1991

Patricia Christiansen vs. Holiday Rent-A-Car, dba Flexi-Lease Inc. and Devon K. Hammer vs. Harold T. Hinckley and Rex Howell, dba Airport Shuttle, Parking Don Maw and Beverly Maw vs. David Lingard, John Lingard, and Craig Lingard: Appellants' Reply Brief on Appeal

Utah Supreme Court

JMENT

DOCKE 919700

IN THE SUPREME COURT OF THE STATE OF UTAH

PATRICIA CHRISTIANSEN,

Plaintiff and Appellant,

vs.

HOLIDAY RENT-A-CAR, dba FLEXI-LEASE INC., and DEVON K. HAMMER,

Defendant and Appellant.

HOLIDAY RENT-A-CAR, dba FLEXI-LEASE, INC.

Third Party Defendant and Appellant,

vs.

HAROLD T. HINCKLEY and REX HOWELL, dba AIRPORT SHUTTLE, PARKING,

Third Party Defendants and Respondents.

CASE No. 19700

DON MAW and BEVERLY MAW,

Intervening Plaintiffs and Appellants,

vs.

DAVID LINGARD, JOHN LINGARD, and CRAIG LINGARD,

Additional Third-Party Defendants and Appellants.

APPELLANTS' REPLY BRIEF ON APPEAL

APPEAL FROM SUMMARY JUDGMENT, THIRD DISTRICT COURT, SALT LAKE COUNTY, ENTERED BY SCOTT DANIELS, JUDGE

Samuel King
Attorney for Plaintiff and Appellant
301 Gump & Ayers Bldg.
2120 South 1300 East
Salt Lake City, UT 84106
486-3751

Robert Stevens
RICHARD, BRANDT, MILLER & NELSON
Attorneys for Thrid Party Defendants and Respondents
50 South Main St.
700 Commercial Security Bank
Salt Lake City, UT 84101

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Attorney for Plaintiff and Appellant
301 Gump & Ayers Bldg.
2120 South 1300 East
Salt Lake City, UT 84106
486-3751

Robert Stevens
RICHARD, BRANDT, MILLER & NELSON
Attorneys for Thrid Party Defendants and Respondents
50 South Main St.
700 Commercial Security Bank
Salt Lake City, UT 84101
531-1777

STATEMENT OF FACTS

On first reading of the briefs in this case, it must appear to the reader that the facts are in such violent dispute that the reviewing court can scarcely resolve them.

Such a conclusion would hurt appellants who seek specific relief, and must show that the facts clearly justify that relief in order to obtain it. Similarly, confusion as to the facts serves respondent.

Appellants contend that if the verbiage is cut through, so that the inquiry goes to the factual documentation for statements, rather than to the statements themselves, that there is really no substantial factual disagreement in these briefs.

As an example, appellants seek to have the amount, $246,033.08, of appellants' judgment affirmed.

To counter this, respondents' brief attacks the amount by using emotionally charged words responding to the amount of her judgment such as "sham" (Resp. Brief pp. 8, 198, 19, 25, 29, 31), "windfall," (Resp. Brief pp. 5, 33), "collusion," (Resp. Brief pp. 32, 33, 35), "set-up," (Resp. Brief pp. 6, 23, 30, 35), "contrived," (Resp. Brief pp. 12, 18, 20, 22, 25, 29, 31, 33), "excessive," (Resp. Brief pp. 19, 31, 33, 35),and "machination," (Resp. Brief pp. 33).

What documentation does respondent submit to support these adjectives? On Mrs. Christiansen's part, she carefully documented

medical, earning and pain basis for her damages (App. Brief 12-14). The basic support was the affidavit of her attending physician, Dr. Robert Baer (R. 181-186) which detailed her injuries, their effect on her ability to work, and her future medical expense for their treatment.

Respondent submitted no rebutting medical affidavit at all.

Clearly, in a personal injury case, the foundation for the amount of damages is the amount of physical injury.

Respondent had the opportunity to submit such documentation. It had deposed Dr. Baer, Dr. Burgoyne, head of the chronic pain clinic attended by Mrs. Christiansen, had had her independently examined by a doctor of respondent's choosing and had her complete medical records.

At pages 7 and 8 of respondent's Brief, numbered paragraphs 3 and 4, respondent says two doctors take a minimal view of her injuries.

Repondent's counsel are obviously highly skilled. The law requiring impeaching material to be in form admissible in evidence is rudimentary. Notwithstanding, there is not a single word from either of those doctors or from any medical source in affidavit, excerpt from deposition, or transcript, before this court or the trial court to support respondent's position in an admissible form.

One would expect that when a party uses the adjectives used by respondent, that party would document them. To repeatedly say that the amount of Mrs. Christiansen's judgment is a sham, con-

trived, collusive, etc., is to tar her. That might be justified if the facts are clear, but then to fail to support with supporting facts is a very questionable procedure.

From this, it can be inferred that the reason respondent has totally failed to document can only be that the documentation does not exist.

In other words, there is no factual dispute properly before the court as to the extent of Mrs. Christiansen's injuries. She has documented their severity. Respondent has totally failed, factually, documentarily, precisely, candidly, to rebut them. Verbiage, yes. Facts, no.

This brings into focus the necessity and purpose of Rule 75(p)(2), Utah Rules of Civil Procedure. It provides.

> "If the respondent agrees with the statement of facts set forth in appellant's brief, he shall so indicate. If he controverts it, he shall state wherein such statement is inconsistent with the facts and shall make a statement of the facts as he finds them, giving reference to the pages of the record supporting his statement and controverting appellant's statement."

It should be noted that respondent's brief, in its statement of facts, which is partially contained in the formally designated statement of facts and also in its argument Point I, does not comply with this rule. It has no designation of the factual statements submitted by appellants with which respondent disagrees, nor cites to the transcript, so that this court can review points of difference, and make an independent determination as to who is accurate.

Appellants see the law as being essentially at rest, each side having submitted law appropriately supporting its factual position, with the caveat that appellants argue that even if the case be viewed as one of indemnity, the full amount of Mrs. Christiansen's judgment is still, under these facts, the proper measure of damages, not the $15,000 paid by Holiday.

Reading these briefs requires the conscious application of the phrase "ipse dixit" on an appellate level--is a thing so because a person says that it is, or is it so because it is documented?

The purpose of this reply brief is to clarify the facts.

Appellants' approach will be to list the key points of fact, as stated by both sides, and compare these to (1) the position of the other party on that point and (2) the transcript.

The factual contentions raised in respondent's brief will be considered first.

IS THE AMOUNT OF APPELLANT PATRICIA CHRISTIANSEN'S JUDGMENT, $246,033.08, JUSTIFIED?

Respondent states in its brief that Mrs. Christiansen's $246,033.08 judgment "bears no relation of any kind to appellant's injuries." (p. 8)

To support this contention, respondent rests solely on the affidavit of its attorney, Mr. Stevens (p. 8 and 33; R. 476-484). Other than the undocumented attack on the severity of Mrs. Christiansen's injuries and their effect on her life and earning capacity, the point made in Mr. Steven's affidavit, and as argued

in respondent's brief at pages 7 and 33, is that a month prior to the trial before Judge Dee of the issue of Airport's contractual obligation to extend insurance to Holiday, and of Mrs. Christiansen's settlement with the Maws, Lingards and Holiday, she had offered settlement of her case for $85,000. This, he argues, states the upper limit of her own evaluation of her claim.

The reasons for Mrs. Christiansen, injured, disabled and unemployed, making an offer of settlement below the value of her case are not in this record, because Mr. Stevens filed his affidavit during the course of the last argument before Judge Daniels when the record was complete otherwise. They are, though, a matter of common sense. The amount a jury might award to a single, divorced woman in Utah is very unpredictable and what apportionment of fault might a jury make (while Holiday was clearly negligent, there was a question of her comparative negligence)? Holiday didn't have the money to pay a substantial judgment (Nielsen affidavit R. 365-368), so her only chance of full recovery was from Home as insurer of Airport, which would involve additional time and uncertainty to litigate the extension of the policy of insurance to Holiday so as to cover her claim.

In that situation, a plaintiff will settle for less than a case is worth in order to provide for themselves and their family and to have the money in hand. Simply, the realistic application of the old axiom that "A bird in the hand is worth two in the bush."

The fact that even under those circumstances, plaintiff insisted on at least $85,000, a very substantial sum, would mean that she and her counsel's evaluation of her injuries was in a far higher figure. This was a discount for cash on the spot.

It is possible that Home missed the boat and should have accepted her offer.

Finally, Judge Fishler is not a rubber stamp. He would not have approved a judgment for $10,000,000. The judgment in his eyes even though he accepted appellants' requests, had to be based on sound mathematics and the facts of the matter presented to him. While a default judgment does not have the same sanctity as one subject to cross-examination, it still has weight and should not be ignored.

The minimizing affidavit of the attorney for the insurance company without any kind of documentary support, scarcely stands as a factual rebuttal of the validity of the amount of the judgment Mrs. Christiansen obtained from Judge Fisher.

Also, for respondent to attack the amount of appellants' judgment requires some showing of collusion or fraud based on proper factual documentation. Respondent has submitted none. Mr. Stevens' affidavit merely confirms that due to the refusal of Home to defendant Holiday, it was forced to settle with plaintiff.

The result is this: Mrs. Christiansen's judgment has support in the record and respondent's opposition to it does not.

DID AIRPORT BREACH ITS CONTRACTUAL OBLIGATION TO EXTEND ITS LIABILITY INSURANCE TO HOLIDAY, I.E., IS THE HOME INSURANCE POLICY IN FORCE COVERING APPELLANTS' CLAIM?

The entire foundation of Airport's case is that it breached its obligation to extend its liability insurance to Holiday.

The reason is that, with the obligation breached, there is no insurance extending to Holiday to cover Mrs. Christiansen's judgment. That, in turn, leads to liability based on breach of contract to provide insurance, $15,000 (see Resp. Brief pp. 12-15), rather than an obligation to insure, $246,000 (see App. Brief pp. 32-39). Home prefers a $15,000 obligation.

If, as a matter of fact, Airport honored that commitment, the case is over - there is insurance in force covering appellants so that all respondent's arguments of indemnity and breach of contract are moot.

What does respondent say in its brief on the facts relative to this point?

The only specific statement is at page 12 of respondent's brief:

> "Under the facts of the case as determined at trial, Airport Shuttle entered into a contract with Holiday under which it was obligated to procure liability insurance. For the purposes of its motion for summary judgments, Airport Shuttle conceded that it had breached this obligation and procured no such insurance, and that had it purchased such insurance, that insurance would have extended coverage to plaintiff's claimed damages." [Emphasis added.]

As support for this vital "concession," that Airport breached the contract, the only facts submitted are stated at page 11 of respondent's brief that (1) the owners of Air-

port Shuttle, Mr. Howell and Mr. Hinckley, did not believe they were obligated to provide the insurance and (2) that Airport Shuttle's attorney made no representation to the court that he believed the Home Insurance policy covered Holiday.

As to the first point, that Airport did not believe it was obligated to provide the insurance, that is now ancient history, unappealed res judicata, the jury before Judge Dee having specifically found that Airport did have that obligation to extend insurance. (R. 248, App. brief p. 11)

As Airport says, "Under the facts of this case as determined at trial, Airport Shuttle entered into a contract with Holiday under which it was obligated to procure liability insurance." (Resp. Brief p. 12)

Airport contended for a point - its owners believed they had no contractual obligation to extend insurance to Holiday, lost before Judge Dee on that very point (App. brief p. 17), in 1982, and never appealed. To now raise the point as a genuine basis for a present legitimate factual dispute is simply an attempt to mislead the court by misstating adjudicated facts. (App. Brief p. 17)

The second contention, that Airport Shuttle's attorney never made any representation to any court that he believed the Home Insurance covered Holiday (Resp. Brief p. 11), is also unsupported by facts in respondent's brief. It is simply

a bare assertion.

Airport in its brief had the opportunity to explain or put in a different context its attorney's chamber statements to Judge Dee, such as "my clients (Airport) have insurance that will cover this agreement (the "insured contract" with Holiday)." (App. brief p. 20, context at pp. 6-11)

The quotes are there in black and white. Airport simply denies them. This fails to raise an issue of fact before this court based on evidence.

The result is that Airport has acknowledged the facts asserted by appellants (App. brief pp. 6-11, 20, law at 27-29) relating to judicial estoppel of Airport.

In respondent's statement as to why the contract to extend insurance was breached, the key phrase is "had it (Airport) purchased such insurance, that insurance would have extended coverage to plaintiffs' claimed damages." (Resp. brief p. 12).

What does Airport mean? The burden of proof to establish the fact is on it. How does it prove it didn't purchase the insurance? If it did, as it concedes, the insurance is in force.

As pointed out in appellants' brief, all the steps necessary to prove the insurance was in full force and effect at the time of plaintiff's injury were documented. (App. brief pp. 5-11, 17-18, 30-31)

Appellants challenged respondent with the obligation of coming up with facts, such as nonpayment of premium, the agent

overstepping his authority, failure to properly interpret the policy of insurance, or such to show that some breach had occurred which would keep the insurance from being in force. (App. brief pp. 19-20)

RESPONDENT TOTALLY AND ENTIRELY FAILED TO MEET THAT CHALLENGE. It dropped the burden of proof. The closest it came is the statement, at page 12 of its brief, "that had it purchased such insurance, that insurance would have extended coverage to plaintiff's claimed damages," i.e., we didn't pay the premium, i.e. Home is not obligated to insure us against plaintiff's or Holiday's claims.

Had there been any facts at all favoring Airport that it had breached by nonpayment of premium, most assuredly respondent would have submitted them to Judge Daniels, and would have submitted them to this court for this appeal.

Airport and Home know perfectly well that the insurance was in force, as the initial payment of an additional premium was not necessary. (App. Brief pp. 6, 8, 10, 20, 31)

If not, and this is repetitive but the point has to be made, Airport and Home would have submitted chapter and text from the insurance policy, the agent or the ledgers, on the necessity and amount of the increased premium to cover Holiday; when it was due; and that it was not paid.

None of these contentions are established to the slightest degree by Airport. It doesn't even try. It just falsely says the premium wasn't paid. Airport's reasons for doing this are

explained in appellants' brief at pages 15 to 25.

The assertion of the fact of nonpayment without support leaves the fact unproved, and sustains plaintiff's facts.

The result is that appellants' evidence tending to prove that all facts necessary to prove the insurance was in force are admitted by respondent's failure to rebut.

IS PLAINTIFF'S CLAIM COVERED BY THE HOME INSURANCE POLICY?

Respondent claims that there is no such coverage.

While this case was on appeal, Airport, through its attorney, Mr. Stevens, tendered Mrs. Christiansen its check for $15,000. This was not an offer of settlement. As his letter indicates, this was a payment in full of the $15,000 judgment entered by Judge Daniels against Airport based on the amount paid by Holiday. (Letter Annex #1)

A photostat of that check is also annexed. (Annex #2)

The Payor of that check is Home Insurance Company.

What is the significance of this check?

Let us examine this from the position of Home.

If, as Airport claims, it breached its obligation to have the Home insurance in force, then Airport is liable to indemnify Holiday. Home is not because the policy is simply not in force relative to plaintiff's claim. That means there is no duty on Home to pay any claim or settlement to plaintiff or Holiday, whether based on liability or indemnity.

The fact that Home pays plaintiff to protect Airport

means that its posture before this court can be reconsidered.

While Home says it is on the sidelines, the fight being between Airport and Holiday for failure to make the insurance effective, its act of paying indicates that Home operates on two levels. On the upper level, for the purpose of litigation (Resp. p. 12), Home says it is not involved, not the insurer here. On the lower level, it concedes it is the insurer by making payment to protect Airport. That is, if Airport has to pay, Home will pay. It did.

This can only be on the basis that Home's position is only that, a position, and it knows in fact after it has plead Airport into being uninsured, that it cannot abandon Airport there. Should it do so, Home's attorney, hired, paid and directed by Home, would be in an untenable position of conflict of interest as to whose interests he really serves, Home's or Airport's.

Now let us examine this from Airport's position.

It was totally in Airport's interest when there was a jury finding that it had the obligation to extend its insurance to Holiday, and its agent, Mr. Denning, said that it had done so, and that the insurance was in force covering Holiday for plaintiff's claim, not to make any statement such as, "Airport Shuttle conceded that it had breached its obligation and procured no such insurance ... ." (Resp. brief p. 12)

To the contrary, Airport would have told Home to protect

and indemnify Airport.

If Home refused to do so, Airport would have joined Holiday in settling with plaintiff and would have assigned its policy rights against Home to her as Holiday did.

In review, these factors lead to what, appellants contend, are inescapable conclusions. These are:

1. Appellants have factually established that the Home insurance covers plaintiff's claims. Respondent, Airport, has submitted no facts to rebut this before Judge Daniels nor here.

2. Airport would not have "conceded" that it had breached its obligation to extend the insurance to Holiday if Airport was speaking for itself. That would leave Airport exposed to liability, whether for $15,000 or $246,000. Accordingly, the concession was based on the knowledge of the Home - Airport attorney, that Airport faced no actual exposure. (See App. brief, pp. 15-25) Home uses Airport as a straw man.

That is, not only within the civil burden of proof, but literally beyond a shadow of a doubt, Home knows its insurance is in force and is using the courts to delay the enforcement of plaintiff's claim until once against she weakens to the point where she offers to settle for $85,000, not because of the merits of her claim, but because faced with endless litigation and chances of losing, she once again discounts her claim.

HAS, AND IS, HOME MANIPULATING THE COURTS?

Appellants refer here to their brief pages 15 to 25 and 39 to 41.

Appellants there pointed out the steps taken by Home, adverse to Holiday, its indirect insured, and adverse to Airport, its direct insured, which appellants claim did in fact amount to a manipulation of the judicial system.

Respondent's brief can be read and reread. Aside from rhetoric, there is not a single fact stated in that brief which in any way rebuts the argument that it manipulated. This is before this court on appeal, and respondent had the duty to rebut, or stand at risk by its silence.

Rather, Home, by its present brief, proves what appellants contended. That is, Home is the real party in interest in defense of this case, not Airport.

CONCLUSION

Mrs. Christiansen's judgment should be affirmed in amount as to Holiday and Airport. The court is requested to find that Airport's obligation to extend its liability insurance from Home to Holiday was not breached, but was honored. The court is requested to find that the Home insurance covers Airport and Holiday for plaintiff's claim. The court is requested to find that Home is a real party in interest.

The court is requested to award appellants' attorney fees and costs for this appeal.

DATED June 18, 1984.

Respectfully submitted,

Samuel King

SAMUEL KING

JAN 24 1984

RICHARDS, BRANDT, MILLER & NELSON

A PROFESSIONAL LAW CORPORATION
CSB TOWER — 50 SOUTH MAIN — SUITE 700
P O BOX 2465
SALT LAKE CITY UTAH 84110

TELEPHONE
(801) 531-1777

ROBERT W MILLER
(1940-1983)

ILLIAM S RICHARDS P C
OBERT W BRANDT
KEITH NELSON
KENT CHRISTOPHERSON
ARY D STOTT
ARY B FERGUSON
OBERT L STEVENS
ELSON L HAYES
DAVID L BARCLAY
JOHN L YOUNG
DAVID K LAURITZEN
LYNN S DAVIES
ROBERT G GILCHRIST
MICHAEL E DYER
RUSSELL C FERICKS
MICHAEL K MOHRMAN

January 19, 1984

Samuel King
Attorney at Law
301 Gump & Ayers Building
2120 South 1300 East
Salt Lake City, UT 84106

Re: Holiday Rent-A-Car v. Airport Shuttle
Our File No. 25721-10

Dear Sam:

I have now received a draft for the payment of the $15,000 judgment in favor of Holiday Rent-A-Car in this matter. Naturally, I understand this judgment has been assigned to your client. We, therefore, hereby tender payment of that judgment.

Please find enclosed a satisfaction of judgment in the case. In view of the assignment posture, I have prepared the satisfaction of judgment for signature both by you and by Dale Lambert on behalf of Holiday Rent-A-Car.

After you have had a chance to execute the satisfaction of judgment, I would be happy to exchange the payment draft with you. I will take care of getting Mr. Lambert's signature on the satisfaction.

Sincerely yours,

RICHARDS, BRANDT, MILLER & NELSON

ROBERT L. STEVENS

RLS/jps

Enc: Satisfaction of Judgment

INSURANCE COMPANIES

Claim Number	Policy Number	Issue Date	Insured Name	Issu Offic
761-L-503177	BOP 8635346	01/11/84	AIRPORT SHUTTLE PARKING	44

51522771

Upon acceptance
Pay to the Order of PATRICIA CHRISTIANSEN, SAMUEL KING, HER ATTY
DALE LAMBERT, AS ATTY FOR HOLIDAY RENT-A-CAR
DBAFLEXI-LEASE INC DAVID JOHN CRAIG LINGARD $ ******15,000.0

Occurrence Date
01/29/80

In payment of ANY AND ALL CLAIMS

Payable through
Hartford National
Bank and Trust Co
Hartford Connecticut

C/O ROBERT L STEVENS
RICHARDS, BRANDT, MILLER & NELSON
PO BOX 2465
SALT LAKE CITY UT 84110

Void if not presented within six months from date of issue

For the Company

Process through
Federal Reserve
System

⑈51522771⑈ ⑆011903675⑆ 1833⑈

MAILING CERTIFICATE

I certify that I mailed two true and correct copies of the foregoing Appellants' Reply Brief, postage prepaid, U. S Mail, to the following persons, June 18, 1984.

Mr. Robert Stevens
Attorney for Third Party
Defendants and Respondents
RICHARD, BRANDT, MILLER & NELSON
50 South Main Street
700 Commercial Security Bank Tower
Salt Lake City, UT 84101

Dale J. Lambert
Attorney for Defendant
and Appellant
900 Kearns Building
Salt Lake City, Ut 84101

Gerald E. Nielsen
Attorney for Intervening
Plaintiffs and Appellants
3737 Honeycut Road
Salt Lake City, UT 84106

Courtest copy to:

S. Baird Morgan
STRONG & HANNI
Attorney for Home Insurance
604 Boston Bldg.
Salt Lake City, UT 84111.

Hazel Sykes