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IN THE UTAH COURT OF APPEALS

REX RANDALL,

Plaintiff,

vs.

PROGRESSIVE CLASSIC INSURANCE
COMPANY, INC.,

Defendant.

Appl No. 20110364 -CA

Appeal from a Grant of Summary Judgment, Civil No. 100903913
Judge Ernest Jones

BRIEF OF APPELLEE

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UTAH APPELLATE COURTS

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STATEMENT OF THE ISSUES

1. Whether Judge Jones correctly deemed Progressive's Statement of Undisputed Material Facts admitted where Randall failed to comply with Rule 7(c)(3)(B). In cases where the non-moving party failed to controvert the moving party's statement of facts, the trial court must deem the facts admitted as an operation of law. Therefore, the appellate court reviews that decision for correctness. *USA Power, LLC v. PacifiCorp*, 2010 UT 31, ¶30, 235 P.3d 749 (Utah 2010).

2. Whether Judge Jones abused his discretion in considering circumstantial evidence of the contents of the UIM rejection form that Randall signed where the original was lost or destroyed. The trial court has broad discretion to admit or exclude evidence and the appellate courts will only disturb its ruling for abuse of discretion. *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶43, 221 P.3d 205 (Utah 2009).

3. Whether Judge Jones correctly decided that Progressive was entitled to summary judgment on Randall's declaratory judgment claim. "A trial court's decision to grant or deny a motion for summary judgment is a legal one and will be reviewed for correctness." *Armed Forces Ins. Exch. v. Harrison*, 2003 UT 14, ¶13, 70 P.3d 35 (Utah 2003).

STATUTORY AUTHORITY

Utah Code Ann. § 31A-22-305.3 states in relevant part:

(2)(g) (i) A named insured may reject underinsured motorist coverage by an express writing to the insurer that provides liability coverage under Subsection 31A-22-302(1)(a).

(ii) A written rejection under this Subsection (2)(g) shall be on a form provided by the insurer that includes a reasonable explanation of the purpose of underinsured motorist coverage and when it would be applicable.

(iii) A written rejection under this Subsection (2)(g) continues for that issuer of the liability coverage until the insured in writing requests underinsured motorist coverage from that liability insurer.

Utah Rule of Evidence 1004 states in relevant part:

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) *Originals lost or destroyed.* All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith. . .

Utah Rule of Civil Procedure 7(c)(3)(B) states:

A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

STATEMENT OF THE CASE

In June of 2005, Schroader-Blackley Insurance Agency (“Schroader-Blackely”) assisted Rex Randall and his wife, Jackie, in applying for an insurance contract with Progressive. As part of that application process, Randall was presented with a form provided by Progressive that he signed rejecting underinsured motorist (“UIM”) coverage. Randall’s application for insurance was uploaded electronically, and the signed documents were retained in the office of Schroader-Blackley. Schroader-Blackley retained the documents for four years, exceeding the state-mandated retention period by one year, but discarded the documents prior to the time Randall desired to make a claim for UIM benefits.

Randall was involved in an automobile accident on May 18, 2006. In 2010, he settled with the driver of the other vehicle and made a claim to obtain additional money for his injuries from Progressive. Progressive denied Randall’s claim because he had rejected UIM coverage and had not paid a premium for UIM coverage. Randall demanded to see the UIM rejection form, but it was not available due to the fact that Schroader-Blackley had disposed of it one year prior to Randall’s claim.

Randall has erroneously urged the Court to allow him to avoid the consequences of his decision to reject UIM coverage by reforming his insurance contract simply because Progressive is unable to physically produce the UIM rejection form he signed. Randall has alleged he did not sign a UIM rejection form, but he has failed to support that allegation with any competent evidence.

Progressive, on the other hand, has presented competent evidence that Randall signed a UIM rejection form that complied with Utah law. Despite the fact that the original document has been lost, the evidence demonstrates that Randall rejected underinsured motorist coverage that Progressive presented him with a UIM rejection form to sign.

Upon cross-motions for summary judgment, Judge Jones granted summary judgment for Progressive and denied Randall's motion for summary judgment. This Court should affirm that decision because the undisputed material facts show that Progressive is entitled to judgment as a matter of law.

STATEMENT OF UNDISPUTED MATERIAL FACTS

On June 3, 2005, Plaintiff Rex Randall worked through a local insurance brokerage, Schroader-Blackley Insurance, to contract with Progressive for the purchase of automobile insurance on his 1989 Ford Escort. (R. 0145-46, 0149-50, 0160.) On May 18, 2006, Randall was involved in a motor vehicle accident in the 1989 Ford Escort and has since made a claim against Progressive for underinsured motorist ("UIM") coverage. (R. 0178-79.)

Marla Warby was the agent from Schroader-Blackley that worked with Randall to apply for the insurance contract. (R. 0167-70, 0149, 0153.) Warby obtained information from Randall and then entered the information into an electronic application that was uploaded to Progressive with the Randalls' selections on coverage. *Id.* Warby printed insurance policy forms generated by Progressive and had the Randalls sign the forms. The owner of Blackley-Schroader Insurance

Agency, testified that “[a]ccording to which policy you’re issuing, which coverages you are selecting, the insurance company . . . software will print out the forms that need to be signed and then we review that with the customer, obtain the signatures, obtain the down payment and issue the policy.” (R. 0153.) Randall recalled providing several signatures on a multiple page automobile insurance application form, but could not recall what the form contained or how many signatures it required. (R. 0174-75.)

After reviewing the insurance policy forms with the Randalls and their selections, the Randalls signed the insurance application in several places. (R. 0167-70). The form Randall signed provided an explanation of Underinsured Motorist Coverage, as well as the different premiums for different UIM coverages selected. (R. 0187-88, 0190.) The form stated:

I have been offered and I waive the option to purchase Underinsured Motorist Bodily Injury Coverage in an amount equal to the limits of my bodily injury liability coverage. Instead, as shown below, I either: 1) elect lower limits of Underinsured Motorist Bodily Injury Coverage; or 2) reject the option to purchase any Underinsured Motorist Bodily Injury Coverage.

I understand that Underinsured Motorist Bodily Injury Coverage protects me, my resident relatives, and occupants of a covered vehicle if any of us sustains bodily injury, including any resulting death, in an accident in which the owner or operator of a motor vehicle who is legally liable does not have enough insurance (an underinsured motorist).

I understand and agree that the election or rejection below shall be binding on all persons insured under the policy, and that it shall apply to any renewal, reinstatement, substitute, amended, altered, modified, or replacement policy with this company or any affiliated company, unless a named insured revokes it or selects a different option.

I waive the option to purchase Underinsured Motorist Bodily Injury Coverage in an amount equal to the limits of my bodily injury liability coverage and either elect the following limits for Underinsured Motorist Bodily Injury Coverage or reject Underinsured Motorist Bodily Injury Coverage.

Id. The form then offered the purchaser a selection of available limits with premiums and provided a form by which the purchaser could reject UIM coverage or select different limits. *Id.*

Prior to becoming an insurance agent, Warby was involved in an automobile accident wherein the lack of Uninsured Motorist coverage was an issue. (R. 0167-70). Because of her experience in the accident and the lack of Uninsured Motorist coverage, it was her practice when the Randalls' insurance policy forms were filled out to share with each customer her personal experience with Uninsured Motorist coverage to recommend and explain UM, UIM, and UMPD Coverage in detail to each customer. *Id.* Warby's approach was consistent with Schroader-Blackley's policy and practice to have each customer sign a form if the customer desired to reject UIM coverage. (See *id.*; R. 0154-58.)

The signed insurance application no longer exists because the Schroader-Blackley Insurance Agency disposed of it after four years. Schroader-Blackley Insurance retained the signed insurance application for the current year and an additional three years. It disposed of the hard copy after the expiration of the time period established by the state of Utah for retaining insurance documents. (R. 0160-0162); see *a/so* Utah Code Ann. §31A-23a-412.

Randall did not pay a premium for Underinsured Motorist Coverage. (R. 0169.) All of the existing records from Schroader-Blackley Insurance show that Randall rejected Underinsured Motorist Coverage. (R.0145-46, 0168-69, 0181.) Likewise, the records from Progressive show that Randall rejected UIM coverage and did not pay a premium for that coverage. (R. 0184.)

SUMMARY OF THE ARGUMENTS

The Court should affirm Judge Jones's decision to grant summary judgment in favor of Progressive because the undisputed material facts show that Randall rejected UIM coverage. Judge Jones deemed the facts in Progressive's brief admitted because Randall failed to comply with the requirements Rule 7(c)(3)(B) places on the non-moving party. Under that rule, Randall was obligated to provide a verbatim restatement of any fact he intended to dispute, and then explain the basis of his dispute with reference to admissible evidence. Randall did not properly dispute any facts, and the Court should affirm Judge Jones's decision that the material facts are deemed admitted.

The Court should also affirm Judge Jones's decision to consider evidence of the contents of the UIM rejection form in the absence of the original. Under Rule 1004, the Court may consider such evidence and it was proper for Judge Jones to do so.

Finally, the Court should affirm Judge Jones's decision to grant summary judgment because Progressive is entitled to judgment as a matter of law. Randall has erroneously urged the Court to reform the insurance contract because

Progressive can not physically produce the UIM rejection form that Randall signed. Randall's position, however, is not supported by the facts or the law he has cited. The UIM statute does not require the result Randall is espousing and Randall has not cited any admissible evidence to support his position. With the evidence on the record, the only conclusion a reasonable jury could reach is that Randall signed the UIM rejection form as part of his insurance application. Randall has not cited any admissible evidence to contradict that conclusion.

ARGUMENT

The Court should affirm Judge Jones's decision to grant summary judgment because: (I) Judge Jones correctly deemed Progressive's statement of facts admitted because Randall failed to comply with Rule 7(c)(3)(B); (II) an insurance company may prove the existence and contents of a UIM rejection form through circumstantial evidence; and (III) Judge Jones correctly granted summary judgment that Randall rejected UIM coverage.

I. JUDGE JONES CORRECTLY DEEMED PROGRESSIVE'S STATEMENT OF FACTS ADMITTED BECAUSE RANDALL FAILED TO COMPLY WITH RULE 7(c)(3)(B)

Randall failed to meet the requirements for an opposing memorandum to a motion for summary judgment under Rules 7 and 56 and Judge Jones correctly deemed Progressive's statement of facts as admitted.¹ (R. 0192-0197.) Rule 56 requires that a motion for summary judgment must "be in accordance with Rule 7."

¹ In addition to making this argument, Progressive maintains that there are no genuinely disputed issues of material fact.

Utah R. Civ. P. 56(c). “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 the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.” *Id.* 56(e).

Rule 7(c)(3)(A) requires the moving party to set forth facts it claims are undisputed in separate numbered paragraphs with references to the record. See Utah R. Civ. P. 7(c)(3)(A). The opposing memorandum must “contain a verbatim restatement of each of the moving party’s facts that is controverted” with an explanation of the dispute properly supported by citation to the record. *Id.* 7(c)(3)(B). The requirement is mandatory. *Jennings Inv., LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, ¶23, 208 P.3d 1077 (Utah Ct. App. 2009); *Bluffdale City v. Smith*, 2007 UT App 25, 156 P.3d 175 (Utah Ct. App. 2007).

In footnote 5 of the *USA Power, LLC* case, the Utah Supreme Court emphasized that Rule 7(c)(3)(B) requires a court to deem uncontroverted facts admitted. 2010 UT 31, ¶30 n.5, 235 P.3d 749. That court wrote, “A trial judge has no discretion in deeming facts admitted unless controverted.” *Id.*

In this case, the Court should affirm Judge Jones’s decision to deem the facts admitted because Randall did not include a verbatim restatement of Progressive’s undisputed facts with an explanation of how those facts are disputed nor did he include a fact section with any citation to record evidence. Instead, Randall offered

a blanket statement that he was not disputing facts 1,4,7,8,16, and 17, but he was disputing “all other ‘facts.’” (R. 0193.) Randall’s Memorandum in Opposition did not contain any specific reference to record evidence. *See id.* Randall did not cite any deposition testimony or refer to any specific documents in his opposing memorandum.

Randall’s failure to comply with the method mandated by Rule 7 prejudiced Progressive because it deprived Progressive of the opportunity to provide a meaningful response to the alleged disputes. Accordingly, Judge Jones made the correct decision to deem Progressive’s facts admitted for the purpose of summary judgment.

II. AN INSURANCE COMPANY MAY PROVE THE EXISTENCE AND CONTENTS OF A DOCUMENT THROUGH CIRCUMSTANTIAL EVIDENCE

Randall has asked the Court “to interpret [the UIM statute] in a manner that requires insurance companies to be able to physically produce a waiver form if they are going to assert that the insured signed or provided such an express writing rejecting underinsured motorist insurance.” (Appellant Brief at 10-11.) The Court should decline that invitation because the UIM statute does not contain any provision that requires an insurance company to provide UIM coverage simply because the UIM rejection form becomes lost or destroyed.

Utah’s UIM statute requires the insurer to provide a form to the applicant, at the time of application, that contains a reasonable explanation of the purpose of UIM coverage and when it would be applicable. *See Lopez v. United Automobile*

Insurance Company, 2009 UT App 389, ¶17, 222 P.3d 1192 (2009). The purpose for that requirement is to provide the insured with reasonable information about the coverage he or she is choosing to decline. In the context of the uninsured motorist statute, the Court of Appeals said,

It is clear that Utah Code section 31A-22-305(3)(b) is not . . . designed to simply memorialize the UM insurance decision after-the-fact. Rather, the 2000 amendment was specifically adopted in order to ‘affirmatively inform’ insureds about the costs of various levels of UM coverage before they decide whether to purchase it and in what amounts.

General Sec. Indem. Co. v. Tipton, 2007 UT App 109, ¶12, 158 P.3d 1121 (Utah Ct. App. 2007).

Stated differently, the statute does not preclude an insurer from proving the existence of the rejection form at a later time through other available evidence. If the form becomes lost or destroyed, the insurer can prove the existence and contents of the form through circumstantial evidence. Utah R. Evid. 1004. Judge Jones ruled correctly on that issue and granted summary judgment in favor of Progressive based on the available evidence.

III. JUDGE JONES CORRECTLY GRANTED SUMMARY JUDGMENT THAT RANDALL REJECTED UIM COVERAGE

The Court should affirm Judge Jones’s correct conclusion that Progressive was entitled to judgment as a matter of law. “A summary judgment movant, on an issue where the nonmoving party will bear the burden of proof at trial, may satisfy its burden on summary judgment by showing, by reference to the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, that there is no genuine issue of material fact.” *Orvis v. Johnson*, 2008 UT 2, ¶¶18-19, 177 P.3d 600 (Utah 2008) (*quoting* Utah R. Civ. P. 56(c)). “Upon such a showing, whether or not supported by additional affirmative factual evidence, the burden then shifts to the nonmoving party, who may not rest upon the mere allegations or denials of the pleadings, but must set forth specific facts showing that there is a genuine issue for trial.” *Id.*

Progressive has satisfied its burden to show that Randall was presented with the UIM rejection form, and Randall has failed to show that there is a genuine issue for trial. He has asserted that Progressive, as the defendant, bears the burden to disprove his claim,² but he has failed to present admissible evidence that supports his claim. Randall cited to an affidavit he signed on May 13, 2010 that was drafted by his attorney, but the statement contained in that affidavit was not subject to cross-examination and it was not based on Randall’s personal knowledge as demonstrated by his deposition testimony taken several months later on September 3, 2010. (*Compare* R. 0020 *with* R. 0174-75.)

² Citing *General Security Indemnity Company v. Tipton*, 2007 UT App 109, 158 P.3d 1121, Randall argued that the courts have shown a strong public interest in interpreting UIM statutes liberally. Randall’s reliance on that case, however, is not on point and *General Security* is distinguishable for several reasons. The important fact in *General Security Indemnity Company* was that the insurance company did not even argue that it presented the plaintiff with a UM waiver form. *Id.* ¶2, n.2. As such, the court “assume[d] that Fulcrum never presented the acknowledgment form to Tipton . . .” and it *Id.* In this case by contrast, Progressive has presented affirmative evidence that it presented Randall with the UIM rejection form.

During his deposition, Randall admitted signing the application for insurance in several places, but he did not have personal knowledge of the information contained in the application forms. (R. 0174-75.) As such, he cannot competently testify as to whether he signed the UIM rejection form, Form #5597, that was part of the packet Progressive and Blackley-Schroader presented Randall to sign. Utah R. Evid. 602.

The only reasonable conclusion that can be drawn from the evidence is that Randall signed the UIM rejection form provided by Progressive. That conclusion is underscored by the sequence of the application process and the procedures by which the UIM rejection form was generated. The Affidavit of Marla Warby establishes that she met with Randall and filled out an electronic application for insurance based on “the Randalls['] selections on coverage.” (R. 0168). After the selection were made, “the insurance policy forms were printed out for the Randalls to sign.” *Id.* Ryan Blackley, the owner of Blackley-Schroader Insurance Agency, testified that “[a]ccording to which policy you’re issuing, which coverages you are selecting, the insurance company . . . software will print out the forms that need to be signed and then we review that with the customer, obtain the signatures, obtain the down payment and issue the policy.” (R. 0153.) The Affidavit of Carol Jones establishes that, based on Randall’s policy number, he would have been provided Form #5597 to review and sign. (R. 0187-88.) Form #5597 provided Randall a reasonable explanation of the purpose of UIM coverage and when it would be applicable.

The reason Form #5597 was presented to Randall was that he told Marla Warby he wanted to reject UIM coverage. That inference is not only supported by the chronology of events, but it is consistent with other pieces of circumstantial evidence such as the Declarations Page provided by Progressive indicating that UIM coverage was "Rejected" and that Randall did not pay a premium for UIM coverage. (R. 0184.) In addition, change forms generated by the insurance agency showed that UIM coverage was rejected. (R. 0145-46, 0181-82.)

Randall's conduct lends further support to the conclusion that Randall rejected UIM coverage. Judge Jones noted on the record,

It seems to me if he thought he had that coverage, when he got that billing statement in the mail and saw that under insured coverage had been rejected . . . he would have picked up the phone or gone to see the people and said, 'Wait a minute, I thought I had under insured coverage.' It shows right there on the billing statement it was rejected.

(Hearing Transcript, Addendum A at 26; 13-19.) The UIM statute provides that a rejection "continues for that issuer of the liability coverage until the insured in writing requests underinsured motorist coverage from that liability insurer." Utah Code Ann. §31A-22-305.3(2)(g)(iii). Randall changed his coverage at least twice during the policy period, but did not make a single request to withdraw his rejection of UIM coverage.

In the absence of affirmative evidence to the contrary, Randall has argued that the Court must conclude the missing form did not exist and that Blackley-Schroader Insurance Agency elected to reject UIM coverage against Randall's will. Those assumptions are not supported by the evidence and they are not reasonable

inferences. Warby stated in her affidavit that it was her custom and habit to explain UIM coverage to her clients and have them sign the forms. (R.0169.) Warby took a personal interest in explaining to clients the benefits of UIM coverage because she had a personal experience in which she learned the benefits of having UIM coverage. *Id.* Additionally, the Court can take judicial notice that an insurance agency earns commissions by selling clients insurance coverage. It was in Warby's interest for Randall to purchase UIM coverage and she had no incentive to dissuade him from purchasing UIM coverage. Neither Progressive nor Blackley-Schroader had any reason to avoid selling Randall UIM coverage. In fact, their incentive was to try to persuade Randall to purchase UIM coverage.


Contrary to Randall's position, the undisputed evidence shows that Warby inputted Randall's UIM rejection into the electronic application based upon Randall's own decision, that Progressive generated a UIM rejection form based on Randall's election, and that Warby presented Randall with Form #5597 as part of the application that Randall signed in several places. Judge Jones carefully considered those facts and the Court should affirm his decision to grant summary judgment.

CONCLUSION

The Court should affirm Judge Jones' decision to grant summary judgment because there is no genuine issue for trial and the facts show that Progressive is entitled to judgment as a matter of law that Rex Randall rejected UIM coverage at the time he entered into an insurance contract with Progressive.

DATED THIS 12th day of October, 2011.

J. JOYCE & ASSOCIATES

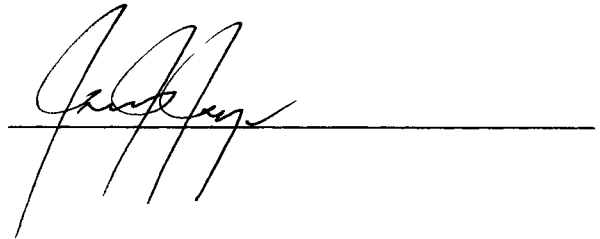


Joseph J. Joyce
Attorneys for Progressive

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12th day of October, 2011, a true and correct copy of the foregoing BRIEF OF APPELLEE was served by mail, postage fully prepaid, upon the following:

Mark H. Gould
290 25th Street, Suite 204
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ADDENDUM

(Transcript of Oral Arguments)

IN THE SECOND JUDICIAL DISTRICT COURT
OF WEBER COUNTY, STATE OF UTAH

_____))
REX RANDALL,))
))
Plaintiff,))
))
vs.) Case No. 100903913
))
PROGRESSIVE CLASSIC INS. CO,))
INC.,))
))
Defendant.))
_____)

Hearing
Electronically Recorded on
February 2, 2011

BEFORE: THE HONORABLE ERNIE W. JONES
Second District Court Judge

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P R O C E E D I N G S

(Electronically recorded on February 2, 2011)

THE COURT: All right. Good morning. Are we on the record?

COURT CLERK: Yes.

THE COURT: Let's see, this is the time set for oral argument on Rex Randall vs. Progressive Classic Insurance. It's case 3913, and Mr. Gould, you're here on behalf of the plaintiff?

MR. GOULD: I am, your Honor.

THE COURT: Is it Mr. Joyce?

MR. SCHRIEVER: Mr. Schriever.

THE COURT: Mr. Schriver or Schriever?

MR. SCHRIEVER: It's Schriever. I can spell it for you if you want.

THE COURT: Okay.

MR. GOULD: I can, too.

THE COURT: All right.

MR. SCHRIEVER: S-c-h-r-i-e-v-e-r.

THE COURT: So v-e-r, all right.

MR. SCHRIEVER: My bar number is 10816.

THE COURT: All right. You're here on behalf of Progressive, I guess, the insurance company?

MR. SCHRIEVER: That's correct, for Mr. Joyce as well.

THE COURT: All right. I guess I have cross motions for summary judgment, right? Plaintiff had filed his motion it looks

1 like in June, and then Progressive filed one in December, right?

2 So I wonder in terms of batting order should we do Mr. Gould's

3 first?

4 MR. GOULD: I would think it's appropriate --

5 THE COURT: Okay.

6 MR. GOULD: -- to do mine first.

7 THE COURT: I might indicate I have had a chance to read

8 the briefs that were submitted by both sides, so --

9 MR. GOULD: Thank you.

10 THE COURT: -- that will help.

11 MR. GOULD: It's a lot of reading.

12 THE COURT: It was. All right. If you want to first,

13 then, Mr. Gould, I'll be glad to hear from you and then we'll

14 hear from Mr. Schriever.

15 MR. GOULD: I anticipated your Honor would of course

16 read the lengthy memorandum here. I thought about this case for

17 awhile, and I thought, you know, I'm going to try and do the

18 judge a favor and try and keep my argument on the short side.

19 THE COURT: Okay.

20 MR. GOULD: I kind of feel about this case that your

21 Honor's going to do what you're going to do, and I'm not sure

22 that the arguments we make are going to strongly impress you

23 either way in this case. What I am going to say is this. I

24 think despite the fact that we've had six relatively lengthy

25 memorandum in support or in opposition to two separate motions,

1 and it would seem relatively complex on its face, I can reduce
2 this case and this argument to a pretty simple proposition.

3 That proposition is this. This case really turns on
4 what meaning your Honor chooses to give the statute 31A-32-305.3.
5 I hate the read the sub parts, but there are sub parts,
6 parentheses (2) parentheses (g) parentheses section (i) and
7 section (ii). This section of the insurance code, as your Honor
8 is probably aware at this point in time, is that section of the
9 code which allows an insured who is seeking a policy from an
10 insurance company to elect or to waive the coverage, elect to
11 waive certain coverages.

12 Under Utah law it is permissible to waive under insured
13 motorist coverage, and it's permissible to waive uninsured
14 motorist coverage. Of course, under insured motorist coverage
15 is what we're here and what we're talking about.

16 The legislature, though, deliberately made that process
17 a difficult process. I think if your Honor peruses that statute
18 in any length that you'll conclude that there is a public policy
19 here, and that that public policy is to discourage the waiver
20 of -- or the non-purchase at least of those coverages. The way
21 the legislature has chosen to do that is its written a very
22 specific process that must be followed into the statute. That
23 statute requires that an insured -- perspective insured or actual
24 insured give an express writing to the insurance company saying,
25 "I do not want this coverage."

1 Well, what we're here today about is the insurance
2 company can't produce an express writing from my client saying
3 that he waived this coverage, but yet is choosing to make an
4 argument that even though it can't produce this express writing
5 that it can somehow use other evidence to prove that this writing
6 was in fact made, did exist at one point in time, and that
7 Mr. Randall, my client, should be held and bound to the notion
8 that he waived this coverage.

9 Mr. Randall maintains that there was no waiver. He
10 maintains that if he had signed any document like that that he'd
11 remember it. That is his deposition testimony in this case. I
12 think that the proposition here is very simple, it's just the
13 legislature created a very specific process.

14 While the statute may not contain actual language that
15 says so, I think it's implicit in this statute, and what the
16 legislature was saying here that they were telling the insurance
17 company, "If you want to come to court or if you want to make the
18 argument that there was a waiver of under insured motorist
19 coverage, then insurance company, you produce that form." Don't
20 come to court and make some kind of an argument that, "Well, we
21 had this form at one point in time, but because of the fact the
22 records weren't retained it was destroyed and so now what we're
23 going to do is try and make an argument that based on business
24 practices where it was this standard business practice at an
25 agency that these forms were used and these forms were provided

1 that the waiver must have been given." That's in essence
2 Progressive Insurance's position in this case.

3 My position is very simple. My position is is that this
4 statute, whether it says so directly or not, the intention of the
5 statute was that if the insurance company was going to make this
6 argument it would actually be able to produce the written waiver
7 that the insurance company -- the insurance agency supposedly
8 obtained.

9 I could go on and on. I could make other arguments. I
10 think my memorandum points out in very good language from written
11 treatises and this sort of a thing that these statutes were
12 written primarily for the benefit of insureds rather than
13 insurance companies.

14 I could point out what I believe is a growing trend
15 in a public policy here in Utah to try to see that people have
16 adequate insurance when they're involved in accidents. That
17 public policy first began when we passed a financial
18 responsibility act years ago requiring people to have minimum
19 limits of liability coverage. I believe that policy has been
20 expanded and it continues by creating these statutes that make it
21 difficult for people to waive under insured motorist coverage.

22 I don't think that these positions should be any
23 surprise or that they're radical or it's fashionable nowadays
24 to call a lot of things socialistic. I think it's simply a
25 recognition that when people get in accidents and they get hurt

1 that they can have a lot of medical bills and there can be a lot
2 of implications and a lot of costs, and that's why this policy is
3 here. I'm content to end my argument on this motion on that
4 note, your Honor.

5 THE COURT: Can I just ask you, though, Mr. Gould?

6 MR. GOULD: Sure.

7 THE COURT: I mean let's assume just for the sake of
8 argument they can't find the waiver. Isn't there something
9 significant, though? According to what I read here, you agree,
10 don't you, that your client didn't pay the premiums for under
11 insured motorist?

12 MR. GOULD: Yeah, that's correct, he didn't pay a
13 premium for it.

14 THE COURT: I mean isn't that significant here? Should
15 he be entitled to coverage even though he never paid the premium
16 for it?

17 MR. GOULD: I tell you why I'm going to answer that yes.
18 When you get your insurance bill in the mail, I mean you don't
19 get a one sentence -- or a one line statement saying pay \$200.
20 You get a very involved statement that has a long list of
21 coverages on it that are spelled out in three and four syllable
22 words, typically, and I'm not sure sometimes that even as an
23 attorney I completely understand everything the insurance company
24 sends me in the mail.

25 THE COURT: I kept thinking on one of the billing

1 statements that I looked at it lists the type of coverage, and
2 out to the side it shows whether or not they're covered or
3 whether he rejected it, and I thought one of those billing
4 statements says he rejected the under insured.

5 MR. GOULD: There is a form.

6 THE COURT: Don't you think if he thought he had that
7 coverage that he would have looked at the form and said, "Gee,
8 there's been a mistake," and call or notify the insurance
9 company, "Hey, wait a minute, I should have been covered under
10 this."

11 MR. GOULD: I think some of people would have been --
12 what I'm saying is that I don't believe Utah law requires that.
13 I don't believe that Utah law ever intended to put the burden
14 on the insured in this kind of a situation. What the Utah law
15 intended to do was to put the burden on the insurance company to
16 prove that the man had waived his coverage.

17 THE COURT: But isn't there other ways to prove that
18 other -- for example, the best evidence, of course, would be the
19 waiver, right?

20 MR. GOULD: Uh-huh.

21 THE COURT: They don't have the waiver.

22 MR. GOULD: Or a copy of it.

23 THE COURT: Right. So they don't have that. Isn't the
24 next best thing to look at is whether or not, you know, he -- on
25 these forms whether or not he ever paid for under insured or

1 whether --

2 MR. GOULD: I understand --

3 THE COURT: -- or not the --

4 MR. GOULD: -- your Honor's point. I understand what
5 you're saying, but I don't see how you square that with the
6 requirement in the statute that an express writing be given by
7 the insured to the insurance company. If the statute speaks of
8 an express writing from the insured to the insurance company,
9 then isn't it implicit that a copy of the express writing that
10 they speak of should be produced?

11 THE COURT: But you agree that under the statute that
12 these records can be destroyed within what, four years or --

13 MR. GOULD: I'm glad you brought that point up because
14 what you're talking about is you're talking about the general
15 records retention statute.

16 THE COURT: Right, so we don't require them to keep them
17 forever. In fact, I think it's four years, isn't it?

18 MR. GOULD: Is it three years or four?

19 MR. SCHRIEVER: It's three years.

20 THE COURT: Is it three?

21 MR. SCHRIEVER: It was retained for four is what Mr.
22 Blackley says.

23 THE COURT: Okay.

24 MR. GOULD: It's a general statute that was not written
25 with the concept of insurance coverages and under insured

1 motorist coverage in mind when it was written. I would suggest
2 that that statute -- all that statute does is it creates some
3 kind of a minimum. It says you have to have these records for
4 this period of time, and I suspect the real reason that that
5 statute exists may have to do for purposes of like auditing,
6 taxes.

7 It may have to do with the insurance commission, the
8 fact that insurance is a regulated business here in Utah -- I
9 think everywhere. That's the reason for a statute like that.
10 It certainly wasn't written with the idea that it would have some
11 bearing on an under insured motorist claim that someone might
12 bring.

13 I want to point something else out, too. You know, this
14 insurance company had notice that there was an accident, and
15 there was at least some insurance claim from its very inception.

16 THE COURT: But didn't the claim come in after the four
17 year --

18 MR. GOULD: The under insured motorist claim --

19 THE COURT: Right.

20 MR. GOULD: -- came in after the period --

21 THE COURT: Right.

22 MR. GOULD: -- under the records retention statute ran.
23 For the insurance company to sit here and say, "Well, we didn't
24 know that there was anything going on," I'm going to suggest that
25 it's the insurance company's business if they're going to be

1 destroying records or not keeping these kind of things handy,
2 it's their job to go out and ask questions. It's their job to
3 come to me, who they had a letter from, and say, "We're on the
4 verge of destroying these records. Now do you think there's
5 going to be an under insured motorist claim that's brought in
6 this case?"

7 If they had done that I would have told them what I had
8 thought we're pursuing a liability claim. If and when we get a
9 tender of the liability policy limits in this case, then yes, I
10 will be at that point in time pursuing an under insured motorist
11 claim.

12 They know what the laws are in Utah. For an automobile
13 insurance company to sit there and pretend that, you know, we
14 don't know that the laws in this state would allow someone making
15 an under insured motorist claim to potentially, you know, make
16 that claim, you know, after that three year record retention
17 statute or something, I mean that is disingenuous for them to
18 suggest that we -- you know, we have no awareness or idea that
19 this is something that could happen. They are in a much better
20 position to protect themselves against something like that than
21 a single uneducated insured person like Mr. Randall is.

22 THE COURT: Let me just ask you one other question.
23 You're not suggesting that the insurance company acted in bad
24 faith, are you?

25 MR. GOULD: No. No, I'm not suggesting that they've

1 acted in bad faith.

2 THE COURT: I know the one statute talks about
3 destroying records and there's certain exceptions, and one was
4 bad faith.

5 MR. GOULD: I'm not suggesting that they acted in bad
6 faith, but what I'm suggesting is is that if they destroyed these
7 records and now they're sitting here claiming that we're
8 prejudiced, you know, we're in this situation that we shouldn't
9 be in, I'm saying it's their fault because they probably have a
10 thousand times more awareness of the problems that could result
11 from that than someone like Mr. Randall has.

12 THE COURT: Okay. Thanks, Mr. Gould. Mr. Schriever?

13 MR. SCHRIEVER: Thank you, Judge. Having reread all the
14 documents and everything that were submitted to the Court this
15 morning, I'm going to submit that all of the evidence points to
16 the conclusion that Mr. Randall rejected under insured motorist
17 coverage, and that the only evidence that's in the record
18 contrary to that is his testimony that he would have not -- or he
19 would remember something if he had rejected it.

20 The problem as I see it is that affidavit testimony has
21 to be admissible in evidence, and I'm going to challenge the
22 admissibility of those -- of that statement based on lack of
23 personal knowledge.

24 The deposition transcript cited by Counsel in his
25 memoranda says that Mr. -- this is on page 29 of Mr. Randall's

1 deposition:

2 A. I'm sure I'd remember it if I
3 rejected something.

4 The next question was:

5 Q. Okay. I appreciate that and I'm
6 going to get there, but I want to ask this
7 piece by piece.

8 And then we broke it down.

9 Q. Do you recall receiving any forms
10 whatsoever from Progressive that dealt with
11 under insured motorist coverage?

12 A. No.

13 Q. Do you recall whether they provided
14 you any forms dealing with the insurance policy
15 at all that you had to sign?

16 A. I know I signed a policy. I signed
17 a form that's a policy form.

18 Q. Okay. Where did you sign that?

19 A. I think -- I'm thinking I signed it
20 in the building of the office.

21 Then we go on to the next page, the question begins:

22 Q. What was contained in the form that
23 you signed?

24 A. I don't remember.

25 Q. Do you remember how many pages it

1 was?

2 A. Not right offhand.

3 Q. Do you recall if it was more than
4 one page?

5 A. It was more than one, I'm sure.

6 Q. Did it require more than one
7 signature?

8 A. Yeah.

9 Q. There were several places that you
10 signed?

11 A. I'm sure of that.

12 So he admits that there was a several page form that
13 he signed, that he signed it in several places, but he does not
14 recall what he signed. That's the testimony. Anything contrary
15 to that is not based on personal knowledge, it's based on his own
16 speculation, but it's not -- it wouldn't be admissible.

17 Then we have the affidavit of Marla Warby who was the
18 agent who wrote the policy. Her testimony is that she -- the
19 only option for writing a Progressive policy at that time was to
20 download an electronic form. There was one form that was used.
21 She filled that out and then she went through that piece by piece
22 with the folks and had them sign each part.

23 We also have the actual form that was used at that time
24 which contained the under insured motorist rejection language,
25 which we've cited in our memo -- our motion for summary judgment.

1 I believe the foundation is laid for that that was the form that
2 would have been used at the time. Ms. Warby's testimony is that
3 she's very conscientious about having people sign this rejection
4 form. She doesn't have a specific recollection of having
5 Mr. Randall it per se, but she always is conscientious to explain
6 that because she was caught in a personal situation where she did
7 not have UI coverage and she wished she had had it, and so her
8 practice is to always sign that.

9 The form was then uploaded electronically from the
10 Blackley Insurance Agency to Progressive with the rejection
11 indicated. That form that contained the signatures was retained
12 by Blackley. It never went to Progressive Insurance per se.
13 Then Progressive sent out billing statements, policy renewal
14 forms, and without fail each one of them indicated that the UI
15 coverage had been rejected, and that there was no premium being
16 collected for that coverage. That is what the evidence is, and
17 those -- and that evidence is undisputed.

18 Based on that evidence, if we were to present that
19 evidence to a jury, the only reasonable conclusion a jury could
20 make is that that form was presented to Mr. Randall, that he
21 signed the form in several different places and that that form
22 contained the UI rejection form and the signature that was then
23 uploaded and that there were never any premiums paid on that.

24 This in a way is kind of like someone going to a Wal-
25 Mart store and saying, "I came here five years ago and there was

1 a sale on a t.v., and I think I might have wanted to buy it, but
2 I can't remember if I did. If you can't produce a receipt from
3 that date that I didn't buy it, then you owe it to me and I'm
4 going to walk out of it with -- out today." It just doesn't make
5 sense.

6 Counsel has indicated his thoughts that the statute
7 contains clear language that the burden is shifted to the
8 defendant to actually produce the express writing. I don't see
9 any language in the statute that says that. The Rules of
10 Evidence don't say that, and there's no case law that says that.

11 What the burden is is to prove that the express writing
12 existed at one point in time, and the undisputed facts do
13 demonstrate that it did exist at one time, and that Mr. Randall
14 signed that form on several different -- at several different
15 locations.

16 I'm happy to answer any questions the Court may have.
17 I don't mean to ramble. There were some notes that I made as
18 Mr. Gould was making his arguments. I'm not sure that they're
19 really that material to the Court's consideration, but I'd be
20 happy to address any other --

21 THE COURT: I guess the only question that -- so you
22 just can't find the waiver, if there is one? I mean --

23 MR. SCHRIEVER: Right. Progressive's policy at that
24 time was that the agency -- and this -- Blackley is an insurance
25 brokerage. They don't just write for Progressive, they write for

1 other companies as well -- Traveler's. These folks actually
2 bought another policy from them afterwards from -- I can't
3 remember the name of the company -- United.

4 THE COURT: So you can find the application for
5 insurance, but you just can't find if there was waiver or not?

6 MR. SCHRIEVER: No, the application contained the
7 waiver, and that was put into a box in Blackley's storage.

8 THE COURT: Okay. Well, I guess the argument from
9 Mr. Gould is the fact that you can find the application but not
10 the waiver would suggest, I guess, that he never signed a waiver.
11 Is that --

12 MR. SCHRIEVER: That's not accurate, and let me try and
13 explain.

14 THE COURT: Okay.

15 MR. SCHRIEVER: The application was what was not
16 retained by Blackley.

17 THE COURT: Okay.

18 MR. SCHRIEVER: So there's written application that the
19 person has. That information is transmitted electronically to
20 Progressive.

21 THE COURT: So you don't even have the application?

22 MR. SCHRIEVER: But the application itself, the written
23 application is what Blackley retained, and they retained that for
24 four years is what his testimony was, and then they discarded it.

25 THE COURT: Okay.

1 MR. SCHRIEVER: Well, it's not -- I was going to talk
2 about Progressive's retention policies, but that's not in the
3 record, it's not before the Court, so --

4 THE COURT: Okay.

5 MR. SCHRIEVER: But the --

6 THE COURT: And so the application is gone, the waiver
7 is gone if it was ever signed.

8 MR. SCHRIEVER: Right. So what we've got is the
9 testimony of Blackley as to what his policies and procedures
10 were, testimony of the Progressive lady who was -- who has laid
11 the foundation for what form was used at that time, and the
12 testimony of Marla Warby, who was the agent who actually wrote
13 and uploaded the policy as to what her standard procedures were.

14 THE COURT: So from your standpoint for the insurance
15 company, is it significant to you that he didn't pay the premiums
16 for under insured?

17 MR. SCHRIEVER: Well, I think it's very significant,
18 Judge, because it's an indication that he had several
19 opportunities to correct a problem if he had intended to purchase
20 UI insurance.

21 THE COURT: Okay.

22 MR. SCHRIEVER: His acquiescence to that --

23 THE COURT: The other thing I noticed again, it's the
24 automobile insurance coverage summary, it's marked as Exhibit 1
25 in the -- and it says under insured motorist and it has rejected.

1 Was that something that would have been sent to him -- to
2 Mr. Randall?

3 MR. SCHRIEVER: That is correct, Judge.

4 THE COURT: Okay. Is that sent to him at the time that
5 he applies for the insurance, this coverage summary or --

6 MR. SCHRIEVER: Any time there was activity on that
7 policy it would be sent to him, which would mean -- and I think
8 that was --

9 THE COURT: His coverage began January 4th, 2006, expires
10 July 4th, 2006.

11 MR. SCHRIEVER: Yeah. So if there's a renewal on that
12 policy then it's going to be sent. I think there was one in
13 June that we marked as an exhibit as well that was a change in
14 automobile coverage so it was sent again. So this was something
15 that was sent out. I believe the payments were made
16 electronically, so I can't state whether that was a monthly
17 statement or not, but I do know that there would have been --
18 any time there was activity on that policy -- changes in policy
19 that it would have been sent out.

20 THE COURT: Okay. Then there's another one, there's
21 another document in there that's marked as Exhibit 2. Let me
22 see if that's -- anyway, it says the same thing, under insured
23 motorist, and then out to the side it says rejected. So there's
24 two different documents. It says this change is requested by
25 Maria via internet on January 13th, 2006. I assume that would

1 have also gone to him; would it not?

2 MR. SCHRIEVER: That's correct.

3 THE COURT: Okay. All right. Anything else?

4 MR. SCHRIEVER: No. I'd be happy to address the
5 retention statute if you want me to. I don't think it's
6 necessary, but --

7 THE COURT: Okay.

8 MR. SCHRIEVER: Thank you, Judge.

9 THE COURT: All right. Thank you. Did I get it wrong,
10 was it Schriver or Schriever?

11 MR. SCHRIEVER: It is Schriever, but --

12 THE COURT: Schriever. Sorry, I said Schriver twice.

13 MR. SCHRIEVER: With a name like Schriever you just --
14 you answer to just about anything.

15 THE COURT: I'm sorry. I'm sorry about that.

16 Mr. Gould, any response to --

17 MR. GOULD: I'll just -- I'm going to address two
18 or three things, and it's going to conclude my argument.
19 Mr. Randall's deposition testimony where he didn't remember some
20 of the forms he signed in the insurance company's office, I'm
21 going to suggest that shouldn't surprise anyone at all. You
22 know, I -- the law does not impose a requirement on people who
23 purchase insurance to remember things like that. The law imposes
24 the requirements on insurers to prove the type of insurance that
25 people have and do not have.

1 Mr. Schriever is correct that the statute in question,
2 the under insured motorist waiver statute doesn't have specific
3 language in it saying the insurance company must produce the
4 express writing that it speaks of if there's a dispute like
5 this. I'm going to suggest that any other interpretation of that
6 statute makes it almost invalid, it makes it almost unnecessary
7 to have that statute (inaudible).

8 Your Honor, I'm not trying to say that there is
9 wrongdoing in this particular case. That's not my intention
10 here, but stop and think about this one for a minute. If that's
11 the interpretation that this statute is going to be given that
12 the insurance company does not need to actually produce the
13 express writing when this issue comes up, and instead the
14 insurance company can fall back on things like, "Well, we'll have
15 someone come to court and testify what our business practices of
16 our agents were," even -- and even when they can't remember the
17 specific person coming in they're going to come in and testify
18 what their business practices were, that testimony is always
19 going to be, "Yeah, we had a business practice where these people
20 were given this form to sign, and they always signed the form and
21 they either accepted it or they rejected the coverage." You're
22 never going to have a case where that defense isn't made and
23 where that testimony isn't given. I mean that's just the way
24 the world works, and that's why it's necessary to give this
25 particular interpretation to the statute that if the insurance

1 company wants to make this defense, it's got to give you a copy
2 at least of the writing it claims the insured actually made
3 saying, "I waive this coverage."

4 Now your Honor makes some points. Your Honor makes
5 some points about, you know, there were mailings to Mr. Randall
6 saying that he didn't have this coverage, there were mailings to
7 Mr. Randall saying that he'd waive the coverage. Mr. Randall is
8 a very unsophisticated man. There's a lot of people out there
9 who are very unsophisticated people.

10 I haven't given Mr. Randall a literacy test, but I
11 suspect if I did that he wouldn't score very high on it, and
12 that's true of a lot of people out there. You may say well, so
13 what. You know, I mean the insurance company's job isn't to test
14 everybody's reading skills.

15 Well, no, it isn't. That isn't their job, but their --
16 that's why it's all the more important that the burden be put on
17 the insurance company in these situations to produce these waiver
18 forms so that we don't have these kinds of disputes and we don't
19 have these problems.

20 How difficult would it have been to have kept these
21 records? In this computer age, in this electronic world we live
22 in, how difficult would it have been for an insurance company
23 that had awareness that this accident had occurred to have hung
24 on to this? I don't think it would have been even slightly
25 difficult. These records were simply disposed of because there

1 was what I'm going to call kind of a brain dead corporate policy
2 in place saying after four years, or after however many years you
3 get rid of the records. You know, no attempt on the part of the
4 agent to contact Progressive and say, "Would there be a need to
5 keep these particular records?"

6 Mr. Randall and the rest of us shouldn't be held hostage
7 to what I'm going to call a bad corporate policy, and it's a bad
8 corporate policy to permit the destruction of these kinds of
9 records when the company knows that there is a claim that is
10 pending. We wouldn't be here today fighting over this if that
11 had occurred. We'd have an answer one way or the other. Thank
12 you.

13 THE COURT: All right. Thanks, Mr. Gould. Anything
14 else?

15 MR. SCHRIEVER: Nothing further, Judge.

16 THE COURT: All right. I appreciate the arguments,
17 and also the motions. I think I'm ready to rule on this case.
18 First of all, you know, it seems to me the facts are fairly
19 straightforward. There doesn't seem to be a lot of dispute over
20 what happened, and of course, Mr. Randall applies for automobile
21 insurance with Progressive Insurance Company. He does that
22 through -- is it Schroeder-Blackley; is that what they're
23 called -- Schroeder-Blackley Agency, and that took place, I
24 believe, in June of 2005 initially.

25 The agency or the agent retained the application and

1 some of the forms for a period of four years, at least that's
2 what they were supposed to do. They discarded those, however,
3 all the forms before the plaintiff had actually filed his claims.
4 So the hard copies, if you will, were all discarded.

5 As you pointed out, under Utah state law, it mandates
6 that they retain those for a period of one year, and that I
7 believe is under 31A-23A-412 paren (5) (a), at least that's what I
8 had out of your briefs. So there's a one year period that you're
9 supposed to keep the applications, so he applies for insurance in
10 June of '05 and it's discarded in '06, I guess, the originals.
11 Then the claim is filed sometime after that.

12 According to the agency, the plaintiff elected to reject
13 the under insured motorist coverage based on their review of the
14 records and their forms. Of course, we don't have either the
15 original or a copy of a waiver, if in fact it was signed, but
16 that's the position taken by Progressive is that he must have
17 elected to reject the insurance coverage based on a review of our
18 records, meaning the agency's records.

19 It's clear also from the memorandums and the motion that
20 Mr. Randall did not pay the premiums for under insured motor
21 coverage. Also the statements from Progressive, at least from
22 the agents are that the plaintiff was not paying for under
23 insured coverage, and their position is that he rejected the
24 under insured coverage, and there are a number of documents in
25 the file indicating that. I think we've already talked about

1 they're part of the briefs and the memorandums indicating when
2 you get down to under insured coverage out to the side it says
3 rejected, so that's the position of Progressive.

4 I know the position of Mr. Randall is that he doesn't
5 really remember. He thinks he would have remembered if he made
6 that decision. Of course, the position of Mr. Randall is that
7 the burden is on the insurance company to keep those forms. If
8 they don't have the forms then he's entitled to the presumption
9 or the benefit that he must not have ever signed a waiver of that
10 kind of coverage.

11 There are a couple of things as far as ruling on the
12 case. It seems clear that under Rule 1004 -- I guess that's the
13 Utah Rules of Evidence -- that clearly you can prove forms were
14 signed or that waivers were signed if the originals are destroyed
15 and there's no bad faith. It seems clear that the originals have
16 been destroyed, and frankly, there's no indication here -- I
17 think I asked Mr. Gould if they were alleging bad faith by the
18 insurance company, and he said no.

19 So since the original -- the hard copy has been
20 destroyed, it seems clear that the insurance company can use
21 copies and they can use circumstantial evidence to prove whether
22 or not the waiver was ever signed or not signed. Again, that's
23 Rule 1004 of the Utah Rules of Evidence.

24 To me what this boils down to really is the question of
25 whether he ever paid the premiums. I just -- I'm having a tough

1 time as a judge believing that he ever did anything concerning
2 the waiver when he's not paying the premiums. It doesn't seem
3 fair to me that he should get the benefit of under insured
4 coverage if he's not paying the premium. I understand your
5 argument, Mr. Gould, that somehow he may not be sophisticated,
6 but it seems to me that he didn't ask for under insured coverage.
7 If he would have, they would have docked him with paying those
8 premiums for under insured coverage. It doesn't seem that he
9 should get the benefit of that coverage if he's not paying the
10 premium.

11 The other argument is -- again is the billing
12 statements. There are several billing statements that show that
13 he rejected that coverage, under insured insurance. It seems to
14 me if he thought he had that coverage, when he got that billing
15 statement in the mail and saw that under insured coverage had
16 been rejected, either by him or by -- he would have picked up the
17 phone or gone to see these people and said, "Wait a minute, I
18 thought I had under insured coverage." It shows right here on
19 the billing statement it was rejected.

20 Again, it's -- there's no violation of the law to
21 destroy records after three years. There's nothing illegal about
22 it under 31A-23A-412.5. So the Court's going to find that
23 clearly the originals have been destroyed. There's no bad on
24 the insurance company. The insurance company can use copies and
25 records to try to determine or answer the question of whether or

1 not he signed the waiver of coverage. The Court's going to find
2 that he did not have under insured coverage and didn't request
3 it, that he had -- the plaintiff really had rejected the
4 coverage, even though we can't find the waiver.

5 The other thing that I wanted to comment on, and that
6 is that it was pointed out in the defendant's brief, in
7 defendant's motion for summary judgment, Mr. Gould, you never
8 really addressed some of the facts that they were alleging in
9 their brief. So my understanding of the law is that if you don't
10 address those, they're deemed to be admitted. So based on your
11 answer to the defendant's motion for summary judgment, the Court
12 has to deem that all of the facts alleged in the defendant's
13 brief -- in Progressive are deemed to be admitted, and I think
14 that's Rule 7 and Rule 56.

15 So based on that, the Court is going to grant summary
16 judgment for the defendant -- for Progressive -- and deny the
17 motion for summary judgment for the plaintiff. Now anything I
18 needed to cover or clarify in the ruling?

19 MR. SCHRIEVER: No.

20 THE COURT: All right. Mr. Schriever, would you prepare
21 the order and submit that to Mr. Gould?

22 MR. SCHRIEVER: Yes, your Honor. Thank you.

23 THE COURT: Okay.

24 (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 I have authorized Natalie Lake to prepare said transcript, as an independent contractor working under my license, appropriately authorized under Utah statutes.

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.

Natalie Lake
Official Court Transcriber

WITNESS MY HAND AND SEAL this 23rd day of September 2011.

My commission expires:
February 24, 2012

Beverly Lowe
NOTARY PUBLIC
Residing in Utah County