1968

Judith H. Dienes and Dianne D. Mcmain v. Safeco Life Insurance Company, A Washington Corporation : Brief of Respondent

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

BRIEF OF RESPONDENT

Appeal From a Judgment of the Third District Court of Salt Lake County
Honorable Merrill C. Faux, Judge

HANSON & BALDWIN
MERLIN R. LYBBERT
702 Kearns Building
Salt Lake City, Utah
Attorneys for Defendant-Respondent

MULLINER, PRINCE & MANGUM
MAX K. MANGUM
206 El Paso Natural Gas Building
Salt Lake City, Utah
Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

CASES CITED

AUTHORITIES CITED

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

BRIEF OF RESPONDENT

Appellants will be referred to as plaintiffs and the Respondent will be referred to as the defendant.

STATEMENT OF THE KIND OF CASE

This is an action to recover $10,000.00 under the double indemnity provisions of an accidental death and dismemberment clause of a life insurance policy.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury, which returned a verdict in favor of the defendant and against the plaintiffs, "No Cause of Action". Judgment was entered on June 15, 1967 (R. 9 and R. 11).

RELIEF SOUGHT ON APPEAL

Defendant seeks affirmance of the judgment entered on the verdict.

STATEMENT OF FACTS

The defendant issued an accidental death and dismemberment policy on the life of Lewis S. DiEnes (Plaintiff's Exhibit 1. See the last page of the exhibit for pertinent provisions). The plaintiff Judith H. DiEnes, surviving wife, was married to Mr. DiEnes in 1961, and plaintiff Dianne D. McMain, is a daughter by a former marriage (R. 72). They claim that Lewis S. DiEnes died as the result of an accident under the provisions of the policy which state:

> "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 appicable 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); . . .

* * *

Because of the extensive medical history of the insured, the defendant deems it necessary to set forth some of that background as established at the trial.

The deceased, Lewis DiEnes, sustained minor injuries when he drove his automobile into the rear end of a parked taxicab on August 5, 1965 (R. 6). He suffered a 1.5 cm. laceration of the nose, abrasions to the face and knees, and was hit in the stomach fairly hard (Ex. 3-D, & Record of Surgical Procedure 8-5-67). He was taken to the hospital and was given an examination by Dr. Donald E. Smith. An electrocardiogram was taken as well as a routine blood count, and he was otherwise prepared for a minor surgical procedure whereby his nose was sutured. He tolerated the procedure well (Ex. 3-D) and Mrs. DiEnes stated that his condition was good. He ate a good dinner and she left for her home about 9:30 p.m. Mr. DiEnes wanted to go with her (R. 74), but the Doctor insisted that he stay at the hospital (R. 72, 74, 84).

Dr. Smith first treated Mr. DiEnes February 4, 1964, at which time he gave him a thorough physical examination (R. 76). He noted a past history of heart disease. Mr. DiEnes suffered a myocardial in-

fraction in March 1962 (R. 74). He was suffering from angina pectoris and was under medication for this disease (R. 77). The resulting pain is from an insufficient supply of blood and oxygen to the heart muscles (R. 77). He also had hypertension or high blood pressure, arteriosclerotic heart disease and a past history of kidney stones (R. 77). Dr. Smith also saw him in September 1964 for what he then considered was a "disturbing new development"; a severe attack of bronchial asthma (R. 78). At the time he didn't think the asthma was related to the heart problem. Esterliazine, a relaxant to control insomnia resulting from apprehension was prescribed (R. 78). The doctor continued to see Mr. DiEnes at two week intervals. The next significant change occurred January 29, 1965, when Mr. DiEnes started showing early signs of "congestive heart failure" (R. 79). The Doctor explained that this disease develops when the heart cannot keep up the pumping load required and as a result becomes enlarged and congestion begins to develop in other tissues of the body and into the lungs. He then determined that the breathing problem was a secondary symptom of the congestive heart failure (R. 80). Mr. DiEnes began to show signs of puffiness of the ankles, marked shortness of breath and x-ray studies showed an enlarged heart, which condition is tied to congestive heart failure disease (R. 80, 92). Mr. DiEnes was given digitalis for treatment of early congestive heart failure (R. 80). At about this time Mr. Di-

Enes experienced a "distressing circumstance" when it became necessary for him to go to Chicago to arrange for the funeral of his sister. The doctor indicated that he was "very definitely worse following that episode . . ." (R. 81).

Mr. DiEnes was on medication for high blood pressure, hyperdill to improve his circulation, digitalis to strengthen and improve the heart's efficiency when in a state of failure, diuretics to assist the kidneys to eliminate excess fluid and relieve congestion of tissues, all of which problems were secondary to the congestive heart failure (R. 82). Mr. DiEnnes was a very tense person and was never calm (R. 83, 93).

Dr. Smith saw Mr. DiEnes between 6:00 and 8:00 o'clock in the evening of the day of the accident and although he wanted to go home the Doctor insisted that he stay at the hospital (R. 84). Two months prior to the date of the accident Mr. DiEnes had a myocardial infraction, a physical malfunction in which a clot blocks a vein that supplies the heart and the heart muscle dies. Dr. Smith had then contemplated surgical intervention (R. 85, 91). On cross-examination Dr. Smith testified that it was unlikely that the injuries resulting from the minor automobile accident would have caused death, independent of the previous heart condition (R. 88). The accident did not cause any change in the electrocardiogram from the one taken two months earlier (R. 82). At 1:00 A.M. on the morning following the

accident, Mr. DiEnes was awakened at the hospital by a nurse for the purpose of taking his temperature, respiration and pulse, which was done and all were found to be normal. Ten minutes later he was found dead (R. 91). Dr. Smith prepared the death certificate, which was admitted in evidence as Exhibit 2-P. The Doctor stated that it was his belief that the "automobile accident was a direct, contributing factor to his final heart attack (R. 86).

Dr. Smith admitted that Mr. DiEnes' medical history was one of continual worsening condition (R. 93). He also agreed with Dr. Carlquist's diagnosis following the autopsy, which states in part as follows:

> "MAJOR DIAGNOSIS:
>
> Marked coronary sclerosis with moderately recent thrombosis; myocardial necrosis, old and recent, with mural thrombus formation at left apex; congestion of viscera; renal calculi, left, laceration of nose and abrasion of face and knees.
>
> "COMMENT:
>
> This man showed an extreme degree of coronary sclerosis with tremendous narrowing of the lumen of the vessels due to both sclerosis and thrombosis. As a result, there was marked destruction of the myocardium in all blocks studied. The more acute necrosis was at the apex of the left ventricle and a mural thrombus had formed in this area. He had been in some degree of congestive failure as shown by the sections of the lung, liver

> and spleen. He also showed the effects of his recent accident with laceration of the nose and abrasions of face and knees." (Ex. 3-D p. 25).

The "moderately recent thrombosis", referred to probably resulted from the heart attack in June of 1965 (R. 95). The "congestion of viscera", refers to congestion of the intestines, which is a result of "ensuing congestive heart failure" (R. 95). The notation that "He had been in some degree of congestive failure, as shown by sections of lung, liver and spleen", indicated he had been in this degree of congestive failure prior to the accident (R. 96). The doctor admitted that Mr. DiEnes' condition had worsened to a point where "any episode of serious anxiety could have caused him to expire," and that he experienced periods of anxiety at night because he couldn't sleep and had difficulty in breathing (R. 97, 98).

Dr. Carlquist, a pathologist and director of laboratories at L.D.S. Hospital, testified that he had performed an autopsy on Lewis DiEnes, August 6, 1965 (R. 102). As noted above, the major findings were those related to the heart (R. 104). His autopsy report is contained as a part of the hospital records, Exhibit D-3, beginning at page 25 (R. 105). His findings revealed an occlusion of both coronary arteries, which supply blood to the heart muscles (R. 105). The lumen, or the openings in the blood vessels, were almost completely closed by the sclerosis process and only a "tiny opening that would rep-

resent approximately 5% of the former total opening" was available for passage of blood. In addition, portions of the lumen were filled with degenerating blood, representing the thrombus of some of the vessels (R. 105). The doctor then drew a diagram in connection with Exhibit 4-D, in which he graphically portrayed the available opening in the blood vessels in relation to the normal opening (R. 106-107). He found old clotting in some areas so that there was no passage possible through parts of these vessels. This condition usually develops over a period of years (R. 107. He also found a "sclerotic condition in the right coronary arteries" although not as involved as the left (R. 107). There was also damage to the heart muscle (R. 107-108). The left ventricle wall of the heart had also thinned from a normal thickness of about 1.6 centimeters to 1.2 centimeters in thickness; "a rather thin wall" (R. 108). The degeneration process of the deceased heart had progressed to a point that on the left ventricle wall of the heart blood clots or "thrombii" had formed and were adhered to the wall (R. 108, 109). These clots had formed prior to death and the kidneys also showed a condition of nephroscelrotic secondary to heart disease (R. 109). The liver showed evidence of chronic passive congestion secondary to heart failure (R. 110). The spleen and lungs also revealed that Mr. DiEnes was suffering from congestive heart failure (R. 109).

In the opinion of the pathologist, DiEnes died

"as a result of severe cardiac damage; his severe heart disease," which condition predated the accident (R. 110, 115). He didn't attempt to assess the relationship between the accident and the heart condition (R. 115).

Dr. George Curtis, a specialist in internal medicine and cardiology also testified. No reference at all is contained in Plaintiff's Brief under statement of "MATERIAL FACTS", to his testimony. He explained that the heart attack Mr. DiEnes suffered in 1965 involved a different artery of the heart than the first one in 1962 (R. 20). This can be clinically determined because when a heart muscle dies it releases an enzyeme into the blood which can be measured. He confirmed the finding of Dr. Smith that the electrocardiogram which was taken on the day of the accident, August 4, 1965, showed no change from the one which was taken in June of the same year, although it did show changes as a result of the 1962 and 1965 heart attacks (R. 121). The results of the electrocardiogram did not have any significance insofar as injuries sustained in the accident were concerned (R. 122). He expressed his opinion that the accident had no connection with the death of Mr. DiEnes (R. 123).

The autopsy report in Dr. Curtis' opinion, showed the following essential findings:

> "One, a markedly enlarged heart that was really twice as large as normal.
>
> "Second, it showed severe arteriosclerosis, with a complete obstruction of the ar-

teries in two of the main arteries and intermittent obstruction.

"The third, artery there, it showed evidence of old heart attacks, with marked destruction of the muscle and a destruction of the septum between the two sides of the heart, and it showed recent thrombus clots in other parts of the arteries of his heart, showing extensive arteriosclerotic heart disease with very little blood getting through any of these major arteries." (R. 124).

On cross-examination, he testified that anxiety can be a precipitating cause of a further heart problem, but he didn't believe that the anxiety factor was a contributing factor to the death of Mr. DiEnes (R. 125). In his opinion, Mr. DiEnes had already lived longer than one would expect (R. 125).

Following presentation of the plaintiffs' case, the defendant made a Motion to Dismiss plaintiffs' Complaint, upon the grounds that the evidence, as a matter of law, showed that the claim for the additional accidental death benefit was not due under the policy, because the prior heart disease was a contributing factor to Mr. DiEnes' death (R. 98). The defendant's Motion was based upon a reading of the "Accidental Death and Dismemberment Benefits" provision to the effect that before the benefits would become due, death had to result "from bodily injuries effected *solely* through external, violent and accidental means . . ." The Court then indicated that he was inclined to reject this argument, which he later did, and stated:

"THE COURT:

"My present feeling is that I would have to instruct — if I permitted that to go to the jury — in this fashion: 'In order to prove the essential elements, plaintiffs claim, the burden is on them to establish by a preponderance of the evidence in the case the following proposition: That the death of Lewis DiEnes resulted from bodily injuries effected solely through external, v i o l e n t, and accidental means'."

"MR. MANGUM:

"If your Honor gives that instruction, I don't think I would take an exception, if you gave it in that precise form you just gave it." (R. 100).

Further colloquy and argument occurred between the Court and counsel, but in essence the Court denied the defendant's Motion when it was renewed following the close of the evidence (R. 126). Plaintiffs' counsel conceded that the heart disease was at least "a contributing factor" in DiEnes' death (R. 127). The court properly analyzed the situation by stating that if he ruled in favor of the defendant's contention, he would direct the jury to return a verdict in favor of the defendant. However, he denied the defendant's Motion and ruled that it was a matter for the jury to determine by a preponderance of the evidence, whether the death came within the provisions of the policy and hence submitted the same to the jury for consideration (R. 128).

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN THE MANNER IN WHICH IT SUBMITTED TO THE JURY THE ISSUE OF COVERAGE UNDER THE INSURANCE POLICY, AND THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING THAT DECEDENT'S DEATH RESULTED FROM NATURAL CAUSES UNRELATED TO INJURIES SUSTAINED IN THE ACCIDENT.

The plaintiffs contend that the language of the policy does not require them to prove that his death resulted *solely* from the injuries incurred by external, violent and accidental means (Plaintiffs' Brief p. 12). As noted, the defendant's counsel made a motion at the conclusion of the plaintiffs' case for an involuntary nonsuit on the grounds that as a matter of law there was no coverage because the testimony conclusively showed that the prior heart disease was a contributing cause of the death, and therefore, the death did not result *solely* from the automobile injuries (R. 98, 99, 127). Mr. Mangum agreed with this interpretation of the evidence (R. 127). The trial court rejected the defendant's contention and denied the Motion for Nonsuit. The Court aptly summed up the two positions of the parties in this language:

> "THE COURT:
>
> "Plaintiff, in effect, contends that the contract means that, if death resulted because

of accident and illness, plaintiff is entitled to recover."

* * *

"Defendant contends, in essence, that if death resulted because of a combination of accident and illness, plaintiff is not entitled to recover." (R. 134, 135).

The Court in further considerating the motion stated:

"THE COURT:

"If I rule on the interpretation of the policy in favor of Mr. Hanson's (defendant's) contention then, I will direct the jury.

"MR. MANGUM:

"I realize that; I hope you don't, but I realize that is the provision."

"THE COURT:

"If I rule on your contention as to the interpretation of the policy, it seems to me that I must submit the matter to the jury, then, to determine the preponderance of the evidence."

"MR. MANGUM:

"I agree with that." (R. 128).

Thereafter the court submitted the matter to the jury and therefore accepted the plaintiffs' theory that it was a jury question as to whether or not death resulted within the coverage of the policy.

The Court submitted this question to the jury in the language of the policy, in its Instruction No. 15, which is as follows:

"INSTRUCTION NO. 15

"In order to prove the essential elements of plaintiffs' claim, the burden is on them to establish by a preponderance of the evidence in the case the following proposition: That the death of Lewis DiEnes was a result of bodily injuries effected solely through external, violent and accidental means."

Plaintiffs' counsel had previously impliedly indicated to the Court that this instruction, if given in the form indicated, would be acceptable (R. 100). Although the defendant does not agree that the trial court was correct in denying its Motion for an Involuntary Nonsuit and for a Directed Verdict at the conclusion of the evidence, doubt was resolved in favor of the plaintiff on the question of cause of death by submitting the matter to the jury.

A considerable portion of the plaintiffs' Brief contains a discussion of cases dealing with the legal effect of language in certain insurance policies considered by this and other courts. The major thrust is to the effect that the present policy as written, would permit a finding that the plaintiffs could recover if Mr. DiEnes' death *occurred as a result* of injuries effected ". . . solely through external, violent and accidental means . . ." It is conceded that the evidence "conclusively shows that the diseased heart of Mr. DiEnes was a concurring cause of his death", but they "deny the obligation to prove that his death was the 'sole result' " of the injuries received in the minor automobile accident. They ac-

knowledge that if this contention is wrong the appeal should be dismissed. The plaintiffs were not given the burden of proving that the accident was the "sole cause". The trial court submitted this question to the jury in the precise language of the policy. In so doing, the court, in effect, accepted plaintiffs' argument concerning the interpretation of the policy.

The plaintiff cites the case of *Standard Life Ins. Co. vs. Foster*, 210 Miss. 242, 49 S.2d 391 (1950), as authority for the proposition that it is a jury question as to whether or not death of the insured was the "proximate result of bodily injuries which were effected solely by external, violent and accidental means". In that case the court held there was sufficient evidence to sustain a judgment on a verdict for the plaintiff on conflicting evidence. We submit that this issue was in fact submitted to the jury in this case, and a determination adverse to the plaintiffs was made.

The evidence in the case was sufficient to have justified the court in granting defendant's Motion for Involuntary Nonsuit following presentation of plaintiffs' case, or a Directed Verdict in its favor following the close of evidence. *Browning vs. Equitable Life Assurance Society*, 94 Utah 532, 72 P.2d 1060, 1073-74 (1937), was an action on a policy insuring against loss resulting "directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental means." The court affirmed the decision in favor of

the plaintiff, holding that there was no evidenc that there was an existing disease within the meaning of the law at the time of the accident which produced the plaintiff's disability and that the toxemia which probably existed in the insured's system at the time of the accident, later causing arthritis in the injured finger, was a mere condition and not a moving cause of the injury. The Court in its opinion analyzes the decisions construing similar policy provisions as follows:

> "*An injury effected through violent, external, and accidental means, entirely independent of all other causes*, have made three distinctions or classes of cases: (1) When an accident causes a diseased condition which, together with the accident, results in the injury or death complained of, the accident alone is to be considered as the cause of the injury or death. *French vs. Fidelity & Casualty Co.*, 135 Wis. 259, 115 N.W. 869, 17 L.R.A. (N.S.) 1011, *Cary vs. Preferred Acc. Ins. Co. of New York*, 127 Wis. 67, 106 N.W. 1055, 5 L.R.A. (N.S.) 926, 115 Am. St. Rep. 997, 7 Ann. Cas. 484. (2) When, at the time of the accident, the insured was suffering from some disease, but the disease had no causal connection with the injury or death resulting from the accident, the accident is to be considered the sole cause. *Bohaker vs. Travelers' Ins. Co.*, 215 Mass. 32, 102 N.E. 342, 344, 46 L.R.A. (N.S.) 543. (3) When at the time of the accident *there was an existing disease* which, cooperating with the accident, resulted in the injury or death, the accident cannot be considered as the sole cause, or as

the cause independent of all other causes. *Smith vs. Federal Life Ins. Co.*, (D.C.) 6 F.2d 283; *Cretney vs. Wodmen Acc. Co.*, 196 Wis. 29, 219 N.W. 448, 62 A.L.R. 675; *Leland vs. Order of United Commercial Travelers of America*, 233 Mass. 558, 124 N.E. 517, 520."

The trial court held that the plaintiff's claim fell within the first class which was affirmed by the majority of the Court. If the claim had fallen within the third class, there would have been no coverage. The additional excerpt from the opinion is pertinent:

"On such a record, can the case fall within class (3) so as to bar a recovery? This class requires that there be an *existing disease*, one existing at the time of the accident, which cooperates with the accident to produce the disability. *Cretney vs. Woodmen Acc. Co.* 196 Wis. 29, 219 N.W. 448, 62 A.L.R. 675. We have searched the record in vain for any evidence that there was an *existing disease* within the meaning of the law, at the time of the accident, which produced the disability. Two propositions of law are thus presented which we shall discuss from the authorities. First, that an *existing disease*, to take a case out of the insured provisions of the policy, does not mean a temporary disorder or derangement of the bodily organs, system, or functions, nor does it mean a tendency or susceptibility to a disease, but means a chronic or definite affliction such as would be embraced in the common understanding and meaning of the term 'diseased' or 'sick'; and second, that the term 'independently of all other causes' does not mean uninfluenced or unaffected by any

> other cause, but means uncontrolled by any other cause, that is, that there was no independent intervening cause unproduced or uninfluenced by the injury, which, acting of itself and without stimulation by the injury, tends to produce the result."

It seems clear that the present facts fall within class (3) enumerated by the court; that is that there was an existing disease which was the concurring sole cause of the death, and there is no coverage. See also annotation, *Pre-existing physical condition as affecting liability under accident policy or accident feature of life policy*, 84 A.L.R. 2d 176.

Were the Court to go further than it did in instructing the jury, it would have in fact been presenting the arguments of counsel under guise of the court's Instructions. This, of course, would have resulted in prejudicial error. The plaintiffs' cause is not aided by citing to the court the law that insurance policies must be construed in favor of the insured, as stated in *Browning vs. Equitable Life Assurance Soc., Supra*, because the court in construing the language of the present policy did resolve doubt in favor of coverage and submitted the question of cause of death to the jury. However, it would have been error for the court to submit the matter to the jury on the plaintiffs' theory, as was done, and then in effect, further advise the jury that they were instructed to resolve doubts in favor of the plaintiffs by presenting plaintiffs' argument under the sanctity of a court's "instruction".

Plaintiffs in their statement of "MATERIAL FACTS" avoid any reference to the testimony of Dr. George Curtis, which was favorable to defendant, even though the plaintiffs, as appellants were under the responsibility of reciting the facts in "the light most favorable to the party who prevailed below." *Ortega vs. Thomas*, 14 U.2d 296, 297, 383 P.2d 406 (1963).

Dr. Smith testified that the minor accident in which DiEnes was involved was a contributing factor in bringing about his death. Dr. Carlquist did not attempt to assess the relationship of the accident to the cause of death. Dr. Curtis testified that the accident was in no way responsible for his death, and that he had such advanced heart disease that he had already lived beyond what one would normally expect a person with his symptoms to live.

The evidence was undisputed that Dr. Smith, decedent's private physician, gave Mr. DiEnes a thorough examination, including an electrocardiogram and assured himself that Mr. DiEnes could undergo minor surgery without ill effects for the purpose of suturing his nose laceration. The electrocardiogram, taken upon admission to the hospital, showed no change as a result of the accident. He tolerated the surgery well, ate his evening meal at the hospital, was found in good condition by his physician when visited between 6:00 and 8:00 o'clock p.m. and also by his wife, who visited him until 9:30 p.m. He was sleeping soundly at 1:00

a.m. when he was awakened by the nurse for the purpose of checking his pulse, temperature and respiration, all of which were normal. Mr. DiEnes died ten minutes later. These facts, together with the opinions of the medical experts which were in conflict as to the cause of death, were in sharp focus. There was then properly before the jury the very question which the plaintiff contends was not presented to them for consideration, i.e., whether or not Mr. DiEnes' death resulted from ". . . bodily injuries effected soley through external, violent and accidental means . . ." The jury determined that the death did not so result and there is ample evidence in the record to support that finding. This court in *Hales vs. Peterson*, 11 U.2d 411, 360 P.2d 822, 824 (1961) stated:

> "We have heretofore recognized the importance of safeguarding the right of trial by jury. A necessary corollary to it is that there must be some solidarity in the result so that it can be relied upon. To the extent the verdict can easily be set aside by the court, the right to trial by jury is weakened. In order to give substance to the right, once the trial has been had and a verdict rendered it should not be regarded lightly, nor overturned because of errors or irregularities unless they are of sufficient consequence to have affected the result.
>
> "Anyone acquainted with the practical operation of a trial by jury and the human factors that must play a part therein is aware that it would be almost impossible to complete a trial of any length without some things oc-

curring with which counsel, after the case is lost, can find fault and, in zeal for his cause, all quite in good faith, magnify into error which to him and the losing parties seems blamable for their failure to prevail. However, from the standpoint of administering even-handed justice the court must dispassionately survey such claims against the overall picture of the trial, and if the parties have been afforded an opportunity to fully and fairly present their evidence and arguments upon the issues, and the jury has made its determination thereon, the objective of the proceeding has been accomplished. And the judgment should not be disturbed unless it is shown that there is error which is substantial and prejudicial in the sense that it appears that there is a reasonable likelihood that the result would have been different in the absence of such error, . . ."

The verdict and judgment of the trial court is entitled to a presumption of validity and should not be overturned except for the reasons indicated. *Brereton vs. Dixon*, 20 U.2d 64, 433 P.2d 3 (1967).

It is submitted that the plaintiffs were given a full opportunity to try their case and present that evidence which they believed would sustain their claims. The plaintiffs' theory of recovery was submitted to the jury in the language of the policy without embellishment or unnecessary comment. The language of the policy was not ambiguous. The terms used in the insuring statement were simple and subject to common understanding. The jury de-

termined by a preponderance of the evidence that death resulted from heart disease of a serious and long standing nature and not as the result of the "injuries effected solely through external, violent and accidental means, . . ." Since there is ample credibile testimony in the record upon which they could make that finding, the judgment entered on their verdict should be affirmed.

POINT II.

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE PLAINTIFFS' REQUESTED INSTRUCTIONS NUMBERED 16, 17, 18 AND 19.

The plaintiffs claim that their theory of the case, as set forth in Instruction Numbers 16, 17, 18 and 19, was not presented to the jury.

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."

By the instruction, the jury is first advised that the immediate cause of death was "an acute coronary insufficiency." The second sentence of the instruction advises the jury that their responsibility is to determine between two alternatives: (1) Whether the coronary insufficiency was set in motion by the accidental injuries sustained by DiEnes, or (2) whether the coronary insufficiency was "controlled, directed or influenced in its action or behavior by accidental injuries sustained by DiEnes." A choice between these two alternatives is the equivalent of a directed verdict. The second alternative is but a restatement of the first and is argumentative. More obvious, however, is the omission from the requested instruction of the primary question of whether the "acute coronary insufficiency" was the result of the prior heart disease experienced by DiEnes over a number of years. The whole instruction is in an argumentative form emphasizing the plaintiffs' view of the evidence.

The substance of this requested instruction was properly given in Instruction No. 15, which accurately sets forth the insuring provisions of the policy without unnecessary comment.

Plaintiffs' Requested Instruction No. 17, is as follows:

"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. Beginning 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."

This instruction is a more obvious comment on the evidence than No. 16. It is a direct attempt to slant the testimony in favor of a plaintiffs' verdict. The question for jury consideration was not whether there had been a "morbid change, so resulting from or induced by such injury", but whether or not Di-Enes' death resulted from ". . . bodily injuries effected solely through external, violent and accidental means . . .", and this question was presented to the jury.

Plaintiffs' Requested Instruction No. 18, reads as follows:

> "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 set 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."

Again, this requested Instruction is not only an unfair comment upon the evidence of the case, it is an attempt to have the Court argue the plaintiffs' theory of the case under the quise of an instruction. It is also duplicitous.

The folly of attempting to argue one's case in the instructions rather than to confine them to a statement of the issues of law, has been previously condemned by this Court. *Cornwell vs. Barton*, 18 U.2d 325, 422 P.2d 663 (1967).

Plaintiffs' Requested Instruction No. 19, reads as follows:

> "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."

Here again, the plaintiffs have attempted to rewrite the insuring language in terms favorable to themselves. The substance of this instruction was given in Instruction No. 15, as follows:

"INSTRUCTION NO. 15

> "In order to prove the essential elements of plaintiffs' claim, the burden is on them to establish 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."

As previously noted, the plaintiffs implied to the court that if the jury were instructed in the language of Instruction No. 15, that such would be acceptable (R. 100).

It is submitted that each of the requested instructions were properly denied by the court. None, nor all of them, were proper substitutes, for the plain and simple language contained in the policy. Had the requested instructions been given, they would have overshadowed the real issue of the case, i.e., did the plaintiffs' decedent sustain ". . . bodily injuries effected solely through external, violent and accidental means, . . ." from which he died. That precise question was presented to the jury for determination in the court's Instruction No. 15.

The plaintiffs contend that defendant's counsel committed error in his summation to the jury by reading the court's instruction No. 15 and stating that the plaintiffs could not recover unless they proved that the death of DiEnes resulted solely from injuries effected through external, violent and accidental means. This was substantially the language of the instruction, and it is difficult to see how such

a statement could result in prejudice. Defendant's counsel merely argued his view of the facts to which the instruction was applicable. Plaintiffs' counsel had the same privilege. In any event, this court has stated that:

> "If something occurs which the party thinks is wrong and so prejudicial to him that he thereafter cannot have a fair trial, he must make his objection promptly and seek redress by moving for a mistrial, or by having cautionary instructions given, if that be deemed adequate, or be held to waive whatever rights may have existed to do so." *Hill vs. Cloward*, 14 U.2d 55, 58, 377 P.2d 186 (1962).

Plaintiffs' counsel made no such request of the Court (R. 140).

Further, the jury was admonished in Instruction No. 9 not to consider or be influenced by any statement of counsel as to what the evidence is, unless stated correctly, or in any statement of counsel of facts not shown in the evidence.

The plaintiff further argues that:

> "There can be no dispute that Mr. DiEnes sustained 'bodily injuries effected solely through external, violent and a c c i d e n t a l means'." (Plaintiffs' Brief p.26).

They allege prejudicial error because the court refused to so instruct the jury. If there was no question about those matters being factual, it would seem to be as obvious to the jury as to the court, and no prejudicial error could result from failing to emphasize that fact with the jury.

The court denied defendant's Motion for a nonsuit and permitted the jury to consider the central question of whether or not DiEnes' death resulted from ". . . bodily injuries effected solely through external, violent and accidental means . . .", the very language of the policy. The jury unanimously rejected plaintiffs' claim and found that the plaintiff died from conditions related solely to his previous heart condition.

CONCLUSION

The plaintiff's theory of the case was properly considered by the court and submitted to the jury, not in the repetitious and argumentative form of plaintiffs' requested instructions, but in the plain, concise and simple language of the insuring provisions of the policy. Plaintiffs impliedly consented to the form of Instruction No. 15, which presented the heart of the case to the jury. The other requested instructions were but comments to plaintiffs' view of the evidence, and it would have constituted prejudicial error had they seen given. There is ample evidence to sustain the jury's finding.

Plaintiffs' assertion that defendant's counsel engaged in improper argument in his summation to the jury is without merit, and even if such an error were committed, plaintiffs' counsel did not preserve his right to assert it in this court. Additionally, it was not an irregularity of sufficient consequence

to have affected the result". *Hale vs. Peterson*, 11 U. 2d 411, 360 P.2d 822-824 (1961).

The judgment entered on the jury verdict should be affirmed.

Respectfully submitted,

HANSON & BALDWIN
MERLIN R. LYBBERT

702 Kearns Building
Salt Lake City, Utah

Attorneys for
Defendant-Respondent

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief were served upon counsel for the plaintiffs by mailing the same, postage prepaid, to Mulliner, Prince & Mangum and Max K. Mangum, 206 El Paso Natural Gas Building, Salt Lake City, Utah, this ..... day of March, 1968.

MERLIN R. LYBBERT