

2005

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

Utah Court of Appeals

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Mitchel T. Rice; Joseph E. Minnock; Morgan, Minnock, Rice and James; Attorneys for Liberty Mutual Insurance Company.

C. Peter Whitmer; Attorney for Burdene Shores; Ronald W. Ady; Attorney for Unior Shores.

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

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Liberty Mutual Insurance Company,

Plaintiff and Appellee,

vs.

Burdene and Unior Shores,

Defendants and Appellants.

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District Court No. 050100099

Court of Appeals No. 20050291-CA

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Addendum to the Brief of Appellee Liberty Mutual Insurance Company

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IN THE UTAH COURT OF APPEALS

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Liberty Mutual Insurance Company,

Plaintiff and Appellee,

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Burdene and Unior Shores,

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Tab A

policies. *Universal Underwriters Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 925 P.2d 1270 (Utah Ct. App. 1996).

**Exceptions to coverage requirements.**

Although Subsection (2)(d) (now (2)(a)(iv)) allows permissive users who are adequately covered by operator's insurance to be excluded from coverage in a policy issued to a motor vehicle business, in order to invoke this exception to the general requirement of Subsection (1)(b)(i) (now (1)(a)(ii)(A)), the insurer must specifically incorporate the language of Subsection (2)(d) (now (2)(a)(iv)) in the insurance policy. *Universal Underwriters Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 925 P.2d 1270 (Utah Ct. App. 1996).

**Invalid policy.**

The reference in a policy's step-down clause to "the limits of the Financial Responsibility Law" violated § 31A-21-106, which prohibits incorporation of provisions not appearing in the contract or in attached documents. *Cullum v. Farmer's Ins. Exch.*, 857 P.2d 922 (Utah 1993).

**Release.**

Injured party who entered into a settlement

agreement with his tort-feasor, whereby he released the tort-feasor from any and all known and unknown personal injury as well as property damage arising from the auto accident, cut off his insurance company's subrogation rights, and by so doing was not entitled to further benefits from his insurance company under the no-fault coverage. *Jones v. Transamerica Ins. Co.*, 592 P.2d 609 (Utah 1979) (decided under prior law).

**Step-down coverage.**

This section does not prohibit insurers from providing step-down coverage for permissive users, as long as the coverage satisfies the statutory minimums set forth in § 31A-22-304. *Cullum v. Farmer's Ins. Exch.*, 857 P.2d 922 (Utah 1993).

**Cited in** *Barber v. Farmers Ins. Exch.*, 751 P.2d 248 (Utah Ct. App. 1988); *Wagner v. Farmers Ins. Exch.*, 786 P.2d 763 (Utah Ct. App. 1990); *State Farm Mut. Auto. Ins. Co. v. Northwestern Nat'l Ins. Co.*, 912 P.2d 983 (Utah 1996).

COLLATERAL REFERENCES

**A.L.R.** — Liability insurance: when is vehicle in "dead storage," 48 A.L.R.4th 591.

Automobile liability insurance policy flight from police exclusion: validity and effect, 49 A.L.R.4th 325.

What constitutes use of vehicle "in the automobile business" within exclusionary clause of liability policy, 56 A.L.R.4th 300.

Validity and construction of automobile insurance provision or statute automatically terminating coverage when insured obtains an-

other policy providing similar coverage, 61 A.L.R.4th 1130.

What constitutes "motor vehicle" for purposes of no-fault insurance, 73 A.L.R.4th 1053.

Validity, construction, and application of provision in automobile liability policy excluding from coverage injury to, or death of, employee of insured, 43 A.L.R.5th 149.

What constitutes use of automobile "to carry persons or property for fee" within exclusion of automobile insurance policy, 57 A.L.R.5th 591.

### 31A-22-304. Motor vehicle liability policy minimum limits.

Policies containing motor vehicle liability coverage may not limit the insurer's liability under that coverage below the following:

- (1) (a) \$25,000 because of liability for bodily injury to or death of one person, arising out of the use of a motor vehicle in any one accident;
- (b) subject to the limit for one person in Subsection (a), in the amount of \$50,000 because of liability for bodily injury to or death of two or more persons arising out of the use of a motor vehicle in any one accident; and
- (c) in the amount of \$15,000 because of liability for injury to, or destruction of, property of others arising out of the use of a motor vehicle in any one accident; or

(2) \$65,000 in any one accident whether arising from bodily injury to or the death of others, or from destruction of, or damage to, the property of others.

**History:** C. 1953, 31A-22-304, enacted by  
L. 1985, ch. 242, § 27; 1992, ch. 132, § 2;  
1993, ch. 271, § 1.

## NOTES TO DECISIONS

## ANALYSIS

Liability of county.  
Liability of self-insurers.  
Step-down coverage.  
Cited.

**Liability of county.**

Liability of county, as self-insurer of own vehicles operated by permissive users, under former law. See *Foster v. Salt Lake County*, 712 P.2d 224 (Utah 1985).

**Liability of self-insurers.**

Public policy as expressed in Utah law is that self-insurers must provide security for damages inflicted by themselves, and by permissive us-

ers of their vehicles. There is no expressed public policy that would require finding liability based upon mere ownership of a vehicle. *Lane v. Honeywell, Inc.*, 663 F. Supp. 370 (D. Utah 1987) (decided under former Title 31).

**Step-down coverage.**

Section 31A-22-303 does not prohibit insurers from providing step-down coverage for permissive users, as long as the coverage satisfies the statutory minimums set forth in this section. *Cullum v. Farmer's Ins. Exch.*, 857 P.2d 922 (Utah 1993).

**Cited in** *Wagner v. Farmers Ins. Exch.*, 786 P.2d 763 (Utah Ct. App. 1990).

## COLLATERAL REFERENCES

**A.L.R.** — Consortium claim of spouse, parent or child of accident victim as within extended "per accident" rather than "per person" coverage of automobile liability policy, 46 A.L.R.4th 735.

What constitutes single accident or occur-

rence within liability policy limiting insurer's liability to a specified amount per accident or occurrence, 64 A.L.R.4th 668.

Validity and operation of "step-down" provision of automobile liability policy reducing coverage for permissive users, 29 A.L.R.5th 469.

### **31A-22-305. Uninsured and underinsured motorist coverage.**

- (1) As used in this section, "covered persons" includes:
  - (a) the named insured;
  - (b) persons related to the named insured by blood, marriage, adoption, or guardianship, who are residents of the named insured's household, including those who usually make their home in the same household but temporarily live elsewhere;
  - (c) any person occupying or using a motor vehicle referred to in the policy or owned by a self-insurer; and
  - (d) any person who is entitled to recover damages against the owner or operator of the uninsured or underinsured motor vehicle because of bodily injury to or death of persons under Subsection (1)(a), (b), or (c).
- (2) As used in this section, "uninsured motor vehicle" includes:
  - (a) (i) a vehicle, the operation, maintenance, or use of which is not covered under a liability policy at the time of an injury-causing occurrence; or
  - (ii) (A) a vehicle covered with lower liability limits than required by Section 31A-22-304;

Tab B

were properly set aside where trial court failed to obtain jurisdiction over defendant because summons was not timely issued. *Fibreboard Paper Prods. Corp. v. Dietrich*, 25 Utah 2d 65, 475 P.2d 1005 (1970).

Where appellants, plaintiffs in a civil action, promptly objected to date set for trial on the ground that their counsel had an already scheduled appearance in another court on that date, but due to fact that there were no law or motion days between time objection was filed and trial date, objection was never heard, refusal to set aside default judgment entered when appellants failed to appear on trial date was an abuse of discretion. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

#### Time for appeal.

Under former Rule 73(h) the time for appeal from a default judgment in a city court ran from the date of notice of entry of such judgment, rather than from the date of judgment. *Buckner v. Main Realty & Ins. Co.*, 4 Utah 2d 124, 288 P.2d 786 (1955) (but see *Central Bank & Trust Co. v. Jensen*, *supra*, and Rule 58A(d)).

Cited in *Utah Sand & Gravel Prods. Corp. v. Tolbert*, 16 Utah 2d 407, 402 P.2d 703 (1965); *J.P.W. Enters., Inc. v. Naef*, 604 P.2d 486 (Utah 1979); *Katz v. Pierce*, 732 P.2d 92 (Utah 1986); *Lund v. Brown*, 2000 UT 75, 11 P.3d 277.

#### COLLATERAL REFERENCES

**Brigham Young Law Review.** — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: *Graham v. Sawaya*, 1981 B.Y.U. L. Rev. 937.

**Am. Jur. 2d.** — 46 Am. Jur. 2d Judgments § 265 et seq.

**C.J.S.** — 49 C.J.S. Judgments §§ 187 to 218.

**A.L.R.** — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and

hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

### Rule 56. Summary judgment.

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.



(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(Amended effective November 1, 1997.)

**Compiler's Notes.** — This rule is similar to Rule 56, F.R.C.P.

**Cross-References.** — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

#### NOTES TO DECISIONS

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|-------------------------------------|---------------------------------|
| Affidavit.                          | Disputed facts.                 |
| — Contents.                         | Effect of denial.               |
| — Corporation.                      | Evidence.                       |
| — Experts.                          | — Admissions of plaintiff.      |
| — Extension of time to submit.      | — Facts considered.             |
| — Failure to submit.                | — Improper evidence.            |
| — Inconsistency with deposition.    | — Proof.                        |
| — Necessity of opposing affidavits. | — Unsupported motion.           |
| — Resting on pleadings.             | — Weight of testimony.          |
| — Objection.                        | Implicit rulings.               |
| — Sufficiency.                      | Improper party plaintiff.       |
| — Hearsay and opinion testimony.    | Issue of fact.                  |
| — Superseding pleadings.            | — Contract interpretation.      |
| — Unpleaded defenses.               | — Corporate existence.          |
| — Verified pleading.                | — Deeds.                        |
| — Waiver of right to contest.       | — Intent to remove trustee.     |
| — When unavailable.                 | — Lease as security.            |
| — Exclusive control of facts.       | — Notice.                       |
| — Who may make.                     | — Wills.                        |
| Affirmative defense.                | Judicial attitude.              |
| Answers to interrogatories.         | Motion for new trial.           |
| Appeal.                             | Motion to dismiss.              |
| — Adversely affected party.         | Motion to reconsider.           |
| — Standard of review.               | Notice.                         |
| Applicability.                      | — Provision not jurisdictional. |
| Attorney's fees.                    | — Waiver of defect.             |
| Availability of motion.             | Procedural due process.         |
| Compliance with rule.               | Purpose.                        |
| Cross-motions.                      | Scope.                          |
| Damages.                            | Summary judgment improper.      |
| Discovery.                          | — Damage to insured vehicle.    |

Tab C

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AUG 30 2004

**MORGAN, MINNOCK & RICE**

Fourth Judicial District Court  
of Utah County, State of Utah

8/27/04 Deputy

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Fax number: (801) 531-9732

COPY

Attorneys for Plaintiff Liberty Mutual Insurance Company

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IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

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LIBERTY MUTUAL INSURANCE  
COMPANY,

Plaintiff,

vs.

BURDENE SHORES and  
UNIOR SHORES,

Defendants.

ORDER AND FINAL JUDGMENT TO  
DISMISS DEFENDANT BURDENE  
SHORES' COUNTERCLAIM OF BAD  
FAITH

Civil No. 040400497  
Honorable Derek Pullan

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THIS MATTER is before the Court on a Motion to Dismiss Count II of Defendant  
Burdene Shores' counterclaim for bad faith against Plaintiff Liberty Mutual Insurance Company,  
with Mitchel T. Rice appearing for Plaintiff and C. Peter Whitmer appearing for Defendant  
Burdene Shores.

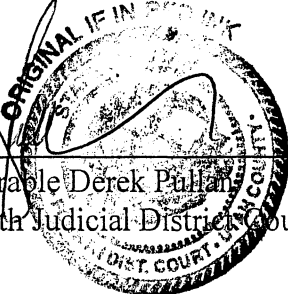
After reading Plaintiff's Motion to Dismiss, the Memoranda in Support thereof, Defendant's Memorandum in Opposition thereto, and after considerations of oral argument from both Counsel, the Court hereby orders and presents its findings and conclusions as follows:

1. The Court finds that on September 9, 2003, Burdene Shores was involved in an automobile accident in which her husband, Unior Shores, was driving; Mrs. Shores allegedly sustained personal injuries in the collision.
2. The Court finds that Mr. and Mrs. Shores are named insureds on an insurance policy issued by Plaintiff which provides liability coverage for the automobile that the Shores were riding in at the time of the accident.
3. The Court finds that Mrs. Shores is suing her husband in a separate action for negligent driving in an effort to collect benefits from the Liberty Mutual insurance policy.
4. The Court finds that Mrs. Shores is seeking recovery under the liability coverage of the insurance policy.
5. The Court finds that the present action shares facts similar to those in *Sperry v. Sperry*, 990 P.2d 381 (Utah 1999), and that this Utah Supreme Court case provides the rule of law in the instant matter.
6. The Court finds that Mrs. Shores' right to recovery stems from the liability coverage extended to Mr. Shores under the insurance policy and not her own coverage.

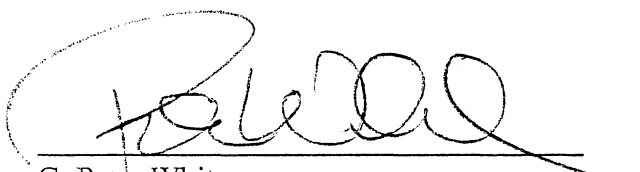
7. For these reasons, the Court concludes that Mrs. Shores is properly considered a third-party to the insurance contract for purposes of this suit.
8. The Court concludes that because Mrs. Shores is considered a third party to the insurance contract, there is no privity of contract between she and Liberty Mutual. As a result, Liberty Mutual owes no duty of good faith and fair dealing to Mrs. Shores.
9. The Court concludes that because Liberty Mutual owes no duty of good faith and fair dealing to Mrs. Shores, she cannot bring an action for bad faith against Liberty Mutual.
10. Based on all of the reasons cited above, and the reasons set forth in Plaintiff's Memoranda in Support of Motion to Dismiss, the Court hereby grants Plaintiff Liberty Mutual Insurance Company's Motion to Dismiss Count II of Defendant Burdene Shores' counterclaim for bad faith. The counterclaim for bad faith is hereby dismissed with prejudice and on the merits as to Defendant Burdene Shores.

DATED this 27 day of August, 2004.

  
The Honorable Derek Pullan  
Utah Fourth Judicial District Court Judge



APPROVED AS TO FORM:

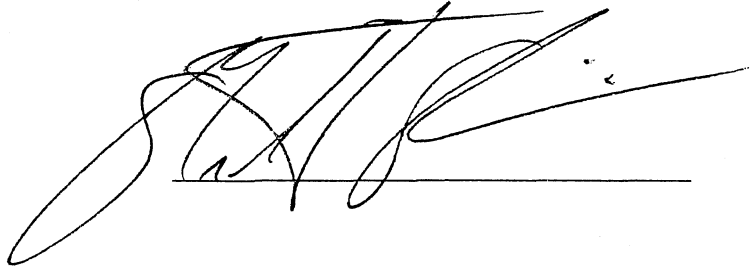
  
C. Peter Whitmer  
Attorney for Defendant Burdene Shores

CERTIFICATE OF MAILING

I do hereby certify that I did cause a true and correct copy of the foregoing ORDER AND  
FINAL JUDGMENT TO DISMISS DEFENDANT BURDENE SHORES' BAD FAITH  
COUNTERCLAIM, to be mailed, postage prepaid, to the following this 19 day of August,  
2004:

C. Peter Whitmer  
P. O. Box 434  
Pleasant Grove UT. 84062

Ronald Ady  
10 West 100 South, Suite 425  
Salt Lake City, UT 84101

A handwritten signature in black ink, appearing to be "C. Peter Whitmer", written over a horizontal line.

Tab D

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**JAN 25 2005**

**MORGAN, MINNOCK & RICE**

FILED IN  
4TH DISTRICT COURT  
AMERICAN FORK DEPT  
STATE OF UTAH  
UTAH COUNTY

2005 JAN 24 A 8:31

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IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, AMERICAN FORK DEPARTMENT, STATE OF UTAH

---

LIBERTY MUTUAL INSURANCE  
COMPANY,

Plaintiff,

vs.

BURDENE SHORES and  
UNIOR SHORES,

Defendant.

ORDER AND FINAL JUDGMENT  
GRANTING PLAINTIFF LIBERTY  
MUTUAL INSURANCE COMPANY'S  
MOTION FOR SUMMARY JUDGMENT  
ON DECLARATORY JUDGMENT  
ACTION, AND DENYING DEFENDANT  
BURDENE SHORES' RULE 56(f)  
MOTION

---

UNIOR SHORES,

Counterclaim Plaintiff,

vs.

LIBERTY MUTUAL INSURANCE  
COMPANY,

Counterclaim Defendant.

Civil No. 050100099  
Honorable Derek Pullan



On December 10, 2004, this matter came on for hearing on the Motion for Summary Judgment on Declaratory Judgment Action of Liberty Mutual Insurance Company, Plaintiff in the above-entitled action, with Mitchel T. Rice appearing as attorney for Plaintiff, C. Peter Whitmer appearing as attorney for Defendant Burdene Shores, and Ronald Ady appearing as attorney for Defendant Unior Shores.

Also before the Court is Defendant Burdene Shores' Rule 56(f) Motion to continue a decision on Plaintiff's Motion for Summary Judgment in order to conduct further discovery. This Motion was raised orally by Mrs. Shores' Counsel at the commencement of the hearing on December 10, 2004.

After reading Plaintiff's Motion for Summary Judgment, the Memoranda in Support thereof, Defendant's Memorandum in Opposition thereto, and after consideration of Oral Arguments from all Counsel on both the Motion for Summary Judgment and Rule 56(f) Motion, the Court hereby Orders and presents its findings and conclusions as follows:

1. The Court finds that on September 9, 2003, Burdene Shores was involved in an automobile accident in which her husband, Unior Shores, was driving the vehicle; Mrs. Shores allegedly sustained personal injuries in the collision.
2. The Court finds that Mr. and Mrs. Shores were named insureds on an insurance policy issued by Plaintiff which provides liability coverage for the automobile that the Shores were riding in at the time of the accident. The policy number is A02-268-209010-1037. The Liberty Mutual Policy includes bodily injury liability coverage of \$100,000 each person and \$300,000 per accident.

3. The Liberty Mutual Policy of Insurance also includes a “step-down” or “household exclusion” in an endorsement to the policy, Endorsement # PP 01 93 04 02. This provision states as follows:

I. Part A - Liability Coverage

Part A is amended as follows:

....

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 limit 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.

4. The Court finds that Mrs. Shores, through her Counsel, has demanded that Liberty Mutual pay \$100,000 in liability limits under the automobile policy as a result of the accident and her injuries. Liberty Mutual has denied Defendant’s demand based on the Household Exclusion provision but has offered to pay \$25,000 in exchange for a release.

5. The Court finds that Mrs. Shores is suing her husband in a separate action for negligent driving in an effort to collect benefits under the liability coverage of the Liberty Mutual Policy of Insurance.

6. Liberty Mutual filed an Amended Complaint for Declaratory Relief asking the Court to declare that it is not liable to pay more than the statutory minimum of \$25,000 pursuant to the Household Exclusion in the policy endorsement.
7. With regard to the legal standards for deciding Plaintiff's Motion, the Court concludes that a Motion for Summary Judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. The Court further views the facts and inferences to be drawn therefrom in a light most favorable to the non-moving party.
8. The Court further concludes that, under Utah law, insurance policies are interpreted according to the rules governing ordinary contracts, and the terms of the contract are harmonized with the policy as a whole. Ambiguities in an insurance policy are construed against the insurer and in favor of coverage.
9. The Court further concludes that exclusions in insurance policies are accepted as long as they don't violate public policy or state statute. Insurers are permitted to exclude certain losses from coverage by using language which clearly and unmistakably communicates to the insured the circumstances under which coverage will not be provided.
10. The Court finds that the issue presented by Plaintiff's Motion for Summary Judgment is whether an insurer may limit coverage for members of an insured household in an automobile policy of insurance under Utah law. The Court finds that this particular issue is unresolved under the current state of the law in Utah.

11. In deciding the present Motions, the Court considers the following judicial history:
- In 1985, the Utah Supreme Court decided *Farmers Insurance Exchange v. Call*, 712 P.2d 231 (Utah 1985), where the Court held that household exclusion clauses in automobile insurance policies are contrary to public policy and the no-fault statutes as to any amounts at or below the minimum benefits established under the No-Fault Insurance Act. In 1987, the Utah Supreme Court decided *State Farm Mutual Automobile Insurance Company v. Mastbaum*, 748 P.2d 1042 (Utah 1987). Two of the five Judges deciding *Mastbaum* held that household exclusions in automobile insurance policies are valid in excess of the statutory mandated amounts. Judge Durham wrote a dissenting opinion in *Mastbaum* where she opined that the legislative history indicated that all household exclusions in automobile insurance policies were contrary to public policy. Judge Zimmerman and Judge Stewart joined in a concurring opinion where they decided that only household exclusions in automobile insurance policies written after 1986 would be contrary to public policy. In 1994, the Utah Court of Appeals in *National Farmers Union Property and Casualty Company v. Moore*, 882 P.2d 1168 (Utah 1994), upheld a household exclusion in a farmowners policy of insurance, and further stated that the concurring and dissenting opinions in *Mastbaum* were dicta. In July of 2004, the Utah Supreme Court decided *Calhoun v. State Farm Mutual Automobile Insurance Company*, 96 P.3d 916 (Utah 2004). In that opinion, the Utah Supreme Court held as follows:

[E]xclusionary endorsements such as the “owned vehicle” exception at issue are not necessarily invalid. “Rather, contracting parties are free to limit coverage in excess of the minimum required limits, and [an] exclusion found in [a] contract [is] valid in relation to any coverage exceeding minimum amounts.” [citations omitted]. 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,” exclusions in insurance policies beyond the minimum coverage limits are allowed. *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1275 (Utah 1993) (quotations omitted).

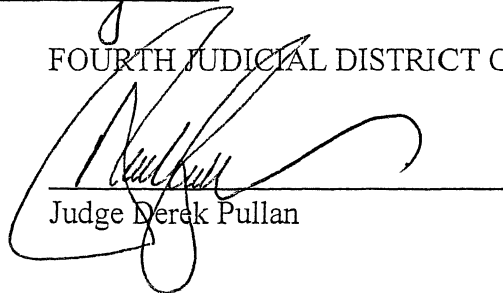
*Id.* at 923-24.

12. The Court concludes that *Calhoun* sets forth the general rule of law governing exclusions in automobile policies, and this District Court is bound to follow that rule of law.
13. The Court finds that the Household Exclusion in the Liberty Mutual Policy of Insurance clearly and unmistakably communicates to the insureds the circumstances under which coverage will be limited under the policy.
14. Based on all of the reasons cited above, and the reasons set forth in Plaintiff Liberty Mutual’s Memoranda in Support of Motion for Summary Judgment, the Court hereby grants Plaintiff’s Motion for Summary Judgment on its Amended Complaint for Declaratory Relief, and further dismisses the causes of action for declaratory relief alleged in Defendant Burdene Shores’ and Defendant Unior Shores’ Counterclaims against Plaintiff.

15. The Court therefore concludes that the Household Exclusion in the endorsement to Liberty Mutual's Policy of Insurance is a valid and enforceable provision limiting the liability coverage for Defendant Burdene Shores' claim to \$25,000.
16. The Court further disregards the Affidavit of Ryan Farnsworth for purposes of Plaintiff's Motion for Summary Judgment. The Court concludes that the issue presented by Plaintiff's Motion is a legal issue to be decided by the Court. The Court therefore orders that Defendant's Rule 56(f) Motion for a continuance to conduct additional discovery is denied.

DATED this 21 day of January, 2005.

FOURTH JUDICIAL DISTRICT COURT



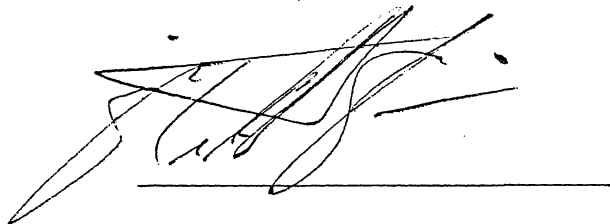
Judge Derek Pullan

CERTIFICATE OF MAILING

I hereby certify that on this 11 day of January, 2005, I caused a true and correct copy of ORDER AND FINAL JUDGMENT GRANTING PLAINTIFF LIBERTY MUTUAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT ON DECLARATORY JUDGMENT ACTION, AND DENYING DEFENDANT BURDENE SHORES' RULE 56(f) MOTION to be mailed via first class mail to the following:

C. Peter Whitmer  
P. O. Box 434  
Pleasant Grove UT. 84062  
Attorney for Defendant

Ronald Ady  
10 West 100 South, Suite 425  
Salt Lake City, UT 84101

A handwritten signature in black ink, appearing to be "C. Peter Whitmer", is written over a horizontal line.

Tab E



IN THE FOURTH JUDICIAL DISTRICT COURT  
OF UTAH COUNTY, STATE OF UTAH

LIBERTY MUTUAL INSURANCE  
GROUP,

Plaintiff,

vs.

BURDENE SHORES, et al.,

Defendant.

ORIGINAL

05010099

Case No. 040400497 MI

Hearing  
Electronically Recorded on  
December 10, 2004

BEFORE: THE HONORABLE DEREK P. PULLAN  
Fourth District Court Judge

APPEARANCES

For the Plaintiff:

Mitchel T. Rice  
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Salt Lake City, Utah 84101

For the Defendant:

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For the Defendant:

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Transcribed by: Beverly Lowe, CSR/CCT

1909 South Washington Avenue  
Provo, Utah 84606  
Telephone: (801) 377-0027

P R O C E E D I N G S

(Electronically recorded on December 10, 2004)

THE COURT: Be seated. We'll go on the record in the matter of Liberty Mutual Insurance Company vs. Burdene Shores and Unior Shores, case No. 040400497. Counsel, will you state your appearances, please.

MR. RICE: Yes, your Honor, Mitch Rice for the plaintiff, Liberty Mutual Insurance Company.

THE COURT: Thank you.

MR. WHITMER: Peter Whitmer appearing for Burdene Shores.

MR. ADY: Ronald Ady here for Unior Shores.

THE COURT: Thank you, Counsel. We're here on -- if I remember correctly, I have read your briefs -- on Liberty Mutual's motion for summary judgment as to the dec action; is that correct?

MR. RICE: That is correct, your Honor.

THE COURT: I have had an opportunity to read through all of your pleadings, follow it up with some research on cases. So I'll put to you, Mr. Rice.

MR. RICE: Thank you, your Honor. Your Honor, if I might, before we begin the argument on this motion, I would request the Court allow a continuance pursuant to Rule 56(f), to complete discovery and to take the deposition of Ryan Farnsworth in this case, an affidavit that's been supplied

1 only to me this week in Liberty Mutual's reply memoranda.

2 THE COURT: Does this go to the marketing practices --

3 MR. RICE: It goes to the marketing practices and  
4 conflicts with Burdene Shores' affidavit.

5 THE COURT: If there are conflicts of genuine issues of  
6 fact, it will preclude summary judgment anyway, won't it?

7 MR. RICE: Yes, it would, your Honor.

8 THE COURT: I'm going to take that under advisement,  
9 because I want to understand more about that. So why don't you  
10 address that as we go along.

11 MR. RICE: Very good.

12 THE COURT: Thank you.

13 MR. RICE: I should put the Court on notice as well,  
14 sir, that I filed a cross motion for summary judgment on behalf  
15 of my client today.

16 THE COURT: Okay, I haven't -- I haven't read that yet.

17 MR. RICE: Yeah.

18 THE COURT: Thanks.

19 MR. RICE: Your Honor, I was -- to give you -- let me  
20 comment on those preliminary comments as well, with regard to  
21 Mr. Ady. We had an agreement early on when I -- when I --  
22 Liberty filed its motion for summary judgment. Mr. Whither  
23 filed a memorandum in opposition.

24 Mr. Ady called me and said, "I need a little bit more  
25 time to file my memo in opposition. I said, "That's fine, but

1 I only want to -- I only want to file one reply, and I'd like  
2 to do it to both to save expense and so forth."

3 So I was waiting for that memo in opposition, and  
4 it did not come. Knowing that the hearing was going to be  
5 held today, I felt the need to go ahead and file the reply  
6 memorandum, which I did last Friday. It's only been today  
7 that Mr. Ady filed that memorandum in opposition; and he's  
8 captioned it as a motion for summary judgment. I'm sure it  
9 serves the same purpose.

10 I have not had an opportunity to review that. I think  
11 it's late in the game. I think it ought not to be considered  
12 and ought to be stricken under the rules of procedure for how  
13 these things are handled. That's my position on that.

14 With regard to the 56(f), I believe that that's --  
15 that the issues will be immaterial; that the motion should  
16 be granted, in any event. Even though there may be some  
17 disputes about the facts of the sale and the transaction,  
18 it's immaterial to the motion.

19 THE COURT: Okay.

20 MR. RICE: Would the Court want me to proceed?

21 THE COURT: Let me just pose some questions to you  
22 off the bat. That is, we have the Call case. That's it.  
23 Farmer's Insurance vs. Call in December of '85. In that case  
24 the Supreme Court says if you have the household exclusion that  
25 makes your coverage below what the minimum no fault requirement

1 is under State law, that's a problem; it violates public policy  
2 and it's going to void it.

3 The plaintiffs in that case then said, "Well, it  
4 should void the whole policy," because -- raised the issue  
5 directly in this case. That the household exclusion should  
6 be void as a matter of public policy, even above statutory  
7 minimums. The Court said, "We're not going to go there. We're  
8 not going to answer that question."

9 Two years later we have Nasbaum, which two justices  
10 say the household exclusion -- "If you're excluding coverage  
11 above what the minimum State law requirement is, then that's  
12 okay. We can live with that."

13 MR. RICE: Right, the majority holding.

14 THE COURT: And well, you got the two --

15 MR. RICE: No, I'm sorry. I'm sorry, to interrupt. Go  
16 ahead, Judge.

17 THE COURT: Yeah, you have the two --

18 MR. RICE: Carry on.

19 THE COURT: -- Justice Zimmerman says, "You know,  
20 in the absence of legislation, I agree with the two in the  
21 majority; but I'm persuaded by what Justice Durham has said;  
22 and I think that every household exclusion written after 1986  
23 should be void, based on what our legislative history is."  
24 Justice Stewart, I think, concurs with him.

25 Is that the holding of this case, then? That after

1 1986, in the absence of the legislature doing something  
2 different, then household exclusions above the minimum  
3 requirement are void?

4 MR. RICE: Your Honor, I appreciate you grasping that  
5 issue; and it's something that I've addressed in the reply  
6 memorandum. Let me apologize for filing a memorandum, an over-  
7 length one, but I felt it necessary.

8 This is an important issue, and -- there were multiple  
9 issues; and I felt the need to file a 17-page reply memorandum.  
10 I filed a motion, ex parte one, for over-length. I discussed  
11 that at length.

12 I feel that that is not the holding and binding  
13 precedent. My position on that is that first of all it's a  
14 plurality decision and it's in dicta. In fact, in the Moore  
15 case, which I believe was a '93 or '94 Utah Supreme Court case,  
16 the Court said just that. They said, "Nasbaum is dicta. It's  
17 not binding precedent."

18 THE COURT: What does Nasbaum stand for today? Is  
19 there a holding there that we can take to the bank at all?  
20 Or I mean, obviously the whole case is in dicta. They reached  
21 a decision. What would -- could it stand for today?

22 MR. RICE: Judge, I don't know that it has much value  
23 today. No. 1, it was decided quite some time ago. No. 2, the  
24 Judges were split.

25 THE COURT: Is that where we are today? From 1987

1 until the present, is the automobile insurance household  
2 exception issue just not been touched for the next almost 20  
3 years?

4 MR. RICE: I think that it has not been decided on  
5 point.

6 THE COURT: Okay.

7 MR. RICE: The arguments that I will make is that the  
8 -- No. 1, the minority decision in Nasbaum was flawed; and that  
9 the personal injury protection statute since Judge Durham made  
10 that decision has been amended.

11 THE COURT: I saw that, yeah. Where it says, "You  
12 can't use this statute to exclude coverage in other areas"?

13 MR. RICE: That's correct.

14 THE COURT: Okay.

15 MR. RICE: Our position on that is that the legislature  
16 then went back and said, "Wait a minute. We didn't want this  
17 to apply all over the place. We wanted it to apply to personal  
18 injury protection.

19 THE COURT: Uh-huh.

20 MR. RICE: Since that time, if the legislature really  
21 felt that household exclusions in auto policies should be  
22 voided, couldn't they have put that in the liability coverage?  
23 They've had nearly 15 years to do that.

24 THE COURT: And that's --

25 MR. RICE: And they have not done that.

1           THE COURT: And when we talk about the liability  
2 coverage, is that 303?

3           MR. RICE: That's correct.

4           THE COURT: Okay.

5           MR. RICE: That's correct. So the legislature came  
6 back and amended and put provision 2(b) in, which you just  
7 referred to. I think that changes the analysis. I think  
8 that the other things that have changed the analysis are the  
9 two Supreme Court decisions that have validated household  
10 exclusions in the non-auto context.

11          THE COURT: What type of insurance was involved in  
12 those?

13          MR. RICE: One of them was a -- I believe a Farmer's  
14 policy, Farmer's liability policy; and the other one was a  
15 homeowner's policy.

16          THE COURT: Uh-huh.

17          MR. RICE: One was in the Allen case. The other was  
18 in the Moore case. Again, the Supreme Court in those has an  
19 opportunity to say, "Public policy reasons, those provisions  
20 are invalid." Did not do that. Did not do that. The legislature  
21 has never at any point come out and said, "They're invalid."  
22 At no point has that happened.

23          Judge Durham comes up with this -- with this analysis,  
24 and I don't want to be critical of her. You know, it's  
25 somewhat of a reasoned analysis, but I believe that it's --



1 I believe that it's flawed. So we have those two Supreme Court  
2 decisions that say they're valid in the non-auto context.

3 THE COURT: Okay.

4 MR. RICE: And then we have a whole litany of cases;  
5 and the most recent one is the Calhoun case. In that case,  
6 just last summer, July of '04, that policy provision included  
7 an own vehicle exclusion. That, again, is not a household  
8 exclusion, but what the Court said on page -- your Honor, I'm  
9 sorry, I've got my West Law printout. I believe it's 923.

10 THE COURT: Do you have a paragraph number with you?

11 MR. RICE: Ten and eleven.

12 THE COURT: Ten and eleven.

13 MR. RICE: Pages 923 and 924.

14 THE COURT: Okay.

15 MR. RICE: And I'd like to take a minute to read that.  
16 "Moreover, contrary to the Calhoun's assertions, exclusionary  
17 endorsements such as the own vehicle exception at issue are not  
18 necessarily invalid. Rather, contracting parties are free to  
19 limit coverage in excess of the minimum required limits, and  
20 an exclusion found in a contract is valid in relation to any  
21 coverage exceeding minimum amounts." I'm going to skip over  
22 those cites.

23 THE COURT: Okay, let me just --

24 MR. RICE: I'm sorry, were you with me?

25 THE COURT: Yeah, I'm about halfway through.

1 MR. RICE: Okay.

2 THE COURT: "Contracting parties are free to limit  
3 coverage in excess of the minimum required limits, and an  
4 exclusion found in a contract is valid in relation to any  
5 coverage exceeding minimum amounts." Your position is that's  
6 just a general principal at this point, a general rule of law?

7 MR. RICE: That's correct.

8 THE COURT: Okay.

9 MR. RICE: And if you applied it to our case, the  
10 provision would be valid above minimum limits.

11 THE COURT: What was the insurance again in Calhoun?

12 MR. RICE: Oh, that's the -- that was an automobile  
13 policy as well. The exclusion, though, was different.

14 THE COURT: Is this the -- this is where the son wasn't  
15 going to be covered, right?

16 MR. RICE: That's correct. The son drives his father's  
17 Cherokee --

18 THE COURT: Yeah.

19 MR. RICE: -- Jeep.

20 THE COURT: Okay.

21 MR. RICE: And he wants to recover under his own  
22 policy, but his own policy says, "We'll, cover your insured  
23 vehicle --"

24 THE COURT: Uh-huh.

25 MR. RICE: -- "but not --"

1 THE COURT: Any another.

2 MR. RICE: -- "another vehicle."

3 THE COURT: And he -- there was a household exclusion  
4 in Dad's policy?

5 MR. RICE: I don't believe there was a household  
6 exclusion. I don't -- there was another exclusion in his  
7 policy.

8 THE COURT: All right.

9 MR. RICE: Let me just read the next sentence, because  
10 I think it's also of value.

11 THE COURT: Okay.

12 MR. RICE: "As long as any exclusions are phrased in  
13 language which clearly and unmistakably communicates to the  
14 insured the specific circumstances under which the expected  
15 coverage will not be provided, exclusions and insurance  
16 policies beyond the minimum coverage limits are allowed."

17 Now, this Calhoun case cites to the Alf vs. State  
18 Farm case. That case also provides very strong language about  
19 exclusions being allowed, as long as they're clearly phrased.  
20 There's a host of other Utah cases that I've cited to. Not --  
21 I'm not talking about a dozen, but there's --

22 THE COURT: No.

23 MR. RICE: -- there's a number of them. Now, you take  
24 those holdings, and then you look at -- I'm certain this is  
25 what would happen. That our Court of Appeals or our Utah

1 Supreme Court would look at what's happening around the nation;  
2 and what's happening around the nation -- and I've cited to  
3 many of those opinions -- the majority of Courts are holding  
4 that as long as it's above minimum limits, you're free to  
5 contract; you're free to exclude.

6 You asked earlier about legislative intent.

7 THE COURT: Uh-huh.

8 MR. RICE: If you read the insurance code, the first  
9 -- the seventh paragraph where it says, "The purpose of the  
10 insurance code --" it says under subparagraph (7), "The purpose  
11 is to allow parties the freedom to contract."

12 Now, the public policy, I would more than agree if  
13 it's below the statutory minimums, it's invalid. That's our  
14 public policy. That's what we're concerned about. These  
15 decisions from around the country, and the decisions of late  
16 that are similar in Utah hold that if it's above the minimum  
17 limits, you're free to contract.

18 THE COURT: I do have a question about 303. In 2000,  
19 the legislature added subparagraph (7), I believe, (7)(a), (b)  
20 and (c) to that statute. So I think the current contract would  
21 be governed by that. Do you -- I have a copy up here if you  
22 need.

23 MR. RICE: Judge, I -- your Honor, I apologize. I  
24 don't know if I have that.

25 THE COURT: No, that's all right. Let me get one.

1           MR. RICE: I knew that part of the discussion would be  
2 on 309, and not so much 303.

3           THE COURT: Here you go. Subparagraph (7) of 303  
4 says, "A policy of motor vehicle liability coverage --" under  
5 subsection 302(1) -- "may specifically exclude from coverage  
6 a person who is a resident of the named insured's household;  
7 including a person who usually makes his home in the same  
8 household but temporarily lives elsewhere if --" then you have  
9 to do three things.

10           Is what we're dealing with here an exclusion from  
11 coverage? If that's the case, do you have to have the written  
12 consent of Ms. Shores in order for this exclusion to be valid?

13           MR. RICE: Your Honor, I believe this is something  
14 different. This is not liability coverage when you have an  
15 insured making a claim against another insured. This is  
16 whether you're going to provide insurance at all to a member  
17 of the household. In fact, that was I think the father's  
18 situation in the Calhoun case.

19           THE COURT: Okay, so -- yeah, and I think Calhoun does  
20 interpret the statute. So what you would say is subparagraph  
21 (7) relates to whether we're going to provide coverage at all  
22 to somebody?

23           MR. RICE: Right.

24           THE COURT: Not what happens --

25           MR. RICE: That's what happened in Calhoun. In Calhoun

1 the boy had a poor driving record, and the parents didn't want  
2 to insure him or pay for him --

3 THE COURT: Uh-huh.

4 MR. RICE: -- and so this is the context they went  
5 into. Under this statute, "We can exclude him. He can get  
6 his own insurance. We have ours." That's something entirely  
7 different from if Mother and Father are in a car and they're in  
8 an accident --

9 THE COURT: Uh-huh.

10 MR. RICE: -- Mother or Father is hurt, bringing an  
11 action against the driver, the negligent party.

12 THE COURT: Maybe it could have been more artfully  
13 worded, but it seems to me if I were read this just like it  
14 says, if you're going to exclude a person from coverage --  
15 which the insurance contract seems to read that way in some  
16 ways, because it's 100,000 per person or 300,000 per accident.  
17 Then you go to the endorsement, and it says, "The following are  
18 excluded from coverage --" or "exclusions." Then it lists the  
19 insure.

20 So did the legislature intend by this statute to say,  
21 "Look, if you're going to be excluding people from coverage,  
22 then you've got to get their written consent of people in the  
23 household"?

24 MR. RICE: Again, Judge, I think that this applies to  
25 something different, a different scenario. We're talking about

1 if you've got a poor driver in the home --

2 THE COURT: Uh-huh.

3 MR. RICE: -- and you want to do something about that  
4 so that it doesn't affect your rate -- because typically under  
5 insurance, everybody in the home's included.

6 THE COURT: Right.

7 MR. RICE: That's just the way it's written. So the  
8 insurance company gets the names of everybody and finds that  
9 out and then set rates based on this. This gives people an  
10 out.

11 THE COURT: And so you -- again, you would have me  
12 interpret "exclude from coverage" meaning if you're going to  
13 not cover somebody at all --

14 MR. RICE: Right.

15 THE COURT: -- in the household, then you've got to do  
16 these things. Place people on notice. Essentially get their  
17 written consent that Johnny's not covered at all, but if you're  
18 offering insurance up to minimums for a person -- if a person  
19 in the household is being offered insurance coverage of some  
20 kind under the policy, then subparagraph (7) does not apply.

21 MR. RICE: It's a different -- it's a different  
22 scenario.

23 THE COURT: Okay.

24 MR. RICE: There's a lot of exclusions in a policy.

25 THE COURT: Yeah.

1           MR. RICE: Many of them, and we don't require signing  
2 off on those. Again, you go back to those cases that say,  
3 "Parties are free to contract with your exclusions." That  
4 doesn't mean that the other side has to sign anything. They  
5 have to receive the policy.

6           THE COURT: Those are all my questions.

7           MR. RICE: Okay. Your Honor, I am not going to talk  
8 any further. I have laid out my arguments in my reply and memo  
9 in support; and if those are the Court's probative questions,  
10 I'll at this point conclude this part of my remarks.

11           THE COURT: Thank you very much, Mr. Rice.

12           Mr. Whitmer.

13           MR. WHITMER: Thank you, your Honor. Before proceeding  
14 with my argument, I would encourage the Court to read 303(7)  
15 exclusion, as you have pointed out, as applying to this case,  
16 because I believe it does apply specifically to this case.

17           Plaintiff's Counsel has specifically referred to  
18 the Calhoun case; and the Calhoun case was interpreting this  
19 particular statutory provision which allowed exclusions. The  
20 case before this Court today is not in point at all, because  
21 it's not with regard to a statutory exclusion. It's regard to  
22 an exclusion from coverage.

23           Now, proceeding with my general argument, if the Court  
24 doesn't have particular questions --

25           THE COURT: Go ahead.



1 MR. WHITMER: -- the first issue I'd like to bring up  
2 again is the state of discovery in this case. By what I will  
3 term "obstruction tactics," the plaintiff's Counsel prevented  
4 any discovery from occurring until mid-September to October  
5 time frame.

6 The discovery that has occurred since that time has  
7 been minimal, and in fact there has been responses which -- to  
8 request for admissions that were served in early October on the  
9 plaintiff, which do not resolve any issues. There have been  
10 objections to request to produce.

11 Out of a total of 33 requests to produce, the  
12 plaintiff objected to and produced nothing in 26 of those  
13 requests. That's significant, not because I think there may  
14 not be some basis for objection in one or two of those, but  
15 there is certainly not a basis for objection in 90-plus percent  
16 of the request to produce.

17 He did -- the plaintiff's Counsel did defer response  
18 in two requests, and he set out a minimal amount of information  
19 in additional three requests. Those additional three requests  
20 relate to the sales file in regard to this case.

21 The reason that sales file is important is because  
22 of the affidavit, again, of Ryan Farnsworth, because the  
23 information produced doesn't correspond with anything in  
24 Mr. Farnsworth's affidavit.

25 THE COURT: Can I --

1 MR. WHITMER: We have a right to inquire into that.

2 THE COURT: Can I ask you this. Because the motion  
3 for summary judgment turns on interpretation of the contractual  
4 language in the statute, could I reach those issues, as opposed  
5 to the marketing tactics of the insurance company that may go  
6 to bad faith, but could I interpret the contract as a matter  
7 of law and the statute as a matter of law?

8 MR. WHITMER: Well, I don't think you could interpret  
9 it absent the factual basis of how the contract was entered  
10 into and what the terms of the contract were. I think those  
11 are factual issues, not purely issues of law, as plaintiff's  
12 Counsel has presented them. Certainly there are many issues of  
13 law associated with it, but those are not the only things there  
14 is issues of law.

15 THE COURT: But what facts would be pertinent to the  
16 issue of whether the household exclusion is permitted under  
17 Utah law?

18 MR. WHITMER: The facts that would be pertinent would  
19 be whether or not Liberty Mutual provided a policy through  
20 Ryan Farnsworth that provided the same coverage as in the Met  
21 Life policy, as was the representation as indicated in Burdene  
22 Shores' affidavit.

23 THE COURT: Is it your position that your clients  
24 didn't receive a copy of the policy?

25 MR. WHITMER: No, we -- your Honor, we did receive --

1 my clients did receive a copy of the policy sometime after it  
2 was issued.

3 THE COURT: Okay.

4 MR. WHITMER: After the terms were negotiated.

5 THE COURT: So this isn't a State Farm vs. Call  
6 problem?

7 MR. WHITMER: Not exactly. No, your Honor.

8 THE COURT: So there's no issue about whether they  
9 received a copy of the policy that contained the exclusions --  
10 the purchaser did?

11 MR. WHITMER: They did receive a copy of the policy  
12 significantly after the policy was issued and after the terms  
13 had -- the terms had been discussed.

14 Proceeding on in this motion, I would argue to the  
15 Court that the reply brief in this case by plaintiff's Counsel  
16 is in reality a new motion. The initial motion for summary  
17 judgment filed in September applied primarily Nasbaum. Said it  
18 was the leading case in this area.

19 The defense -- at least Burdene Shores still believes  
20 it's the leading case in this area; but the best that can  
21 be said in favor of the plaintiff in Nasbaum is that it is  
22 inconclusive. At worst, the opinion of the dissent, and  
23 Justice Zimmerman and Justice Stewart would hold that the  
24 policy of insurance in this case is not valid as to the family  
25 exclusion.

1           Plaintiff's Counsel spends a significant amount of  
2 time in his reply brief; 17 -- physically 19 pages --

3           THE COURT: Can I just add -- before you leave Nasbaum,  
4 what do you think the holding in this case is?

5           MR. WHITMER: I believe the holding is that a post-1986  
6 family exclusion is not permitted.

7           THE COURT: Okay.

8           MR. WHITMER: As I was starting to say in the 17 to 19  
9 page memoranda that plaintiff's Counsel has filed in reply,  
10 this is really a new motion for summary judgment, which in  
11 fairness, in addition to the discovery issues, the defense  
12 should have the opportunity to respond to.

13           This isn't a five-page reply addressing simply the  
14 issues that were raised in the opposition. Although some of  
15 those issues are addressed, it's not within the bounds of a  
16 normal reply memorandum.

17           So I would therefore at a minimum request the  
18 opportunity to respond to that reply memorandum, both with  
19 additional discovery, and with arguments and case law.

20           THE COURT: Can you -- I read the reply memorandum  
21 earlier today. What specific -- actually, read the reply  
22 memorandum late last night, and read your memorandum earlier  
23 today. What specific new issues do you need -- do you feel  
24 like you need to respond to?

25           MR. WHITMER: Well, the primary new issues relate to --

1 factual new issues relate to statements by Ryan Farnsworth in  
2 his affidavit, of which we were totally unaware until the reply  
3 memorandum.

4 Second thing relates to -- excuse me a moment. The  
5 fact again here, the plaintiff's Counsel has argued extensively  
6 cases not in Utah jurisdiction. As he candidly admitted in his  
7 opening argument, there are no cases directly in point beyond  
8 Nasbaum in Utah. That makes Nasbaum, at least in my mind, the,  
9 if not totally controlling, highly persuasive case law, that  
10 post 1986 family exclusions are invalid.

11 Now, additionally plaintiff's Counsel has made  
12 extensive arguments in regard to ambiguity, going far beyond  
13 any of the simple arguments in the initial motion for summary  
14 judgment.

15 I believe we need to have time to explore those issues  
16 in greater detail to supply a response to this reply, so that  
17 the issues may be appropriately presented to the Court, but  
18 primarily factual issues, and also so that discovery may be  
19 pressed forward.

20 At this point in time, virtually no substantive  
21 discovery has occurred. Not because we haven't tried to  
22 perform some substantive discovery, but because the plaintiff's  
23 Counsel has, in my opinion, actively obstructed substantive  
24 discovery ever since the case has been filed. We would --

25 THE COURT: I don't know the answer to this question.

1 You can help me. Is there a pretrial scheduling order? Have  
2 you hold your attorney planning meeting and --

3 MR. WHITMER: An attorney planning meeting was held in  
4 mid September, your Honor.

5 THE COURT: Okay. Is there a scheduling order that  
6 arose out of that?

7 MR. WHITMER: I believe there was.

8 THE COURT: What are the deadlines for fact discovery?  
9 I just had them.

10 MR. WHITMER: Judge, I don't have it with me. I  
11 believe that we have --

12 MR. ADY: Peter --

13 MR. WHITMER: -- next summer (inaudible).

14 MR. ADY: It's just a -- check the last page, Peter.

15 THE COURT: I just didn't get a chance to look,  
16 frankly.

17 MR. WHITMER: Here is Mr. Ady's file copy.

18 THE COURT: Thank you for that. I should have looked  
19 further.

20 MR. WHITMER: Your Honor, in brief conclusion of my  
21 argument, the substantive issues in the motion for summary  
22 judgment are in great dispute. Plaintiff's primary arguments  
23 involve, again, non-Utah cases. Most notably Pribble v. State  
24 Farm from Wyoming. The statutory and case law in Wyoming don't  
25 sup -- don't follow Utah statutory or case law at all, at least

1 as far as I was able to determine. So I don't think it's  
2 really in point, the Pribble case.

3 Another important factor that's been argued is the  
4 statutes of Utah related to requirements for rates being  
5 separately stated for different rating factors. I believe  
6 that's code subsection 308 requires those things to be stated  
7 separately.

8 There are -- or is not real separate statement of  
9 limits of liability, which as you correctly pointed out, is an  
10 exclusionary limit of liability as it relates to the plaintiff,  
11 Burdene Shores, in this case. Excludes her liability from  
12 anything over \$25,000 regardless of what the declarations page  
13 says.

14 There is no indication on the declarations page that  
15 the \$25,000 limit applies to Burdene Shores. I think it's  
16 important to comply with the statute that it be stated on the  
17 declarations page. It is not.

18 There is a significant section in the policy of  
19 insurance that talks about rating factors. There is no mention  
20 of a rating factor as being a co-insured or a family household  
21 member or anything of that nature as a rating factor.

22 So while the policy terms the \$25,000 a limit, an  
23 exclusionary limit of liability, it is both ambiguous in what  
24 it means, because of arguments put forth in the brief.

25 Common ordinary person, let alone a person of 71,

1 75, 82 years old, could be easily confused by obtuse language  
2 referring to statutes, calling things "minimum limits," when in  
3 reality they're maximum limits.

4 An ordinary person would be confused by the policy if  
5 they weren't schooled in the law. If an ordinary person of 30  
6 to 50 would be confused, certainly a person of 71 -- currently  
7 75 to 83 would be confused.

8 These are, again, factual issues that need to be  
9 explored as to -- if we could go into marketing practices,  
10 again, these are things that plaintiff's Counsel has failed  
11 to provide discovery on to this point, and which we intend to  
12 actively pursue in obtaining the information as to how Liberty  
13 Mutual marketed to seniors, and especially to retired people,  
14 who by common ordinary knowledge have limited understanding of  
15 legal matters, someone especially not schooled in the law.

16 For those reasons I believe the policy is both  
17 ambiguous -- it's a violation of statute, and there are  
18 material factual disputes which preclude summary judgment in  
19 this case. Certainly at a minimum require additional discovery  
20 to be completed before we can say with any authoritativeness  
21 what the state of the facts is. Thank you, your Honor.

22 THE COURT: All right. Tell me what it is you'd like  
23 me to do, and in what order, I guess? What priority? Do you  
24 want the Rule 56(f)?

25 MR. WHITMER: Yes, I would like the Rule --



1 THE COURT: (Inaudible).

2 MR. WHITMER: -- the Rule 56. That will be one of  
3 the first items. I will anticipate filing the motion at the  
4 earliest, the beginning of next -- at the latest, the beginning  
5 of next week. Certainly I would like the Rule 56(f) motion  
6 almost immediately.

7 The same time that motion is filed there will be  
8 a motion to compel discovery, in regard to the many, many  
9 requests to produce that the plaintiff has refused and  
10 objected to answering; and also to be able to inquire into  
11 the competence and truthfulness of Mr. Farnsworth, as in our  
12 mind it's a significant piece of the picture; which we haven't  
13 had time to, having received his affidavit only Monday of this  
14 week.

15 Beyond that, you know, the limits set forth in the  
16 scheduling order are probably adequate to give us time to do  
17 these things if it's pressed vigorously.

18 THE COURT: Thank you very much.

19 MR. WHITMER: Thank you.

20 THE COURT: Mr. Ady, let me just inquire, is your  
21 motion a motion for summary judgment?

22 MR. ADY: Yes.

23 THE COURT: That's not before me today, then, right?

24 MR. ADY: Yeah, yeah. No, and I intend to only argue,  
25 if I can put it this way, to ski a tight line, based upon

1 supplementing those -- some arguments off of Mr. Whitmer's  
2 memorandum in opposition.

3 THE COURT: So are you just joining in his memorandum?

4 MR. ADY: Yeah, I want to make argument on his -- yes,  
5 I'm joining in his memorandum, and wish to make argument off of  
6 it, if I may.

7 THE COURT: I'm going to -- that's fine. I hear you  
8 joining in the motion of -- that they've made; but your motion  
9 for summary judgment that's been filed today isn't ready for  
10 decision. I'm not going to rule on that.

11 MR. ADY: Right.

12 THE COURT: Okay. All right.

13 MR. ADY: Sir, I think Mr. Whitmer's laid out -- and  
14 Mr. Rice have both done a very good job of laying out the  
15 issues here. I don't want to trench on Mr. Whitmer's arguments  
16 at all. So if I start to, please let me know.

17 I want to talk just a little about the ambiguity  
18 issue. The case cited by Mr. Whitmer in his memorandum,  
19 Versaw, I think is a very important case. Why I think Versaw  
20 is so important is because I think it distinguishes Utah law  
21 from Pribble, the Wyoming case.

22 In Utah, once a Court finds ambiguity, then it applies  
23 rules of construction to resolve that ambiguity. I don't  
24 believe that's the case in Utah. I think that our Courts  
25 up front apply the test in Pribble, and that page 10 of

1 Mr. Whitmer's brief at paragraph 8, it is -- or they cite  
2 paragraph 8 of Versaw.

3 I'll quote it, "Would the meaning of the language  
4 of the insurance contract be plain to a person of ordinary  
5 intelligence, understanding, viewing the matter fairly and  
6 reasonably in accordance with the usual and natural meaning  
7 of the words and the light -- and in the light of existing  
8 circumstances?" I think --

9 THE COURT: Can you give me a cite on that?

10 MR. ADY: It is 2004 of Utah 73, and I just quoted from  
11 paragraph 8.

12 THE COURT: Okay, and that's --

13 MR. ADY: 2000.

14 THE COURT: -- out of the Court of Appeals or --

15 MR. ADY: Utah. That's the Utah Supreme Court.

16 THE COURT: Okay.

17 MR. ADY: And I think "in the light of existing  
18 circumstances" is a term that I would like to focus on. If  
19 one looks at this policy, and it's attached as Exhibit A to  
20 Mr. Rice's memorandum, there is in there -- I think it's  
21 perhaps the very last page -- or near the very last -- yes.  
22 In my copy it's the very last page of that memorandum of  
23 Mr. Rice, under tab A. This is his memorandum support of the  
24 motion for summary judgment.

25 Mrs. Shores was required to sign this summary page,

1 and on this summary page it's quite interesting. She's  
2 required to sign this, and right at the very top, Liberty  
3 Mutual puts in this language:

4 "Please be aware that any summary of coverage on  
5 this form is necessarily general in nature." Okay, so we've  
6 outlined her coverage here as "general in nature."

7 Then the next two sentences are what I want to key  
8 on. "Her policy contains "specific descriptions, definitions,  
9 exclusions and conditions."

10 Your policy, "In case of any conflict --" "any  
11 conflict." It's unequivocal -- "your policy language will  
12 control the resolution of coverage questions." So they make  
13 her sign off on this statement.

14 "If you have any questions, please contact your local  
15 Liberty Mutual sales office before completing this form." So  
16 what Liberty Mutual is telling Mrs. Shores with this form right  
17 there is "Talk to your sales representative, Mr. Farnsworth.  
18 He'll help you understand this policy."

19 What did Mr. Farnsworth do? Told her it provided the  
20 same coverage -- now, this is a fact that's in dispute -- as  
21 her old policy, and this -- they had her sign off on this.

22 Furthermore, what's interesting about the second  
23 sentence in that first paragraph, sir --

24 THE COURT: Did it?

25 MR. ADY: Pardon me?

1 THE COURT: Did it provide the same coverage as --

2 MR. ADY: No, the step-down clause clearly diminishes  
3 coverage. So they give her this and they tell her, "Talk to  
4 our sales rep. He's going to help you understand this form,"  
5 or what his help was, "It's the same coverage."

6 Now, "Your policy contains specific descriptions,  
7 definitions, exclusions and conditions," second sentence in  
8 that first paragraph. Not one word in there about endorsements,  
9 not one. That's why Versaw quotes Sant, I think. I saw it in  
10 Mr. Whitmer's brief, and he maybe can give me a leg up here if  
11 I stumble.

12 The concept that if you could readily include language  
13 in a policy at -- to resolve an ambiguity or to clarify its  
14 terms, and you don't, "Well, we're sorry, Mr. Insure, you're  
15 going to take it in the shorts on coverage," because it's going  
16 to be construed against you.

17 So where we're at here is the summary page sets out  
18 here and says, "Look at your policy. It controls over -- it  
19 trumps everything else; and if you've got any questions about  
20 this exceedingly complex document, you talk to your sales rep  
21 before you sign this form," and she did.

22 Now, I'd just like to take you through, and hit some  
23 of the highlights in this document. I think the observations  
24 of Counsel -- I was in a mediation yesterday regarding an  
25 insurance policy up at the Court of Appeals. Counsel for the

1 insurance company said, "You know, I have to read these things  
2 14 or 15 times before I can understand them." That's a very  
3 experienced insurance Counsel, and Kirk, I think is -- was very  
4 forthright in telling me that.

5 If you look at page 11 of the policy, which is tab A,  
6 part F, section A to this policy --

7 THE COURT: I'm sorry, my page numbers are cut off. So  
8 you're looking -- give me a section or part.

9 MR. ADY: Part F.

10 THE COURT: Part F?

11 MR. ADY: Part F. Mine are cut off, too.

12 THE COURT: Okay.

13 MR. ADY: We go to part -- looks like you're there.  
14 I'm still looking. That's the general provisions, your Honor.  
15 Oh, general provisions, there we are. Part F, and then I want  
16 to look at Section A.

17 "This policy contains all of the ingredients between  
18 you and us. It's terms may not be changed or waived, except by  
19 endorsement issued by us."

20 Now, I'd invite the Court to read this policy. I  
21 have, and Mr. Rice can correct me if I misstate this, but I  
22 couldn't find anywhere else in this policy where it talked  
23 about endorsements. Not one other place. That's it, and it  
24 says the endorsements have to be issued.

25 If you look at the last page of this policy -- two

1 more pages in -- when I think of "issued," I think is someone  
2 signing off and saying, you know, authoritatively, "Here it  
3 goes." Well, you've got the secretary and the president of  
4 Liberty Mutual issuing this policy. There's their signatures  
5 at the bottom of that page.

6 If you look at the endorsements that are attached,  
7 how one would determine whether those are issued, I don't know,  
8 because they're all just forms. There's nothing to indicate  
9 that these are issued.

10 In fact, it just has ISO Properties, Inc. 2001.  
11 I forget what ISO means, but it's an insurance service  
12 organization. Do you know what that means, Mr. Rice? ISO.  
13 Insurance Service Organization, I think it means. They provide  
14 forms to insurance companies.

15 So what we've got here are a bunch of ISO forms  
16 attached in, with no indication that they've ever been issued.  
17 In fact, on my -- on my copy, if you page in -- if you were  
18 a lay reader, a person of ordinary intelligence -- and I  
19 know you're not, your Honor -- but if you were, the first  
20 endorsement you would hit --

21 THE COURT: I'm working to become that way.

22 MR. ADY: -- the second endorsement --

23 THE COURT: I'm working to become a person of ordinary  
24 intelligence.

25 MR. ADY: Okay.

1 THE COURT: I hope to achieve that, and I mean that.

2 MR. ADY: I'm sorry, I was talking from the other  
3 direction.

4 THE COURT: I know. It's all right.

5 MR. ADY: But if you look at the first endorsement,  
6 nothing's checked. Nothing's filled in. Schedule, here's an  
7 endorsement attached. You don't see any marks -- at least on  
8 the one that Mr. Rice has attached. You don't see any check  
9 marks.

10 You go to the next endorsement. That's five, six  
11 pages in. Under "Insured motorist coverage Utah, schedule,  
12 limited liability," nothing's filled in.

13 Now, this continues on -- or those two, at least. So  
14 how do you know that they've been issued? Oh, then you go  
15 "Towing and labor cost coverage," which is a number of pages  
16 in. Once again, it's all blank.

17 You can go to "Property damage," "Uninsured motorist  
18 coverage." All the schedules are blank. So the only reference  
19 in this entire policy is to endorsements, says that they have  
20 to be issued. You look at them, and one is going to ask right  
21 away, as a lay person of ordinary intelligence, "Well, are  
22 these issued?" "What are these?"

23 There's no signature. There's no stamp on there  
24 saying, "Issued by Liberty Mutual." Most policies, sir, that  
25 I've encountered, contain a statement at the bottom. Right



1 under that signature line on the last page where you've got  
2 Dexter R. Long and Edmund F. Kelly, there's a big in black  
3 letters -- block letters, "The endorsements attached hereto  
4 form a part of --" and if you read, "as part of this policy,"  
5 or some language like that. Don't see that there.

6           So what you have is a summary page that I referred you  
7 to earlier that says, "The policy trumps everything else," and  
8 it talks about policy descriptions, definitions, exclusions and  
9 conditions, and doesn't say one word about endorsements.

10           The policy goes through, if you read sir, and talks  
11 -- never talks about declarations generally, or makes any kind  
12 of provision for declarations. Always refers to them bit by  
13 bit on an ad hoc basis.

14           I'd like to refer the Court to a statute, 31(a)-21-  
15 1061 Utah Code says that "Any insurance policy form containing  
16 any agreement or incorporation of any provision not fully set  
17 forth in the policy or other document attached to and made  
18 a part of the policy isn't part of the policy. Fully set  
19 forth and attached and made part of the policy." Well, this  
20 is certainly in my view isn't fully set forth, and made part  
21 of the policy, these endorsements.

22           Then at Versaw -- at Versaw again, at paragraph 25,  
23 the Supreme Court says, "We've also stated that ambiguous or  
24 uncertain language in an insurance contract that is very  
25 susceptible to different interpretations should be construed

1 in favor of coverage. Insurance contract has inconsistent  
2 provisions; one which can be construed against coverage and  
3 one which can be construed in favor of coverage, the contract  
4 should be construed in favor of coverage."

5 Well, other ambiguities. Define this --

6 THE COURT: Let me ask you this. How is the endorsement  
7 itself -- what is your fairly susceptible interpretation in  
8 subsection (b) in the endorsement issue, the language, "We do  
9 not provide liability coverage for any insured."

10 MR. ADY: Let me get to that, sir, if I may.

11 THE COURT: It's -- I'm sorry -- "Amendment of policy  
12 provisions, Utah --"

13 MR. ADY: I just looked at it before coming to Court.

14 THE COURT: I think the issue that would be before me  
15 is are there two reasonable interpretations of the endorsement  
16 itself, and --

17 MR. ADY: Ah.

18 THE COURT: -- and I wonder what those might be, as far  
19 as you're concerned.

20 MR. ADY: I think there's more than one reasonable  
21 interpretation. I'd like to go through those and expanding on  
22 Mr. Whitmer's brief -- memorandum.

23 First of all, look at the forerunning of this, sir.  
24 You've got part one, Roman Numeral I, part A. So Roman Numeral  
25 I, part A, liability coverage. That's what part A addresses.

1 Then you've got three subs, three subparts; (a), (b), (c).  
2 Okay? Now, notice that sub -- and then you go over and you've  
3 got under subpart (c)(1) and (2) for other insurance -- (1),  
4 (2) and (3).

5 Then you've got a part II, Roman Numeral II, part (c),  
6 uninsured motorist coverage. I don't know what happened to  
7 part (b). I don't think it's of any real consequence, other  
8 than it's going to cause more questions in the mind of a lay  
9 person.

10 THE COURT: It just wasn't amended, I suppose. It is  
11 what it is in the policy.

12 MR. ADY: Yeah, and a lay person, I guess, would have  
13 to sit and stew on that for quite some time, but here's the  
14 thing. Under part A, liability coverage, a lay person looks  
15 at this, and I don't think that Mrs. Shores concedes that she  
16 had to have read the endorsement.

17 I think, for the sake of argument, I think as I  
18 understand her position is, you know, "You never issued these  
19 endorsements. You never filled in the schedules. You gave me  
20 the summary page, saying that I didn't need to look at these,  
21 and told me to talk to the agent, which I did, and he told me I  
22 had coverage."

23 So I think the endorsements, you don't even have to  
24 look at; but if you do, for the sake of argument, then I think  
25 you get the issues like this. Part 1(a) purports to replace

1 the paragraph A of the insuring agreement, and if you soldier  
2 and slug on through this verbiage, you get to part 1(b), and it  
3 says, "The limits of liability for this coverage."

4 Now, you've just gotten rid of part A -- or paragraph  
5 A, with part A. Part B talks about third line down in that  
6 paragraph, that "The limits of liability for this coverage  
7 exceed." That line. Can you see that, sir?

8 THE COURT: I do, yeah.

9 MR. ADY: "The limits of liability for this coverage  
10 exceed." Well, where do I find that at? Well, I don't go  
11 look at paragraph A, because it's gone now. Part A covers  
12 that. Hm, where would I go for that? I'm a lay reader.

13 Go down to the Provo Library and pour over the Utah  
14 code, and you will eventually conclude that the only limits you  
15 can find are those stated in 31(a)-22-304. There they are.  
16 Stated rights, and they're repeated verbatim in the policy; and  
17 they're stated as the minimum limits. Well, what does  
18 that mean? Because they're repeatedly stated to be minimum,  
19 not maximum limits.

20 Then you look at this again, and you wonder "To the  
21 extent that the limits of liability of this coverage exceed,"  
22 what does that mean, then? Your agent's already told you that  
23 you've got coverage, because the policy told us to rely upon  
24 it, and so you're looking at it that way.

25 Now, is this a reference to the Utah code? I mean,

1 that's a reasonable conclusion. If it is, I would con -- the  
2 lay reader would conclude it doesn't affect your coverage under  
3 the policy, given that the minimum coverage stated in the last  
4 sentence of subpart 1(a) adopts the language in the Utah code.  
5 Part 1(b), pardon me, adopts the language in the Utah code.

6 Is that line, "The limits of liability for this  
7 coverage exceed," is it a reference to the old policy term  
8 now replaced by subpart 1(a), and in that case, because the  
9 old paragraph A of the insurance agreement no longer applies,  
10 mustn't the lay reader conclude that this coverage refers to  
11 the old paragraph A, so that the lay reader does have excess  
12 coverage under the endorsement.

13 You're sitting there and you're going, "Well, if that  
14 refers to the old paragraph A --" it doesn't say what it refers  
15 to. It's an ambiguous reference. If it does refer to the old  
16 paragraph A, we've got a new subpart (a), and therefore I  
17 guess I've got coverage, because it doesn't apply.

18 Or is it a reference to the subpart 1(a) of this  
19 endorsement, meaning that so long as the limits stated in the  
20 declaration exceed those in this endorsement, this endorsement  
21 does not apply? Because they keep talking about minimum  
22 limits.

23 Or is it a limited reference to other insurance?  
24 Because you've got subpart (c) under part A, "Other insurance,"  
25 and is that what this is all leading down to, because you go

1 from (a) to (b) to (c). So what it's saying is if we have  
2 other insurance, then these -- we can't exceed these minimum  
3 limits for liability, because you've got in big bold letters  
4 other insurance there.

5 The fact that they put other insurance under that  
6 liability coverage, and then over at part II, which is a full  
7 heading part II, Roman Numeral II, uninsured motorist coverage,  
8 just reinforces that belief that all they're really talking  
9 about here is if I've got other insurance, then, darn it, I'm  
10 limited, as that line says, to this kind of liability coverage.

11 So there's a number of alternative readings because  
12 of that ambiguous reference in subpart (b) to this endorsement.  
13 So in summary, sir, our position -- I would say in support of  
14 Mr. Whitmer's argument, first of all, Liberty gave her the  
15 summary page. They told her, "Don't look at the endorsements.  
16 Look at this. That controls. That trumps everything else.  
17 If you have questions talk to your agent."

18 She talked to Farnsworth. He told her she had the  
19 same coverage, and that's the interpretation they told her to  
20 use, and that's the one she used, and I think they created the  
21 ambiguity. They're bound under Versaw and cases supporting it.

22 Even if you get to the endorsement, as I've pointed  
23 out, there's a number of ambiguities because of that ambiguous  
24 reference of that one line. What is it talking about? One  
25 could very easily conclude that they're only talking about

1 other insurance, because they include it in the same subpart,  
2 and I gave you some other arguments that I won't repeat. Those  
3 are my suggestions, sir.

4 THE COURT: Thank you, Mr. Ady.

5 MR. RICE: Your Honor, may I respond?

6 THE COURT: You may.

7 MR. RICE: Okay. Judge, I can only refer you to the  
8 case law, and comparing some of those provisions that have  
9 been upheld to this provision. This is actually much more  
10 clear than provisions that have been upheld in the case law.

11 This says under B, "The following exclusion is added."  
12 How much more plain could that be? "We do not provide liability  
13 coverage for any insured for bodily injury." That's fairly  
14 straightforward, pretty plain.

15 Again, I'll refer you to the case law where they've  
16 upheld household exclusions. They have language similar to  
17 that, or a variant of that. The Courts have said, "Yes, that's  
18 okay. That passes the test."

19 Liberty did something a little bit extra. As you look  
20 at the case law, you'll see that many of those provisions that  
21 were upheld didn't include the information about the minimum  
22 limits.

23 THE COURT: Uh-huh.

24 MR. RICE: Some of them said -- some of them just said,  
25 "To the extent they don't exceed the applicable minimum

1 limits," but then they didn't go the next step and put in what  
2 those limits are. Liberty took the time to do that. That even  
3 makes it more plain and straightforward.

4           It's referring again to the Utah code, so the reader  
5 knows where to go. They feel like they get -- if they have to  
6 get somebody involved, at least they know where to go to look  
7 that up.

8           I just don't know how you could come up with any  
9 multiple meanings, omission of terms, any unclarity with a  
10 statement that says, "We do not provide liability coverage for  
11 any insured for bodily injury."

12           THE COURT: Are I and II quoted directly out of the  
13 statute?

14           MR. RICE: I don't believe that they're direct, but  
15 they're similar. Now, to the argument that -- this endorsement  
16 argument. The defendants have done a good job of clouding this  
17 issue, and making it into something it's not. The endorsement  
18 was provided. It was in the policy. The first page, the cover  
19 letter says, "Please read your policy and each endorsement  
20 carefully."

21           Under the agreement, the first sentence, "In return  
22 for payment of the premium, and subject to all terms of the  
23 policy, we agree with you as follows."

24           Not only that, but the declarations actually did refer  
25 to the endorsements, numbered them. There's a reference to



1 that. Now, it doesn't lay it out, but it refers to the  
2 endorsements. Again, now --

3 THE COURT: Is it undisputed that the policy as it  
4 exists in Exhibit A to your memorandum is the policy that was  
5 provided to --

6 MR. RICE: Undisputed from our angle.

7 THE COURT: I don't -- I really need to know that, I  
8 think, before --

9 MR. WHITMER: Your Honor --

10 THE COURT: Is this what she got?

11 MR. WHITMER: The substantive terms are the same.  
12 However, there was much other information included in the  
13 policy as delivered to the Shores -- as delivered to Burdene  
14 Shores. That's included on the answer, I believe.

15 MR. RICE: Your Honor, it seems to me if that's an  
16 issue, where is it? If that's an issue in this case, where is  
17 it in a memorandum in opposition? You know --

18 THE COURT: I'm just inquiring of the limits.

19 MR. RICE: Okay, all right. I lose a little bit of  
20 patience when I talk about things that aren't before the Court,  
21 when today's the day to decide this issue.

22 Again, I'll refer to the opinions that I've cited to.  
23 It doesn't matter if it's a provisions and an endorsement.  
24 It's still a valid provision. Policies are to be read as a  
25 whole. They're to be considered as a whole. That's what the

1 Judges have found.

2 Moving onto the discovery issue. Judge, I think  
3 if you're going to file a Rule 56(f) motion on a motion for  
4 summary judgment, it has to be before the Court. It has to be  
5 with a memorandum in opposition, with an affidavit and properly  
6 done.

7 This is the first I've heard of a Rule 56(f) motion.  
8 Now, I feel a little bit like I'm being railroaded here and  
9 slandered on discovery. We've responded to the discovery, and  
10 we have asserted some valid objections. Mr. Whitmer served a  
11 whole lot of request for production and request for admissions.  
12 A lot of them are immaterial to the case. So we've asserted  
13 some valid objections.

14 Your Honor, we're here today because we feel that this  
15 issue is ripe and ready. I agree with your prior statement.  
16 This is a question of law. This is a legal issue.

17 Now, the only issue that could arguably be factual is  
18 did Mr. Farnsworth fail to disclose the household exclusion, or  
19 did he misrepresent it in some way? I've talked about that at  
20 length in the reply memorandum, but let me just emphasize a few  
21 things.

22 First of all, we will admit that he didn't talk about  
23 the household exclusion. He didn't talk about any of the other  
24 exclusions either. It's not common practice to do so. You  
25 don't do that at that point. You don't go through and go

1 through every limitation and exclusion.

2           The insured is provided with the policy, and the first  
3 page reads, "Please read your policy and each endorsement  
4 carefully." Did Liberty Mutual get a call in the next nine  
5 months before the accident? No. Did Mr. Farnsworth? No.  
6 There were no questions. There was nothing that was brought  
7 up. The policy was provided.

8           Now, that's part of the argument. The second part  
9 that completely undercuts and undermines this argument about  
10 misrepresentation is that the Met Life policy had a household  
11 exclusion. It had one in there. So not only do you have the  
12 100/300 coverage, but you've also got a household exclusion in  
13 the Met Life policy.

14           So let's assume for a minute Mr. Farnsworth did say  
15 the coverage is the same. You know what? That's an accurate  
16 representation, right down to the household exclusion, because  
17 it's in there, in the Met Life policy.

18           Now, Mr. Whitmer argues that that exclusion is not  
19 valid. Well, that's the same argument we're here talking  
20 about today. You know, if this one isn't valid, that one's  
21 not valid. If that one's valid, this one's valid.

22           THE COURT: And can you just help me. This is a  
23 declaratory judgment action brought by your client to determine  
24 what this means, right?

25           MR. RICE: Correct.

1           THE COURT: And the counterclaim for bad faith was  
2 dismissed on motion for summary judgment.

3           MR. RICE: Only Burdene's.

4           THE COURT: Only Burdene's?

5           MR. RICE: Mr. Ady's client still has one pending.

6           THE COURT: Okay. So if I were to rule in your favor  
7 today, what would be left? You've brought the dec action. Is  
8 all that's left the counterclaim for bad faith?

9           MR. RICE: That is correct. Your Honor, I did things  
10 surgically, and there's a rhyme and a reason for that. First  
11 of all, based on the Court's ruling in July, I felt that  
12 Burdene did not have standing to bring a bad faith claim. So  
13 I immediately brought that motion.

14           Then I brought this motion because I felt like it is a  
15 legal issue that can be decided without any discovery. Then my  
16 feeling is that depending on how the Court decides this issue  
17 -- that issue, that has a bearing on Mr. Shores' counterclaim  
18 for bad faith. So yes --

19           THE COURT: As to whether there was a material breach,  
20 right? Bad faith requires a material breach in the contract,  
21 and if I were to rule in your favor then there is none?

22           MR. RICE: Correct. That's -- your Honor, that's why I  
23 approached it like I did. Judge, I believe that discovery is  
24 not necessary. The issues are here. They're before the Court.  
25 Discovery is also only going to create more expense. I will

1 flatly admit that there is a dispute as to what Mr. Farnsworth  
2 said and what Mrs. Shore said.

3 THE COURT: Can I disregard --

4 MR. RICE: Immaterial.

5 THE COURT: -- everything in Mr. Farnsworth's affidavit  
6 and rule on this legal issue today?

7 MR. RICE: I believe, your Honor, that you can. I  
8 provided that to give the Court some -- a better understanding  
9 of the issues of the case, but I believe that you can accept  
10 what Burdene has said. Not the legal representations, not  
11 statements like "There was a misrepresentation."

12 THE COURT: Uh-huh.

13 MR. RICE: But the factual part, I think you can still  
14 rule on this, keeping in mind, Judge, that in the Met Life  
15 policy there was a household exclusion.

16 THE COURT: All right.

17 MR. RICE: Which I think completely destroys any  
18 argument or misrepresentation.

19 THE COURT: Okay, and so other than that alleged  
20 misrepresentation, I can disregard everything Mr. Farnsworth  
21 says in his affidavit?

22 MR. RICE: For purposes of this motion?

23 THE COURT: Right.

24 MR. RICE: Judge, I think that's correct, because the  
25 issue of whether the provision is valid, that's a legal issue.

1           THE COURT: And I guess that's what I'm getting to; is  
2 if what you're doing is presenting to me the legal issue of  
3 are household exclusions in excess of minimum limits lawful  
4 in Utah, that's requiring me to interpret Call and Nasbaum and  
5 Calhoun --

6           MR. RICE: Correct.

7           THE COURT: -- and the statute, and simply rule on that  
8 legal question.

9           MR. RICE: Correct. Correct, and I would add to that  
10 that if the Court is considering any factual issue about the  
11 misrepresentation, there is no issue there. There's no  
12 material issue, because there's no misrepresentation.

13          THE COURT: Could I -- I can't remember. Did you  
14 provide me the Met Life policy, or all the --

15          MR. RICE: The opposing attorney did.

16          THE COURT: Okay. I can't remember.

17          MR. WHITMER: It's attached to Burdene Shores'  
18 affidavit, your Honor.

19          THE COURT: That's right. Okay.

20          MR. RICE: I don't think discovery is going to further  
21 -- I don't think it's going to advance anything with regard to  
22 the material issues.

23          THE COURT: Oh, there it is. Okay.

24          MR. RICE: Judge, I believe that exclusion's on page 4  
25 of 24.

1 THE COURT: What is it, I'm sorry? Page 4?

2 MR. RICE: Page 4 of 24, subparagraph (i).

3 THE COURT: I haven't read the whole policy, but is  
4 this an exclusion, even of minimum requirements?

5 MR. RICE: It is.

6 THE COURT: It reads like that.

7 MR. RICE: It is, Judge.

8 THE COURT: Probably not enforceable.

9 MR. RICE: Judge, let me comment on that. Nasbaum was  
10 the same way.

11 THE COURT: Yes.

12 MR. RICE: It would be enforceable above the minimum  
13 limits. Any Court deciding on this would come in and say,  
14 "Minimum limits, you're right. It's not enforceable."

15 THE COURT: Right.

16 MR. RICE: Above that, it is.

17 THE COURT: And your point is that your client was more  
18 descriptive than they needed to be?

19 MR. RICE: Yes.

20 THE COURT: Okay.

21 MR. RICE: And that the positions are exactly the same.  
22 The coverages are the same. There's no misrepresentation.

23 THE COURT: All right. Counsel, I'd like to -- I feel  
24 like I've done a lot of research and preparation for today's  
25 hearing. If you'll give me a few minutes, I want to go through

1 my notes and look one more time at a couple of cases.

2 If I can rule from the bench, I'll come out and do it  
3 in about 15 minutes. If having done that, I feel like I need  
4 more time -- and I also want to think about the 56(f) issue --  
5 then I'll come out and do that, too, but if you can give me  
6 about 15 minutes, we'll be in recess.

7 (Recess taken)

8 THE COURT: Okay. We'll go back on the record in the  
9 matter of Liberty Mutual Insurance Company vs. Burdene Shores  
10 and Unior Shores. The record should reflect that Counsel for  
11 the parties are present.

12 This matter comes before the Court on plaintiff's  
13 motion for summary judgment as to its declaratory judgment  
14 action. Specifically the issue presented to the Court is  
15 whether parties to an insurance contract may limit motor  
16 vehicle liability coverage for household members of the  
17 insured in excess of minimum required limits under State law.

18 The defendants in this matter have made a Rule 56(f)  
19 motion today. That rule provides that should it appear from  
20 the affidavit of a party opposing the motion, that he cannot,  
21 for reasons stated, present by affidavit facts essential to  
22 justify his opposition, the Court may refuse the application  
23 for judgment, or may order a continuance to permit affidavits  
24 to be obtained, or depositions to be taken or discovery to be  
25 had; or make such other order as is just.



1           The basis for the Rule 56(f) motion primarily arises  
2 out of the filing of an affidavit in conjunction with the  
3 plaintiff's reply brief. It's the affidavit of Ryan Farnsworth.  
4 For purposes of the motion for summary judgment, the Court  
5 disregards in its entirety the affidavit of Mr. Farnsworth, and  
6 can reach the issue of law presented; and therefore denies the  
7 Rule 56(f) motion for summary judgment, noting that pursuant  
8 to Rule 56(a), a party seeking to recover upon a claim for  
9 declaratory judgment; namely for summary judgment at any time  
10 after the expiration of 20 days from the commencement of the  
11 action.

12           In reaching the issue presented, the Court construes  
13 the facts in the light most favorable to the nonmoving party.  
14 Insurance contracts are not subject to a negotiation between  
15 the parties. Therefore the insurance contract is construed in  
16 favor of the coverage and in favor of the insured, with respect  
17 to any ambiguities in that contract. Exceptions and limitations  
18 on coverage are permissible in an insurance contract unless  
19 they violate statute or public policy.

20           Turning to the issues at hand, the Court makes the  
21 following findings of fact. That on September 9<sup>th</sup>, 2003,  
22 Burdene Shores was involved in an automobile accident, in  
23 which she was a passenger and her husband Unior Shores was  
24 driving.

25           The automobile driven by Mr. Shores was insured under

1 a personal automobile policy issued by Liberty Mutual, with  
2 coverage from January 12<sup>th</sup>, 2003 to January 12<sup>th</sup>, 2004.

3 The Liberty Mutual policy provides bodily injury  
4 liability coverage of \$100,000 for each person, and \$300,000  
5 per accident. With respect to liability coverage, the Liberty  
6 policy also includes a step-down or household exclusion, giving  
7 an endorsement to the policy.

8 The provision states, "We do not provide liability  
9 coverage for any insurer for bodily injury to you to the  
10 extent that the limits of liability for this coverage exceed  
11 the applicable minimum limits for liability specified by Utah  
12 Code Annotated, Section 31(a)-32-304."

13 Policy then states what those minimum limits are.  
14 Specifically, \$65,000 for each accident, if the limit of  
15 liability for this coverage is a single limit that applies  
16 for each accident; or \$25,000 for each person, \$50,000 for  
17 each accident, if the limited liability for this coverage is  
18 indicated as a split limit.

19 Through her Counsel for Ms. Shores has demanded that  
20 Liberty Mutual pay \$100,000 under the policy as a result of the  
21 accident for her injuries. Ms. Shores has filed a separate  
22 lawsuit for negligent driving against Mr. Shores, in an attempt  
23 to collect under the liability coverage of the Liberty Mutual  
24 policy.

25 Liberty Mutual has denied the defendant's demand based

1 on the household exclusion, leaving that coverage is limited to  
2 \$25,000. Liberty Mutual now, by way of summary judgment, seeks  
3 declaratory judgment as to that issue.

4 To determine this issue, the Court is required to look  
5 at case law beginning in 1985, and continuing through the year  
6 2004. In 1985 in the case of Farmer's Insurance Exchange vs.  
7 Call, the Utah Supreme Court held that household or family  
8 exclusion clauses in an automobile policy are contrary to  
9 public policy and statutory requirements of the No Fault  
10 Insurance Act, as to the minimum benefits provided by statute.

11 The plaintiff in that case, the insured, argued that  
12 the household exclusion clause in the policy -- I'm sorry. The  
13 insured, the defendant in the case, called the insured, argued  
14 that the household clause in the automobile policy was invalid  
15 as to the policy limits in excess of the statutory amounts.  
16 The Court declined to reach that question, and it is in effect  
17 presented to this Court today.

18 The next case was approximately two years later. That  
19 is the case of State Farm Mutual Automobile Insurance Company  
20 vs. Nasbaum. In that case the Court held that a household or  
21 family exclusion in a polic -- in an automobile policy issued  
22 prior to 1986 was valid and enforceable as to renounce in  
23 benefits provided by the automobile policy in excess of amounts  
24 which were statutorily mandated under the No Fault Insurance  
25 Act.

1           Justice Durham in that case wrote a dissenting opinion  
2 in which she argued that the statutory language in Section  
3 31(a)-22-309, and the legislative history of 31(a)-22-303  
4 precluded a household exception in all insurance policies,  
5 automobile policies, whether issued before 1986 or after 1986.

6           Justice Zimmerman, who concurred in the late opinion,  
7 was persuaded by Justice Durham's opinion as it related to  
8 automobile insurance policies that issued after 1986; and  
9 Justice Stewart joined in that concurring opinion.

10           In 1994, the Utah Court of Appeals in the case of  
11 National Farmer's Union Property vs. Moore noted that the  
12 concurring opinion and dissenting opinion were in fact dicta,  
13 because that conclusion is not explained in that case, but the  
14 Court concludes that the reason for that is because the policy  
15 at issue in Nasbaum was issued before 1986. So the issue was  
16 never presented.

17           Since Nasbaum there has been notable silence on this  
18 specific issue until the Supreme Court's holding this year in  
19 Calhoun vs. State Farm Mutual Automobile Insurance Company.

20           Now, that case -- in that case the pol -- automobile  
21 policy excluded from coverage the insured's son, because he  
22 had a -- I believe a poor driving record. So the Court  
23 acknowledges that the policies -- that the facts are not  
24 directly on point.

25           Whether Calhoun sets forth a general rule of law for

1 the State of Utah, which this Court is banned by, Calhoun  
2 provides:

3 "Contrary to the Calhoun's assertions, exclusionary  
4 endorsements such as the owned vehicle exception at issue are  
5 not necessarily invalid."

6 The Calhoun case then quotes All State Insurance  
7 Company vs. United States Fiduciary and Guaranty Company, a  
8 1980 case, for this rule of law. Quote, "Rather, contracting  
9 parties are free to limit coverage in excess of the minimum  
10 required limits, and an exclusion found in a contract is valid  
11 in relation to any coverage exceeding minimum amounts."

12 The Court finds that that rule of law is binding  
13 and on point and resolves the issue in this case; and grants  
14 summary judgment on that question to the plaintiff.

15 Turning to the issue of clarity in the policy. "In  
16 order for the exclusion to be valid, it must be phrased in  
17 language which clearly and unmistakably communicates to the  
18 insured the specific circumstances under which the expected  
19 coverage will not be provided."

20 The plaintiffs -- the plaintiff in this case contends  
21 that the language in the policy is -- meets this standard.  
22 The defendants contend that the policy is confusing and fails  
23 to unmistakably communicate those circumstances under which  
24 coverage is limited.

25 After reviewing the language, the Court notes that

1 it addresses complex issues. There's no question about that.  
2 However, it communicates those issues in a way that meets the  
3 required standard under Calhoun.

4 I find that it clearly and unmistakably communicates  
5 to the insured the specific circumstances under which the  
6 expected coverage would not be provided to Burdene Shores.  
7 As to that issue I rule in favor of the plaintiff.

8 The issue, then, that remains in this case is  
9 Mr. Shores' bad faith claim. In the responsive memorandum  
10 the defendants bring a host of factual allegations with respect  
11 to misrepresentations that were made to induce the Shores to  
12 enter into the insurance contract; and also what Ms. Shores  
13 alleges to be unfair or fraudulent marketing tactics on the  
14 part of the insurance company.

15 The Court finds that those issues go to the question  
16 of bad faith; and that issue is not before me today. For those  
17 reasons the plaintiff's motion for summary judgment is granted.

18 Mr. Rice, will you prepare an order consistent with my  
19 decision?

20 MR. RICE: I will, your Honor.

21 THE COURT: Thank you. Counsel, enjoy your weekend.  
22 Thank you for your patience tonight.

23 MR. RICE: Thank you, sir.

24 MR. WHITMER: Thank you for your time.

25 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH       )  
                          ) ss.  
COUNTY OF UTAH     )

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.


That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 12<sup>th</sup> day of May 2005.

My commission expires:  
February 24, 2008

  
Beverly Lowe  
NOTARY PUBLIC  
Residing in Utah County

