Shores that the Liberty Mutual insurance policy which Farnsworth convinced the Shores to purchase contained the same coverage as the policy it was replacing from Met Life.

Facts were presented by affidavit both supporting this fact and opposing it. Judge Pullan refused to consider this factual dispute and ruled it made no difference to his ruling. See para.15 and 16 of Judge Pullan's judgment and order dated January 27, 2005 (RoA, page 437). See also, pgs. 18, 19; 29, 38, 45 and 48 through 54 of the Transcript of December 10, 2005 hearing.

Judge Pullan, in effect, ruled that the false representations of Liberty Mutual to the Shores (who are elderly, retired purchasers of insurance) as to the coverage they were purchasing cannot be inquired into; and, in any event do not overcome the falsely represented and materially undisclosed family exclusion which Liberty Mutual, after the sale, had hidden in the insurance policy actually delivered to the Shores.

Judge Pullan also ruled that no discovery on this issue may be had, since it does not matter to the outcome of the case.

The conduct of Liberty Mutual and Judge Pullan's upholding of that conduct constitute a travesty of justice which should have a remedy. The minimum remedy is that the Shores should have the opportunity to inquire into Liberty Mutual's sales practices to elderly, retired veterans including the Shores, and more particularly into the false representations of their insurance agent, Ryan Farnsworth, in this case.

Liberty Mutual argued at the December 10, 2004 hearing on their motion for

summary judgment that the Family Exclusion provision of their insurance policy was the same as the Met Life policy which it replaced. That is clearly false.

The Met Life policy contains a clearly invalid total family exclusion under Mastbaum, supra.

Liberty Mutual convinced Judge Pullan that the Liberty Mutual family exclusion was the same as the Met Life family exclusion. Such is not the case.

A clearly drafted and disclosed family exclusion in excess of the statutory minimums may be valid if the clear language of the concurring and dissenting opinions in Mastbaum are ignored and construed as non-controlling dicta.

However, the total family exclusion in the Met Life policy is clearly invalid under the holding of Mastbaum, unless the court places language in the Met Life insurance policy which does not exist.

If the Liberty Mutual family exclusion liability limits for insureds were clearly drafted and properly disclosed and therefore could be enforceable, is not the same as the Met Life total family exclusion which is clearly invalid.

There was therefore, in fact, a misrepresentation of policy limits and terms by Liberty Mutual to induce the sale of the insurance policy.

This misrepresentation makes the family exclusion provision of the insurance policy unenforceable by Liberty Mutual.

The exact mechanism leading to unenforceability will be determined in appropriate discovery, including one or more of the following theories to be pursued based on the outcome of that discovery:

a request to reform the contract to reflect the intent of the parties,
a misrepresentation claim for damages against Liberty Mutual, and
fraud at the inception and a claim for damages against Liberty Mutual.

**Improper refusal to allow the Shores to conduct appropriate discovery on issues of
Liberty Mutual's motion for summary judgment**

Liberty Mutual is the plaintiff in this case. The case was filed February 9, 2004 by Liberty Mutual.

Liberty Mutual stalled discovery until September of 2004. A minimal amount of discovery was done, but no meaningful disclosures were ever made by Liberty Mutual.

Liberty Mutual filed its motion for summary judgment on September 16, 2004. Oral argument on that motion occurred on December 10, 2004. Judge Pullan denied any further discovery before ruling on the summary judgment motion.

Liberty Mutual's motion for summary judgment was essentially treated as a motion for judgment on the pleadings or motion for dismissal, without benefit of any substantive discovery. There are many factual issues which need to be inquired into as pointed out in the preceding arguments. It was improper for Judge Pullan to allow Liberty Mutual to stall, and certainly improper to deny the benefit of further discovery, when there are meaningful and significant factual disputes which should have precluded summary judgment without benefit of appropriate discovery. Those factual issues include:

1. Facts surrounding misrepresentations in the sale of the insurance policy to the Shores.

2. The marketing practices of Liberty Mutual to elderly retired military personnel, including:
 - (a) The intent of Liberty Mutual in failing to disclose the family exclusion in the declarations; and,
 - (b) The reasons the family exclusion is not stated in an understandable and clear fashion as required by Utah law.
3. How often Liberty Mutual has taken advantage of insureds in Utah by improperly enforcing an invalid family exclusion to deny appropriate coverage, as specified in the declarations.
4. Liberty Mutual's use of the family exclusion provision in other states.
5. The hiding of the family exclusion liability limits outside of the insurance policy declarations, and reasons for non-placement in the declarations; and,
6. The reasons for lack of clarity in structure and wording of the family exclusion policy limits.

CONCLUSION AND RELIEF SOUGHT

Burdene Shores' Bad-Faith Counterclaim against Liberty Mutual Should be Allowed to go Forward

Burdene Shores' bad-faith counterclaim was improperly dismissed by Judge Pullan. The bad-faith counterclaim was based on the first party contractual relationship of Burdene Shores to Liberty Mutual, not her (also present) third party claim for damages against her co-insured husband. The determination of whether a claim is first party or third party is transaction specific.²

Liberty Mutual holds fast to the claim that because Burdene Shores had agreed to the family exclusion provision as an insurance co-purchaser, Liberty Mutual had no obligation to pay more than the family exclusion amount to Burdene Shores.

The bad-faith claim is based on this claimed contractual limitation on which Liberty Mutual strongly relies.

The bad-faith occurred because there is no issue that Burdene Shores is entitled to recover the \$25,000. Liberty Mutual has refused to pay the \$25,000 to her without a complete release of all liability, even though Burdene Shores' medical specials exceed that \$25,000.

Utah public policy requires Liberty Mutual to pay Burdene Shores' claim for \$25,000 because the liability is reasonably clear; and, Liberty Mutual may not use non-payment of that reasonably clear claim to force settlement under other portions of the insurance policy. Such payment was required to be made within 30 days of the claim being

² See discussion *Sperry v. Sperry*, footnote 1, *supra*.

made³. Conduct such as Liberty Mutual followed in this case is an unfair claims settlement practice.

It is requested that Judge Pullan's dismissal of Burdene Shores' bad-faith counterclaim be reversed, the bad-faith counterclaim be reinstated and allowed to proceed to discovery and as appropriate, to trial.

The Summary Judgment for Liberty Mutual and Dismissal of the Shores' Counterclaims Should be Reversed and the Case Allowed to Go to Trial

Judge Pullan improperly found Liberty Mutual's family exclusion provision both generally valid and valid in the circumstances of this case.

Liberty Mutual's family exclusion is invalid as against Utah public policy, and invalid in the context of this case because of false representations of the sales agent in selling the insurance policy to the Shores.

It is requested that the granting of summary judgment and dismissal of the Shores' counterclaims for declaratory relief be reversed.

It is requested that the Liberty Mutual style of family exclusion be declared invalid and against the public policy of Utah.

It is requested that the Liberty Mutual family exclusion be found invalid and unenforceable against the Shores because of the false representations of Liberty Mutual in

³ See discussion under Detailed Argument, Improper Dismissal of the Bad-Faith Counterclaim, Additional Factors, supra, for discussion of Utah Administrative Rule R590-190-9, titled "Unfair Methods, Deceptive Acts and Practices Defined" in subsection (8) in clarification of Utah Code §31A-26-303.

the sale of the insurance policy; or, at a minimum, that summary judgment and the dismissal be reversed and the Shores be allowed to conduct discovery on the issues.

If the Liberty Mutual family exclusion is generally found to be valid, it is requested that the case be allowed to proceed on the factual issues surrounding the false representations which induced the Shores to purchase the insurance policy to determine the validity of the insurance policy under the facts of this case.

It is requested that the Shores be allowed to move forward and go to trial on their counterclaims for declaratory relief against Liberty Mutual.

The Shores should be allowed appropriate Discovery before Dispositive Rulings by the Court

The trial court improperly allowed Liberty Mutual to stall discovery in this case; and, improperly refused to allow further discovery before ruling on Liberty Mutual's motion for summary judgment and dismissal of the Shores' declaratory judgment claims.

The summary judgment and dismissal should be reversed and remanded for further discovery before ruling on a fact-dependant motion which Liberty Mutual might present.

Additionally, the Shores should be allowed to complete discovery to determine if other theories need to be advanced in support of their counterclaims including reformation of contract, misrepresentation and fraud.

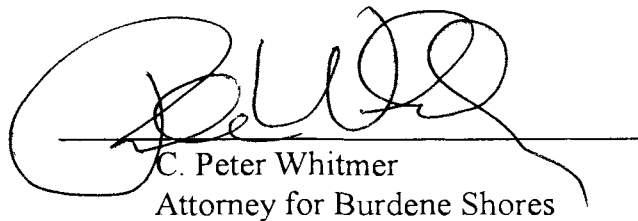
The Shores should be granted their attorney's fees as consequential damages.

Under *Pugh v. North American*, 1 P.3d 570, 2000 UT App 121, the Shores are

entitled to recover their attorney's fees as consequential damages for Liberty Mutual's conduct in this case.

Burdene Shores requests that she recover her attorney's fees incurred because of Liberty Mutual's failure to properly handle her claim in this case.

Dated: August 19, 2005



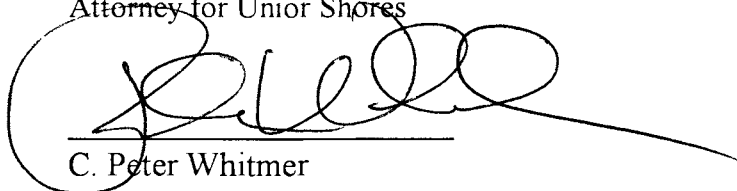
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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing "Brief of The Appellant Burdene Shores" was mailed by first class mail, postage prepaid, on the 20th day of August, 2005 to each of the following:

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