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IN THE SUPREME COURT OF THE STATE OF IDAHO

THE ESTATE OF JUDY DUMOULIN, Deceased, by and through her Personal Representative and JOSEPH DUMOULIN, an individual.

Plaintiffs-Appellants,

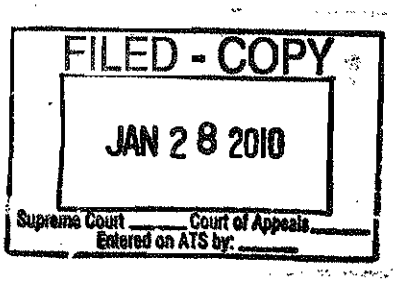
vs.

CUNA Mutual Group, an Iowa corporation authorized by the State of Idaho, Department of Insurance, to transact business in the State of Idaho

Defendant/Respondent.

Supreme Court Docket No. 36828

District Court No. CV OC 2008-18710



APPELLANTS' OPENING BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE HONORABLE RONALD COPSEY, DISTRICT JUDGE

THOMAS V. MAILE, IV
Attorney at Law
380 West State Street
Eagle, Idaho 83616
Telephone: (208) 939-1000

Attorneys for Plaintiffs/Appellants

Kevin West
Hall, Farley, Oberrecht & Blanton, P.A.
702 West Idaho Street, Suite 700
Post Office Box 1271
Boise, Idaho 83701-1271
Telephone: (208) 395-8500

Attorneys for Defendants/Respondent

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This present matter is an appeal by the Appellants, The Estate of Judy Dumoulin, deceased and by and through her personal representative and Joseph Dumoulin, an individual (hereinafter referred to as Appellants) from the entry Summary Judgment and the resulting Judgment that were entered by the lower court dismissing the case with prejudice on July 28, 2009. The case involved the Appellants and CUNA Mutual Group. The Honorable Cheri C. Copsey District Judge of the Fourth Judicial District, granted CUNA Mutual Group's Motion for Summary Judgment by an Order filed July 22, 2009 (R. Vol. I, p. 72). The District Court in its Order Granting Defendant's Motion for Summary Judgment, reasoned the insurance policy (R. Vol. I, pp 13-19) purchased by the Appellants covered only accidental death, and the death of Judy Dumoulin was not an accident.

B. COURSE OF PROCEEDINGS

The Plaintiffs-Appellants filed their Complaint and Demand for Jury Trial on October 2, 2009 (R. Vol. I, pp. 6-24). The Defendants-Respondents filed their Answer on October 31, 2008 (R. Vol. I, pp. 25-31). The Defendants-Respondents filed Motion for Summary Judgment on April 20, 2009 (R. Vol. I, pp. 43-44). Consequently, the Plaintiffs-Appellants filed a Motion to Continue Summary Judgment Hearing on June 5, 2009 (R. Vol. I, pp. 57-58). On July 22, 2009, The Honorable Cheri C. Copsey entered the Court's Order Granting the Defendants-Respondents Summary Judgment (R. Vo, I p. 72), with the Judgment of the Complaint to be dismissed with prejudice by Judge Copsey being filed on July 28, 2009 (R. Vol I, p. 74).

C. STATEMENT OF THE FACTS

In October 2007, Joseph and Judy Dumoulin purchased a $40,000.00 group accidental death and accidental dismemberment insurance policy from CUNA Mutual Group (Certificate of Exhibits ({hereafter referred to C.E.}# 6, Exhibit A). The following is language taken from the group accidental death & accidental dismemberment insurance policy issued by CUNA Mutual Group (C.E. # 6 Exhibit A) germane in this case:

1) Definitions:
accident: An occurrence which is unexpected or unforeseen either as to its cause or as to its result (Page 2)

accidental death: Death resulting form an injury, and occurring within 1 year of the date of the accident causing the injury (Page 2)

injury, injuries: Bodily damage or harm which: (a) is caused directly by an accident and independently of all other causes; (b) is effected solely through external means; and (c) occurs while a covered person's insurance is in force under your certificate.

On March 13, 2008, Mrs. Dumoulin went to West Valley Medical's emergency department (E.D.) with the chief complaint of dyspnea (shortness of breath). The patient had a multiple risk factors, evidenced by her medical history, which would predispose her to have a large variety of illnesses that could manifest as dyspnea. Her initial evaluation in the E.D. including her history, the abnormalities noted on physical examination, and concerning diagnostic studies all gave credence to a pathologic process occurring within her lungs. However the focus of the assessment and plan formulated by the admitting medical team gave little consideration to this. This was a missed opportunity for more diagnostic studies to be done as to find the cause of her dyspnea that eventually led to respiratory failure (C.E. # 3 ¶ 6).

On March 15th it was recognized that her pulmonary disorder needed further attention and

computed tomography (CT scan) of the chest was obtained. The radiologist reading this study stated that the lung parenchyma (lung tissue) was "profoundly" and "markedly" abnormal. Based on CT scan findings the radiologist felt as though an infectious process was the etiology along with other potential pathologic processes that needed follow up. There is nothing in the medical records to demonstrate that these findings, which require timely evaluation and intervention, were addressed with appropriate priority. (C.E. # 3 ¶ 7).

At nine o'clock in the evening on the 15th the patient began demonstrating signs of respiratory failure. The respiratory rate is considered one of the "vital signs" and is used in part as a reflection of a patient's respiratory status. Her respiratory rate throughout her hospital stay was typically in the realm of twenty-some breaths per minute. At nine p.m. it dramatically increased to 48 breaths per minute. This is extremely high and is not compatible with life for an extended period of time.

Mrs. Dumoulin had an alarming respiratory rate for approximately 13 hours prior to her respiratory arrest. Initially this was not appropriately recognized (or acted on) by the nursing staff as a physician was not alerted to her condition until after 1:30 a.m. on March 16th. Once the physician was made aware of this appropriate action was not taken. Mrs. Dumoulin needed an emergent evaluation and management into what was assuredly impending respiratory doom. Had proper steps been taken it is believed that her outcome would have been extremely different. The autopsy report, which diagnosed her with a treatable condition, supports this view. (C.E. #3 ¶ 9).

Joseph Dumoulin and Judy Dumoulin were married for approximately 17 years. Prior to her hospitalization Judy Dumoulin had for approximately seven (7) years experienced a deterioration of her mental health. Judy Dumoulin was on medication for psychological

disorders for seven (7) years prior to her hospitalization at West Valley, in 2008. During her hospitalization which lasted five (5) days, Judy Dumoulin had become more disoriented. (C.E. # 6 ¶ 4).

Prior to her hospitalization, Mrs. Dumoulin was never on any oxygen support systems. Mrs. Dumoulin prior to her hospitalization never had any experience with oxygen lines being used for her well being (C.E. #6 ¶ 7).

II. ISSUES ON APPEAL

1. Was the District Court correct in entering the Order granting the Defendant-Respondent's Motion for Summary Judgment?
2. Was the District Court correct in determining that the policy language excluded the Appellants' claims for benefits under the policy?
3. Was the District Court correct in determining that the death of Judy Dumoulin was not an accident under the terms of the insurance policy?
4. Was the District Court correct in determining that the exclusions under the insurance policy barred the plaintiffs from recovery pursuant to the insurance policy?
5. Are the appellants entitled to attorney's fees on appeal pursuant to rules 40 and 41 of the Idaho Appellate Rules and Idaho Code 41-1839.

II. ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING THE DEFENDANT-RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

A. The Standard of Review for an Order Granting a Motion for Summary Judgment.

On appeal from an order granting a party's motion for summary judgment, the appellate court employs the same standard of review that the trial court uses in ruling on the motion. Banner Life Insurance Co. v. Mark Wallace Dixson Irrevocable Trust, 147 Id. 117, 123, 206 P.3d 481, 487 (2009). Summary judgment is appropriate when the pleadings, affidavits, and discovery documents before the court indicate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Idaho R. Civ. P. 56(c); Banner Life Insurance Co., 147 Idaho at 123, 206 P.3d at 487. The moving party carries the burden of proving the absence of a genuine issue of material fact. Id. For the reason set forth below the District Court erred in granting summary judgment.

B. The Insurance Policy Provisions Did Not Exclude the Appellants' Claims for Accidental Death Benefits.

The district court was requested by the Respondent to determine that there were no material disputed questions of fact in interrupting the relevant contract language in light of the facts surrounding the insured's death. The principle issue for the lower court was the construction and interruption of the contractual terms as well as the exclusions contained in the life insurance policies, that were applicable to the Appellants' claims in light of the facts in the record. In construing an insurance policy, the court must look to the plain meaning of the words to determine if there are any ambiguities. This determination is a question of law if unambiguous. In resolving this question of law, the Court must construe the policy "as a whole, not by an isolated phrase." Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co., 141 Idaho 660, 663, 115 P.3d 751, 754 (2005) (quoting Selkirk Seed Co. v. State Ins. Fund, 135 Idaho 434, 437, 18 P.3d 956, 959 (2000)). "When interpreting insurance policies, this Court applies the general

rules of contract law subject to certain special canons of construction." Clark v. Prudential Prop. & Cas. Ins. Co., 138 Idaho 538, 540, 66 P.3d 242, 244 (2003). "The general rule is that, because insurance contracts are adhesion contracts, typically not subject to negotiation between the parties, any ambiguity that exists in the contract `must be construed most strongly against the insurer.'" Talbot, 133 Idaho at 432, 987 P.2d at 1047 (quoting Mut. of Enumclaw Ins. Co. v. Roberts, 128 Idaho 232, 235, 912 P.2d 119, 122 (1996)).

The Affidavit of Joseph Dumoulin, provided the court with the factual medical history of the insured, Judy Dumoulin. The deceased never had any need for an oxygen support system in the past (C.E. #6 ¶ 7). The Affidavit of Stephen Bekanich established that the hospital failed to treat the insured. Specifically, the testimony of Dr. Bekanich provides commencing at ¶ 9:

> Once the physician was made aware of this appropriate action was not taken. Mrs. Dumoulin needed an emergent evaluation and management into what was assuredly impending respiratory doom. Had proper steps been taken, your Affiant, believes her outcome would have been extremely different. The autopsy report, which diagnosed her with a treatable condition, supports this view.
> With reasonable medical certainly, your Affiant renders the medical opinion that had doctors and/or the hospital staff been properly conducted an emergent evaluation and follow through management as required by the appropriate standard of care Mrs. Dumoulin would have stabilized to an appropriate condition....
>
> As she was not properly monitored we don't know how long she labored in this condition but judging by her clinical assessment and arterial blood gas at the time she was found, as well her subsequent clinical course and further diagnostic studies that it was for a significant period of time. Had these interventions taken place, all of which were within the resources of her care takers and the hospital to provide, it is hard to imagine that Mrs. Dumoulin would have not had a significantly different outcome (C.E. #3 ¶ 9).

The Affidavit of Stephen Bekanich established that the hospital and doctors failed to treat the insured and that her death was preventable. The testimony of Dr. Bekanich established the

death was not due to natural causes but was due to lack of treatment and negligence. If as Dr. Stephen Bekanich states the death was preventable it was by its very circumstances accidental.

Idaho Law construes insurance contracts in a light most favorable to the insured and in a manner which will provide full coverage for the indicated risks rather than to narrow its protection." Smith v. O/P Transp., 128 Idaho 697, 700, 918 P.2d 281, 284 (1996). If the Court finds any ambiguities in the insurance policy, they must be construed against the insurer, Farmers Ins. Co. of Idaho v. Talbot, 133 Idaho 428, 435, 987 P.2d 1043, 1050 (1999); See also Foremost Ins. Co. v. Putzier, 102 Idaho 138, 627 P.2d 317 (1981) ("...insurance policies are to be construed most liberally in favor of recovery, with all ambiguities being resolved in favor of the insured"). If a policy is found to be ambiguous, then its interpretation is a question of fact. See Clark v. Prudential Property and Cas. Ins. Co., 138 Idaho 538, 541, 66 P.3d 242, 245 (2003).

In the case of State Farm Fire & Cas. Co. v. Heinz, 136 Idaho 381, 34 P.3d 429 (2001 S.C.), our Supreme Court held:

> Idaho law governing the interpretation of insurance policies was set forth well by Justice Shepard in Moss v. Mid- American Fire and Marine Ins. Co., 103 Idaho 298, 300, 647 P.2d 754, 756 (1982):
> "This Court has long recognized that insurance policies are contracts of adhesion, not subject to negotiation between the parties, and hence must be construed most strongly against the insurer (citations omitted). The provision at issue today is one which seeks to exclude the insurer's coverage. Such an exclusion must be strictly construed in favor of the insured (citations omitted). Hence, the courts have held that the burden is on the insurer to use clear and precise language if it wishes to restrict the scope of its coverage.

A provision that seeks to exclude the insurer's coverage must be strictly construed in favor of the insured. Moss v. Mid-America Fire & Marine Ins. Co., 103 Idaho 298, 300, 647 P.2d 754, 756 (1982). The "burden is on the insurer to use clear and precise language if it wishes to

restrict the scope of its Coverage." Arreguin V. Farmers Ins. Co. Of Idaho, 180 P.3d 498 (ID 2008).

An insurance policy is ambiguous when it is reasonably subject to differing interpretations. Armstrong v. Farmers Ins. Co. of Idaho, 143 Idaho 135, 137, 139 P.3d 737, 739 (2006). Furthermore, a provision excluding coverage is strictly construed in favor of the insured and the insurer has the burden to use clear and precise language if it is restricting the scope of its coverage. Moss, 103 Idaho at 300, 647 P.2d at 756. Exclusions not stated with specificity will not be presumed or inferred. Clark v. Prudential Prop. & Cas. Ins. Co., 138 Idaho 538, 541, 66 P.3d 242, 245 (2003).

In the present case the insurance company has chosen the term "no benefit will be paid for any loss or covered injury that: ..... is due to any disease, sickness, bodily or mental illness, or complication resulting from any medical treatment, surgery, pregnancy or childbirth". As established by Dr. Bekanich, there was no on going treatment.

An accident as defined by the policy is "an occurrence which is unexpected or unforeseen either as to its cause or as to its result" (C.E. #6). In Bergkamp v. Carico, 101 Idaho 365, 613 P.2d 376 (1980) our Supreme Court stated, "where the terms of a contract are ambiguous, its interpretation and meaning is a question of fact and extrinsic evidence may be considered in attempting to arrive at the true intent of the contracting parties." In the case of Bondy v. Levy, 121 Id. 993, 829 P.2d 1342, (1992) our Supreme Court observed, "...in determining whether a contract is ambiguous, our task is to ascertain whether the contract is reasonably subject to conflicting interpretation." citing Spencer-Steed v. Spencer, 115 Id. 338, 766 P.2d 1219 (1988); Delancy v. Delancy, 110 Id. 63, 714 P.2d 32 (1986).

The clear mandate is for the court to: "...determine what a reasonable person in the position of the insured would have understood the language to mean. " Kromrei v. AID Ins. Co.(Mutual), 110 Id. 549, 551, 716 P.2d 1321, 1323 (1986); Permann v. Nationwide 108 Id. 192, 194 697 P.2d 1206,1208 (1985); Burgess Farms v. New Hampshire Insurance Group, 108 Id. 831 834, 702 P.2d 869, 872 (Ct. App. 1985).

As Dr. Bekanich stated that "had doctors and/or the hospital staff been properly conducted an emergent evaluation and follow through management as required by the appropriate standard of care Mrs. Dumoulin would have stabilized to an appropriate condition"(C.E. #3 ¶ 9). The relevant policy definition provides: "accident: An occurrence which is unexpected or unforeseen either as to its cause or as to its result" (C.E. # 6 policy page 2). An average consumer would expect that proper treatment at a hospital would be administered, and it would be unexpected and/or unforeseen by a consumer not to receive proper medical treatment.

The plain meaning of the term negligence to an average consumer would be equivalent to the term accident. By way of analogy, an average person would describe an event of two vehicles colliding as an accident. Typically when two vehicles collide there is a negligent party who has caused the event. The same result should be obtained under the language drafted by CUNA in its definition of accident, to wit: negligence is tantamount to accident. The entry of summary judgment was in error as there existed a dispute of material fact relating to Judy Dumoulin's death being an accident under the terms of the policy.

C. The District Court was incorrect in determining that the exclusion under the insurance policy barred the Appellants from recovery pursuant to the insurance policy.

The District Court ruled that a certain exclusion in the policy applied to defeat the Appellants' claims. The Appellants maintain that the term "medical or surgical treatment" is ambiguous because it allows for two reasonable constructions. There are a number of possible interruptions of the provision "medical treatment". One construction could mean that all medical treatment, no matter how skillfully or unskillfully performed, is covered by that phrase. For example patently negligent treatment, such as amputating the wrong leg, could be a reasonable interruption. Another construction, could mean that improper treatment, or malpractice, which is an accident, is not included within the meaning of "medical treatment". Furthermore as provided by Dr. Bekanich, treatment was not undertaken. There was no change in prescriptions for example. When nothing is prescribed there is no treatment. When nothing is operated upon there is no treatment. When nothing is treated there is no treatment. The exclusion for "medical treatment" cannot apply.

The Appellants contend, therefore, that because there are at least two reasonable constructions of the phrase "medical or surgical treatment," the phrase is ambiguous and, thus, in accordance with familiar legal principles cited, should be construed in favor of the Appellants, and should be determined by a jury. There clearly was no death as a result of any complication from medical treatment or surgery as the Respondent asserted.

The exclusion term "medical treatment" was relied upon by the Respondent as one of its basis for the motion for summary judgment. The term "medical treatment" is ambiguous as the facts of this very case establish. The case of Dinkowitz v. Prudential Insurance Co., 90 N.J. Super. 181, 16 A.2d 613 (N.J. Super Law Div. 01/14/1966) dealt with the interplay between an exclusion within an accidental death benefit policy and alleged medical malpractice. The

Dinkowitz, supra case, in defining medical and surgical treatment, stated "what is done by a physician of any recognized type or by a surgeon in diagnosing a bodily ailment and seeking to alleviate or cure it." (90 N.J. Super. 186). J. Appleman, Insurance Law and Practice § 415, provides: "'The expression "medical and surgical treatment" when used in the contract, includes all acts done by a physician in the preliminary care, general treatment or later care in order to effect a cure. . . . '".

The Affidavit of Dr. Bekanich establishes that the hospital, doctors, and support staff failed to develop a course of treatment in order to effect a cure. There was no attempt by the hospital to alleviate the condition or cure it. This death was not a result of complications. The logical conclusion to be drawn by the insurer's language may relate to those deaths, for example that occurred on a surgical table, not for deaths resulting from inaction. The Respondent had the opportunity in drafting its accidental death policy to specifically exclude medical malpractice as a non-accidental death. It did not do so and summary judgment was improperly entered.

II. THE APPELLANTS ARE ENTITLED TO ATTORNEY'S FEES ON APPEAL PURSUANT TO RULES 40 AND 41 OF THE IDAHO APPELLATE RULES.

Pursuant to I.A.R. Rule 41, an award of attorney fees on appeal is appropriate, when the prevailing party is entitled to attorney fees at the trial court level, pursuant to I.C. 12-120 or I.C. 12-121, see generally, Griggs v. Nash, 116 Idaho 228, 775 P.2d.120 (1989); Spidell v. Jenkins, 111 Idaho 857, 727 P.2d 1285 (1986); Building Concepts v. Pickering, 114 Idaho 640, 759 P.2d 931 (1988); Robinson v. Joint School District No. 331, 105 Idaho 487, 670 P.2d 894 (1983).

In this case Idaho Code § 41-1839 provides the court with the appropriate standard for the determination of attorneys fees.

Idaho Code, § 41-1839 provides in relevant provisions:

ALLOWANCE OF ATTORNEY FEES IN SUITS AGAINST INSURERS.

(4) Notwithstanding any other provision of statute to the contrary, this section and section 12-123, Idaho Code, shall provide the exclusive remedy for the award of statutory attorney's fees in all actions between insureds and insurers involving disputes arising under policies of insurance. Provided, attorney's fees may be awarded by the court when it finds, from the facts presented to it that a case was brought, pursued or defended frivolously, unreasonably or without foundation. Section 12-120, Idaho Code, shall not apply to any actions between insureds and insurers involving disputes arising under any policy of insurance.

Specific Idaho legislation has provided the framework for this court to analysis a request for attorney fees relating to an insurance policy. That pursuant to the specific provision, the Appellants are entitled to attorneys fees at the trial level and the appellate level.

III. CONCLUSION

The Appellants presented sufficient factual evidence to warrant a jury trial. The District Court was in error in determining that Judy Dumoulin's death was not an accident as defined by the policy language. There were no exclusions which applied to defeat the Appellants' rights to benefits under the policy. Furthermore the Appellants should ultimately be awarded their attorneys fees and costs at the trial level and the appellate level.

DATED this 28th day of January, 2010.

THOMAS G. MAILE, IV
Attorney for THE ESTATE OF JUDY DUMOULIN, Deceased, by and through her Personal Representative and JOSEPH DUMOULIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 29th day of January, 2010, I mailed two true and correct copies of the foregoing APPELLANTS' OPENING BRIEF, by placing the same in the United States Mail, postage prepaid, addressed as follows, to be delivered, addressed as follows:

J. Kevin West & Sally Reynolds
Hall, Farley, Oberrecht & Blanton, P.A.
702 West Idaho Street, Suite 700
Post Office Box 1271
Boise, Idaho 83701-1271
Facsimile: (208) 395-8585

( ) U. S. Mail
(X) Facsimile Transmission
( ) Hand Delivery
( ) Overnight Delivery

THOMAS G. MAILE, IV
Attorney for THE ESTATE OF JUDY DUMOULIN, Deceased, by and through her Personal Representative and JOSEPH DUMOULIN