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Recommended Citation
Reply Brief, *Liberty Mutual Insurance Company v. Burdene Shores*, No. 20050291 (Utah Court of Appeals, 2005).
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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.	**REPLY 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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FILED
UTAH APPELLATE COURTS
DEC 12 2005

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Introduction

If Liberty Mutual's brief were the only brief read, the question would come to mind as to why anyone would contest the conduct of Liberty Mutual or the trial court in this case in dismissing the bad faith counterclaim or finding against Burdene Shores' right to claim the stated declarations policy liability limits.

After all, according to the honorable counsel for Liberty Mutual, on the one hand – for purposes of bad faith – Burdene Shores is a third party stranger to the insurance contract she entered into with Liberty Mutual; and, yet when it suits their purposes to provide an alternative liability limit, Burdene Shores is required to know and presumed to know, be intimately familiar with and be bound by the hidden details of the undisclosed[1] provisions of that same insurance policy which control the relationship between the parties.

Burdene Shores' Bad Faith Claim and Liberty Mutual's Duty of Good Faith and Fair Dealing

In their argument, Liberty Mutual's position presumes the validity in this case of the legal fiction that Burdene Shores is strictly a third party to the insurance

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[1] "Undisclosed" meaning that the provisions which Liberty Mutual claims bind the Shores, were never pointed out to the Shores, never disclosed in a reasonably findable place in the declarations to the insurance policy or elsewhere and never disclosed in a single place in language reasonably understandable by a normal person – let alone the Shores who are elderly, retired persons in their 70s and 80s.

contract.

If Burdene Shores truly were only a third party stranger, the analysis would need go no further and Liberty Mutual should prevail on the bad faith claim.

However, factually Burdene Shores is in actual, direct privity of contract with Liberty Mutual. She is a named insured to the insurance contract.

More importantly, because of her status as a named insured in direct privity of contract with Liberty Mutual, Liberty Mutual claims Burdene Shores is bound by a family exclusion liability limitation which it can enforce against no real third party to the insurance contract – the $25,000 family exclusion liability limit. If Burdene Shores were not a named insured, the liability limit unquestionably would be $100,000 for her injuries.

Liberty Mutual's brief asserts as absolute the allegation that where liability of an insurance company is based upon a family member's tort liability, there can be no bad faith[2].

As was pointed out in Appellant Burdene Shores' Brief, Burdene Shores occupies the positions of both a first party and third party claimant – not strictly a third party claimant as Liberty Mutual contends.

The underlying liability of Liberty Mutual to Burdene Shores is based first upon the tortuous acts of her husband, Unior Shores. Bad faith is alleged based upon the refusal of Liberty Mutual to settle at the first party contractual family exclusion liability limit cap.

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[2] See page 13, Liberty Mutual's Brief.

The liability limit cap which Liberty Mutual seeks to impose on Burdene Shores is a $25,000 family exclusion policy limit based solely upon Burdene Shores' first party contractual relationship with Liberty Mutual.

In *Black v. Allstate*, 2004 UT 66 (Utah 2004) the Utah Supreme Court stated:

> "¶14 Allstate argues that, like the plaintiff in *Sperry*, Black, as the injured third party, has no standing to bring an action against Allstate based on Allstate's handling of the Black claim against its insured, Gallagher. Allstate contends that, when handling the Black claim, any duties it owed ran only to Gallagher by virtue of its role as Gallagher's liability insurer. Thus, **Allstate concludes, and the district court agreed, that since Black is not a party to the relevant insurance policy between Allstate and Gallagher, Black cannot maintain an action against Allstate at any time because such an action is prohibited under Utah law. We disagree.** [emphasis added]
>
> ¶15 Although Allstate's reasoning may be correct with regard to its handling of the Black claim against Gallagher, Allstate mischaracterizes the nature of Black's cause of action. In viewing Black's complaint in this case, it is clear that Black does not take issue with Allstate's conduct in processing his claim against Gallagher. Rather, Black argues that Allstate breached the duties it owed to him in handling Gallagher's claim against him. Black pleaded in his complaint that, when processing the Gallagher claim, Allstate breached duties it owed to Black by "failing to adequately investigate the facts of the accident and by unreasonably determining that [Black] was primarily at fault." Black asserted that he had "been damaged by . . . Allstate's breach by increased premiums paid due to Allstate's erroneous assessment, " and suffered "losses due to decreased insurability because of the improperly allowed claim on his driving record."
>
> ¶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.(fn2) Accordingly, we next consider what duties Allstate owed to Black in handling Gallagher's claim against him.

It is important to understand in this case what the bad faith claim of Burdene

Shores against Liberty Mutual is not.

The bad faith claim is not based on a failure or refusal of Liberty Mutual to pay the reasonable value of the claim within the stated $100,000 policy limits based on Burdene Shores' injuries and damages.

It is not based on a refusal to settle the total claim in the fashion they should have settled it.

The bad faith claim is based upon Liberty Mutual's failure and refusal – after repeated request – to pay the contractually limited minimum cap which is undeniably due to Burdene Shores. Liberty Mutual has paid that $25,000 into the court in recognition of their liability for this contractually based minimum amount. Liberty Mutual has failed and refused to release or agree to the release of the $25,000 to Burdene Shores without a complete release of all claims for which Liberty Mutual may have ultimate liability.

The bad faith claim against Liberty Mutual is thus based on a mixture of first and third party elements. The underlying tort claim against Unior Shores (ergo Liberty Mutual) for damages to Burdene Shores depends on the tort liability of Unior Shores for Burdene Shores' injuries. But, the bad faith refusal to settle claim is based on the refusal of Liberty Mutual to pay the $25,000 family exclusion minimum liability limit which they have refused to pay and which they acknowledge owing. There is no question that Liberty Mutual is obligated to pay the $25,000 family exclusion liability limit based on the claimed contractually limited family exclusion

amount which they have refused to pay without a complete release of all other claims by Burdene Shores.

The bad faith claim against Liberty Mutual is thus based on first party elements; and, comes within the public policy statement of 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)[3], which 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 rule and statute speak about "privity of contract" – not first party claims and third party claims. And, they speak of liability being "reasonably clear." Both these tests apply in this case to the $25,000 family exclusion amount which Liberty Mutual has refused to pay to Burdene Shores without a complete release of all liability claims.

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[3] Utah Code §31A-26-303 states in pertinent part:
"(2)(c) failing to settle a claim promptly under one portion of the insurance policy coverage, where liability and the amount of loss are reasonably clear, in order to influence settlements under other portions of the insurance policy coverage, but this Subsection (2) (c) applies only to claims made by persons in direct privity of contract with the insurer."
"(3)(h)(h) not attempting in good faith to effectuate a prompt, fair, and equitable settlement of claims in which liability is reasonably clear.

Because there is actual direct privity of contract and the fact that the bad faith claim is based on the first party relationship between Burdene Shores and Liberty Mutual, this bad faith claim comes within the purview of *Black v. Allstate*, supra and Utah Administrative Rule R590-190-9, supra., in clarification of Utah Code §31A-26-303.

If it is true, as counsel for Liberty Mutual claims, that Burdene Shores has a reduced right of recovery because of the contractually reduced household exclusion liability limit cap of $25,000[4], that reduced liability limit only exists because of the first party contractual relationship between Burdene Shores and Liberty Mutual; and, is therefore a valid basis for a first party bad faith claim..

Counsel for Liberty Mutual argues the holding of *Sperry v. Sperry* 990 P.2d 381, 1999 UT 101 (Utah 1999)[5]::

> "Contrary to Mrs. Shore's [sic] arguments, the existence of the household provision was completely irrelevant to the holding. The Court in *Sperry* never made any mention that the injured party's status could change because of the household exclusion and the potential reduced right of recovery. Furthermore, the plaintiff in Sperry never made this argument, and there is simply no support for Mrs. Shore's [sic] position that her case can be distinguished from *Sperry* because Liberty Mutual maintains that the household exclusion applies. The existence or non-existence of the household exclusion doesn't make a difference."

The *Sperry* case is important because Liberty Mutual claims it is determinative as to whether a bad faith claim can be made against Liberty Mutual at

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[4] Last paragraph, page 8 of Liberty Mutual's brief.

[5] Last paragraph, page 13 of Liberty Mutual's brief.

all; and, that it is – in their words – "directly on point".[6]

Liberty Mutual's argument that the existence or non-existence of the household exclusion is irrelevant is interesting. If the non-existence of the household exclusion in *Sperry* makes no difference, why is it prominently stated in footnote 1 to that opinion, as follows:

> "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. "

Nowhere in the opinion is there any discussion as to whether the household exclusion would have made any difference if it had been present in regard to the bad faith claim. It is simply not addressed – although it was obviously considered, or it would not have been prominently displayed in the opinion. Liberty Mutual is in part correct because in *Sperry* the household exclusion was truly irrelevant to the holding because it played no part in the holding of that case. In this case the household exclusion policy limit is central and highly relevant because it is the basis underlying the bad faith claim of Burdene Shores against Liberty Mutual and has resulted in damages to Burdene Shores because of Liberty Mutual's failure to pay that $25,000 there is no question is due. The household exclusion policy limit is also central to Liberty Mutual's liability to Burdene Shores for anything beyond the $25,000 family

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[6] Third paragraph, page 12 of Liberty Mutual's brief.

exclusion liability limit.

The existence of the family exclusion liability limit, based on the first party contract between Liberty Mutual and Burdene Shores, is a sufficient first party nexus to give rise to a bad faith claim for refusal to pay the contractually based family exclusion liability limit cap. Liberty Mutual has acknowledged the money is due by paying it into the court, but has refused to allow its release without a release of all claims against Liberty Mutual.

The undersigned does not have access to the arguments of the plaintiff in *Sperry*, and it does not appear to be part of the published record in that case.

Liberty Mutual claims this case is directly on point with *Sperry* – it is not. The non-existence of an argument in *Sperry* in the published record does not make the issue non-relevant to this case when that is a primary distinguishing factor between Sperry and this case.

Violation of Utah Code §31A-21-308.

Without citation of any authority or any persuasive argument, Liberty Mutual claims that the varying "risks" specified in Utah Code §31A-21-308 mean ***only*** differing types of coverage[7] It would be helpful if counsel for Liberty Mutual would point out where in the statutes or case law that definition occurs – my version of the

[7] See Liberty Mutual Brief, first paragraph, page 18. See also discussion beginning on page 25 of Burdene Shores Brief.

statutes and no Utah case I have found have such a minimizing and exclusive definition.

Liberty Mutual bolsters its argument by stating that the family exclusion is really simply one of multiple exclusions and limitations. There are multiple exclusions, but there is only one policy limitation not contained in the declarations. The family exclusion liability limitation is that singular limitation. Unless exclusions and limitations are the same thing, that assertion by counsel for Liberty Mutual is false.

The family exclusion liability limit is the only exclusion in the Liberty Mutual insurance policy which imposes a differing liability limit – most especially one not specified in the declarations. The argument is equivalent to stating that a pig is an animal and a chicken is an animal, and because they are both animals a pig is a chicken.

Even though Liberty Mutual claims the family exclusion liability limit is only an exclusion, it is also a liability limit by whatever name Liberty Mutual or their counsel choose to designate it.[8] The true status is as both an exclusion and a liability limit.

Additionally, and more importantly, the family exclusion liability limit is not clearly stated such that a normal insurance purchaser would understand it's terms as

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[8] Liberty Mutual repeatedly in these proceedings refers to the family exclusion as a limit of liability – See for example Liberty Mutual Brief, page 7, paragraph 5..

required by Utah Code §31A-21-308. It has conflicting, contrary provisions scattered in multiple places in the insurance policy. See arguments in Appellant Burdene Shores' Brief, page 31, et seq.

Multiply stated, conflicting versions of essentially the same provision are about as far away from clarity as one might stray – unless the real intent of Liberty Mutual is to confuse the insurance purchaser – especially the elderly senior citizens to whom Liberty Mutual markets their insurance policies.

Public Policy Arguments

In their brief, Liberty Mutual apparently places great reliance on *Rackley v. Fairview Care*, 23 P.3d 1022, 2001 UT 32 (Utah 2001) for the generic proposition that all public policy must fit into the category of "clear public policy" and is only defined by one of three sources: (1) legislative enactments, (2) constitutional standards; or, (3) judicial decisions."[9] A careful reading of *Rackley* reveals that the standards which are enunciated therein apply only to a claim of violation of public policy in the context of termination of "at will" employment. See, for example, *Rackley*, supra, at page 1026 wherein the court said:

> "¶ 15 The public policy exception to the employment at-will presumption is much narrower than traditional notions of public policy. . . . Only "clear and substantial public policies will support a claim of wrongful discharge in violation of public policy." . . . The nature and scope of what constitutes a "clear and substantial" public policy, however, is not always easily discernible.

[9] See Liberty Mutual Brief, page 19, second paragraph, et seq..

> *See, e.g., Patton v. United States,* 281 U.S. 276, 306, 50 S.Ct. 253, 74 L.Ed. 854 (1930) ("The truth is that the theory of public policy embodies a doctrine of vague and variable quality. . . ."). "In Utah, we have frequently invoked the concept of public policy without articulating precisely its origin or definition." *Berube,* 771 P.2d at 1042; *see also Fox,* 931 P.2d at 860 (stating that "a more precise definition of the term must await the time when this Court has had sufficient experience with a number of cases"); *Peterson,* 832 P.2d at 1282 ("The identification of clear and substantial public policies will require case-by-case development.").

Even though Liberty Mutual's arguments and statements about the necessity of "clear public policy" are not the law in regard to automobile insurance policies, some response to their arguments is required.

Case law Cited by Liberty Mutual

Counsel for Liberty Mutual characterizes Burdene Shores' reliance on Justice Durham's dissent in State Farm v. Mastbaum 1987.UT.331, 748 P.2d 1042 (Utah 1987) as a reliance on Utah Code §31A-22-309. Such characterization by counsel for Liberty Mutual is a false representation.

Other than the convenient opportunity to attack Burdene Shores' position it creates, there is little basis for Liberty Mutual's argument. If one simply reads Justice Durham's dissent – a copy of the decision is attached to this brief in the addendum – it is clear that assertion by Liberty Mutual is false.

There were two separate opinions upholding the decision in Mastbaum for differing reasons. The claimed "majority" opinion has no precedent value today (post-1986) at all – it was not supported by a majority of the court. Only the result

for cases arising before 1986 was supported by a majority of the court.

Justice Durham's dissent in *Mastbaum* speaks to the actions of the legislature in amending Utah Code §31A-22-303 through §31A-22-309, with §31A-22-303 providing the main focus. The §31A-22-309 amendments, by the terms of the statute, relate to PIP coverage and were apparently thrown in by Justice Durham to bolster her position – but they are not necessary at all to her argument.

A lack of Justice Durham's Utah Code §31A-22-309 arguments in no way defeats the reasoning or basis of Justice Durham's dissent and does not change the underlying position of *Mastbaum* at all as Liberty Mutual apparently contends. The concurring opinion of Justice Zimmerman and the dissent of Justice Durham constitute a majority of the court; and, post-1986 should control in Utah unless explicitly overruled.

Justice Durham stated in her dissent, at page 1046:

> "This interpretation of the automobile insurance statutory scheme is bolstered by the record of the state senate's consideration of a proposed amendment in Senate Bill 91 to section 31A-22--303. Senate Bill 91 contained a large number of amendments to Utah's insurance laws. The majority of these amendments were suggested to the legislature by the Insurance Code Task Force, which was comprised primarily of representatives of the insurance industry, as well as several members of the state legislature. The task force minutes from January 10, 1986, reflect that the draft version of Senate Bill 91 was changed to add an additional clause to section 31A-22--303. That clause was to be inserted as subsection (d) under subsection (3), and the subsection was then to read as follows: "
>
> (3)"Motor vehicle liability coverage need not insure any liability:
>
> (a) under any workers compensation law under Title 35;
>
> (b) resulting from bodily injury to or death of an employee of the named insured, other than a domestic employee, while

engaged in the employment of the insured, or while engaged in the operation, maintenance, or repair of a designated vehicle;

(c) resulting from damage to property owned by, rented to, bailed to, or transported by the insured; or

(d) ***resulting from bodily injury or death of any insured or any member of an insured's family residing in the insured's household.***"

"Utah S.B. 91, 46th Leg. draft version 1--06--86, at 319--20 (emphasis added [in the original]).

"Thus, when presented to the senate for consideration in January 1986, Senate Bill 91 explicitly allowed insurers to exclude household members from coverage under automobile liability policies. This version of the bill apparently remained unchallenged until February 24, 1986. On that date, Senator Hillyard moved to amend Senate Bill 91 to delete the clause allowing the household exclusion from section 31A-22-303(3) because the legislature had not properly considered the exclusion's extensive impact."

"In arguing to delete the pertinent language, Senator Hillyard pointed out the unfair and adhesive nature of this type of exclusion. He stated, "What you're going to do is end up with people with exposure who think they have insurance to cover them, but by this exclusion, they're not going to have any insurance." Senator Hillyard then requested the senate membership to "vote affirmatively to remove this [household exclusion] and let it be put in later if that's the decision of the legislature through legislative intent."

"A member of the task force told the senate membership that the task force itself had fully considered the household exclusion question and felt that it was appropriate and based on sound public policy. Nonetheless, the senate voted to approve Senator Hillyard's amendment, thereby deleting the language allowing a household exclusion in liability policies. This process, combined with the straight-forward language in section 31A-22-309, suggests that the legislature has never intended to permit household exclusion clauses. Thus, the majority opinion's premise regarding legislative intent is at least open to question."

Any direct legislative approval of the household exclusion is still absent from Utah Code §31A-22-303; and, direct affirmative legislative approval of the household exclusion is still totally absent from all Utah statutes Apparently the legislature has never had the intent to place the household exclusion in the statutes as

Senator Hillyard suggested – if indeed, the legislature ever thought it was appropriate at all.

Approval of the household exclusion in automobile liability insurance policies is not and has not been the intent of the legislature since passage of the 1986 amendments.

The intent of the legislature as reflected in the specific legislative removal of a proposed provision authorizing and allowing the household exclusion in automobile liability insurance policies controls the court's interpretation of legislative intent.

The Utah Supreme Court has often evidenced the necessity in interpreting statutes according to legislative intent, such as in *State v. Hodges*, 2002 UT 117, 63 P.3d 66 (Utah 2002) wherein the court stated:

> ¶ 6 "[O]ur primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve." *State v. Burns*, 2000 UT 56, ¶ 25, 4 P.3d 795. "We need look beyond the plain language only if we find some ambiguity." Id.

The clear purpose of Utah Code §31A-22-304 is to provide minimum adequate liability insurance for Utah insurance consumers. There is no hint in the statute that a corollary purpose of that statute is to create a defacto maximum coverage for a class of Utah insureds. Liberty Mutual seeks to have Utah Code §31A-22-304 define the defacto maximum coverage available to its Utah insureds under its policies of insurance – certainly not a purpose of that statute.

Liberty Mutual argues for the validity of the household exclusion liability limit by arguing cases from other jurisdictions which do not have the same case law,

same legislative history, or same legislative intent as Utah; and, by arguing cases from Utah which are not factually on point. No Utah case is cited having a household exclusion which has been specifically rejected by the legislature which the court later upheld.

Review of Utah Cases cited by Liberty Mutual:

National Farmers Union Prop. & Casualty Co. v. Moore, 882 P.2d 1168 (Utah App 1994). Young boy accidentally shot by his brother. Court upheld a household exclusion in property owner's insurance policy.

Allen v. Prudential Property & Casualty Ins. Co., 839 P.2d 798 (Utah 1992). Young boy burned by pot of boiling water spilled on him Court upheld the household exclusion in property owner's policy against claim that it violated the reasonable expectations of the purchaser.

Calhoun v. State Farm, 2004 UT 56, 96 P.3d 916 (Utah 2004). Alleging the invalidity of the exclusion for named drivers. The exclusion was upheld as being specifically provided for in Utah Code §31A-22-303(7).

Legislative Enactments Supporting the Household Exclusion

To repeat what was said in Burdene Shores' Opening Brief at page 42:

> "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."

Perhaps most important is the fact that the legislature in 1986 specifically

rejected the family exclusion as a part of Utah Code §31A-22-303(3).[10]

Liberty Mutual argues a "clear inference" from Utah Code §31A-22-304(1)(a) that Liberty Mutual may limit liability coverage to greater than or equal to $25,000.

If such is the case, and it probably is true as far as general liability limits in an automobile insurance policy are concerned, that does not mean that Liberty Mutual is free to impose a separate family exclusion liability limit which is not consistent with the general liability limit of the policy, not materially disclosed to insurance purchasers, and which is not based on differing risks as required by Utah Code §31A-21-308.

There are no legislative enactments which specifically approve the Liberty Mutual style family exclusion liability limit, or indeed any family exclusion. Liberty Mutual's arguments of indirect approval are tenuous at best and do not overcome the specific rejection of the family exclusion by the Utah legislature in 1986.

Liberty Mutual also argues that the Shores' position would require insurers to offer more than the minimum liability amounts under Utah Code §31A-22-304.[11] Such a statement is without merit, false and has no logical basis.

Utah Code §31A-22-304 does not allow the issuance of liability insurance policies which have limits of less than $25,000. There is no preclusion of liability limits in excess of $25,000. The practicalities of the insurance market may dictate

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[10] See Justice Durham's dissent in *Mastbaum*., quoted supra.

[11] See Liberty Mutual Brief, page 27, last paragraph.

that higher disclosed policy limits are required to sell their policies, but the statute and the Shores' position in this case, if adopted, certainly do not require it.

The practicalities of the insurance market may also dictate that Liberty Mutual cannot sell their insurance policy including the family exclusion liability limit, if they are forced – as this case seeks to do – to clearly state and disclose that liability limit and the associated risk factors of the family exclusion liability limit as required by Utah Code §31A-21-308.

Meaningful disclosure of actual policy liability limits and other material terms would seem to be a good thing for everyone, except perhaps Liberty Mutual which apparently seeks to hide the true nature of their inferior insurance product from their customers.

Liberty Mutual's Failure to Materially Disclose and Lack of Clarity in Specification of the Household Exclusion Liability Limitation

Utah Code §31A-21-308 allows differing liability limits in an insurance policy "if the policy clearly states" those differing limits.

As quoted by Liberty Mutual[12], Calhoun v. State Farm, supra, allows an exclusion in excess of minimum required coverages

> "As long as any exclusions are phrased in 'language which ***clearly and unmistakably communicates to the insured*** the specific circumstances under which the expected coverage will not be provided . . ." [emphasis added]

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[12] See Liberty Mutual Brief, page 23, second paragraph.

Many cases establish the principle that exclusions must be clearly and unambiguously communicated to the insured.

In its simplest form, the question thus becomes: What does it mean to "clearly state" an exclusion?

In the Funk & Wagnalls Standard College Dictionary (1963) p. 1160, "clearly" is defined, among a myriad of definitions, as: "to free from doubt or ambiguity: make plain."

Ambiguity and clarity are thus at opposite ends of the spectrum.

In apparent response to Burdene Shores' claims that the wording and structure of Liberty Mutual's Insurance policy is ambiguous, unclear and confusing to elderly and non-elderly purchasers of insurance, Liberty Mutual has taken great pains in their brief to claim that the family exclusion liability limit is unambiguous.[13]

Liberty Mutual claims their insurance policy follows the high sounding general principles of contract law and states:

1. Insurance policies are governed according to the rules governing ordinary contracts.

2. The terms in the insurance policy must be harmonized with the policy as a whole and all provisions should be given effect if possible.

3. Ambiguity may be found if the terms used to express the intention of the parties may have two or more meanings.

All of these principles have validity – especially if applied in the context of an

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[13] See Liberty Mutual Brief, page 32, et seq..

arm's length negotiated insurance contract between parties of nearly equal bargaining power. Such a situation is not present in this case before this court.

This is a pure contract of adhesion prepared by a financial giant to take advantage of those with essentially nothing and no bargaining power.

Liberty Mutual is a multi-billion dollar insurance company employing many lawyers to protect their financial interests.

The Shores are elderly, retired persons in their 70s and 80s to whom Liberty Mutual has specifically target-marketed their insurance policies. Elderly persons, including the Shores, generally have reduced mental capacities – not because they are retired veterans[14] but because they are elderly persons in their 70s and 80s. Common sense and experience dictate that the elderly are frequent targets of unscrupulous business practices because of their age and mental state.

The *Guidelines for the Evaluation of Dementia and Age-related Cognitive Decline*[15] state:

> "Declines in memory and cognitive abilities are a normal consequence of aging in humans. This is true across cultures and, indeed, in virtually all mammalian species. The nosological category of Age-Associated Memory Impairment was proposed by a National Institute of Mental Health (NIMH)

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[14] In Liberty Mutual's Brief at page 34, second paragraph, counsel for Liberty Mutual claims that the Shores are claiming veterans are superior to others and improperly and falsely claims that the Shores feel veterans have disadvantages over the rest of the population in mental capacity. This is simply a diversionary tactic.

[15] American Psychological Association, Presidential Task Force on the Assessment of Age-Consistent Memory Decline and Dementia (1998). Guidelines for the evaluation of dementia and age-related cognitive decline. Washington, DC: American Psychological Association.

work group to describe older persons with objective memory declines relative to their younger years, but cognitive functioning that is normal relative to their age peers." (citations omitted)

Whether Liberty Mutual's marketing practices to the Shores are in the category of unscrupulous business practices awaits further discovery which the trial court has refused to allow.

There is no agreement with Liberty Mutual's characterizations of clarity and lack of ambiguity in their insurance policy.

On the one hand counsel for Liberty Mutual argues that we must consider the insurance policy as a whole in judging its terms. On the other hand, in their brief counsel for Liberty Mutual does exactly the opposite. Liberty Mutual asks the court to treat the hidden family exclusion provision as if it were prominently stated with other exclusions and limitations (their phrase), but wants it judged independently of all other provisions.

Some scenarios could have existed – but which do not – where Liberty Mutual's desired treatment might more likely be valid. Those scenarios include:

1. Placing all policy limitations in one place so they may more easily be found and reviewed, including:

(a) Placing the family exclusion liability limits on the declarations page, or in some other common place, where all the liability limits are located.

(b) Placing important policy provisions, or summaries of those provisions, in the declarations or near the beginning of the

policy.

2. Not having conflicting and superceded provisions in various places in the insurance policy – but rather, having only one set of provisions applicable to any given liability limit, exclusion or other provision.

3. Phrasing all (especially differing) limitations clearly and in similar terms – such as $100,000 / $300,000 general liability and $25,000 / $50,000 for insureds as required by Utah Code §31A-21-308.

4. Phrasing and giving descriptions of policy terms and provisions such that persons in the elderly target market are likely to understand those terms.

We are thus back at the same underlying question on clarity and ambiguity:

Is the Liberty Mutual family exclusion liability limitation clearly and unambiguously stated?

To Liberty Mutual's counsel, it is clearly stated.

To Burdene Shores it was hidden from her and certainly not clearly and unmistakably communicated to her until after she made a claim.

Denial of Discovery

If Judge Pullan properly handled this case at the trial level, then it is probable that no further discovery is needful.

If there are yet any fact dependent issues in this case, then the denial of discovery was improper and the motion to allow further discovery should have been granted.

The fact dependent issues include:

- Misrepresentations by Liberty Mutual in the sale of the insurance policy to the Shores. Do what Liberty Mutual represented the insurance policy to be and what it actually was make any difference?
- Factual issues regarding clarity, or more correctly the lack of clarity and ambiguity created by Liberty Mutual's construction and wording of their insurance policy.
- Factual issues as to why the Utah specific family exclusion liability limitation was not listed in the declarations; and, all other limitations (including Utah specific limitations) were listed in the declarations. Was there a conscious intent to mislead or deceive elderly or non-elderly insurance purchasers?
- How often has Liberty Mutual taken advantage of the Utah specific family exclusion liability limit in dealings with its Utah insureds?
- How were the differing liability limits for insureds (the family exclusion liability limit) arrived at and what differing risks were involved in setting those differing liability limits.

Conclusion

The basic underlying question in this case is a current variation of the question posed by Senator Hillyard in the 1986 legislative defeat of the insurance industry's

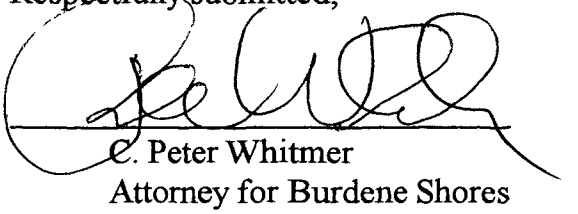
attempt to legislatively validate the family exclusion:[16]

"With the unfair and adhesive nature of the family exclusion liability limitation, what the Shores ended up with was thinking they had insurance to cover them, but by this exclusion, they do not have the insurance they thought they purchased and paid for, can Liberty Mutual properly do this? "

Is the Liberty Mutual behemoth allowed to financially drown the Shores by use of an adhesive insurance contract depriving them of what they reasonably believed they had purchased when the legislature has specifically rejected such provisions?

Dated: December 12, 2005

Respectfully submitted,



C. Peter Whitmer
Attorney for Burdene Shores

[16] From *Mastbaum*, supra, at page 1046.

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing "Reply Brief of The Appellant Burdene Shores" were mailed by first class mail, postage prepaid, on the 12th day of December, 2005 to each of the following:

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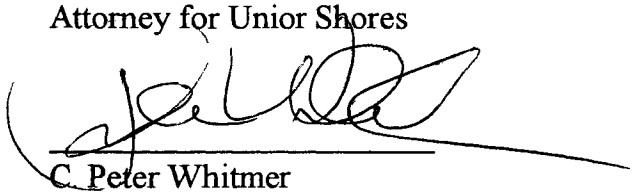

C. Peter Whitmer

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff and Respondent, v. Thomas Layton MASTBAUM and Kathleen Marie Mastbaum, Defendants and Appellants.

No. 19779.

Supreme Court of Utah.

December 2, 1987.

B.H. Harris and James C. Jenkins, Logan, for defendants and appellants.

Henry E. Heath and Barbara L. Maw, Salt Lake City, for plaintiff and respondent.

HOWE, Justice.

Defendants Thomas Layton Mastbaum and Kathleen Marie Mastbaum, his wife, seek reversal of a summary judgment entered by the trial court in favor of plaintiff State Farm Mutual Automobile Insurance Company.

On May 30, 1981, defendants were involved in an automobile accident near Garden City, Utah. Kathleen Mastbaum, who was seated in the front passenger seat, sustained severe personal injuries. She filed a civil action for damages against her husband, Thomas Mastbaum, the driver of the vehicle, alleging that at the time of the accident, he was under the influence of alcohol and negligently drove into an oncoming vehicle. Thomas had purchased an insurance policy on his vehicle from plaintiff. Plaintiff subsequently brought this action for declaratory judgment that the family exclusion provision in the policy was valid and enforceable, that it was therefore not required to defend Thomas in the civil action brought by his wife, and that plaintiff was not required to pay any judgment she might obtain in her action. The trial court, on motion of plaintiff for summary judgment, awarded plaintiff the relief sought. Defendants bring this appeal.

The policy contained the following family or household exclusion:

> THIS INSURANCE DOES NOT APPLY UNDER: (h) COVERAGE A ["Bodily Injury Sustained By Other Persons"], TO BODILY INJURY TO ANY INSURED OR ANY MEMBER OF THE FAMILY OF AN INSURED RESIDING IN THE SAME HOUSEHOLD AS THE INSURED.

While this case was pending on appeal in this Court but before oral argument, we decided *Farmers Insurance Exchange v. Call,* 712 P.2d 231 (Utah 1985). In that case, we held

that a household or family exclusion clause in an automobile insurance policy contravenes the statutory requirements found in Utah's No-Fault Insurance

Act, Utah Code Ann. §§ 31--41--1 to -13 (1974, Supp.1985) (now sections 31A-22--306 to -309 (1986)), as to the minimum benefits which must be provided to all persons sustaining personal injuries. We found it unnecessary to address the validity of the exclusion clause with respect to insurance coverage provided by the policy in excess of the statutorily mandated minimums. However, in that case, a majority of this Court allowed recovery on the policy in excess of the statutory minimum amount because the insurer was unable to produce any evidence that the insurance policy had ever been delivered to the insured. In the instant case, that void in the evidence does not exist since it is undisputed that Thomas Mastbaum did receive a copy of the insurance policy at the time it was issued by plaintiff.

The sole question then for our determination in this case is whether the household and family exclusion is valid in the policy issued by plaintiff as to amounts and benefits provided by the policy in excess of those which are statutorily mandated. In a case involving a policy with a somewhat analogous exclusion, *Allstate Insurance Co. v. U.S. Fidelity & Guaranty Co.,* 619 P.2d 329 (Utah 1980), we held that an exclusion of a named driver was unenforceable only to the extent of statutory minimum coverage. In sustaining the exclusion as to policy amounts above the minimum coverage, we said:

> Our decision does not, however, read the named driver exclusionary endorsement out of the contract entirely. Rather, contracting parties are free to limit coverage in excess of the minimum required limits, and the exclusion found in the contract is valid in relation to any coverage exceeding the minimum amounts. Thus, a balance is struck between the necessity of securing minimum automobile liability coverage and the availability of lower premiums because of the exclusion of high insurance risks. This effectuates the express two-fold purpose of the Utah No-Fault Insurance Act which is to require the payment of certain prescribed benefits in respect to motor vehicle accidents while stabilizing the rising costs of automobile accident insurance.

Allstate Insurance Co., 619 P.2d at 333 (footnotes omitted). In so holding, we relied on Utah Code Ann. § 41--12--21(g), which provides:

> Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this act....

We also cited with approval and followed *Estate of Neal v. Farmers Insurance Exchange,* 93 Nev. 348, 566 P.2d 81 (1977).

Two years after our decision in *Allstate Insurance Co. v. U.S. Fidelity & Guaranty Co., supra,* we relied upon its precedence in deciding *Dairy land Insurance Corp. v. Smith,* 646 P.2d 737 (Utah 1982). In that case, an insurer brought suit to void an automobile policy due to material misrepresentations made by the owner of the policy as to who would drive the vehicle. We reversed a trial court ruling that the policy was void *ab initio* and held, on the authority of Allstate, that the policy could not be rescinded after the occurrence of an accident to the extent of statutorily required minimum coverage, but could be rescinded as to amounts in excess of the minimum coverage.

The vast majority of cases in which the issue before us has been decided have held that household exclusions or analogous exclusions are enforceable with respect to policy amounts in excess of the statutory minimum required amount. *Estate of Neal v. Farmers Insurance Exchange, supra; DeWitt v. Young,* 229 Kan. 474, 625 P.2d 478 (1981); *Arceneaux v. State Farm Mutual Automobile Insurance Co.,* 113 Ariz. 216, 550 P.2d 87 (1976); *Allstate Insurance Co. v. Wyoming Insurance Department,* 672 P.2d 810 (Wyo.1983); *Staser v. Fulton,* 684 S.W.2d 306 (Ky.Ct.App.1984); *Universal Underwriters Insurance Co. v. American Motorists Insurance Co.,* 541 F.Supp. 755 (N.D.Miss.1982) (applying Mississippi law); *Pennsylvania National Mutual*

Casualty Insurance Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct.App.1984); *State Farm Mutual Automobile Insurance Co. v. Nationwide Mutual Insurance Co.,* 307 Md. 631, 516 A.2d 586 (1986). In reaching their decisions, two appellate courts have cited with approval and relied upon our decision in *Allstate Insurance Co. v. U.S. Fidelity & Guaranty Co., supra. See State Farm Mutual Automobile Insurance Co. v. Nationwide Mutual Insurance Co., supra, Pennsylvania National Mutual Casualty Insurance Co. v. Parker, supra.* Another appellate court, although not citing *Allstate Insurance Co. v. U.S. Fidelity & Guaranty,* employed the same reasoning as we did in *Allstate,* to wit, freedom of contract to limit coverage in excess of the minimum required amounts thereby presumably obtaining a lower premium because of the exclusion of a high risk. *Staser v. Fulton, supra.*

The leading case espousing the minority view that a household exclusion is invalid as to all amounts of the policy is *Meyer v. State Farm Mutual Automobile Insurance Co.,* 689 P.2d 585 (Colo.1984). In that case, the court, after recognizing that there were "two equally compelling arguments," held that because the statutes of that state authorized the writing of insurance policies providing greater coverage than the statutory minimum, there was a legislative intent to avoid inadequate compensation to victims of automobile accidents. A dissenting opinion pointed out that the court's decision was contrary to the majority of appellate courts which have considered this issue and which have adopted the rule that although an insurance policy must comply with statutory requirements, a statute

has no effect upon insurance which it does not require. The Court of Appeals of *Maryland, in State Farm Mutual Automobile Insurance Co. v. Nationwide Mutual Insurance Co., supra,* recently had precisely the same issue before it as we do in the instant case. In a well-considered opinion, the court found the majority opinion in *Meyer* to be unpersuasive and stated that while Maryland's compulsory insurance statutes also have the purpose of assuring recovery for innocent victims of motor vehicle accidents, the court did not view that purpose as extending beyond the prescribed statutory minimum coverage so far as the household exclusion was concerned.

We adhere to *Allstate* and the majority view and hold that the household or family exclusion is valid in this state as to insurance provided by an automobile policy in excess of the statutorily mandated amounts and benefits. While the minority view is attractive from the standpoint of an injured victim, the policy must be enforced as written when its provisions do not conflict with our mandatory automobile insurance statutes. The summary judgment is reversed, and the case is remanded to the trial court for further proceedings consistent with this opinion.

HALL, C.J., concurs.

ZIMMERMAN, Justice: (concurring)

As a matter of public policy and in the absence of some legislative statement on the subject, I agree with the majority that household member exclusions should be invalid only up to the limits set by our mandatory automobile insurance statutes. However, Justice Durham's recitation of the legislative history surrounding the 1986 amendment of the relevant statutes does persuade me that with respect to insurance policies written after the effective date of that act, household member exclusions will be entirely invalid because the legislature has now made it clear that such exclusions are contrary to public policy. However, I cannot join Justice Durham in finding that the expression of such an intention in 1986 should be applied to the determination of the validity of a clause contained in a contract written many years earlier and governed by a predecessor statute.

With respect to the adhesion contract arguments made by Justice Durham, I would not reach these since this issue is not adequately presented on appeal.

Inasmuch as there are no grounds for reversing the instant case, I think it unnecessary for us to decide at this juncture whether *Stoker v. Stoker,* 616 P.2d 590 (Utah 1980), abrogated interspousal immunity

with respect to actions grounded in negligence as well as those grounded in intentional torts.

STEWART, Associate C.J., concurs in the concurring opinion of Justice ZIMMERMAN.

DURHAM, Justice: (dissenting)

I cannot agree with the majority opinion's reasoning or result because it fails to address the viability of the household exclusion under public policy as reflected in Utah's automobile insurance statutes, the applicability of adhesion contract principles, and the question of interspousal tort immunity.

I would reverse the summary judgment and enter judgment in favor of defendant on public policy grounds. On adhesion contract principles alone, I would reverse and remand this case for further evidentiary proceedings. Nor do I believe that inter-spousal tort immunity is a barrier to litigation between the Mastbaums.

I
Public Policy Considerations

The majority errs in assuming that the state legislature intended to allow a household exclusion for coverage beyond the statutory minimum. The legislative history on this question suggests that the legislature does not support the household exclusion, but instead considers it to be contrary to public policy.

The legislature recodified Utah's insurance laws in its 1985 and 1986 sessions. The 1986 session placed all changes to the state insurance laws into Senate Bill 91. Two sections in particular are relevant to this discussion: first, Utah Code Ann. § 31A-22--303 (motor vehicle liability coverage), which generally describes motor vehicle liability coverage required under the statutory scheme, and second, section 31A-22--309 (limitations, exclusions, and conditions to personal injury protection), which describes the allowable exclusions for personal injury protection coverage in automobile insurance policies. Prior to the passage of Senate Bill 91, which was effective July 1, 1986, subsection 2 of section 31A-22--309 read as follows:

> (2) Any insurer may exclude benefits:
>
> (a)(i) for any injury sustained by the injured while occupying another motor vehicle owned by the insured and not insured under the policy; or
>
> (ii) for any injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle.
>
> (b) to any injured person, if the person's conduct contributed to his injury....

Utah Code Ann. § 31A-22--309 (1985 Insurance Code Recodification pamphlet edition) (emphasis added).

This section designates the exclusions an insurer "may" attach to a policy providing personal injury protection coverage under Utah state laws. It does not specify that these exclusions are allowable only for amounts below the statutory minimum, but indicates that an insurer may only exclude benefits in those few and narrow situations.

That such was the legislature's intention before the 1986 recodification is suggested by the history of Senate Bill 91, which amended section 31A-22--309 to read:

> (2)(a) Any insurer issuing personal injury protection coverage under this part may *only* exclude from this coverage benefits:
>
> (i) for any injury sustained by the injured while occupying another motor vehicle owned by the insured and not insured under the policy;
>
> (ii) for any injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle; or
>
> (iii) to any injured person, if the person's conduct contributed to his injury:
>
> (A) by intentionally causing injury to himself; or
>
> (B) while committing a felony.

Utah Code Ann. § 31A-22--309 (1986) (emphasis added).

The legislature thus removed any ambiguity about the validity of exclusions not specifically mentioned in section 31A-22--309. Insurers may only exclude coverage for the designated reasons. The household exclusion is not among those. It is not unreasonable to infer that the legislature always intended household exclusion clauses, and others not mentioned in section 31A-22--309, to be invalid and made the foregoing change to eliminate the argument that they were permissible beyond the statutory minimum because they were not explicitly excluded.

This interpretation of the automobile insurance statutory scheme is bolstered by the record of the state senate's consideration of a proposed amendment in Senate Bill 91 to section 31A-22--303. Senate Bill 91 contained a large number of amendments to Utah's insurance laws. The majority of these amendments were suggested to the legislature by the Insurance Code Task Force, which was comprised primarily of representatives of the insurance industry, as well as several members of the state legislature. The task force minutes from January 10, 1986, reflect that the draft version of Senate Bill 91 was changed to add an additional clause to section 31A-22--303. That clause was to be

inserted as subsection (d) under subsection (3), and the subsection was then to read as follows:

> (3)"Motor vehicle liability coverage need not insure any liability:
>
> (a) under any workers compensation law under Title 35;
>
> (b) resulting from bodily injury to or death of an employee of the named insured, other than a domestic employee, while engaged in the employment of the insured, or while engaged in the operation, maintenance, or repair of a designated vehicle;
>
> (c) resulting from damage to property owned by, rented to, bailed to, or transported by the insured; or
>
> (d) *resulting from bodily injury or death of any insured or any member of an insured's family residing in the insured's household.*

Utah S.B. 91, 46th Leg. draft version 1--06--86, at 319--20 (emphasis added).

Thus, when presented to the senate for consideration in January 1986, Senate Bill 91 explicitly allowed insurers to exclude household members from coverage under automobile liability policies. This version of the bill apparently remained unchallenged until February 24, 1986. On that date, Senator Hillyard moved to amend Senate Bill 91 to delete the clause allowing the household exclusion from section 31A-22--303(3) because the legislature had not properly considered the exclusion's extensive impact.

In arguing to delete the pertinent language, Senator Hillyard pointed out the unfair and adhesive nature of this type of exclusion. He stated, "What you're going to do is end up with people with exposure who think they have insurance to cover them, but by this exclusion, they're not going to have any insurance." Senator Hillyard then requested the senate membership to "vote affirmatively to remove this [household exclusion] and let it be put in later if that's the decision of the legislature through legislative intent."

A member of the task force told the senate membership that the task force itself had fully considered the household exclusion question and felt that it was appropriate and based on sound public policy. Nonetheless, the senate voted to approve Senator Hillyard's amendment, thereby deleting the language allowing a household exclusion in liability policies. This process, combined with the straight-forward language in section 31A-22--309, suggests that the legislature has never intended to permit household exclusion clauses. Thus, the majority opinion's premise regarding legislative intent is at least open to question.

In *Farmers Insurance Exchange v. Call,* 712 P.2d 231 (Utah 1985), we noted that a number of jurisdictions had found that the household exclusion clause violated public

policy, even for coverage exceeding that mandated by statute. *Id.* at 236 n. 2; *see, e.g., Meyer v. State Farm Mutual*

Automobile Insurance, Co., 689 P.2d 585, 592 (Colo. 1984). At that time, however, we declined to address the question presented by this appeal. *Call,* 712 P.2d at 236. In light of the legislative history of permissible exclusions under Utah's automobile insurance statutes and the language of the statutes themselves, I would find the household exclusion void in all cases. Accordingly, I would reverse the judgment of the trial court and enter judgment in appellants' favor.

II

Adhesion Contract Theory

The majority opinion states that the primary issue is whether the household exclusion is valid as to amounts in excess of those which are statutorily mandated and relies on the principle of freedom of contract to permit the extension of the household exclusion to coverage beyond the statutory minimums. This approach fails to address adhesion contract theory, raised by appellants in the trial court and on appeal. Aside from public policy considerations, the adhesion issue is sufficient by itself to reverse and remand the trial court's decision.

Appellants relied on the adhesion contract theory in the trial court and specifically requested the court to resolve that issue. The court refused to do so, but instead noted that the insurance contract was "valid," implying that the adhesion theory was inapplicable. Before this Court, appellants cite several cases from other states dealing with the household exclusion and argue that appellants' reasonable expectations were not met. Thus, the issue is properly before this Court and should be treated.

As this Court recently noted, "Like credit life and disability insurance, automobile 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." *Farmers Insurance Exchange v. Call,* 712 P.2d at 236 (Utah 1985). In fact, this Court has examined a number of contracts in light of adhesion theory with varying results. *See, e.g., Resource Management Co. v. Weston Ranch and Livestock Co.,* 706 P.2d 1028, 1040--49 (Utah 1985) (contract terms not unconscionable and contract not one of adhesion); *System Concepts, Inc. v. Dixon,* 669 P.2d 421, 429 (Utah 1983) (no disparate bargaining status between parties); *General Motors Acceptance Corp. v. Martinez,* 668 P.2d 498, 501 (Utah 1983) (adhesive nature of insurance policy is basis of duty to notify); *White v. Fox,* 665 P.2d 1297, 1300 (Utah 1983) (contract not adhesive; parties' bargaining status was equivalent); *Bekins Bar V Ranch v. Huth,* 664 P.2d 455, 459--64 (Utah 1983) (finance charges in loan agreement not unconscionable).

In the leading case of *Gray v. Zurich Insurance Co.*, 65 Cal.2d 263, 419 P.2d 168, 54 Cal.Rptr. 104 (1966), Justice Tobriner of the California Supreme Court set forth the principle of reasonable expectations in adhesion insurance contracts.

> Although courts have long followed the basic precept that they would look to the words of the contract to find the meaning which the parties expected from them, they have also applied the doctrine of the adhesion contract to insurance policies, holding that in view of the disparate bargaining status of the parties we must ascertain that meaning of the contract which the insured would reasonably expect.

65 Cal.2d at 269--70, 419 P.2d at 171--72, 54 Cal.Rptr. at 107--08.

Judicial determination of the insured's reasonable expectations does not necessarily depend upon the presence of an ambiguity in the policy. *See, e.g., Powers v. Detroit Automobile Inter-insurance Exchange,* 427 Mich. 602, 632 n. 8, 398 N.W. 2d 411, 424 n. 8 (1986); *Stordahl v. Government Employees Insurance Co.*, 564 P.2d 63, 65--66 (Alaska 1977). Indeed, the insured's complete failure to read the policy's provisions, exclusions, or limitations may not be determinative of his reasonable expectations unless the insurer can demonstrate that the failure to read was unreasonable. Keeton, *Insurance Law Rights at Variance with Policy Provisions,* 83 Harv.L.Rev. 961, 967--68 (1970);

see Hawaiian Insurance and Guaranty Co. v. Brooks, 67 Hawaii 285, 686 P.2d 23 (1984); *Reserve Insurance Co. v. Pisciotta,* 30 Cal.3d 800, 810 n. 3, 640 P.2d 764, 769 n. 3, 180 Cal.Rptr. 628, 633 n. 3 (1982).

At least one state has used the adhesion contract theory to invalidate a household exclusion clause in an automobile insurance policy. In *Transamerica Insurance Co. v. Royle,* 202 Mont. 173, 656 P.2d 820 (1983), the Supreme Court of Montana considered the case of a mother who had negligently caused an automobile accident in which her daughter, a passenger in the mother's car, was seriously injured. The insurance policy covering the automobile contained a household exclusion that denied coverage for injuries incurred by a person living or residing in the insured's household at the time of loss. After determining that parent-child immunity did not present a barrier to the daughter's suit, the Montana Supreme Court concluded:

> [W]e hold that the household exclusion clause is invalid due to its failure to "honor the reasonable expectations" of the purchaser of the policy.... "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts, will be honored even though painstaking study of the policy provisions would have negated those expectations."

Royle, 656 P.2d at 824 (quoting Keeton, *Insurance Law Rights at Variance with Policy Provisions,* 83 Harv.L.Rev. 961, 967 (1970))

The importance of considering adhesion theory in this case is obvious. The majority opinion's reliance on the principle of a freedom of contract between the parties is a misplaced if the insurance policy is adhesive in nature because the parties' ability to freely contract is largely illusory where adhesion theory applies. The Supreme Court of New Mexico in *Estep v. State Farm Mutual Automobile Insurance Co.,* 103 N.M. 105, 703 P.2d 882 (1985), noted:

> With respect to the freedom of contract argument, we suggest, as did the court a in the second case of *Mutual of Enumclaw Insurance Co. v. Wiscomb,* 97 Wash.2d 203, 211, 643 P.2d 441, 445 (1982), that to say there is freedom of contract regarding inclusion or exclusion of coverage for family members in these cases "is to ignore reality." The discussion in *Wiscomb* of the "take-it-or-leave-it" nature of obtaining automobile liability coverage, and the effect of the policy's exclusion on third parties who are or may be ignorant of the insurance arrangements and unable or incompetent to contract for coverage for themselves, illustrates the fragility of any assertion that the terms of this or similar insurance policies truly are the product of conscious bargaining between the parties. The argument might be more credibly made were there evidence that insureds had been, or traditionally are, offered the choice of including or excluding coverage for family members. There is no such evidence in this record.

103 N.M. at 109--10, 703 P.2d at 886--87. Absent findings of fact regarding the reasonable expectations of the parties, the Course of negotiations between them, and the circumstances existing when the contact was made, it is impossible to conclude, as does the majority opinion, that the contract terms were arrived at freely in this case.

When reviewing motions for summary judgment, this Court views issues of fact in le light most favorable to the party opposing summary judgment. *Call,* 712 P.2d at 37; *Mountain States Telephone & Telegraph Co. v. Atkin, Wright & Miles, Chartered,* 681 P.2d 1258, 1261 (Utah 984). The parties' failure to include a copy of the insurance policy in the record and the lack of evidence directed to the adhesion claims make it necessary to remand this case to the trial court. Thomas Mastbaum did state in his affidavit that he as unable to read or review the text of le insurance policy before he purchased it, lat he was unaware of the household exclusion clause, and that he assumed the insurance policy covered all parties, including his wife, for any injuries sustained in n automobile accident involving his vehicle. However, in the absence of the policy itself and without a more complete description

of the nature of the negotiations and circumstances surrounding the contract's formation, there is too much uncertainty and too little evidence from which to draw a conclusion regarding the Mastbaums' reasonable expectations. Hence, apart from questions of public policy, this action should be remanded to the trial court to complete the record regarding appellants' claims of adhesion.

III

Interspousal Tort Immunity

Finally, I dissent from the majority opinion because it completely omits reference to the doctrine of interspousal tort immunity, which was extensively briefed and relied upon by the parties on appeal. This Court thoroughly discussed the doctrine of interspousal tort immunity in *Stoker v. Stoker,* 616 P.2d 590 (Utah 1980). In reaching a decision to repudiate the doctrine of interspousal tort immunity, this Court relied upon Utah Code Ann. § 30--2--4 (1974), which states in pertinent part that a married woman "may prosecute and defend all actions for the preservation and protection of her rights and property as if unmarried." The Court also pointed out that the statute was enacted in derogation of the common law and must therefore be liberally construed in order to meet its purpose and to promote justice. Id. at 591; Utah Code Ann. § 68--3--2 (1986). The Court in Stoker emphasized the broad scope of its analysis by proclaiming, "Our holding today reaffirms the Legislative abrogation of Interspousal Immunity.(fn1) *Id.* at 592.

This Court has also rejected the notion that the potential for collusion is a sufficient rationale for prohibiting certain kinds of litigation. *See Malan v. Lewis,* 693 P.2d 661, 674 (Utah 1984); *Call,* 712 P.2d at 235--36. As this Court stated in *Call:*

> Furthermore, we are not persuaded that the collusion rationale that the Court relied upon in the Kay [*State Farm Mutual Auto Insurance Co. v. Kay,* 26 Utah 2d 195, 487 P.2d 852 (1972); *Kay v. Kay,* 30 Utah 2d 94, 513 P.2d 1372 (1973)] opinions remains an adequate justification for the household exclusion clause. In *Malan v. Lewis,* Utah, 693 P.2d 661, 674 (1984), this Court determined that the Utah Guest Statute is unconstitutional and found the collusion rationale to be insufficient to deny coverage to innocent guest passengers injured in automobile accidents. In addition, the risk of collusion in intrafamily litigation has never been accepted by this Court as grounds for endorsing the parent-child immunity doctrine, which has likewise never been established by the legislature.

Call, 712 P.2d at 235. The Court in *Call* also agreed with the Kansas Supreme Court, which pointed out that "the possibility of collusion exists to a certain extent in any case. Everyday [sic] we depend on juries and trial judges to sift evidence in order to determine the facts and arrive at proper verdicts. Experience has shown that the courts are quite adequate for this task." *Id.* at 235 (quoting *Nocktonick v. Nocktonick,* 227 Kan. 758, 768--69, 611 P.2d 135, 142 (1980)). Interspousal tort immunity would therefore not be a barrier to Kathleen Mastbaum's efforts to recover from her husband.

For the reasons set forth above, I would reverse and enter judgment in favor of appellants on public policy grounds. Apart from questions of public policy, however, I would still reverse and remand to the lower court for further evidentiary proceedings. In either instance, the doctrine of interspousal tort immunity would not pose a barrier to proceedings between the Mastbaums.

Footnotes:

1. This interpretation is consistent with the "open courts" provision of the Utah Constitution article I, section 11, which states:

> All courts shall be open, and every person, for an injury done to him and his person, property, reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause for which he is a party.

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