1968

# Judith H. Dienes and Dianne D. Mcmain v. Safeco Life Insurance Company, A Washington Corporation : Appellants' Brief

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— vs. —

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## AUTHORITIES CITED

### Cases

# IN THE SUPREME COURT OF THE STATE OF UTAH

JUDITH H. DIENES and
DIANNE D. McMAIN,
*Plaintiffs and Appellants,*

— vs. —

SAFECO LIFE INSURANCE
COMPANY, a Washington
corporation,
*Defendant and Respondent.*

Case
No. 11048

# APPELLANTS' BRIEF

## I
## STATEMENT OF THE NATURE OF THE CASE

This is a suit to recover $10,000 from the defendant insurance company for a double-indemnity life insurance risk policy.

## II
## DISPOSITION BY LOWER COURT

Judgment on a jury verdict in favor of the defendant-respondent and against the plaintiffs-appellants "no cause of action" was entered on June 15, 1967.

## III
## RELIEF BEING SOUGHT ON APPEAL

Appellants are asking the Supreme Court to reverse the lower court by sending the matter back for a new trial, with direction to the lower court to modify its instructions to the jury. The jury should be instructed that plaintiff is entitled to recover without being required to prove that the death of the insured resulted *solely* from external injuries suffered in the auto accident. Appellants contend their requested instruction No. 19 is a correct interpretation of the insurance policy language involved and of the law of Utah.

## V
## MATERIAL FACTS

The life of Louis S. DiEnes, the husband and father of the appellants, was insured by respondent for $10,000 by an accidental death and dismemberment policy. (Exhibit 1-P, Complaint and Answer R-1 and R-3.) Appellants submitted proof of death in the form of a certified copy of "Certificate of Death" of Louis S. DiEnes, and made demand on respondent for the payment of the $10,000 accidental death and dismemberment benefits, which respondent refused to pay. (Complaint and Answer R-1 and R-3.) This lawsuit by appellants was filed to compel respondent to pay the $10,000.

The policy language with which we are concerned reads as follows:

> "ACCIDENTAL DEATH AND DISMEMBERMENT BENEFITS — Subject to the exclusion provision, if

any employee, while insured by this policy and prior to retirement, sustains bodily injuries effected solely through external, violent and accidental means, and as a result thereof, suffers within 90 days one of the following losses, Lifeco Insurance Company of America will pay the applicable amount specified in the Schedule of Insurance for Accidental Death and Dismemberment Insurance, or one-half such amount, as indicated:

1. For loss of life, the full amount";

* * *

"EXCLUSIONS — No Benefits under this Accidental Death and Dismemberment provision shall be paid for accidental death or dismemberment caused by:

1. Disease or bodily or mental infirmity, or medical or surgical treatment thereof, ptomaine or bacterial infection (except infections occurring through an accidental cut or wound); or"

* * *

It was stipulated that the name of the company in the policy, to-wit, "Lifeco," had been amended to "Safeco." (R-67)

On the morning of August 4, 1965, Mr. Louis S. DiEnes was involved in an automobile accident. He was injured and after some delay at the accident scene he was taken to the hospital (R-71). He had a through and through laceration to his nose, abrasions on both knees, and hit his stomach fairly hard. (Emergency Record Exhibit 3-d.) Mr. DiEnes was a high-keyed individual, very tense, and very significantly upset over the

happening of the accident (R-81). He was given an electrocardiogram and prepared for corrective nose surgery (R-81). The electrocardiogram showed no substantial changes from the previous one of some two months earlier (R-82).

Mr. DiEnes had suffered a myocardial infarction in 1962, due to arteriosclerotic heart disease; he had been admitted to the hospital for coronary insufficiency in June, 1965; the autopsy performed after his death showed an extreme degree of coronary sclerosis with marked narrowing of the lumen due to both sclerosis and thrombosis; Mr. DiEnes had responded well to medication and therapy following his previous two admissions to the hospital in March, 1962, and June of 1965; however, at approximately 1:10 a.m. on August 5, he passed away (R-86, 87 and Exhibit 2-P). The death certificate which was completed by Dr. Smith, his own physician (who participated in the autopsy) listed the immediate cause of death as

(a) Acute coronary insufficiency
(b) Due to recent auto accident
(c) Due to severe artereiosclerotic heart disease (underlying cause listed last)

(Exhibit 2-P admitted in evidence R-86 although not stamped "admitted" by clerk.)

Dr. Smith testified that the last time he saw Mr. DiEnes alive he was much concerned about how keyed-up and tense and disturbed he was. Mr. DiEnes wanted to go home, but because of his extreme tension, Dr. Smith insisted that he stay in the hospital (R.-84).

Dr. Smith testified at the trial that he believed that the automobile accident was a direct contributing factor to Mr. DiEnes' final heart attack (R-87). When he was asked to explain this statement, Dr. Smith testified:

> "It has been proved that he had a serious heart disease prior to the accident. He was in the hospital as a direct result of the accident. The accident itself, seemingly, was — to an ordinary individual — of minor consequences; but, as far as Mr. DiEnes was concerned with the type of medical problem that we were treating him for, the accident was definitely the final contributing factor to his death." (R-87)

On cross-examination, Dr. Smith testified that in Mr. DiEnes' condition any episode of serious anxiety could very likely have caused him to expire (R-97).

On redirect examination, Dr. Smith testified that anxiety was not good for Mr. DiEnes (R-97). When asked whether he had an opinion, medically, as to what caused Mr. DiEnes' anxiety on August 4, Dr. Smith responded, "Well, it was definitely a result of the auto accident." (R-98)

Dr. Carlquist, the pathologist who performed the autopsy on Mr. DiEnes, testified at length as to the seriousness of Mr. DiEnes' heart problems and circulation problems (R-104, 110). He described them as acute, marked, with the lumen in the left aorta almost completely clotted and only a tiny opening that would represent about five percent of the former total opening; the heart muscle was also in a state of degeneration (R-106, 108).

Dr. Carlquist testified that in his opinion the cause of Mr. DiEnes' death was his severe cardiac damage, severe heart disease (R-114, 115).

Nevertheless, Dr. Carlquist did not have an opinion whether Mr. DiEnes' death occurred as a *result* of the external violent and accidental bodily injuries suffered by Mr. DiEnes in the August 4 automobile accident (R-114). When pressed on recross-examination, Dr. Carlquist testified as follows:

> Q. "Doctor, do you exclude, completely, from this consideration the fact of the automobile accident?
>
> A. No, sir; I have no way of tying it to—together —as far as my autopsy was concerned.
>
> Q. Do you take the position that the automobile accident is wholly inconsequential, insofar as his death is concerned?
>
> A. No, I don't — didn't mean to imply that — by my "yes" or "no" answers. I mean, I simply meant to imply I don't know what relationship was between the accident and his death.
>
> Q. Do you exclude the accident as a causative factor?
>
> A. No."

Appellants and respondent differed in the lower court as to the construction of the policy. The court declined to take sides by refusing to instruct the jury on the legal theory of either counsel. Instead, the court instructed the jury in the language of the policy. The court further instructed appellants' counsel that he would not permit him to argue that the insuring agreement was am-

biguous, and in argument to the jury, counsel would be restricted to the precise language of the court's instruction No. 15 (R-139, 140). Appellants' counsel was denied permission to present to the jury his construction of the policy language as reflected in appellants' proposed instruction No. 19 (R-60 and R-137, 138).

In summation to the jury, *respondent's* counsel read the court's instruction No. 15 and stated to the jury that plaintiffs could not recover unless they had proved that the death of DiEnes *resulted solely* from injuries effected through external, violent and accidental means (R-140). Appellants interrupted argument at this point and made objection to the court (R-140).

A timely motion for new trial was filed by appellants, supported by an affidavit of counsel. Respondent's counsel also filed an affidavit. We quote in full the motion and both affidavits as the best possible resume of the differences between appellants and the lower court:

"MOTION FOR NEW TRIAL

Civil No. 163708

Plaintiffs move the court to set aside the verdict of the jury returned herein on June 15, 1967, and to grant a new trial because of errors of law as follows:

1. The Court erred in refusing to give to the jury plaintiffs' requested instructions numbered 16, 17, 18 and particularly instruction number 19.

2. The Court erred in instructing the jury by giving its instruction numbered 15 for the reason and on the ground that instruction number 15 does not determine the law of this case and leaves

it up to the jury to determine the law, and for the further reason that instruction number 15 does not recite that the bodily injuries suffered by Mr. DiEnes were affected solely through external, violent and accidental means, a fact which was not in dispute, and which plaintiffs specifically requested in chambers before the Court gave its instructions to the jury.

3. The Court erred in refusing to determine the law of the case and instruct the jury thereon, the Court having stated in chambers that it would remain neutral with respect to the dispute between the plaintiff and the defendant on the construction of the language of the policy.

4. Counsel for the defendant conducted himself improperly in arguing to the jury that in order for plaintiffs to recover they had to prove that the death of decedent was solely the result of injuries affected through external, violent and accidental means and the Court did not admonish counsel or instruct the jury to disregard such statements.

5. The Court erred in advising counsel for the plaintiffs in chambers that he would not permit counsel to argue his theory of the case as recited in plaintiffs' proposed instruction number 19, and that plaintiffs' counsel would be restricted to arguing from the precise language of the Court's instruction number 15.

This motion is based on the records and proceedings in this action, and the affidavit attached hereto.

MULLINER, PRINCE & MANGUM
By /s/ MAX K. MANGUM
*Attorneys for Plaintiffs''*

"AFFIDAVIT
Civil No. 163708

STATE OF UTAH }
COUNTY OF SALT LAKE } ss

MAX K. MANGUM, being first sworn upon his oath deposes and says:

That on June 15, 1967, in chambers of Judge Merrill Faux, and before the jury had been instructed in the case of *DiEnes* v. *Safeco Life Insurance Co.*, the following took place without a court reporter being present:

1. The Court advised counsel that he would not instruct the jury on plaintiffs' theory of the law, and that plaintiffs' requested instructions numbered 16, 17, 18 and 19 would not be given.

2. The Court advised counsel that he would not give defendant's requested instructions numbered 6 or 7.

3. The Court advised counsel that he would remain neutral on the construction of the language of the policy, and would therefore instruct the jury by using the precise language of the policy, which was done by the court's instruction No. 15.

4. The Court in response to a direct question from affiant whether affiant would be permitted to argue his theory of the case as recited in plaintiff's requested instruction number 19, was advised that summation to the jury must be restricted to the language of the court's instructions. Counsel for the defendant, nevertheless, stated to the jury on two separate occasions that plaintiffs could not recover unless they proved that the death of Mr. DiEnes was *solely* the result of injuries effected through external, violent and accidental means. Despite objection by plaintiffs'

counsel, the Court did not admonish counsel for the defendant, nor did he instruct the jury to disregard such statements.

Further affiant sayeth naught.

/s/ MAX K. MANGUM

Subscribed and sworn to before me this 23rd day of June, 1967.

/s/ JANE ROBERTS
Notary Public
Residing at Salt Lake City, Utah."

My commission expires:
April 9, 1969

"AFFIDAVIT
Civil No. 163708

STATE OF UTAH }
COUNTY OF SALT LAKE } ss

REX J. HANSON being first duly sworn deposes and says:

That on June 15, 1967, before the jury was instructed, the court's proposed instructions were discussed between Court and counsel in chambers. Counsel for plaintiffs contended that the insuring agreement of the insurance policy was ambiguous in that the words "effected solely through external, violent and accidental means" could reasonably be construed to apply to injuries sustained by the insured and not his death. The court was of the opinion that the provision was not ambiguous and stated that he would instruct the jury using said words in the insuring agreement. The court advised plaintiffs' counsel that he would

not permit him to argue that the insuring agreement was ambiguous and that in his argument to the jury, plaintiffs' counsel would be governed by the law as stated in the court's instructions. Affiant does not recall and therefore denies that the court said he would remain neutral in the matter except that the court did say that he would not instruct the jury on the legal theory of either counsel, but would instruct the jury in accordance with the wording of the insurance policy. After the discussion, the Reporter was called into chambers and both counsel took some exceptions to the court's proposed instructions reserving the right to take additional exceptions after the jury had retired.

In summation to the jury, affiant read the court's Instruction No. 15, and stated to the jury that plaintiffs could not recover unless they had proved that the death of DiEnes resulted solely from injuries effected through external, violent and accidental means, which was objected to by counsel for the plaintiffs but no request was made to the court to admonish the jury or for a mistrial. It is affiant's position that his statement to the jury was supported by the evidence and in accordance with the law given in the Instructions.

/s/ Rex J. Hanson
REX J. HANSON

Subscribed and sworn to before me this 5th day of July, 1967.

/s/ Diane M. Martin
Notary Public — Residing
at Salt Lake City, Utah

My Commission Expires August 17, 1969."

## VI

## ARGUMENT

### POINT 1

### UNDER THE INSURING LANGUAGE OF THE DIENES POLICY, INSURED'S DEATH NEED NOT HAVE RESULTED SOLELY FROM THE INJURIES INCURRED BY EXTERNAL, VIOLENT AND ACCIDENTAL MEANS, BUT MUST HAVE OCCURRED AS A RESULT OF THESE INJURIES IN ORDER FOR APPELLANTS TO RECOVER.

Respondent took the position throughout the trial that appellants could not recover since decedent's heart disease was at least a contributing cause of his death. To restate the same proposition, respondent always insisted that appellants had to prove that the death of Mr. DiEnes *resulted solely* from injuries effected through external, violent and accidental means in order to recover. Appellants contend that they may recover if Mr. DiEnes' death occurred as *a result* of injuries effected solely through external violent and accidental means. This difference is the whole crux of the case. Appellants concede without argument that the evidence conclusively shows that the diseased heart of Mr. DiEnes was a concurring cause of his death, but we deny the obligation to prove that his death was the *sole result* of the injuries. If appellants are wrong on this issue, your opinion should dismiss our appeal.

On the other hand, if we are right on this point, then the lower court committed reversible error by refusing

to properly instruct the jury on appellant's theory of the law of this case.

The accidental death and dismemberment clauses in the policy read as follows insofar as they are applicable to the issues in this case:

> "ACCIDENTAL DEATH AND DISMEMBERMENT BENEFITS — Subject to the exclusion, if any employee, while insured by this policy and prior to retirement, sustains bodily injuries effected solely through external, violent and accidental means, and as a result thereof, suffers within 90 days one of the following losses, Lifeco Insurance Company of America will pay the applicable amount specified in the Schedule of Insurance for Accidental Death and Dismemberment Insurance, or one-half such amount, as indicated:
>
> 1. For loss of life, the full amount;
>
> * * *

It is significant to note that the controlling language of this policy simply requires that bodily injuries sustained solely through external, violent and accidental means must be present. The policy does not require that death, the result of bodily injuries, *be solely* due to the accident but instead merely provides that as *a result* of the accidental bodily injuries, if death ensues, the liability follows. Thus, the first real question to be determined is whether the *injuries* or the *death* must be solely attributable to accidental means. It should be kept in mind that in case of doubt because of the language used in the policy, the doubt must be resolved against the insurance carrier and in favor of the insured.

A case which discussed this distinction and which recognized that language similar to the language in this case requires only that the bodily injuries be sustained solely through accidental means is *Standard Life Insurance Company* v. *Foster* (1950), 210 Miss. 242, 49 S.2d 391. Foster sustained injuries by being struck by a motor vehicle on November 18, sustaining a fractured ankle and multiple rib fractures. He died on the following Dec. 1. The attending physician's certificate filed with the Bureau of Vital Statistics, and received in evidence as prima facie proof of the facts therein recited, listed the fractures and also stated that the death was "not due to external causes." Defendant contended insured died of epilepsy.

The insurance policy language involved in the *Foster* case reads that the insurance company "hereby insures the person named in the policy against the *result* of bodily injuries received during the time this policy is in force, and affected solely by external violent and accidental means."

The unanimous decision by the Chief Justice of the Mississippi Supreme Court is so clear on the precise dispute now before this court that we quote from this decision:

> "Therefore, under the foregoing testimony we are of the opinion that it was a question for the jury as to whether or not the death of the insured was the proximate result of *bodily injuries,* which were effected solely by external violent and accidental means. In fact, there could be no question but that the bodily injuries were received and ef-

fected solely by external, violent and accidental means, and if there is any doubt as to whether the provision of the policy means that the bodily injuries must be effected solely by external, violent and accidental means, instead of meaning that the *death* must be effected solely by such means, then the doubt would have to be resolved in favor of the insured * * *." 49 So. 2d at 395. (Emphasis added)

The Mississippi court then points out the different result which will follow when policy language is used which insures against the effects *resulting directly and exclusively of all other causes from bodily injury sustained solely through accidental means.* (Compare with the language used in the policy in the *Tucker* case (Utah) discussed at page 20 herein.)

The Mississippi court concluded that the insurance clause in the *Foster* case (language almost identical to the instant case) only requires that the bodily injuries shall be received and effected solely by external, violent and accidental means and that the death must occur as a result thereof.

It should be pointed out that the DiEnes policy does not provide, as it could by the choice of the insurer, that the liability is excluded if death was caused *or contributed to directly or indirectly or wholly or partially by disease or by bodily infirmity.*

This court has held that an insurance policy, while it is a written contract, is not one which is negotiated between the parties. These policy contracts are prepared

in advance by the insurance company. This court has held that there must be a liberal construction of all the terms in favor of the insured to accomplish the purpose for which the insurance was taken out and *for which the premium was paid.* See *Browning* v. *Equitable Life Assurance Society,* 72 P.2d 1060, 94 Ut. 532, and see written opinion denying the rehearing, which is reported in 80 P.2d 349, 94 Ut. 570.

Respondents will undoubtedly place reliance upon the exclusionary clause in the DiEnes policy, but again it should be noted that the clause simply provides that no benefits under this accidental death and dismemberment provision shall be paid for accidental death or dismemberment caused by disease or bodily or mental infirmity. The authors of the policy could very easily have provided in the exclusionary clause that liability is excluded if death was caused *or contributed to directly or indirectly or wholly or partially by disease or by bodily infirmity.* They did not elect to use this type of exclusionary language and they cannot, therefore, at this point be permitted to assert that the same results can be achieved by a forced construction of the language which they did use. Furthermore, the exclusionary clause cannot be interpreted in such a manner as to completely negate the language of the insuring clause. The two clauses must be construed as a whole, not piecemeal.

There are, of course, hundreds of cases construing insurance policies and many courts have allowed recovery even though there is a diseased or bodily infirmity present where an accidental injury triggers or influences

or controls the conditions which existed at the time of the injury and which set in motion the prior disease or bodily infirmity so that death ensues. Recovery has been allowed in many cases notwithstanding the fact that a pre-existing disease has contributed to the death. Again the controlling point is the *language used by the authors of the policy.*

This court in *Browning* held that when a diseased condition is set in motion as the result of an injury, the disability or death is deemed the proximate result of the injury and not of the disease as an independent cause. The intervening cause which follows as a natural, though not necessary, consequence of accidental injury, cannot, therefore, be considered an independent cause. The court in *Browning* pointed out that an intervening cause set in motion by accidental injury is a *result* of the accident and not an independent cause. Justice Wolfe in his concurring opinion in *Griffin* v. *Prudential Ins. Co.,* 102 Ut. 563, 133 P.2d 333, at 339, adopted this same view of the law.

The DiEnes policy clause before the Court in this case does not provide that recovery shall be had *only if* no other circumstance than the accident contributes to the death either proximately or remotely, directly or indirectly, wholly or in part. This court in the *Browning* case recognized this legal point and commented on the problem of language choice as it affects the legal results.

In *Browning,* this court also said that when an insured claims a right to recover under the accident pro-

visions of a policy (accidental death clause) all he need do is bring himself within the field therein defined and show that the injury was proximately caused through violent, external and accidental means. He is not required to show that there were no latent causes or other conditions which might have contributed to the result, indirectly or in part. When he brings himself within the insuring clause he has made his case and any exceptions, exclusions or conditions which would then deny him relief are matters of defense and the burden thereof rests upon the insurer.

*Browning* also noted that in a case starting with bodily injury all morbid changes in the exercise of vital functions which result from or are induced by such injury should be regarded as the effect thereof and not as an independent cause. *When death results from such morbid change so resulting from or induced by such injury, the injury and not the morbid change induced by it is the cause of death.* Beginning with a primary cause conditions induced by such cause are effects thereof and every condition so induced must be considered in relation thereto as an effect and not a cause.

Interpreting these points made in the *Browning* case, if the acute coronary insufficiency, which was the immediate cause of Mr. DiEnes' death, was set in motion by the accident or if the coronary insufficiency was controlled, directed or influenced in its action or behavior by the accident, then the coronary insufficiency was a result of the accident and not an independent cause of death.

In *Lee* v. *New York Life Ins. Co.*, 82 P.2d 178, 95 Ut. 445, Justice Wolfe recognized the "thin skull" rule as operative in Utah. He said the "insurer takes the insured 'as is' and if the accident by operating on that particular person actually set in motion causes which would not have been set in motion in a normal person but which produced the final result, it is a reasonable construction of the policy to hold that the accident was the direct and only cause of the final result."

In the *Lee* case, Lee had been suffering from gall bladder trouble which had apparently become dormant. Lee suffered a severe blow which ruptured the gall bladder, infection followed, and then death. The policy paid double indemnity if death of the insured resulted "*directly and independently of all other cause* from bodily injury effected solely through external violent and accidental causes." (emphasis added) The opinion of the court held "that where an accidental injury sets in motion or starts activity of a latent or dormant disease and such disease contributes to the death after having been so precipitated by the accident, the disease is not a direct or indirect cause of death, nor a contributing cause within the meaning of the policy, but the accident which started the mischief and precipitated the condition resulting in death is the sole cause of death."

We repeat that there is no language in the DiEnes policy that if death results *directly and independently of all other causes* from bodily injuries then and only then is the insurer liable. Thus appellants' burden in this case

is not so onerous as plaintiff had in the *Lee* case, where plaintiff prevailed despite the stringent policy language.

Another Utah case is worthy of comment in this brief. We refer to *Tucker* v. *New York Life Insurance Company,* 107 Utah 478, 155 P.2d 173. The policy language in the *Tucker* case reads "New York Life Insurance Company agrees to pay to the beneficiaries $1,000, the face of this policy, upon receipt of due proof of the death of Garber M. Nichols, the insured; or double the face of this policy upon receipt of due proof that the *death of the insured resulted directly and independently of all other causes* from bodily injury affected solely through external, violent and accidental cause, and that such death occurred within 60 days after sustaining such injury." (Emphasis added) The exclusion clause of this policy reads: "This double indemnity benefit will not apply if the insured's death resulted from physical or mental infirmities; or directly or indirectly from illness or disease of any kind." The evidence in the *Tucker* case clearly showed that the accident set in motion forces which increased the blood pressure of the deceased which, working on a pathological condition, to-wit: a weakened main artery because of prolonged high blood pressure, caused his death. The ruling of the court was obviously controlled by the policy language which paid the double indemnity amount *only if the death resulted directly and independently of all other causes* from the bodily injury. Since the death in the *Tucker* case resulted from a combination of circumstances, the policy language prevented payment. Again we repeat, *there is no requirement in*

*the DiEnes policy that death result directly and independently of all other causes from the injuries or accident.* Certainly, *Tucker* should not control this case as the policy language there was radically different. It is nevertheless interesting and at the same time disturbing to note that the lower court felt that the *Tucker* case was controlling and that the language was different without any real distinction in a reasonable interpretation of it. (R-128)

Another Utah case which discusses some of the problems which are present in this case is *Griffin* v. *Prudential Insurance Company,* 102 Ut. 563, 133 P.2d 333. Justice Wolfe in his concurring opinion cites cases which establish that the true question is whether the deceased would have died at the time he did die if he had not received the injuries in the auto accident. The mere fact that the auto accident hastened death by aggravating a heart condition so that deceased only lived a few hours when, even if he had not had the auto accident and consequent injuries, he might not have lived as much as a month, would not defeat recovery under the language of the DiEnes policy. If the coronary insufficiency which Mr. DiEnes suffered was *a result* of the auto accident injuries, even though Mr. DiEnes had a diseased heart, recovery may be had under the language of this policy. The *Griffin* case also made clear the fact that the insurer has burden of proof that death was caused by exceptions to the risk insured against. Thus, if the defendant claims that death was within the exclusion clause, then the defendant has the burden of proving this with a preponderance of the evidence.

Dr. Curtis, a fully qualified heart specialist who never did testify that he ever saw or treated Mr. DiEnes, but who merely reviewed the written medical hospital and autopsy reports of Mr. DiEnes, was the only expert witness who testified that the accidental injuries had no connection with the death of Mr. DiEnes (R-116, 125). Nevertheless, Dr. Curtis was not prepared to predict Mr. DiEnes' life expectancy at the time of the accident, although he did say that Mr. DiEnes had already lived longer than one would expect (R-125). Dr. Curtis did testify that anxiety such as Mr. DiEnes had was a factor in his heart problem, and that it could be a precipitating factor to bring on a second, third or fourth heart problem (R. 124, 125). Dr. Curtis, who never knew or treated Mr. DiEnes, and who did not participate in the autopsy, nevertheless expressed his opinion (not supported by the other experts whose information went far beyond a mere review of a paper record) that anxiety from the auto accident was not a factor in Mr. DiEnes' death.

Under appellants' theory of the law of this case, Dr. Curtis' testimony at most made a jury question as to whether Mr. DiEnes died as a *result* of the accidental injuries. However, we point out again that under the ruling of the court we were forbidden to argue our theory of the law as it would apply to Dr. Curtis' testimony.

## POINT 2

### THE LOWER COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO INSTRUCT THE JURY ON APPELLANTS' THEORY OF THE LAW OF THIS CASE.

Appellants took exception to the refusal of the court to give their requested instructions numbered 16, 17, 18 and 19. Appellants also took exception to instruction No. 15 as given by the court.

Appellants' requested instructions numbered 16, 17, 18 and 19 as submitted to the lower court were as follows:

PLAINTIFFS' REQUESTED INSTRUCTION NO. 16

> "You are instructed that from the undisputed testimony in this case Mr. DiEnes did in fact suffer an acute coronary insufficiency on August 5, 1965, which was the immediate cause of his death. You must determine by a preponderance of the evidence whether the acute coronary insufficiency was set in motion by accidental injuries sustained by Mr. DiEnes, or whether the acute coronary insufficiency was controlled, directed or influenced in its action or behavior by accidental injuries sustained by Mr. DiEnes. If you find by a preponderance of the evidence that the acute coronary insufficiency was set in motion, controlled, directed or influenced by accidental injuries to Mr. DiEnes, then you may find that the coronary insufficiency and death were a result of the accident, and not the independent cause of the death of Mr. DiEnes."

PLAINTIFFS' REQUESTED INSTRUCTION NO. 17

> "Starting with a bodily injury, all morbid changes in the exercise of vital functions which result from or are induced by such injury should be regarded as the effect thereof and not as independent causes. When death results from any such morbid change so resulting from or induced by such injury, the injury and not the morbid change induced by it, is the cause of death. Be-

ginning with a primary cause, conditions induced by such cause and effects thereof, and every condition so induced must be considered in relation thereto as an effect and not as a cause."

PLAINTIFFS' REQUESTED INSTRUCTION NO. 18

"You are instructed that when an insurance company insures the life of an individual with an accidental double indemnity policy, that the insurance company takes that individual 'as he is.' If an accident by operating on that particular insured individual actually sets in motion causes which would not have been set in motion in a normal person but which, nevertheless, resulted in the death of the insured, it is a reasonable construction of the policy to hold that the death was the direct result of the accident."

PLAINTIFFS' REQUESTED INSTRUCTION NO. 19

"You are instructed that under the terms of the policy involved in this case, the deceased, Mr. DiEnes, must have:

1. Sustained bodily injuries effected solely through external violent and accidental means in order to recover, and

2. As a result of such injuries, his death must have occurred within ninety days.

The death need not have resulted solely from the injuries incurred by external, violent and accidental means, but must have occurred as a result of these injuries in order for plaintiffs to recover."

Instruction number 15 as given by the court was as follows:

INSTRUCTION NO. 15

"In order to prove the essential elements of plaintiffs' claim, the burden is on them to estab-

lish by a preponderance of the evidence in the case the following proposition: That the death of Louis DiEnes was a result of bodily injuries effected solely through external, violent and accidental means."

Instruction No. 15 ignores the dispute between the litigants and simply uses the policy language itself. The court did nothing to clarify the opposite positions taken by counsel throughout the trial, except that the court directly instructed appellants' counsel in chambers that he was not at liberty to argue that the insuring agreement was ambiguous, and in his arguments to the jury, counsel was to be governed by the court's instruction (R-137, 140).

Despite this, counsel for respondents states that:

> "In his summation to the jury affiant read the court's instruction No. 15, and stated to the jury that plaintiffs could not recover unless they had proved that the death of DiEnes resulted *solely* from injuries effected through external, violent, and accidental means." (R-140 Affidavit of respondent's counsel filed in connection with appellants' Motion for a New Trial.) (Emphasis added)

Objection was made to these remarks at the very time they were uttered, but the court did not admonish counsel nor instruct the jury to disregard such comments (R-138).

At no time throughout the entire trial was counsel for appellants ever permitted to state in the presence of the jury, that appellants were entitled to recover if

death resulted from a combination of factors, or that the death of Mr. DiEnes need not have resulted *solely* from injuries incurred in the accident. Appellants were forced to try the case and argue to the jury on the premise of the trial court that if the heart condition of Mr. DiEnes was a contributing factor in his death, then appellants could not recover (R-100).

In the absence of the right to discuss this matter with the jury, it was obvious that they could only reach one verdict, "no cause of action." The evidence conclusively showed that Mr. DiEnes' diseased heart was a concurring cause of his death. Unless appellants were accorded the right to argue their construction of the insurance policy language, they never had a chance to prevail. This, we say, was reversible error.

There can be no dispute that Mr. DiEnes sustained "bodily injuries effected solely through external, violent and accidental means" (the precise language of the policy, Exhibit 1-P). Nevertheless, the court refused to so instruct the jury despite a specific request to do so (R-131). Appellants requested the court to preface its instruction No. 15 with the statement that there is no dispute about the fact that Mr. DiEnes suffered bodily injuries effected solely through external, violent and accidental means. An exception was taken to this refusal by the court (R-131).

Under the authorities cited and discussed in pages 12 to 22 herein, appellants' theory of the law should have been given as requested in instructions 16, 17, 18 and particularly number 19.

## CONCLUSION

Appellants believe that their requested instruction No. 19 sums up their entire contentions in this case and we therefore close this brief by again quoting this requested instruction:

### PLAINTIFFS' REQUESTED INSTRUCTION NO. 19

> "You are instructed that under the terms of the policy involved in this case, the deceased, Mr. DiEnes, must have:
>
> 1. Sustained bodily injuries effected solely through external violent and accidental means in order to recover, and
>
> 2. As a result of such injuries, his death must have occurred within ninety days.
>
> The death need not have resulted solely from the injuries incurred by external, violent and accidental means, but must have occurred as a result of these injuries in order for plaintiffs to recover."

Respectfully submitted,

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