

1988

Ronald Draughon v. Cuna Mutual Insurance Society : Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *Draughon v. Cuna Mutual Insurance*, No. 880240.00 (Utah Supreme Court, 1988).

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BRIEF

DOCKET NO. ~~88-0240-CA~~

IN THE SUPREME COURT OF THE STATE OF UTAH

RONALD DRAUGHON,	:	
Plaintiff-Appellant,	:	88-0240-CA
v.	:	Case No. 870174
	:	Priority No. 14b
CUNA MUTUAL INSURANCE SOCIETY,	:	
Defendant-Respondent.	:	

APPELLANT'S REPLY BRIEF

AN APPEAL FROM THE
FOURTH JUDICIAL DISTRICT COURT OF DAVIS COUNTY
THE HONORABLE DOUGLAS L. CORNABY, PRESIDING

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FILED
OCT 1 1987

Clerk, Supreme Court, Utah

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REPLY TO RESPONDENT'S STATEMENT OF FACTS

CUNA's statements regarding the side effects experienced by Mrs. Draughon are exaggerated. Contrary to CUNA's representations, Dr. Border stated that Mrs. Draughon suffered from vomiting and muscle cramps as a result of some of her dialysis treatments. He was uncertain about hypotension stating that "she may have had hypotension."¹

More importantly, Mrs. Draughon experienced these side effects only infrequently. Dr. Border stated: "When I say suffer from them, I mean that on the average one or more of these side effects may have occurred every third to fifth dialysis, for example. They do not occur every time."² That is, on average, Mrs. Draughon experienced one or both of the side effects once every one to two weeks.

¹ Deposition transcript of Dr. Wayne A. Border at 31.

² Id.

CUNA also exaggerated the side effects experienced by Mrs. Draughon as a result of her kidney disease. Dr. Border stated that she had anemia as a result of her disease. Again, however, he was uncertain about the insomnia and restlessness stating that "she may have had insomnia and restlessness."³

With these exceptions, Mr. Draughon agrees with CUNA's statement of facts.

ARGUMENT

POINT I

COUCH ON INSURANCE DOES NOT
REFUTE THE CONTENTION THAT
PROXIMATE CAUSE IS THE
FUNCTIONAL EQUIVALENT OF
"MATERIAL CONTRIBUTING CAUSE."

CUNA relies on Couch on Insurance, § 41.408, to refute Mr. Draughon's contention that a proximate cause standard can serve as the functional equivalent of the phrase at issue, "material contributing cause." CUNA's reliance is misplaced. Section 41-408 simply notes that, by judicial declaration, a disease can be termed a "contributing cause" of death under certain policy language although it does not qualify as a proximate cause of death under common law tort principles. Section 41.408 makes no reference to the phrase material contributing cause:

³ Id.

A provision excluding liability when a disease, defect, or bodily infirmity is a contributing cause of death, in addition to excluding liability in cases where disease, defect, or bodily infirmity is a proximate cause of the insured's death, excludes cases where the disease, defect, or bodily infirmity is a contributing cause of the insured's death regardless of whether the disease, defect, or bodily infirmity is the proximate cause thereof.⁴

CUNA attempts to discount the difference between the meaning of "contributing cause" and that of "material contributing cause" by arguing that the addition of the word material "merely requires that the condition which contributes to the insured's injury or death be important and not merely incidental."⁵ A close examination of the nature of the two phrases, however, reveals a significant difference - the difference between an objective and a subjective standard.

A contributing cause can be objectively identified because its existence is based on observable or at least perceivable phenomena. Whether or not something is a contributing cause is not a function of the quality or degree

⁴ Citing Railway Mail Ass'n v. Schrader, (1939) 107 Ind.App 235, 19 NE2d 887 (ulcerous condition of insured's stomach was not under circumstances a disease, defect, or bodily infirmity within meaning of this provision).

⁵ Brief of Respondent at 8.

of contribution. In the case of injury or death, either a cause makes a contribution or it does not. A "contributing cause" standard is, therefore, applied utilizing objective parameters.

A material contributing cause, taking material to mean important, can only be subjectively identified because its existence is dependent on the personal judgment of the person deciding whether or not the contribution is important. Depending on how one defines the standard, the quality or degree of contribution are the decisive elements. Therefore, a "material contributing cause" standard is applied utilizing subjective parameters. In the present matter the standard was applied by a CUNA claims adjuster based on his or her individual value judgment, not on any empirical observation.

The two phrases cannot be equated. Therefore, that Couch on Insurance notes a difference between a "contributing cause" standard and a "proximate cause" standard is immaterial and does not refute Mr. Draughon's contention that the court should substitute a proximate cause standard in place of "material contributing cause."

DATED this 15 day of October, 1987.

DART, ADAMSON & KASTING



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CERTIFICATE OF MAILING

I hereby certify that on the 15 day of October, 1987, four true and correct copies of the foregoing Appellant's Reply Brief were mailed, first class, postage prepaid, to Lewis B. Quigley, BAYLE, HANSON, NELSON & CHIPMAN, Attorneys for Defendant-Respondent, Continental Bank Building, Suite 1300, Salt Lake City, Utah 84101.


