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Judith H. Dienes and Dianne D. Mcmain v. Safeco
Life Insurance Company, A Washington
Corporation : Brief In Support of Respondent's
Petition For Rehearing

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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 IN SUPPORT OF RESPONDENT'S
PETITION FOR REHEARING

POINT I

THE PLAINTIFFS' THEORY OF THE CASE
WAS PRESENTED TO THE JURY IN UN-
AMBIGUOUS LANGUAGE.

The Court's opinion observes that "Plaintiffs' request for an instruction on their theory of the case was refused." The decision does not specify which of the Plaintiffs' requested instructions, 16, 17, 18 or 19 is referred to. Defendant does not deny that Plaintiffs were entitled to have their theory of the case presented to the jury, but the Court was not required to submit it in the language of the requested instructions. It is sufficient that all the in-

structions when considered together, cover the issues and the applicable principles of law in such a way that the jury will understand them. *Macshara vs. Garfield*, 20 Utah 2d 152, 434 P.2d 756, *Ostertag vs. LaMont*, 9 Utah 2d 130, 339 P.2d 1022. The Plaintiffs' right to recover was succinctly stated in the Court's Instruction No. 15 which reads as follows:

"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."

The Court's opinion states that because the instruction was in the policy language, the jury was permitted to determine the legal effect of the words of the policy. The Court said that the language of the policy means ". . . that Plaintiffs may recover if the insured died as a result of *injuries* sustained solely by external, violent and accidental means". The Court's interpretive language, ". . . result of *injuries* sustained solely by external, violent and accident mean," does not differ from the policy language in any material respect. The phrase "*bodily injuries*" appears in the policy and is even more explicit than the term "injuries" used by the Court. The Court chose to substitute "sustained" for the policy term "effected". Either word clearly conveys the idea that before liability would arise, the

injuries had to result solely through "external, violent and accidental means." The Court also substituted the term "by" for the policy language "through".

It is submitted that the trial court's Instruction No. 15 did, in fact, present the Plaintiffs' theory of recovery in essentially the very language suggested in the Court's opinion. The variance is in choice of words and not in the substance of the idea being expressed. Surely the jury was as capable of understanding the instruction as given as the language contained in the Court's decision.

Although the decision discusses rules which apply in construing ambiguous insurance contracts, the reasoning and very language of the Court negates any such ambiguity in the instruction of the Trial Court concerning it. The reasoning and language of the Court's decision should be considered an affirmance of the Trial Court's instruction rather than a basis for finding it ambiguous.

POINT II

THE COURT IN RENDERING ITS OPINION
FAILED TO SUSTAIN THE JURY'S VERDICT
EVEN THOUGH THERE WAS SUFFICIENT
EVIDENCE TO SUPPORT IT.

There was a sharp dispute at trial in the medical testimony concerning the cause of death. Dr. Smith was of the opinion that the automobile accident was a contributing factor to the final heart attack (R. 86). Pathologist Carlquist made no at-

tempt to relate the accident to the heart attack. Heart specialist Dr. George Curtis, was of the opinion that the accident had no connection with Mr. DiEnes' death (R. 123, 125). The Court, in the recent language of *Woodhouse vs. Johnson*, 436 P.2d 442, 20 Utah 2d 210, (1968), has the "... duty to assume that the jury believed the evidence which supports (the jury) verdict and ... to review the evidence whatever inference can fairly and reasonably be drawn therefrom in the light most favorable to it." Additionally, the verdict carries with it a "presumption of validity." *Brereton vs. Dixon*, 443 P.2d 3, 20 Utah 2d 64 (1967). The compelling conclusion in the present case is that the jury believed the testimony of Dr. Curtis and found as a fact that DiEnes' death was not related to the accident. Any other conclusion does violence to the verdict returned by the jury in this case and denies it the effect this Court has repeatedly held it to be entitled. These presumptions make the general verdict very clear and it should not be stricken down for vagueness. Nevertheless, the Court's opinion states:

"From the general verdict rendered by the jury, it is not possible for us to know whether the jury found as a fact that death was caused by a heart attack independent of injuries received in the accident or whether death resulted from a heart attack induced by such injuries and which otherwise would not have occurred at that time."

This Court has recently reaffirmed the tradi-

tional role of an appellant tribunal in the following words:

“In view of the contentions made to upset this judgment, it seems necessary to restate and emphasize that upon appeal it is our duty to assume that the jury believed the evidence which supports their verdict; and for that reason, to review the evidence of whatever inferences can fairly and reasonably be drawn therefrom in the light most favorable to it.” *Woodhouse vs. Johnson*, 436 P.2d, 442, 443, 20 Utah 2d 210, (1968). See also *Brereton vs. Dixon*, 20 Utah 2d 64, 443 P.2d 3, (1967).

Additionally, the policy itself specifically excludes recovery under the policy for death caused by disease.

Although the Court could have required the jury to return a special verdict or to answer special interrogatories in connection with the general verdict, none were requested by counsel. There is an inference in the Court's opinion that this procedure should have been followed in this case. However, that determination is properly left to the discretion of the trial judge (Rule 49 U.R.C.P.). Uncertainty has not infrequently arisen in interpreting special findings. See *Warner vs. United States Mutual Accident Association*, 32 P. 696, 8 Utah 431; *Schweitzer vs. Stone*, 371 P.2d 201, 13 Utah 2d 199. The presumptions favoring the validity of a verdict apply to a general as well as to a special verdict to

avoid the temptation to violate the sanctity of jury findings.

The Court's opinion refers to the case of *Browning vs. Equitable Life Assurance Society*, 94 Utah 532, 72 P.2d 1060, for the proposition that ambiguous statements in an insurance policy are to be enforced against the insurer. This is not contested, but the *Browning* decision has greater significance in this case, because it carefully analyzes policy provisions similar to those contained in the present policy:

“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. (Citing cases) (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. (Citing cases) (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. (Citing cases)”

The facts in the present case are even stronger in favor of the jury verdict than the findings necessary to deny recovery under *Browning*. Mr. DiEnes suffered from a serious heart disease before the accident which had shown symptoms of the progressive deterioration of his entire body to the extent that death was imminent at any time. There was sufficient evidence to permit the jury to find that it was the *sole* cause of death.

The opinion in the present case indicates that under this type of policy there can be a recovery “. . . when death results from injuries and would not have occurred at that time except for those injuries.” Even application of this principle in the present case does not justify overturning the jury verdict because there was sufficient testimony to support the jury’s finding that the injuries DiEnes sustained in the accident had no connection with his death. There is a presumption that the jury so found.

CONCLUSION

The Plaintiff’s theory of the case was submitted to the jury in almost the identical language of the Court’s opinion. The jury was as capable of understanding the Trial Court’s instruction as a new jury would be of the language contained in the opinion.

Further, there was sufficient evidence, in addition to legal presumptions, to support the jury's No Cause for Action verdict.

Respectfully submitted

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