

### September 5, 2017

# Via Electronic Filing Only

Gary Widerburg
Commission Administrator
Utah Public Service Commission
Heber M. Wells Building, 4th Floor
160 East 300 South
Salt Lake City, UT 84111
psc@utah.gov

Re: Docket No. 17-049-09

Dear Mr. Widerburg:

Attached for filing please find CenturyLink's Reply to the Response to the Motion to Dismiss, along with a Certificate of Service.

If you have any questions, please call me.

Sincerely,

arla Worlde

Carla M. Butler

Paralegal

Enclosures cc: Service List

Torry R. Somers CenturyLink 6700 Via Austi Pkwy. Las Vegas, NV 89119

Ph: (702) 244-8100 Fax: (702) 244-7775

torry.r.somers@centurylink.com

Attorney for Qwest Corporation d/b/a CenturyLink QC

#### BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Formal Complaint of Stephen D. and Tamara Thomas against Owest Corporation d/b/a CenturyLink OC DOCKET NO. 17-049-09

CENTURYLINK'S REPLY TO THE RESPONSE TO THE MOTION TO DISMISS

On August 8, 2017, Qwest Corporation d/b/a CenturyLink QC ("CenturyLink") filed a Motion to Dismiss the Formal Complaint of Stephen D. and Tamara Thomas (the "Complaint"). On August 23, 2017, Complainants' submitted a response to CenturyLink's Motion to Dismiss ("Response"). The Response provides further support that the Complaint should be dismissed. Complainants' fail to state any claim for relief that can be granted by the Public Service Commission ("Commission"). Based on the allegations in the Complaint and Response, the following appear to be the Thomas' claims:

- CenturyLink does not have an easement, thus no right to be on the property Not subject to Commission jurisdiction;
- 2. If CenturyLink has a right to be on the property, the manner it is using the property goes beyond its easement rights **Not subject to Commission jurisdiction**; and/or

<sup>&</sup>lt;sup>1</sup> The Response was never served on CenturyLink, and CenturyLink only learned of the Response by reviewing the Commission's website.

A former CenturyLink employee made certain representations that Complainants'
allegedly relied upon - Not subject to Commission jurisdiction and no prima facie
showing of this claim.

There is no claim directly or implicitly alleged that would entitle the Complainants' relief before the Commission. This case is primarily about property rights, and these are legal issues beyond the Commission's jurisdiction. Complainants' allege CenturyLink has no easement. This is a property rights issue. Complainants' allege that the way CenturyLink's lines are on the property prevent them from using the property in a reasonable manner. This also is a property rights issue. Complainants' allege that CenturyLink's property rights were somehow changed as a result of vague, unsubstantiated, inconclusive statements from a former employee. This also is in part a property rights issue, and a legal issue outside the Commission's jurisdiction. At most the vague statements from a former CenturyLink employee may be raised to present a claim of promissory estoppel. Even if this is a claim alleged by Complainants, they do not even set forth a prima facie showing of promissory estoppel; moreover it is an issue beyond the Commission's jurisdiction. Lastly, there is no allegation that CenturyLink is in violation of a rate, term or condition.

#### THIS CASE IS ULTIMATELY ABOUT AN EASEMENT

The Complaint alleges the following:

"So, my complaint is that I have the right to use my property in a reasonable manor (sp). CenturyLink does not have a written easement."

Based on the above, this case is fundamentally about whether CenturyLink has an easement, and therefore a right to be on the property, and if so is CenturyLink using the easement

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<sup>&</sup>lt;sup>2</sup> Complaint, p.1 (emphasis added).

it in a manner that goes beyond its scope. The Thomas' allege that CenturyLink does not have an easement, therefore implying it has no right to be on their property.<sup>3</sup> Further, Complainants' allege that the lines are not properly placed. The Complaint claims that "[t]hey have a line that does not run along property boundaries but straight down the middle of my property." The Response also states the following: "Again, I want to make it very clear, I have the right to use my property in a reasonable manor (sp). These lines are not strategically placed, following property boundary lines, but they cut across the middle of my property, going in two different directions." The attack on the location of the lines is simply challenging CenturyLink's use of the property and scope of its easement. The Commission does not have jurisdiction to determine the easement issues in question.

Under similar scenarios, the Commission has previously determined it does not have jurisdiction to consider easement issues. *In the Matter of the Formal Complaint of Judith Zimmerman against Rocky Mountain Power*, the Commission dismissed the Complaint finding it "does not have jurisdiction over matters of trespass or easement, as those are issues within the jurisdiction of a district court." Judith Zimmerman alleged that Rocky Mountain Power had "no recorded easement" and it "improperly installed" the lines, and Rocky Mountain Power, not Ms. Zimmerman, should be required to pay for the relocation of the utility lines. Almost identical to Ms. Zimmerman, the Thomas' allege that CenturyLink does not have an easement, the lines are not properly installed, and CenturyLink, not the Thomas' should pay for the relocation. Similar to *Zimmerman*, the Commission should dismiss the Complaint with prejudice.

The *Zimmerman* case is just one example where the Commission dismissed a complaint based on lack of jurisdiction over easement issues. *In the Matter of the Formal Complaint of* 

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<sup>&</sup>lt;sup>3</sup> *Id.*, also see the Response.

<sup>&</sup>lt;sup>4</sup> Complaint, p.2.

<sup>&</sup>lt;sup>5</sup> Response, Par. 5.

<sup>&</sup>lt;sup>6</sup> See, Order of Dismissal, Docket No. 10-035-122. (All cases cited in this Reply are attached in Attachment A). <sup>7</sup> *Id*.

Saina Carey against Rocket Mountain Power, the Commission recognized its limited scope of jurisdiction, and stated that "issues regarding violations of zoning laws, trespass, easements, illegal encumbrances, property devaluation, and other torts, are beyond the scope of the Commission's jurisdiction and are properly raised in a district court." Further, In the Matter of the Formal Complaint of Bryan Taylor vs. PacifiCorp, the Commission refused to consider easement issues, stating they are outside of its jurisdiction. The Taylor decision was also affirmed by the Court of Appeal of Utah. 10

As previously stated, the fundamental issue in this case is whether CenturyLink has an easement, and if so, is it violating the easement with respect to the manner it has its lines on the Thomas' property. These are all issues that are outside of the Commission's jurisdiction, and the Complaint should be dismissed.

# THE ALLEGATIONS REGARDING CENTURYLINK'S FORMER EMPLOYEE DO NOT CREATE A CLAIM FOR RELIEF

Complainants' continue to raise allegations by a former CenturyLink employee to somehow suggest CenturyLink agreed not to charge to move the lines. This issue is misleading. It is important to look at the specific words in the Complaint and Response to realize the Complainants' fail to state any claim for relief. The Complainants' make several vague, unsubstantiated claims that Gary Mailman, a former CenturyLink employee, told them that he "felt" Complainants' would not be charged to move the lines, and that there was potentially an alternative to moving the lines. In the Response, for the first time, Complainants' claim they "relied on the proposal made by Gary Mailman..."

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<sup>&</sup>lt;sup>8</sup> See, Report and Order, Docket No. 11-035-10.

<sup>&</sup>lt;sup>9</sup> See, Report and Order, Docket No. 03-035-05.

<sup>&</sup>lt;sup>10</sup> See, 2005 UT App 121, 2005 Utah App LEXIS 146 (unpublished decision).

<sup>&</sup>lt;sup>11</sup> Response, unnumbered paragraph after Par. 6.

By claiming they somehow "relied" on Mr. Mailman's alleged statements, Complainants' appear to be raising a claim for promissory estoppel. Significantly, even if Complainants' could present facts, even if taken as true, to support a promissory estoppel claim, the Commission does not have jurisdiction over this claim. In the Matter of the Complaint of Jon Beutler v. Utah Power & Light Company/PacifiCorp, similar to the Complaint, Mr. Beutler was challenging having to pay to relocate certain PacifiCorp facilities, and raised allegations that an employee of PacifiCorp told him that he would not have to pay to move such facilities. The Commission dismissed the Complaint, and stated that "Complainant has not alleged that Respondent has deviated from its tariffs; rather the claim is that through either negligence or intentional misrepresentation, Respondent misled Complainant as to the cost and/or placement of a pole to remedy Complainant's own violation of existing clearance standards. If we have no authority to adjudicate Complainant's monetary claim, a fortiori we have no authority to decide the easement issue Complainant raises."12 The Commission went on to state that it does not have jurisdiction to decide the estoppel and negligence claims. 13 Thus, the Complaint should be dismissed since the Commission does not have jurisdiction to consider Complainants' estoppel claims.

Even if the Commission had jurisdiction to consider the promissory estoppel claim, Complainants' have not even alleged facts to prove this claim. In order to prove promissory estoppel the following must be shown:

> (1) The plaintiff acted with prudence and in reasonable reliance on a promise made by the defendant; (2) the defendant knew that the plaintiff had relied on the promise which the defendant should reasonably expect to induce action or forbearance on the part of the plaintiff or a third person; (3) the defendant was aware of all material

 $<sup>^{12}</sup>$  See, Report and Order, Docket No. 99-035-12 (emphasis in original).  $^{13}$  Id.

facts; and (4) the plaintiff relied on the promise and reliance resulted in a loss to the plaintiff." <sup>14</sup>

A fundamental element of a claim for promissory estoppel is **prudent** and **reasonable reliance** on a **promise** made by defendant. The Complaint does not even allege that the Thomas' relied on any statements from CenturyLink. It is not until the Response that the Thomas' claim they "relied" on statements from Gary Mailman. <sup>15</sup> Further, there is no allegation that Mr. Mailman even made a "promise", a necessary component of promissory estoppel. The Response states that "CenturyLink has completely ignored the fact that a representative from their company had been telling me for over a year that 1) He **felt** that CenturyLink could have something **worked** out at no cost to me. And 2) The lines could be removed and bypass the property." It is not even alleged that CenturyLink promised that Complainant would not have to pay to move the lines. Rather, Complainants' acknowledge that Mr. Mailman simply "felt" something could be "worked out" at no cost to Complainants. A feeling that something may be worked out is far from a promise, and does not create any basis for reasonable and prudent reliance on such a statement. Further, based on statements from the Complaint and Response, Complainants' appear to claim that CenturyLink may have been able to provide the move at no cost based upon the proximity to another potential development. The Complaint states that "He (Mr. Mailman) said that there was another project just west of my piece and that they needed to do work on those lines as well and **thought** he could roll this into that project."<sup>17</sup> The plain words of the Complaint demonstrate Complainant cannot prove a case of promissory estoppel. There is no allegation that CenturyLink promised there would be no cost to Complainants', and there was no promise that CenturyLink

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<sup>&</sup>lt;sup>14</sup> Youngblood v. Auto-Owners Ins. Co., 158 P.3d 1088, 1092 (2007).

<sup>&</sup>lt;sup>15</sup> Response, unnumbered paragraph after Par. 6.

<sup>&</sup>lt;sup>16</sup> Response, Par. 4.

<sup>&</sup>lt;sup>17</sup> Complaint (emphasis added).

would be able to "roll this into" some other project. Complainants' own words even state that Mr. Mailman only "thought" it could be rolled into another project.

Further, there is no allegation that CenturyLink new Complainants' relied on Mr. Mailman's statements, that CenturyLink was aware of all material facts, that Complainant relied on the promise, or that they suffered any loss based on such reliance. These are all required elements of promissory estoppel. Once again, assuming the Commission has jurisdiction over such a claim (which it does not), the essential elements of the claim are not even alleged, and the Complaint must be dismissed.

#### NO CLAIM THAT CENTURYLINK VIOLATED ANY RATE, TERM OR CONDITION

Very significantly, the Complaint does not allege that CenturyLink violated any rates, terms or conditions regulated by the Commission. Similarly, in *Zimmerman* and *Beuter* the complainants' did not allege any violation of any rates, terms or conditions regulated by the Commission, and the complaints were dismissed. Once again, even assuming all allegations in the Complaint are taken as true, and it is proven a former CenturyLink employee said he "felt" there would not be a charge, any claim of reliance on this vague statement is still not an issue that appropriately should be decided by the Commission, as it has nothing to do with a rate, term or condition that is even regulated by the Commission.

#### **Division Recommendation**

On August 8, 2017, the Commission filed a recommendation that this matter be set for hearing. This recommendation is based on the Complaint and CenturyLink's informal response, and appears to have been filed before the Division reviewed CenturyLink's Motion to Dismiss.

Without reviewing the Motion to Dismiss, the Division claims that "the complaint does not appear

to be confined to an easement issue beyond the Commission's jurisdiction." As set forth above, the fundamental issue in this case involves easement rights, which are beyond the Commission's jurisdiction. Further, the Division fails to state what other issues need to be addressed by the Commission, and whether or not they are within the Commission's jurisdiction. As stated at the outset in this reply, the only issue arguably outside of the easement issue is the vague promissory estoppel claim, which also is beyond the Commission's jurisdiction, and is not even properly alleged. Lastly, the Division does not allege that the Complainant is challenging any rate, term or condition that is regulated by the Commission.

#### **CONCLUSION**

No matter how the facts of the Complaint may be interpreted, the ultimate issue that needs to be decided is CenturyLink's use of the Complainants' property. This is an issue beyond the Commission's jurisdiction. Whether CenturyLink's former employee's alleged statements change the underlying property rights, which they do not, still does not change the basis of this Complaint, and that is whether CenturyLink has a right to have the lines in question on the property.

In the event the Commission does not dismiss the Complaint, it requests the Commission make a final determination of the legal issues regarding its jurisdiction so these legal issues can be addressed by a court before additional time and money is spent evaluating potentially unnecessary factual issues. Further, if the Commission does move forward with a hearing, CenturyLink requests an immediate 90-day stay of the proceeding so that it may seek interlocutory review of the Commission's decision in court. For the above stated reasons, CenturyLink respectfully requests that the Commission dismiss the Complaint with prejudice.

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<sup>&</sup>lt;sup>18</sup> Division Recommendation, p.2

# RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of September, 2017

# CENTURYLINK

Torry R. Somers

6700 Via Austi Pkwy.

Las Vegas, NV 89119

Ph: (702) 244-8100 Fax: (702) 244-7775

torry.r.somers@centurylink.com

Attorney for CenturyLink

# 2011 Utah PUC LEXIS 22

Utah Public Service Commission January 11, 2011, Issued DOCKET NO. 10-035-122

Reporter
2011 Utah PUC LEXIS 22 \*

# In the Matter of the Formal Complaint of Judith Zimmerman against Rocky Mountain Power

#### **Core Terms**

easement, bury, formal complaint, trespass, tariff, commission's jurisdiction, petition for review, agency's action, related costs, burial

Panel: [\*1] Ruben H. Arredondo, Administrative Law Judge; Ted Boyer, Chairman; Ric Campbell, Commissioner; Ron Allen, Commissioner

Opinion By: ARREDONDO

# Opinion

#### ORDER OF DISMISSAL

By The Commission:

This matter is before the Commission on the formal complaint of Judith Zimmerman against Rocky Mountain Power (Company). Ms. Zimmerman complains of what she terms "aerial trespass", specifically complaining that the Company's lines "run across the middle of [her]property to provide service to [her] neighbor" and that it is "an improper installation and costs for moving the line should be incurred by" the Company. Zimmerman Complaint, P 3. She further complains that "there is no recorded easement on the property plat for utility lines at this location" Idi at P 4. The Company offered to bury the line so long as Ms. Zimmerman paid for the costs of the burial, per the Company's tariff. Ms. Zimmerman, however, asks the Commission to order the Company to bury the power line and incur all related costs.

The Company filed its Answer and Motion to Dismiss moving the Commission to dismiss the complaint as issues of easement or trespass are outside of the Commission's jurisdiction.

The Division also recommended dismissal [\*2] of the complaint as the easement issue is not within the jurisdiction of the Commission. It also stated that the Company did not violate any statute, Rule, or tariff in offering to bury the line only if Ms. Zimmerman incurred the costs for the burial.

The Commission finds that there is no basis for the maintenance of the Complaint. The Commission does not have jurisdiction over matters of trespass or easement, as those are issues within the jurisdiction of a district court. See e.g. <u>McCune v. Mountain Bell Telephone</u>, 758 P.2d 914 (<u>Utah 1988</u>). Additionally, the Company violated no statute, Rule, or tariff in offering to bury the line on condition that Ms. Zimmerman bears the related costs.

#### 2011 Utah PUC LEXIS 22, \*2

#### ORDER

The formal complaint of Judith Zimmerman is dismissed with prejudice. Pursuant to <u>Sections 63G-4-301</u> and <u>54-7-15 of the Utah Code</u>, an aggrieved party may request agency review or rehearing of this Order by filing a written request with the Commission within 30 days after the issuance of this Order. Responses to a request for agency review or rehearing must be filed within 15 days [\*3] of the filing of the request for review or rehearing. If the Commission does not grant a request for review or rehearing within 20 days after the filing of the request, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30 days after final agency action. Any petition for review must comply with the requirements of <u>Sections 63G-4-401</u> and <u>63G-4-403 of the Utah Code</u> and Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 11th day of January, 2011.

Ruben H. Arredondo

Administrative Law Judge

Approved and confirmed this 11th day of January, 2011, as the Order of Dismissal of the Public Service Commission of Utah.

Ted Boyer, Chairman

Ric Campbell, Commissioner

Ron Allen, Commissioner

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### 2011 Utah PUC LEXIS 105

Utah Public Service Commission
March 15, 2011, Issued
DOCKET NO. 11-035-10

Reporter

2011 Utah PUC LEXIS 105 \*

# In the Matter of the Formal Complaint of Saina Carey against Rocky Mountain Power

Disposition: [\*1] SYNOPSIS

The Commission grants the Company's Motion to Dismiss and dismisses the formal complaint with prejudice.

#### Core Terms

formal complaint, tariff, power line, tree-trimming, trimming, district court, easement, petition for review, tariff provision, agency's action, no violation, zoning law, encumbrance, placement, recommend, shade, pole

Panel: Ruben H. Arredondo, Administrative Law Judge; Ted Boyer, Chairman; Ric Campbell, Commissioner; Ron Allen, Commissioner

Opinion By: ARREDONDO

# Opinion

#### REPORT AND ORDER

By The Commission:

This matter is before the Commission on the formal complaint of Saina Carey against Rocky Mountain Power. Ms. Carey complains that 1) the Company "has a power pole and line illegally on my property and outside of the subdivision utility easement . . . ."; 2)the Company's placement of the pole in the easement it claims is unsafe as the "power lines go directly over [her] house and garage, which violate Moab City Subdivision and Moab City Zoning laws"; 3) the placement of the power line creates an illegal encumbrance on her property; 4) the Company has been illegally cutting limbs away from the power lines; 5) the Company's trimming of her tree reduces shade for her house, increasing her power bills. The Company offered to move its facilities, if Ms. Carey paid for the relocation, per the Company tariff, Regulation 12, Schedule 6. Ms, Carey declined the offer and instead demanded the Company move the line [\*2] at its own cost. The Company also stated it was trimming trees near the power line because of the safety hazard they posed. The Company affirmed that it was trimming trees in accordance with its tariff.

The Commission, in previous orders has recognized its limited scope of jurisdiction. The matters raised by Ms. Carey, i.e. issues regarding violations of zoning laws, trespass, easements, illegal encumbrances, property devaluation, and other torts, are beyond the scope of the Commission's jurisdiction and are properly raised in a district court. See e.g. McCune v. Mountain Bell Tel., 758 P.2d 914 (Utah 1988) (holding that the "district court, not

#### 2011 Utah PUC LEXIS 105, \*2

the Commission, . . . has jurisdiction to consider claims for . . . torts committed by a public utility); see also <u>Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.. 709 P.2d 330. 334 (Utah 1985)</u> (holding that a utility's actions which give rise to tortuous or contractual liability and which do not call in question the validity of orders of the PSC or trench upon its delegated powers are subject to the jurisdiction of the district court). The only issues before the Commission [\*3] which would impact Commission Rules and the Company's tariff, are the issues of tree-trimming. The Company's arborist communicated with Ms. Carey and reviewed the tariff provision governing the trimming of trees. He reiterated that the Company tried to minimize tree-trimming to preserve shade where possible, but while still protecting public safety.

The Division submitted its recommendation on February 7, 2011, recommending the Commission dismiss the formal complaint, finding no violations of Utah law, Commission Rules, or Company tariff.

Therefore, the Commission must find that the formal complaint provides no basis for jurisdiction, except on the issue of tree-trimming. As to the issues of tree-trimming, the Commission finds no violations of Utah law, Commission Rules, or Company tariff.

#### ORDER

The formal complaint is dismissed with prejudice and the Company shall be free to remove any vegetation that may interfere with the safe and reliable operation of its facilities, in accordance with Utah law, Commission Rules, and applicable tariff provisions.

Pursuant to <u>Sections 63G-4-301</u> and <u>54-7-15 of the Utah Code</u> [\*4], an aggrieved party may request agency review or rehearing of this Order by filing a written request with the Commission within 30 days after the issuance of this Order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission does not grant a request for review or rehearing within 20 days after the filing of the request, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30 days after final agency action. Any petition for review must comply with the requirements of <u>Sections 63G-4-401</u> and <u>63G-4-403 of the Utah Code</u> and Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 15th day of March, 2011.

Ruben H. Arredondo

Administrative Law Judge

Approved and confirmed this 15th day of March, 2011, as the Report and Order of the Public Service Commission of Utah.

Ted Boyer, Chairman

Ric Campbell, Commissioner

Ron Allen, Commissioner

End of Document

Docket No. 17-049-09

Docket No. 03-035-05 -- Report and Order (Issued: 9/30/2003) Taylor vs. ParOenturyLink's Replyt of 5

Attachment. A

- BEFORE THE PUB	LIC SEI	RVICE COMMISSION OF UTAH -
In the Matter of the Formal Complaint of Bryan Taylor vs. PacifiCorp	) ) )	DOCKET NO. 03-035-05  REPORT AND ORDER In Formal Adjudicative Proceeding On Limited Remand
		ISSUED: September 30, 2003

Rv The Commission:

### PROCEDURAL HISTORY

This matter is on a limited remand from the Utah Supreme Court, pursuant to the parties' stipulation. Complainant Bryan Taylor filed a formal complaint against PacifiCorp on April 8, 2003, regarding tree-trimming at his house. On April 23, 2003, PacifiCorp filed a Motion to Dismiss and a request for expedited resolution of this matter to enable the company to perform necessary pruning and avoid safety issues or service interruption. On May 14, 2003, Mr. Taylor filed a written response to PacifiCorp's Motion to Dismiss. A Hearing was held on May 29, 2003, before the Commission's Administrative Law Judge. Mr. Taylor appeared and offered testimony. PacifiCorp was represented by David Elmont, and offered the testimony of Randy Milier, its Assistant Fortester. At the request of the Commission, the parties met and attempted to settle the matter following the hearing. As requested during the hearing, on June 9, 2003, both parties filed written comments regarding the results of the settlement efforts. Mr. Taylor's filing also included additional argument.

The Commission issued its original Report and Order on June 17, 2003. On July 7, Mr. Taylor petitioned for rehearing. PacifiCorp filed in opposition to the requested rehearing on July 21, 2003; Mr. Taylor responded to PacifiCorp's opposition on July 25, 2003. The Commission did not grant rehearing and Mr. Taylor filed a Petition for Review with the Utah Supreme Court on August 28, 2003. On appeal, the parties reached agreement that the Supreme Court proceeding be stayed and a limited remand granted in order for the Commission to clearly designate the proceeding before the Commission as a formal adjudicative proceeding pursuant to the Utah Administrative Procedures Act, Utah Code Sections 63-46b-1 et seq. and to enter a stay deferring the trimming of Mr. Taylor's trees pending final resolution of the appeal. The Supreme Court entered its order granting the stay and limited remand on September 25, 2003. The Commission has previously issued its order designating this proceeding as a formal adjudicative proceeding.

Being fully advised, the Administrative Law Judge enters the following recommended report and order.

#### **DISCUSSION**

Party Positions: This dispute began when a contractor working for PacifiCorp was trimming trees near overhead power lines in the neighborhood of Mr. Taylor's residence. The tree-trimmers began work on Mr. Taylor's property and Mr. Taylor objected to the trimming. There followed a series of

Docket No. 03-035-05 -- Report and Order (Issued: 9/30/2003) Taylor vs. Pacific or Pacific or Report and Order (Issued: 9/30/2003) Taylor vs. Pacific or Repor

discussions between Mr. Taylor and PacifiCorp regarding the extent of trimming to be done on Mr. Taylor's property. No resolution was reached.

Mr. Taylor argues that the trimming PacifiCorp intends to do is excessive, in violation of any easement rights PacifiCorp has in the property, more severe than historical trimming practices, and that the clearances sought are arbitrary. Mr. Taylor's complaint sought to eliminate trimming that is not currently interfering with the power lines or causing a safety problem, reduce the clearance requirements and provide for more frequent trimming, or to have PacifiCorp accept liability for the aesthetic damage the trimming will cause.

PacifiCorp argues that its proposed pruning does not violate any law, rule, tariff provision, or Commission order, and that it is applying its vegetation management procedures in a fair manner. PacifiCorp also argues that injunctive relief that would enforce different vegetation requirements of PacifiCorp is improper in a customer complaint proceeding. PacifiCorp further argues that this Commission does not have the authority or jurisdiction to award damages.

Tree Trimming Necessity: Tree trimming and vegetation management efforts by PacifiCorp often gives rise to concern by customers. Even when done properly and conservatively, tree trimming often causes aesthetic damage to the trees. In some situations complete removal of trees is necessary. The trimming or removal of trees changes the environment of individual customers in ways often seen as negative, and it is understandable that customers would resist some trimming. However, overhead power lines are prevalent in much of PacifiCorp's Utah service territory. Those lines must be maintained for both safety reasons and to aid in system reliability, and tree trimming is a necessary part of that maintenance.

Easement: Mr. Taylor argued at length about the easement rights, or lack thereof, of PacifiCorp Mr. Taylor stated that there was no recorded easement across his property, and that if an easement exists it is a prescriptive easement only. Under the prescriptive easement, Mr. Taylor argued, PacifiCorp's tree trimming rights extent only to the historical level of tree-trimming. According to Mr. Taylor the proposed tree trimming goes beyond historical levels and therefore not allowable.

PacifiCorp did not respond to this argument in its Motion to Dismiss. At hearing, counsel for PacifiCorp argued that the easement question was not the proper issue before the Commission, the issue is whether PacifiCorp's proposed actions were in violation of any rule, statute or tariff provision. PacifiCorp also pointed to the provision contained in its tariff at Utah Electric Service Regulation 6R.1(2)(C), which states:

The Customer shall permit access by the Company's representatives at all hours to maintain electric distribution facilities on the Customer's premises. The Customer shall permit the Company to trim trees and other vegetation to the extent necessary to avoid interference with the Company's lines and to protect public safety.

This Commission is not the body to render a decision regarding the extent of prescriptive easement rights in this situation. Such a question is beyond the jurisdiction of this Commission. Mr. Taylor does not dispute PacifiCorp's ability to trim trees, but he does seek to limit the extent of the trimming with this argument. The company's tariff specifically requires a customer to allow trimming "to the extent necessary to avoid interference with the Company's lines and to protect public safety." We are satisfied that PacifiCorp has the legal right to do that, and will address whether the proposed trimming talls within that standard.

Docket No. 03-035-05 -- Report and Order (Issued: 9/30/2003) Taylor vs. PaccenturyLink's Reply of 5

Attachment. A

Trimming Standards: Our rule R746-310-4(D) states in part:

General Requirements - Unless otherwise ordered by the Commission, the requirements contained in the National Electric Safety Code, as defined at R746-310-1(B)(13), constitute the minimum requirements relative to the following:

- 1. the installation and maintenance of electrical supply stations;
- 2 the installation and maintenance of overhead and underground electrical supply and communication lines.

At the hearing PacifiCorp offered as an exhibit section 218 of the National Electric Safety Code ("NESC"), entitled "Tree Trimming", which states:

#### A General

1. Trees that may interfere with ungrounded supply conductors should be trimmed or removed.

*NOTE*: Normal tree growth, the combined movement of trees and conductors under adverse weather conditions, voltage, and sagging of conductors at elevated temperatures are among the factors to be considered in determining the extent of trimming required.

PacifiCorp also offered as an exhibit portion of the Approved American National Standard ("ANSI") A300, containing various standards for vegetation pruning around utility facilities. PacifiCorp's Assistant Forester, Randy Miller, testified that in accordance with the Commission rule, the NESC, the ANSI A300 standards, and its tariff, the company had developed tree trimming and other vegetation management standards to be used by its trimming contractors. Mr. Miller further testified that the trimming proposed for Mr. Taylor's property was consistent with those company standards. Mr. Miller also stated that part of the impetus behind its tree trimming program is to improve service quality and decrease outages in PacifiCorp's Litah service area

Mr. Taylor argued that the company standards were designed only from the company's standpoint to best advance its interests, and did not adequately consider the impact on customers. He also argued that the trimming standards used by the company today differ from those in the past, and that it is improper to make customers bear the brunt of the new standards when they had, due to past company practices, expected something different. Mr. Taylor also offered into evidence a brief illustrated document showing the tree trimming approach of a Colorado tree coalition that he claimed differed from those of PacifiCorp. Mr. Taylor further argued that the standards adopted by PacifiCorp went beyond what is necessary, and beyond what the quoted NESC and ANSI standards require.

Mr. Miller testified that the company standards were in accordance with the requirements of the NESC, ANSI, and the general standards of arborists. He also admitted that there was room for interpretation in applying those standards. He also testified that the standards of the Colorado tree coalition shown on the offered exhibit were consistent with those used by PacifiCorp.

With that evidence before us we must decide if it is appropriate to order PacifiCorp to vary from its usual trimming standards on this particular property. We are not persuaded that whether this trimming varies from the trimming that has been done in the past is controlling. The nature of vegetation maintenance, dealing with growing trees and plants, is that the present situation on a given property is not the same as it was just a few years ago, and also will not be the same situation in the future. It

Docket No. 03-035-05 -- Report and Order (Issued: 9/30/2003) Taylor vs. Pacific Confury Link's Reply of 5

Attachment A

would not be appropriate or prudent to hold the company strictly to its historical practices for that reason, and also because with further study and learning in the field, better practices may be available today and in the future than were available in the past

With the record as it is, there is not sufficient evidence to support standards different than PacifiCorp's adopted trimming standards. Accordingly we will not prohibit PacifiCorp from continuing its normal tree trimming on this property. PacifiCorp has already compromised some with respect to the treatment of the large Spruce tree on the property. It's desire to clear twenty feet of branches from that tree still remains a point of dispute. While we have reason to believe less than twenty feet would be sufficient, we do not have sufficient evidence to state what smaller clearance is required. We will allow PacifiCorp to trim to the extent necessary and strongly encourage it to cut less than twenty feet of branches if that can be done without compromising safety and the integrity of the system.

Burying the lines: Mr. Taylor argued that the company should hear the cost of burying the lines to avoid interference with trees. We disagree. There are tariff provisions in place setting forth how such costs are handled. It would not be allowable, or appropriate, to cause the company, and by extension other ratepayers, to pay for burying lines on this property, or any other individual property other than as set forth in the tariff. Mr. Taylor may exercise his option to have the lines buried, but the costs must be paid as set forth in PacifiCorp's tariff.

<u>Damages</u>: Mr. Taylor's original complaint sought PacifiCorp liability for aesthetic damage and likely death of some foliage as a result of its trimming practices. In response to PacifiCorp's motion to dismiss Mr. Taylor stated that he was not asking the Commission to impose damages, but was merely asking PacifiCorp to accept on their own liability for the aesthetic damage and death of some foliage. Since it appears that Mr. Taylor is not asking this Commission for relief in the form of damages, we will not address this issue further.

Additional Concerns: Two additional concerns arise from this matter. The first is that additional conflicts with customers will arise if PacifiCorp's approach to applying is adopted standards is done in a strident and completely unyielding manner. As Mr. Miller stated, there is room for interpretation regarding the standards. Each situation encountered by tree trimmers is also different, and it seems that this area deserves frequent judgment calls, and the best possible communication and cooperation with landowners. We would encourage PacifiCorp and its contractors to, when dealing with landowners, use any discretion it has, within the parameters necessary to promote safety and system reliability, to work with the customers.

The second concern is about how the standards are explained to customers. In the testimony it was implied that since PacifiCorp had made a presentation to the Commission regarding its tree trimming standards, that those standards were approved by this Commission. They were not. While we encourage and appreciate presentations such as the one discussed in testimony in this matter, they should not be interpreted as official approval of the material presented. Likewise, we will not, as requested by counsel for PacifiCorp, enter an order in this case "reaffirming" the company standards.

Pursuant to the Mr. Taylor's request for a stay and the agreements made while the matter was before the Supreme Court, a stay of this order will be included, pending final resolution of the case before the Supreme Court

#### **ORDER**

NOW, THEREFORE, IT IS HEREBY ORDERED that:

Docket No. 03-035-05 -- Report and Order (Issued: 9/30/2003) Taylor vs. Pacific Report Report and Order (Issued: 9/30/2003) Taylor vs. Pacific Report Report Report Attachment. A

- 1. Complainant's request for an order barring trimming by PacifiCorp or lessening the clearances sought by PacifiCorp, is denied.
- 2 This order is stayed pending Mr. Taylor's appeal before the Utah Supreme Court. During the stay. PacifiCorp may not perform the tree trimming contemplated and will defer any trimming until final resolution of the appeal before the Court.

DATED at Salt Lake City, Utah, this 30th day of September, 2003.

/s/ Donolas C Tingey

Administrative Law Judge

Approved and Confirmed this 30<sup>th</sup> day of September, 2003, as the Report and Order of the Public Service Commission of Utah.

/s/ Ric Campbell Chairman

/s/ Constance B. White, Commissioner

/s/ Ted Boyer, Commissioner

Attest:

/s/ Julie Orchard Commission Secretary

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# Taylor v. PSC

Court of Appeals of Utah March 17, 2005, Filed Case No. 20030694-CA

#### Reporter

2005 Utah App. LEXIS 146 \*; 2005 UT App 121

Bryan Taylor, Petitioner, v. Public Service Commission and PacifiCorp, Respondents.

Notice: [\*1] NOT FOR OFFICIAL PUBLICATION

**Disposition:** Court declined to disturb Public Service Commission's order.

#### Core Terms

trimming, circumstances, public utility, guidelines, supervise, issues

# Case Summary

#### **Procedural Posture**

Petitioner homeowner challenged a tree trimming proposal of respondent power company in an administrative setting before respondent Utah Public Service Commission (PSC), but he was denied relief. On appeal, the homeowner argued that his due process rights were violated in multiple ways during the course of the proceedings before the PSC.

#### Overview

The homeowner alleged that the burden of proof was on the power company to demonstrate that its proposed trimming was reasonable under the circumstances, that the PSC erred by refusing to grant his petition for a rehearing, that the PSC's order was not supported by substantial evidence, and that the PSC erred by declining to address whether the power company had an easement over his property. The appellate court noted that in a typical challenge to agency action, the party challenging the action carried the burden of demonstrating its impropriety. The appellate court held that the homeowner provided no explanation as to why the "new" evidence or similar evidence was not available at his PSC hearing, or why he could not have introduced that material during the hearing, and that

substantial evidence supported the PSC's determination that the electric company's guidelines and proposed trimming plans were objectively reasonable under all the circumstances. The appellate court concluded that a decision regarding the existence of an easement over the homeowner's property was not within the jurisdiction of the PSC.

#### Outcome

The judgment of the PSC was affirmed.

#### LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > General Overview

Evidence > Burdens of Proof > General Overview

HN1 [ Judicial Review, Standards of Review

In the typical challenge to agency action, the party challenging the action carries the burden of demonstrating its impropriety.

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Civil Procedure > Appeals > Standards of Review > De Novo Review

Energy & Utilities Law > ... > Public Utility Commissions > Hearings & Orders > Judicial Review

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

2005 Utah App. LEXIS 146, \*1

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview

### HN2[ Reviewability, Factual Determinations

An appellate court does not review the Utah Public Service Commission's findings de novo or reweigh the evidence.

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Utility Companies > General Overview

# <u>HN3</u> Public Utility Commissions, Authorities & Powers

Under <u>Utah Code Ann. § 54-4-1</u> (2000), the Utah Public Service Commission is vested with power and jurisdiction to supervise and regulate every public utility in Utah, and to supervise all of the business of every such public utility in the state.

**Counsel:** Bryan Taylor, Petitioner, Pro se, Salt Lake City.

Gregory B. Monson, David L. Elmont, and Sander J. Mooy, Salt Lake City, for Respondents.

**Judges:** Gregory K. Orme, Judge. WE CONCUR: Judith M. Billings, Presiding Judge, Norman H. Jackson, Judge.

Opinion by: Gregory K. Orme

# Opinion

MEMORANDUM DECISION

Original Proceeding in this Court.

ORME, Judge:

We have determined that "the facts and legal arguments are adequately presented in the briefs and record[,] and the decisional process would not be significantly aided by oral argument." <u>Utah R. App. P. 29(a)(3)</u>. Moreover, the issues presented are readily resolved under applicable law.

Taylor asserts that his due process rights were violated in multiple ways during the course of the proceedings before the Public Service Commission. Even assuming Taylor properly preserved these issues for appeal, his arguments fail on their merits.

We reject Taylor's argument that "any and all burden of proof should be on PacifiCorp" to demonstrate that its proposed trimming was reasonable under the circumstances. HN1[1] "In the typical challenge [\*2] to agency action, the party challenging the action carries the burden of demonstrating its impropriety." SEMECO Indus. v. Utah State Tax Comm'n, 849 P.2d 1167, 1174 (Utah 1993) (Durham, J., dissenting). See Kelly v. Salt Lake City Civil Serv. Comm'n, 2000 UT App 235, P30, 8 P.3d 1048 (favorably quoting Justice Durham's dissent).

We also refuse to find that the PSC erred in denying Taylor's petition for a rehearing. Taylor provided no explanation as to why the "new" evidence or similar evidence was not available at the May 29, 2003 hearing, or why he could not have introduced this material during the May hearing.

Moreover, Taylor's contention that the PSC gave undue deference to PacifiCorp's evidence during the hearing is not supported by the record. He fails to demonstrate that the PSC exhibited bias in favor of PacifiCorp.

Taylor also has not demonstrated that the PSC's order was "not supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63-46b-16(4)(g) (1997). HN2[1] "We do not review the Commission's findings de novo or reweigh the evidence." Lucas v. Murray City Civil Serv. Comm'n, 949 P.2d 746, 758 (Utah Ct. App. 1997). [\*3] The PSC's findings that PacifiCorp has the legal right to trim "to the extent necessary to avoid interference with the Company's lines and to protect public safety," and that the proposed trimming is reasonable under these circumstances, is supported by the National Electric Safety Code trimming guidelines, the Approved American National Standard A300 standards, and the testimony of PacifiCorp's Assistant Forester, Randy Miller. Thus, while Taylor has understandably strong views and some evidence to the contrary, we are persuaded that substantial evidence supports the PSC's

2005 Utah App. LEXIS 146, \*3

determination that PacifiCorp's guidelines and proposed trimming plans are objectively reasonable under all the circumstances.

Finally, we agree with the PSC that a decision regarding the existence of an easement over Taylor's property is not within the jurisdiction of the PSC. See <u>Utah Code Ann. § 54-4-1</u> (2000) (stating that <u>HN3[1]</u> PSC is "vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state"). Cf. <u>Kearns-Tribune Corp. v. Public Serv. Comm'n. 682 P.2d 858, 859 (Utah 1984) [\*4]</u> (setting aside PSC action and rule where no explicit statutory authority for rule).

Accordingly, we decline to disturb the PSC's order.

Gregory K. Orme, Judge

WE CONCUR:

Judith M. Billings,

Presiding Judge

Norman H. Jackson, Judge

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# 2000 Utah PUC LEXIS 7

Utah Public Service Commission January 28, 2000, Issued DOCKET NO. 99-035-12

#### Reporter

2000 Utah PUC LEXIS 7 \*

# In the Matter of the Complaint of JON BEUTLER, Complainants v. UTAH POWER & LIGHT COMPANY/PACIFICORP, Respondent

#### **Core Terms**

pole, install, motion to dismiss, tariff, clearance

#### Counsel

Appearances: John M. Eriksson, For PACIFICORP, dba UTAH POWER & LIGHT COMPANY

Panel: Stephen F. Mecham, Chairman; Constance B. White, Commissioner; Clark D. Jones, Commissioner

Opinion By: THURMAN

# Opinion

#### REPORT AND ORDER

#### SYNOPSIS

Complainant having failed to show any violation of Respondent's published tariffs or of the applicable statutes and Commission rules, we dismiss.

By the Commission:

#### PROCEDURAL HISTORY

Complainant above-named filed his complaint November 15, 1999, and Respondent filed its answer, together with a motion to dismiss, December 15, 1999. Customer complaints being designated informal proceedings under Commission rules, and there appearing to be no disputed factual issue necessary to the resolution of this matter, we deem it ripe for disposition without hearing or submission of further evidence. The Administrative Law Judge, having been fully advised in the premises, now enters the following Report, containing proposed findings of fact, conclusions of law, and the Order based thereon.

#### **FINDINGS OF FACT**

- . Jon Beutler ("Complainant") is a residential customer of PacifiCorp, dba Utah Power & Light Company ("Respondent"), an electrical corporation certificated by this Commission.
- 2. Complainant alleges, and for purposes of deciding Respondent's motion to dismiss, we find that:

#### 2000 Utah PUC LEXIS 7, \*7

- . Complainant is the owner of a new home located at 4245 Sunrise Drive in Park City, Utah. Complainant's home was built within two feet of a 12.5 kV overhead distribution line in violation of at least two National Electrical Code (NEC) clearance standards and at least one PacifiCorp Distribution Construction Standard. The 12.5 kV overhead distribution line was constructed in and has been in place since the 1960s.
- . Before Complainant could move into his home at 4245 Sunrise Drive, the safety violations created by the construction of his house had to be remedied. In an effort to remedy those violations, Respondent representatives contacted Chris Shulz, the record owner of the property. (County records indicated that the lot upon which Complainant's home was built was owned by Chris Shulz, Complainant's brother-in-law. Respondent had previously dealt with Mr. Shulz regarding similar violations of NEC clearance standards relating to another home he built across the street.)
- . Respondent informed Mr. Shulz that the clearance violations could be corrected with the installation of a 50-foot pole adjacent to Complainant's home. Mr. Shulz was informed that the cost to the homeowner for correcting the code violation would be \$ 3006.
- . Respondent also informed Complainant of its offer to correct the code violation by letter dated September 23, 1999. The letter clearly indicated that to correct the code violations, Respondent could "install a new 50' pole" on Complainant's property "adjacent" to his house structure.
- . Respondent subsequently negotiated with Mr. Shulz regarding the cost for installation of the new pole. (Respondent negotiated with Mr. Shulz based on Mr. Shulz' representations that he was negotiating on Complainant's behalf.) In order to expeditiously resolve the issue and correct the safety violation, Respondent ultimately agreed to charge Complainant only \$ 1200 for installing the pole. Mr. Shulz represented that he believed Complainant would agree to pay that amount.
- . On September 29, 1999, Complainant's wife tendered a check to Respondent in the amount of \$ 1200. Accordingly, Respondent installed a pole adjacent to Complainant's home and remedied the safety violations he created. According to Respondent, the pole was installed pursuant to the parties' agreement and within the Company's prescriptive easement which exists on the property. Complainant disputes this, and for purposes of deciding Respondent's motion to dismiss, we will assume Complainant is correct.
- . Several days after Respondent installed the pole, Complainant stopped payment on the check he had tendered to Respondent. Complainant thus has not contributed any payment toward the installation of the pole necessitated by the construction of his home in violation of clearance codes.
- . Complainant claims that Respondent agreed to replace the pole across the street to correct his safety violations. Respondent asserts in its answer that at no time did it agree to such a remedy. For purposes of deciding Respondent's motion to dismiss, we will assume that Complainant's version is true.
- . In its answer, Respondent asserts, and we find that in fact, the cost of replacing the pole across the street would be \$ 10,000 rather than \$ 3006, and would require the installation of a pole in excess of 70 feet. It could also entail the replacement of a second pole to maintain proper wire tension.

#### DISCUSSION

For purposes of deciding Respondent's motion to dismiss, we must consider the allegations contained in the complaint and answer in the light most favorable to Complainants. Our findings above do so.

We begin our analysis with the premise that the Commission is a creature of the Utah Legislature and can exercise *only* the authority specifically delegated by the Commission's enabling statutes or fairly inferable from the explicit grant. <sup>1</sup> In regard to *monetary* disputes between a public utility and its customers, the Commission's *only* authority derives from § 54-7-20. UCA 1953, as amended, which in pertinent part provides:

Basin Flying Service v. PSC, 531 P.2d 1303 (Utah 1975).

#### 2000 Utah PUC LEXIS 7, \*7

When complaint has been made to the commission concerning any rate, fare, toll, rental or charge for any product or commodity furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an amount for such product, commodity or service in excess of the schedules, rates and tariffs on file with the commission, or has charged an unjust, unreasonable or discriminatory amount against the complainant, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection.

As the Utah Supreme Court has construed this statute, the Commission's *sole* authority is to determine whether a utility has deviated from its published tariffs <sup>2</sup> and afford refunds if it has.

In the instant case, Complainant has not alleged that Respondent has deviated from its tariffs; rather the claim is that through either negligence or intentional misrepresentation, Respondent misled Complainant as to the cost and/or placement of a pole to remedy Complainant's own violation of existing clearance standards. If we have no authority to adjudicate Complainant's monetary claim, a fortiori we have no authority to decide the easement issue Complainant raises.

There are legal concepts under which sufficient factual proof might sustain relief to Complainant--equitable estoppel and negligence come to mind. Unfortunately for Complainant, our jurisdiction simply does not extend to affording relief under such theories, and therefore an evidentiary hearing on them would be an exercise in futility.

The point is that no matter how compelling Complainant's evidence might be, we would still have no authority to afford him relief. While it is possible a claim such as his would be justiciable by a court of law, <sup>3</sup> it is not justiciable by us.

#### **CONCLUSIONS OF LAW**

The Commission has party jurisdiction; subject matter jurisdiction is lacking. Complainant has failed to allege facts which would entitle him to relief under <u>Section 54-7-20, UCA</u> 1953, as amended. That statute entitles a customer to reparations only upon a showing of charges beyond Respondent's published tariff, or a discriminatory application of the tariff. The facts alleged by Complainant do not indicate such overcharge or discrimination. Accordingly, Respondent's motion to dismiss must be granted, and the complaint must be dismissed.

#### **ORDER**

NOW, THEREFORE, IT IS HEREBY ORDERED that:

The motion of Respondent & LIGHT COMPANY/PACIFICORP, to dismiss the complaint of JON BEUTLER be, and it is, granted, and this matter be, and it is, dismissed.

If JON BEUTLER wish to proceed further, JON BEUTLER may file a written petition for review within 20 days of the date of this Order. Failure so to do will forfeit the right to appeal to the Utah Supreme Court.

Dated at Salt Lake City, Utah, this 28th day of January, 2000.

#### /s/ A. Robert Thurman, Administrative Law Judge

Approved and Confirmed this 28th day of January, 2000, as the Report and Order of the Public Service Commission of Utah.

/s/ Stephen F. Mecham, Chairman

<sup>&</sup>lt;sup>2</sup> Denver & RGRR v. PUC, 73 Utah 139, 272P, 939 (1928): American Salt Co. v. W.S. Hatch Co., 748 P.2d 1060 (Utah 1987)

<sup>&</sup>lt;sup>3</sup> See American Salt Co. v W.S. Hatch Co., id., at 1067 (Concurring opinion.)

# 2000 Utah PUC LEXIS 7, \*7

/s/ Constance B. White, Commissioner

/s/ Clark D. Jones, Commissioner

Attest:

/s/ Julie Orchard, Commission Secretary

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# Youngblood v. Auto-Owners Ins. Co.

Supreme Court of Utah March 23, 2007, Filed No. 20050400

#### Reporter

2007 UT 28 \*; 158 P.3d 1088 \*\*; 2007 Utah LEXIS 64 \*\*\*; 574 Utah Adv. Rep. 32

Robert L. Youngblood, II, Plaintiff and Respondent, v. Auto-Owners Insurance Company, a corporation, Defendant and Petitioner.

**Subsequent History:** [\*\*\*1] Released for Publication May 5, 2007.

**Prior History:** Third District, Salt Lake. The Honorable William B. Bohling. No. 010911647.

Youngblood v. Auto-Owners Ins. Co., 111 P.3d 829, 2005 UT App 154, 2005 Utah App, LEXIS 156 (2005)

#### Core Terms

coverage, promissory estoppel, equitable estoppel, estoppel, misrepresentations, insured, circumstances, pedestrian, underinsured, occupying, struck, insurance policy, cause of action, insurance agent, provisions, scope of coverage, policy coverage, district court, named insured, principles, walking, cases, language of the policy, bodily injury, representations, equitable, motorist, caselaw, material misrepresentation, court of appeals

# Case Summary

#### **Procedural Posture**

In plaintiff insured's action seeking to extend the coverage of an insurance policy under the doctrine of equitable estoppel, defendant insurer's motion for summary judgment was granted. The Court of Appeals of Utah reversed on the basis of material issues of fact precluding summary judgment.

#### Overview

The insured was struck by an automobile as he walked across a parking lot. He claimed that his damages

exceeded the \$ 50,000 obtained from the driver's insurance company and sought additional coverage under underinsured provisions of his own insurance policy, which was written in the name of the insured's corporation. Even though the policy excluded coverage because the insured was a pedestrian, he contended that equitable estoppel should extend coverage based on representations made by the insurance agent in selling him the policy. On review, the court held that the insurer's agent misrepresented the policy's scope of coverage by stating that it also covered the insured as an individual even though his corporation was the named insured and that the policy would cover the insured if he were struck by a car while walking down the street. However, the question of whether the insured's reliance on the agent's misrepresentations of the scope of coverage under the policy was reasonable was unresolved, and therefore the case was remanded for further proceedings.

#### Outcome

The judgment reversing summary judgment for the insurer was affirmed, and the case was remanded for further proceedings.

#### LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview

#### HN1 Appeals, Standards of Review

The Supreme Court of Utah reviews the decision of the court of appeals for correctness. The court affords no deference to conclusions of law reached by it, or by the district court.

2007 UT 28, \*28; 158 P.3d 1088, \*\*1088; 2007 Utah LEXIS 64, \*\*\*1

Contracts Law > ... > Estoppel > Equitable Estoppel > Elements of Equitable Estoppel

# <u>HN2</u>[♣] Equitable Estoppel, Elements of Equitable Estoppel

Utah's caselaw requires proof of three elements for equitable estoppel: first, a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; next, reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act or failure to act; and, third, injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

# HN3 [ stoppel, Equitable Estoppel

As a general rule, absent circumstances where application of promissory estoppel is appropriate, a representation or assurance, in order to furnish the basis of an estoppel, must relate to some present or past fact or state of things, as distinguished from mere promises or statements as to the future. The Supreme Court of Utah typically only applies equitable estoppel to circumstances involving misrepresentations of past or present fact, along with the other necessary factors. Equitable estoppel reflects circumstances where it is not fair for a party to represent facts to be one way to get the other to agree, and then change positions later to the other's detriment.

Business & Corporate Compliance > ... > Formation of Contracts > Consideration > Promissory Estoppel

# <u>HN4</u>[♣] Consideration, Promissory Estoppel

Promissory estoppel contemplates circumstances where a party promises that things will be a given way in the future, knowing at the time of the promise all of the material facts, but is ultimately wrong, and where the other relied on that promise in acting (or withholding action). To make out a case of promissory estoppel necessitates a showing that (1) the plaintiff acted with

prudence and in reasonable reliance on a promise made by the defendant; (2) the defendant knew that the plaintiff had relied on the promise which the defendant should reasonably expect to induce action or forbearance on the part of the plaintiff or a third person; (3) the defendant was aware of all material facts; and (4) the plaintiff relied on the promise and the reliance resulted in a loss to the plaintiff.

Business & Corporate Compliance > ... > Formation of Contracts > Consideration > Promissory Estoppel

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

# HN5[ Language Consideration, Promissory Estoppel

In the case of equitable estoppel the representation is made of an existing or previously existing fact, and in promissory estoppel it is of a future fact. In both situations, it is the representor of the incorrect fact who is seeking to avoid responsibility for the error. The Supreme Court of Utah has treated equitable estoppel as a defense raised by a party against whom relief is sought when the other party misrepresented facts, and promissory estoppel as a cause of action against the misrepresentor when it fails to perform.

Civil Procedure > Pleading &
Practice > Pleadings > General Overview

HN6[基] Pleading & Practice, Pleadings

Utah's rules of pleading require that a cause be made out, but not necessarily that it always be correctly labeled.

Business & Corporate Compliance > ... > Formation of Contracts > Consideration > Promissory Estoppel

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

Insurance Law > Claim, Contract & Practice
Issues > Estoppel & Waiver > Equitable Estoppel

HN7 Consideration, Promissory Estoppel

Docket No. 17-049-09 CenturyLink's Reply Attachangent A<sub>10</sub>

2007 UT 28, \*28; 158 P.3d 1088, \*\*1088; 2007 Utah LEXIS 64, \*\*\*1

In insurance coverage claims, it is unnecessary to decide whether the agent's misrepresentations are to past or to future facts.

Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver > Equitable Estoppel

Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver > Policy Coverage Issues

# HN8[1] Estoppel & Waiver, Equitable Estoppel

Estoppel may be applied to modify terms of an insurance policy when (1) an agent makes material misrepresentations to the prospective insured as to the scope of coverage or other important policy benefits, (2) the insured acts with prudence and in reasonable reliance on those misrepresentations, and (3) that reliance results in injury to the insured.

Insurance Law > Claim, Contract & Practice
Issues > Estoppel & Waiver > Equitable Estoppel

Insurance Law > Claim, Contract & Practice
Issues > Estoppel & Waiver > Misrepresentations

# HN9 Stoppel & Waiver, Equitable Estoppel

Having established that an agent made material misrepresentations regarding the policy's coverage, a plaintiff must next demonstrate that he acted prudently and reasonably relied on those misrepresentations. When a party knows or should have known reliance would be in error, the party cannot reasonably rely on the misrepresentation as a matter of law.

Insurance Law > Claim, Contract & Practice
Issues > Estoppel & Waiver > Equitable Estoppel

Insurance Law > Claim, Contract & Practice
Issues > Estoppel & Waiver > Misrepresentations

HN10 Lstoppel & Waiver, Equitable Estoppel

A party claiming an estoppel cannot rely on representations or acts if they are contrary to his knowledge of the truth or if he had the means by which with reasonable diligence he could ascertain the truth. The determination of reasonableness is not based "on the subjective state of mind of the person claiming he was misled, but rather is to be based on an objective test, i.e., what would a reasonable person conclude under these circumstances." This reasonable person standard, known for centuries in the law, is the safest way to protect those who would be unduly taken advantage of, be it insured or insurer.

Insurance Law > Claim, Contract & Practice
Issues > Estoppel & Waiver > Equitable Estoppel

Insurance Law > Claim, Contract & Practice
Issues > Estoppel & Waiver > Misrepresentations

Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver > Policy Coverage Issues

# HN11 Stoppel & Waiver, Equitable Estoppel

Reliance upon an agent's material misrepresentations regarding coverage may or may not be reasonable, depending upon the facts of the individual case.

Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver > Misrepresentations

# HN12 Stoppel & Waiver, Misrepresentations

The law holds insurance agents to accurately representing policy provisions and honestly answering consumer questions. Agents who are not trained to act with complete honesty and integrity in their interactions with consumers, or who simply refuse to do so, place themselves and their principals at risk. The law will hold both principal and agent liable for misrepresentations upon which consumers reasonably rely.

Insurance Law > Claim, Contract & Practice
Issues > Estoppel & Waiver > Misrepresentations

Insurance Law > Claim, Contract & Practice

Docket No. 17-049-09 CenturyLink's Reply Attachagent A<sub>10</sub>

2007 UT 28, \*28; 158 P.3d 1088, \*\*1088; 2007 Utah LEXIS 64, \*\*\*1

Issues > Estoppel & Waiver > Policy Coverage Issues

HN13 Estoppel & Waiver, Misrepresentations

Insurance purchasers fail to make the effort to read and understand the content of their insurance policies at their peril. When the language is clear, direct, understandable to ordinary people, and complete, it will be more difficult to prove reasonable reliance on contrary oral promises. On the other hand, when the language is unintelligible, incomplete, or simply too complex to be understood by persons of reasonable intelligence, reliance on an agent's "plain language" explanations and representations of what the policy covers becomes easier to establish. In addition, the reasonableness of reliance may be affected by the ease, or lack of it, that confronts a person of ordinary intelligence in discovering the whereabouts of otherwise clear, direct, and understandable terms within an insurance contact. A conclusion that an insurance contract term is unambiguous, while certainly relevant to the issue of whether reliance on a contradictory representation is reasonable, is not the end of the inquiry. A perfectly clear insurance term is of no use if it cannot be located.

Insurance Law > Claim, Contract & Practice
Issues > Estoppel & Waiver > Equitable Estoppel

Insurance Law > Claim, Contract & Practice
Issues > Estoppel & Waiver > Misrepresentations

# HN14 stoppel & Waiver, Equitable Estoppel

A party may recover under the doctrine of estoppel when an insurance agent makes material misrepresentations as to the policy provisions, the party reasonably relies on those misrepresentations in buying the coverage, and that reliance results in legal injury to the party.

Counsel: Peter C. Collins, Salt Lake City, for plaintiff. Robert R. Wallace, Salt Lake City, for defendant.

Judges: WILKINS, Associate Chief Justice: Justice Durrant, Justice Parrish, Justice Nehring, and Judge Hadley concur in Associate Chief Justice Wilkins' opinion. Having disqualified herself, Chief Justice Durham does not participate herein; District Judge Scott M. Hadley sat.

Opinion by: WILKINS

# Opinion

[\*\*1090]

On Certiorari to the Utah Court of Appeals

#### WILKINS, Associate Chief Justice:

[\*P1] Mr. Youngblood seeks to extend the coverage of an insurance policy under the doctrine of equitable estoppel. He admits that the language of the policy does not extend coverage under these circumstances, but relies on representations of the scope of coverage made by the insurance agent in selling him the policy. On summary judgment, the district court held him to the language of the policy, but on appeal, the court of appeals agreed in principle and reversed on the basis of material issues of fact precluding summary judgment.

[\*P2] [\*\*\*2] On certiorari, we have agreed to review the court of appeals' legal conclusion that an insured may rely upon principles of equitable estoppel to enlarge the scope of an insurance policy's coverage where the company's agent materially misstates the scope of coverage prior to the purchase of the policy. We conclude that estoppel may apply under some factual circumstances and remand for further action in the district court.

#### BACKGROUND

[\*P3] Mr. Youngblood was struck by an automobile as he walked across the parking lot of a medical plaza. The driver, Ms. Cooksey, carried \$ 50,000 in available liability insurance and settled Mr. Youngblood's claim for the \$ 50,000 policy limit. He claims, however, that his damages exceed \$ 50,000 and accordingly seeks additional coverage pursuant to the underinsured driver provisions of his own insurance policy from Auto-Owners Insurance Co. ("Auto-Owners").

[\*P4] Youngblood purchased the insurance policy, known as underinsured motorist ("UIM") coverage, in the name of his corporation, Youngblood Home Improvement, Inc., rather than in his individual name. He contends that the insurance company's sales agent orally guaranteed him that [\*\*\*3] the UIM coverage being offered from Auto-Owners would also extend to him as an individual pedestrian in the event of an

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underinsured motorist claim.

[\*P5] Auto-Owners, on the other hand, argues that the policy's language clearly precludes Youngblood from recovering under the UIM provisions and that, therefore, the agent's statements are legally irrelevant. The insurance company relies entirely upon the specific language of the policy. Under the policy language, 1 a person is eligible for UIM coverage in only two circumstances: first, when one sustains bodily injury while occupying an automobile that is insured under the UIM policy; or, second, when one sustains bodily injury as a pedestrian or while occupying another person's automobile that is not insured under the UIM policy and [\*\*1091] the first named insured in the policy is an individual. Also of note, the policy defines "occupying" as "in or on an automobile as a passenger or operator, or being engaged in the immediate acts of entering, boarding or alighting from an automobile." A "pedestrian" is defined as "any natural person who is not occupying an automobile."

[\*P6] [\*\*\*4] There is no factual dispute that Youngblood was a pedestrian and not occupying an automobile, as defined in the policy, at the time he was struck and injured. There is also no factual dispute that

<sup>1</sup> The policy states, in pertinent part,

- (a) We will pay compensatory damages any person is legally entitled to recover:
  - (1) from the owner or operator of an underinsured automobile:
  - (2) for bodily injury sustained while occupying an automobile that is covered by SECTION II LIABILITY Coverage of the policy.
- (b) If the first named insured in the Declaration is an individual, this coverage is extended as follows:
  - (1) We will pay compensatory damages you are legally entitled to recover:
  - (a) from the owner or operator of any underinsured automobile;
  - (b) for bodily injury you sustain:
  - (1) when you are a pedestrian;

or

(2) while occupying an automobile you do not own which is covered by SECTION II - LIABILITY Coverage of the policy.

entity. Under a strict reading of the terms of the policy, then, Youngblood's injury does not qualify for UIM coverage under the Auto-Owners policy. Youngblood concedes that the language of the policy does not extend coverage. However, he advances the principles of estoppel as support for his claim of entitlement.

[\*P7] In his deposition, Youngblood said that an employee of Cottonwood Insurance, acting as Auto-

Youngblood Home Improvement, Inc., is the first named insured and is not an individual but rather a corporate

employee of Cottonwood Insurance, acting as Auto-Owner's agent, assured him that he would be covered under the UIM provisions of the policy in the event he was struck and injured while a pedestrian by a motorist who was either underinsured or uninsured. According to Youngblood, the agent repeatedly provided a specific scenario, to wit, "Hey, if you're walking down the street, you've got nothing if you have--if you don't have underinsured and uninsured motorist and somebody runs you over." Throughout his sales [\*\*\*5] interaction with Youngblood, the agent repeated this scenario of getting hit by a car while walking somewhere. The clear implication of the agent's hypothetical was that Youngblood would not be covered for injuries sustained as a pedestrian if struck by an underinsured or uninsured driver if he did not purchase the proffered UIM and UM coverage, and that doing so would extend protection to Youngblood as a pedestrian if struck by an underinsured (or uninsured) motorist.

[\*P8] After meeting with the agent and agreeing to purchase the UIM coverage, Youngblood received his own copy of the policy in due course. He concedes that he did not read the language of the policy at any point prior to his injury and the rejection of his UIM claim. Instead, he says he relied solely upon the oral representations of coverage made by the sales representative.

[\*P9] Youngblood brought suit against Auto-Owners in the district court when it declined his claim under the UIM provisions. He argued in the district court that even though the explicit terms of the policy do not provide coverage to him under these circumstances, coverage should nevertheless be extended under the doctrine of [\*\*\*6] equitable estoppel. The district court granted summary judgment in favor of Auto-Owners, finding the terms of the insurance policy to be clear and unambiguous in not extending coverage under these circumstances. The district court declined to apply estoppel principles to extend the coverage.

[\*P10] A unanimous panel at the court of appeals

(emphasis added).

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reversed the district court's grant of summary judgment. <sup>2</sup> We review the court of appeals' legal conclusion on the sole question of whether or not an insured may apply equitable estoppel to modify the scope of an insurance policy's coverage when the company's agent misstated the scope of coverage prior to the insured's purchase of the policy. We have jurisdiction pursuant to Utah Code sections 78-2-2(3)(a) and (5).

#### **ANALYSIS**

[\*P11] <u>HN1</u>[\*] We review the decision of the court of appeals for correctness. <sup>3</sup> We afford no deference to conclusions of law reached [\*\*\*7] by it, or by the district court. <sup>4</sup>

[\*P12] Acknowledging that the plain language of the insurance policy does not extend protection to him, Youngblood argues that courts should extend coverage as a matter [\*\*1092] of equity under the doctrine of equitable estoppel. However, he argues the elements of promissory estoppel. Our caselaw recognizes equitable estoppel and promissory estoppel as two distinct legal principles, one a defense and one a cause of action in most instances. However, in insurance coverage cases like this one the technical distinction between equitable and promissory estoppel is of less analytic utility and approaches being irrelevant.

[\*P13] Consequently, we depart from our traditional distinctions between equitable and promissory estoppel in evaluating the applicability of estoppel, as a general concept, to [\*\*\*8] cases of this type. As a result, it may be useful to briefly address the primary distinctions between the two and the basis for our decision to apply more general, "generic" principles of estoppel in this case.

[\*P14] HN2[\*] Our caselaw requires proof of three elements for equitable estoppel: first, "a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted"; next, "reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act or failure to act"; and, third, "injury to the second party that

would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act."  $^5$ 

[\*P15] Moreover, HN3[\*] "[a]s a general rule, absent circumstances where application of promissory estoppel is appropriate, 'a representation or assurance, in order to furnish the basis of an estoppel, [\*\*\*9] must relate to some present or past fact or state of things, as distinguished from mere promises or statements as to the future." <sup>6</sup> We typically only apply equitable estoppel to circumstances involving misrepresentations of past or present fact, along with the other necessary factors. Equitable estoppel reflects circumstances where it is not fair for a party to represent facts to be one way to get the other to agree, and then change positions later to the other's detriment.

[\*P16] <u>HN4</u>[1] Promissory estoppel, on the other hand, contemplates circumstances where a party promises that things will be a given way in the future, knowing at the time of the promise all of the material facts, but is ultimately wrong, and where the other relied on that promise in acting (or withholding action). To make out a case of promissory estoppel necessitates a showing that

(1) [t]he plaintiff acted with prudence [\*\*\*10] and in reasonable reliance on a promise made by the defendant; (2) the defendant knew that the plaintiff had relied on the promise which the defendant should reasonably expect to induce action or forbearance on the part of the plaintiff or a third person; (3) the defendant was aware of all material facts; and (4) the plaintiff relied on the promise and the reliance resulted in a loss to the plaintiff. <sup>7</sup>

[\*P17] The distinction we have drawn between these two legal concepts is essentially that <u>HNS</u>[\*] in the case of equitable estoppel the representation is made of an existing or previously existing fact, and in promissory estoppel it is of a future fact. In both situations, it is the representor of the incorrect fact who is seeking to avoid responsibility for the error. We have treated equitable estoppel as a defense raised by a party against whom

<sup>&</sup>lt;sup>2</sup> <u>Youngblood v. Auto-Owners, 2005 UT App 154, P 27, 111 P.3d 829.</u>

<sup>&</sup>lt;sup>3</sup> Laney v. Fairview City, 2002 UT 79, P 9, 57 P.3d 1007.

<sup>&</sup>lt;sup>4</sup> First Am. Title Ins. Co. v. J.B. Ranch, Inc., 966 P.2d 834, 836 (Utah 1998).

<sup>&</sup>lt;sup>5</sup> Nunley v. Westates Casing Servs.. Inc., 1999 UT 100, P 34, 989 P.2d 1077.

<sup>&</sup>lt;sup>6</sup> Id. (quoting <u>28 Am. Jur. 2d Estoppel and Waiver § 46</u> (2000)).

<sup>7</sup> Id. P 35.

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relief is sought when the other party misrepresented facts, and promissory estoppel as a cause of action against the misrepresentor when it fails [\*\*\*11] to perform. Sadly, we have also mixed and muddled this application.

[\*P18] Other courts have recently addressed this traditional distinction. The Tenth Circuit recently observed that promissory estoppel is "an affirmative cause of action or defense, which arises in instances where no formal contract exists and the party seeking promissory estoppel is attempting to prove [\*\*1093] the existence of an enforceable promise or agreement." 8

[\*P19] Other courts, such as the Ninth Circuit, have also explicitly distinguished between promissory estoppel and equitable estoppel, noting that "promissory estoppel and equitable estoppel are distinct concepts with distinct uses and effects" <sup>9</sup> because "promissory estoppel is used to create a cause of action, whereas equitable estoppel is used to bar a party from raising a defense or objection it otherwise would have." <sup>10</sup> [\*\*\*13] In other words, "[p]romissory estoppel is a sword, and equitable estoppel [\*\*\*12] is a shield." <sup>11</sup> Legal treatises

describe the distinction as follows:

Promissory estoppel involves a clear and definite promise, while equitable estoppel involves only representations and inducements. The representations at issue in promissory estoppel go to future intent, while equitable estoppel involves statement of past or present fact. It is also said that equitable estoppel lies in tort, while promissory estoppel lies in contract. The major distinction between equitable estoppel and promissory estoppel is that the former is available only as a defense, while promissory estoppel can be used as the basis of a cause of action for damages. <sup>12</sup>

[\*P20] Ultimately, the distinctions make little difference in the matter of insurance coverage disputes between an insured who was told he would be covered for certain injuries, and an insurance agent and company denying coverage after the injury has occurred. It is difficult to see any real distinction between an agent representing that a policy will cover a particular peril (a "clear and definite promise"), and an agent representing that the policy provision covers the peril (a "representation" and "inducement" based upon a material and existing fact—the policy provisions existing in the policy to be sold). Under these circumstances, what useful purpose is served by continuing the distinction between the traditional "sword" and "shield"?

[\*P21] We see none.

[\*P22] However, it appears that Youngblood intended to bring a claim under the theory of promissory instead of equitable estoppel. His legal arguments neatly fit those elements [\*\*\*14] described under promissory estoppel. Were we to hold fast to the distinctions between promissory and equitable estoppel, and if we were also to conclude that the misrepresentations or promises were as to future facts, Youngblood would be barred under our prior caselaw from bringing a claim. Such an exalting of form over substance, while not unknown in our caselaw, is to be avoided when possible. HN6[1] Our rules of pleading require that a cause be made out, but not necessarily that it always be correctly labeled. In Youngblood's case, and in others of the same type, the defendant insurance company is denied nothing in terms of knowing what is being claimed and how to defend. We

<sup>&</sup>lt;sup>8</sup> Mile High Indus. v. Cohen. 222 F.3d 845, 859 (10th Cir. 2000).

<sup>&</sup>lt;sup>9</sup> <u>Humetrix, Inc. v. Gemplus S.C.A., 268 F.3d 910, 918 (9th Cir.</u> 2001).

<sup>10</sup> ld.; see also Jodek Charitable Trust. R.A. v. Vertical Net, Inc., 412 F. Supp. 2d 469, 477 (E.D. Pa. 2006) ("[T]here is no independent cause of action for 'equitable estoppel' . . . --it may only be asserted as a defense. The only sense in which there is a cause of action for 'equitable estoppel' is insofar as the phrase is sometimes used interchangeably with promissory estoppel, a related but distinct concept." (citations omitted)); Kolkman v. Roth, 656 N.W.2d 148, 155 n.3 (lowa-2003) ("There is a recognized distinction between equitable estoppel and promissory estoppel . . . . Equitable estoppel is used as a shield to estop a party from raising the statute of frauds when plaintiff establishes the defendant 'made a misrepresentation of facts,' as opposed to a promise of a future act, that resulted in detrimental reliance. Thus, it is not an offensive theory that can be used as a basis for damages. On the other hand, promissory estoppel is a broader doctrine that can be utilized as an alternative theory of recovery 'in the absence of a contract' when the plaintiff 'detrimentally relied on a promise,' as opposed to a misstatement of fact." (citations omitted) (quoting David J. Gass, Michigan's UCC Statute of Frauds and Promissory Estoppel, 74 Mich. B.J. 524, 525-26 (1995))).

<sup>&</sup>lt;sup>11</sup> Humetrix, 268 F.3d at 918.

<sup>12 28</sup> Am. Jur. 2d Estoppel and Waiver § 35 (2004).

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therefore conclude that estoppel, an equitable principle under the court's common law equitable powers, is a sufficient description of such an action.

[\*P23] [\*\*1094] We are not alone in this approach. Facing this question, some courts either apply the same elements to both, as we now propose to do, or treat promissory estoppel as a subset of equitable estoppel, 13 something we find no less confusing than treating them separately. Overall, however, the difference between equitable and promissory estoppel has [\*\*\*15] become inconsequential particularly in *insurance* cases. We agree with *Corbin on Contracts*, that when a

party asks an insurance agent if a particular matter is covered by a certain kind of insurance policy[,] [and] . . . the agent responds: "We've got you covered" or "We cover you for \$ 7,500, and you are fully covered" or similar assurances[,] [d]id the insurance agent make a representation of fact or a promise regarding coverage? In reality, it makes little difference so long as estoppel is affirmatively applied to enforce the agent's statement. Thus, whereas earlier decisions applied defensive equitable estoppel, modern decisions, felicitously following the principles of good faith, conscience, and equity underpinning estoppel, apply promissory estoppel as an affirmative cause of action to validate and enforce the agent's promise. 14

The distinction between equitable and promissory estoppel has become muddled in insurance cases over the decades, and courts have applied either form when choosing to enforce an agent's statement. Therefore, although our prior caselaw may have made a distinction between equitable estoppel and promissory estoppel, we must [\*\*\*16] modify that position. In this case, and <code>HNT[\*]</code> in other similar insurance coverage claims, it is unnecessary to decide whether the agent's misrepresentations are to past or to future facts. Consequently, we will apply basic principles of estoppel to these cases.

[\*P24] In this case, Auto-Owners, as the Petitioner and Defendant, would have us interpret Utah law to prohibit any form of estoppel under circumstances where agents

misrepresent insurance coverage and the insured reasonably relies on those misrepresentations. Under Auto-Owner's analysis, an insured is responsible to read and understand the contract. They urge that the policy language, if unambiguous, remains unmodifiable [\*\*\*17] by any form of parole evidence.

[\*P25] We disagree, as did the court of appeals. <u>HN8[</u> applied to modify terms of an insurance policy when (1) an agent makes material misrepresentations to the prospective insured as to the scope of coverage or other important policy benefits, (2) the insured acts with prudence and in reasonable reliance on those misrepresentations, and (3) that reliance results in injury to the insured. <sup>15</sup> With this rule of law in mind, we address the consequences to Youngblood and Auto-Owners in this case.

# I. AUTO-OWNERS' AGENT MISREPRESENTED THE POLICY'S SCOPE OF COVERAGE

[\*P26] Our first inquiry is whether the agent's oral statements constituted misrepresentations of the policy's scope of coverage or other benefits. Youngblood argues that the agent made two such misrepresentations: (1) that [\*\*\*18] the policy also covered Youngblood as an individual, even though Youngblood Home Improvement, Inc., was the named insured on the document, and (2) that the policy would cover Youngblood if he were struck by a car while walking down the street.

[\*P27] We agree that these statements are misrepresentations of the policy's coverage. When parsed with great care, the policy terms do not include coverage of Youngblood when struck by a car while a pedestrian. Under provision 2(a), a person may recover from the owner of an underinsured automobile for bodily injuries sustained while occupying an automobile covered by the policy. [\*\*1095] Youngblood was on foot at the time of the injury.

[\*P28] Youngblood was walking through a medical plaza parking lot when struck and injured. He was not in or on an automobile as a passenger or operator, nor was he entering an automobile at the time. Thus, under the policy, he was not "occupying" an automobile at the time of the accident.

<sup>&</sup>lt;sup>13</sup> See, e.g., <u>Davis v. Davis, 855 P.2d 342, 348 (Wyo. 1993)</u> ("The doctrines of promissory estoppel and equitable estoppel are closely related and . . . they often have been invoked together and interchangeably, without the benefit of clear distinction.").

<sup>143</sup> Eric Mills Holmes, Corbin on Contracts, § 8.11 (1996).

<sup>&</sup>lt;sup>15</sup> See, e.g., <u>Lee v. Burkhart. 991 F.2d 1004, 1009 (2d Cir. 1993)</u> ("The elements of estoppel are (1) material representation, (2) reliance and (3) damage.").

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[\*P29] Under provision 2(b), when the first named insured in the Declaration is an *individual*, the coverage extends to those bodily injuries sustained as a *pedestrian*. Here, the first named insured on [\*\*\*19] the policy is Youngblood Home Improvement, Inc., a corporate business entity, *not* an individual. This language precludes coverage for Youngblood as a pedestrian because the coverage does not apply if the first named insured (the corporation in this case) is not an individual.

[\*P30] The language of the policy classifies Youngblood as neither a covered "pedestrian" nor "occupying" his automobile at the time of the accident, as required for Youngblood to benefit from the coverage provided by the policy.

[\*P31] Youngblood testified, however, that the agent provided a scenario under which the policy would cover Youngblood under these exact circumstances as a pedestrian. In his deposition, Youngblood testified that the agent said, "Hey, if you're walking down the street, you've got nothing if you have--if you don't have underinsured and uninsured motorist [coverage] and somebody runs you over." Or "[y]ou could be sitting at your desk or walking down the street and if you don't have the coverage, you've got nothing." <sup>16</sup> These statements are in direct conflict with the language of the policy, which does not extend coverage to Youngblood under the given circumstances. [\*\*\*20] Consequently, the agent made misrepresentations about the policy's coverage and other benefits.

# II. DID YOUNGBLOOD REASONABLY RELY ON THE AGENT'S MISREPRESENTATIONS

[\*P32] HN9[\*] Having established that an agent made material misrepresentations regarding the policy's coverage, a plaintiff must next demonstrate that he acted prudently and reasonably relied on those misrepresentations. <sup>17</sup> When a party knows or should

have known reliance would be in error, the party cannot reasonably rely on the misrepresentation as a matter of law. In this case, the question is whether Youngblood should have known [\*\*\*21] that reliance would be in error.

[\*P33] Under our caselaw, HN10[1] "[a] party claiming an estoppel cannot rely on representations or acts if they are contrary to his knowledge of the truth or if he had the means by which with reasonable diligence he could ascertain the truth." 18 Youngblood argues that because we have not previously dealt with this particular fact pattern--an agent making oral misrepresentations upon which an insured relied in purchasing his policy-our estoppel analysis should allow more leniency to the insured in his reliance, given the "nature of insurance agents and insurance contracts." 19 Although we are sympathetic toward those who rely on an agent's misrepresentations, [\*\*\*22] recovery can be permitted only when that reliance is reasonable. To do otherwise would allow too much room for sympathy, passion, and error, and drastically diminish the predictability needed by insureds and insurers in the marketplace.

[\*P34] [\*\*1096] On the other hand, the determination of reasonableness is not based "on the subjective state of mind of the person claiming he was misled, but rather is to be based on an objective test, i.e., what would a reasonable person conclude under these circumstances." <sup>20</sup> This reasonable person standard, known for centuries in the law, is the safest way to protect those who would be unduly taken advantage of, be it insured or insurer.

[\*P35] [\*\*\*23] <u>HN11[\*\*]</u> Reliance upon an agent's material misrepresentations regarding coverage may or may not be reasonable, depending upon the facts of the individual case. The policy of the law is not only to protect consumers from fraudulent sales and from agents who misrepresent provisions to make a sale, but also to deter unscrupulous insureds from fabricating agent's statements in order to receive additional

<sup>&</sup>lt;sup>16</sup> It appears the agent continued to believe this incorrect representation even after the injury. After the accident, when Youngblood called Cottonwood Insurance to report his claim as a pedestrian, the agent allegedly told him, "Once you get everything out of [the driver of the automobile that struck you], then you have to come to me, but you've got to get everything out of her first and then I can pay your claim."

<sup>&</sup>lt;sup>17</sup> Nunley v. Westates Casing Servs., 1999 UT 100, P 36, 989 P.2d 1077 ("A party claiming estoppel must present evidence showing that an offer or promise was made on which the party based his or her reliance."); see **Restatement** (Second) of

Contracts § 90 (1979).

<sup>&</sup>lt;sup>18</sup> Perkins v. Great-West Life Assurance Co., 814 P.2d 1125.
1130 (Utah Ct. App. 1991) (quoting Larson v. Wycoff Co., 624 P.2d 1151, 1155 (Utah 1981)).

<sup>&</sup>lt;sup>19</sup>We presume Youngblood suggests that the "nature" of insurance agents and insurance contracts is not to be seen as good.

<sup>&</sup>lt;sup>20</sup> Larson, 624 P.2d at 1155.

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coverage or benefits after an injury has occurred.

[\*P36] HN12[\*] The law holds insurance agents to accurately representing policy provisions and honestly answering consumer questions. Agents who are not trained to act with complete honesty and integrity in their interactions with consumers, or who simply refuse to do so, place themselves and their principals at risk. The law will hold both principal and agent liable for misrepresentations upon which consumers reasonably rely.

[\*P37] Correspondingly, HN13[1] insurance purchasers fail to make the effort to read and understand the content of their insurance policies at their peril. When the language is clear, direct, understandable to ordinary people, and complete, it will be more difficult to prove reasonable reliance on contrary oral promises. [\*\*\*24] On the other hand, when the language is unintelligible, incomplete, or simply too complex to be understood by persons of reasonable intelligence, reliance on an agent's "plain language" explanations and representations of what the policy covers becomes easier to establish. In addition, the reasonableness of reliance may be affected by the ease, or lack of it, that confronts a person of ordinary intelligence in discovering the whereabouts of otherwise clear, direct, and understandable terms within an insurance contact. A conclusion that an insurance contract term is unambiguous, while certainly relevant to the issue of whether reliance on a contradictory representation is reasonable, is not the end of the inquiry. A perfectly clear insurance term is of no use if it cannot be located.

[\*P38] In this case, the question of whether or not Youngblood's reliance on the agent's misrepresentations of the scope of coverage under the policy was reasonable is unresolved. It is one of fact. Youngblood may not recover under the doctrine of estoppel if his reliance on the agent's statements was not reasonable. A material question of fact remains to be resolved by the trier of fact, and we therefore [\*\*\*25] remand for proceedings consistent with this opinion.

#### CONCLUSION

[\*P39] <u>HN14</u>[\*] A party may recover under the doctrine of estoppel when an insurance agent makes material misrepresentations as to the policy provisions, the party reasonably relies on those misrepresentations in buying the coverage, and that reliance results in legal injury to the party. In this case, the agent made material misrepresentations regarding the policy's coverage.

Nonetheless, Youngblood has the burden to establish that his reliance was reasonable under the facts of the case.

[\*P40] Affirmed, and remanded for proceedings consistent with this opinion.

[\*P41] Justice Durrant, Justice Parrish, Justice Nehring, and Judge Hadley concur in Associate Chief Justice Wilkins' opinion.

[\*P42] Having disqualified herself, Chief Justice Durham does not participate herein; District Judge Scott M. Hadley sat.

**End of Document** 

#### **CERTIFICATE OF SERVICE**

# VIA EMAIL TRANSMISSION

Docket No. 17-049-09

I hereby certify that on the 5th day of September, 2017, I caused a true and correct copy of the foregoing CENTURYLINK'S REPLY TO THE RESPONSE TO THE MOTION TO DISMISS to be served upon the following persons via electronic mail at the e-mail addresses shown below.

**Public Service Commission:** 

**Stephen D. and Tamara Thomas** 

psc@utah.gov

sthomas@ic-group.net tammythomas14@yahoo.com

**Utah Division of Public Utilities:** 

Justin Jetter — <u>jjetter@utah.gov</u> Erika Tedder — <u>etedder@utah.gov</u>

**CENTURYLINK** 

By: Carla M. Butler

310 SW Park Ave., 11<sup>th</sup> Flr.

Portland, OR 97205 Telephone: 503-242-5420 Facsimile: 503-242-8589

e-mail: carla.butler@centurylink.com

Paralegal for CenturyLink