3-10-2010

Estate of Dumoulin v. CUNA Mut. Group Appellant's Reply Brief Dckt. 36828

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' REPLY 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 Defendant/Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Treatises:

I. APPELLANTS' REPLY ARGUMENT

A. The District Court ruled incorrectly in granting Summary Judgment

The appellants have properly framed the issues before the court in their opening brief. The death of Judy Dumoulin involves a factual determination of the cause of death in light of the policy language drafted by the Respondent. There material disputed questions of fact relating to the death and the policy language that warrant a trial.

A court must first decide, when construing a contract, whether it is ambiguous, which is a question of law. Lovey v. Regence BlueShield of Idaho, 139 Id. 37, 46, 72 P.3d 877, 886 (2003). A contractual provision is ambiguous if it is reasonably subject to conflicting interpretations. If the policy at issue does not appear ambiguous on its face, and if neither party asserts that it contains an ambiguity, then this Court exercises free review over its interpretation. The meaning of the contract and the intent of the parties must be determined from the plain meaning of the words used. Idaho Counties Risk Management Program Underwriters v. Northland, 147 Id. 84 205 P.3d 1220 (2009).

The death of Judy Dumoulin was an accident and not excluded by the policy langauge. 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". In the present case, treatment was not undertaken. The hospital tested and observed but did nothing, creates a factual issue for a determination by the trier of fact.

The appellants rely upon the policy language and the specific lack of exclusions relating to the professional malpractice as causing the death of Judy Dumoulin. The Affidavit of Stephen Bekanich established that the hospital failed to treat the insured. The death occurred at West Valley Medical Center, in Caldwell Idaho. The hospital staff failed to provide medical treatment. In the present case the insurance company had 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".

The death was not caused by medical treatment of the insured but the very lack of treatment. There clearly was no death as a result of any complication from medical treatment or surgery as the respondent has asserted. The exclusion term "medical treatment" was relied upon by the respondent as a basis for its motion for summary judgment. The appellants advance their case based upon the ambiguity of that exclusion and the language of the policy. A reasonable person would consider that death as a result of medical malpractice consisting of a lack of treatment is an occurrence which is unexpected or unforeseen. What is reasonably foreseen by a reasonable person is reasonable medical treatment.

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." (16 A. 2d. 616). 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 appellants maintained that the term "medical or surgical treatment" was 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 treatment was not undertaken by the hospital as opined by Dr. Bekanich, to wit

1. " the standard of care required by the medical community for the treatment of Judy Dumoulin determined by the Idaho physicians was breached by the doctors, and hospital staff at West Valley Medical facility in failing to properly treat Mrs. Dumoulin to prevent her death";
2. "There is nothing in the medical records to demonstrate that these findings, which require timely evaluation and intervention, were addressed with appropriate priority";
3. "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";
4. "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".

The question of the respondent's policy specifically excluding medical malpractice is not apparent on the face of the policy. There is nothing in the policy that excludes medical malpractice as an accidental death. The defendant had the opportunity in drafting its policy to specifically exclude medical malpractice as a non-accidental death exclusion.

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 Bondy v. Levy, 121 Id. 993,997, 829 P. 2d 1342, 1347(Idaho 1992), the Idaho Supreme Court restated well established rules regarding contracts: "The primary objective in construing a contract is to discover the intent of the parties, and in order to effectuate this objective, the contract must be viewed as a whole and considered in its entirety." citing Luzar v. Western Surety Co., 107 Id. 693, 692 P. 2d 337 (1984); Beal v. Mars Larsen Ranch Corp., 99 Id. 662, 586 P.2d 1378 (1978).

In Bondy, supra, the 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).

The Idaho Supreme Court has held "that insurance policies are contracts of adhesion", and as such "are not subject to negotiation between the parties", thus resolving "any ambiguity... most strongly [sic] against the insurer." AID Ins. Co. v. Armstrong ,119 Id. 897,901, 811 P.2d 507, 510 (Idaho App. 1991);Kromrei , supra. In interpreting an insurance policy, "where the policy language is clear and unambiguous, coverage must be determined, as a matter of law,

according to the plain meaning of the words used." Clark v. Prudential Property and Cas. Ins. Co., 138 Idaho 538, 541, 66 P.3d 242, 245 (2003) (citing Mutual of Enumclaw Ins. Co. v. Roberts, 128 Idaho 232, 235, 912 P.2d 119, 122 (1996)). "This Court 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).

In AID Ins. Co., supra, and Gordon, infra, 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." The court further references 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). By analogy in defining an accident, all one has to consider is a typical automobile accident involving a negligent driver. The negligence of a driver creates an accident that results in injury, damage, and/or death. A reasonable person would define an accident as including so action can be considered as negligent conduct. There are material question of disputed facts which warrant a trial in this matter.

B. The Respondent is Not Entitled to Attorney Fees on Appeal

The Respondent request an award of the attorneys' fees under Idaho Code Sections 41-1839(4) and 12-123. Idaho Code § 41-1839 overrides any claim for attorneys fees under any other Idaho Code provisions not specifically referenced therein. In this appeal, 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 in an unsuccessful claim relating to a policy. Specifically, an award of attorney fees under Idaho Code §12-121 is not a matter of right to the prevailing party, but is appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation, see generally, *Nampa & Meridian Irrigation Dist. v. Washington Fed. Savings*, 135 Id. 518, 20 P.3d 702 (2001). In deciding whether a case was brought, pursued, or defended frivolously, unreasonably, or without foundation, the entire course of the litigation should be taken into account. If there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. Although an award of attorney fees under the statute is discretionary, the award must be supported by findings, and those findings, in turn, must be supported by the record. Wait v. Leavell Cattle, Inc., 136 Id. 792, 41 P.3d 220 (2002).

In the present case, the claims filed by the appellants relate primarily to the interruption of exclusions contained within the policy and the contract language itself. Idaho Code § 12-121 permits the court to award attorney fees to the prevailing party in a civil action. Idaho Rule 54(e)(1) provides for an award of attorney fees under I.C. § 12-121 only when the court finds that

the case was brought, pursued or defended frivolously, unreasonably or without foundation. Boll v. State Farm Mut. Auto. Ins. Co., 140 Idaho 334, 338, 92 P.3d 1081, 1085 (2004). In the present matter, there were good faith arguments advanced by the plaintiffs as to the facts and the application of the law to the facts. Defendant should not be entitled to attorneys fees under I.C. § 12-121.

Idaho Code § 12-123 as indicated in I.C. 41-1839 provides a statutory basis for an award of attorneys fees against an insured. Relevant hereto I.C. 12-123 provides:

> (1) As used in this section:
> (a) "Conduct" means filing a civil action, asserting a claim, defense, or other position in connection with a civil action, or taking any other action in connection with a civil action.
> (b) "Frivolous conduct" means conduct of a party to a civil action or of his counsel of record that satisfies either of the following:
> (I) It obviously serves merely to harass or maliciously injure another party to the civil action;
> (ii) It is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

The case of McCorkle v. Northwestern Mut. Life Ins, Co., 141 Idaho 550, 554, 112 P.3d 838, 842 (Ct. App. 2005), dealt with the application of I.C. § 41-1839 in determining an award of attorney fees in defense to an insurance claim against a policy and provides:

> Idaho Code Section 41-1839(4) provides the authority for an award of attorney fees in disputes between an insured and the insurer when a court finds that the case was "brought, pursued, or defended frivolously, unreasonably or without foundation." This statute and I.C. § 12-123 combine to provide the exclusive remedy for the award of attorney fees for either the insured or the insurer involving disputes arising under policies of insurance. I.C. § 41-1839(4). The entire course of litigation is taken into account when determining whether attorney fees are appropriate; therefore, when a claim involves multiple claims and defenses, it is not appropriate to segregate claims and defenses to determine which were pursued or defended frivolously. Pocatello Auto Color, Inc. v. Akzo Coatings, Inc., 127 Idaho 41, 48, 896 P.2d 949, 956 (1995). In order to award

attorney fees on the basis of frivolous claims in an action involving multiple claims, each claim in the action must be determined frivolous.

Idaho Law has no reported cases involving the facts similar to the present matter. No Idaho Law has been determined relating to the legal issue of whether a medical malpractice action is excluded as an exception to an accidental life insurance claim. The simple premise as opined by Dr. Bekanich, is that there was a lack of treatment for Judy Dumoulin and as such her death was preventable. The insurance company in drafting its policy could have and should have included such a provision if it wanted to exclude this type of death.

An award of attorneys' fees on appeal is appropriate "if the law is well-settled and the Appellants have made no substantial showing that the district court misapplied the law." *Keller v. Rogstad*, 112 Idaho 484, 489, 733 P.2d 705, 710 (1987), quoting *Davis v. Gage*, 109 Idaho 1029, 1031, 712 P.2d 730, 732 (Ct. App. 1985).

An award of attorney fees in this matter, requires a finding the appeal was based upon a complete lack of foundation, and the Court should be left with the "abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation" and award attorneys' fees and costs. *See generally, Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990) and *McKay v. Owens*, 130 Idaho 148, 937 P.2d 1222 (1997). It is the position of the Appellants that this court can not make such a determination based upon the facts surrounding Judy Dumoulin's death and the policy language drafted by the respondent. The Respondents are not entitled to their attorneys' fees and costs incurred herein.

IV. 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 are no exclusions which apply to defeat the Appellants' rights to benefits under the policy. The Respondent is not entitled to any attorneys fees in this matter. Furthermore the Appellants should ultimately be awarded their attorneys fees and costs at the trial level and the appellate level.

DATED this 12, day of March, 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 12 day of March, 2010, I mailed two true and correct copies of the foregoing APPELLANTS' REPLY BRIEF, by placing the same in the United States Mail, postage prepaid, addressed as follows, to be delivered, addressed as follows:

J. Kevin West & Noah G. Hillen
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