

1968

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

Appellants' Brief Respondent's Brief for Rehearing

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} Case
No. 11048

Appellants' Brief in Answer to Respondent's Petition for Rehearing

POINT I

RESPONDENT HAS RAISED NO NEW OR
IMPORTANT MATTERS NOT PREVIOUS-
LY CONSIDERED BY THIS COURT.

The gist of respondent's Petition for a Rehearing is that the facts of the case would justify a verdict of no cause of action by the jury. But that was not and is not the issue before this Court on appeal. Appellants

contended that they were prevented from presenting their theory of the case to the jury by the rulings of the trial court. This court agreed that "The trial court advised plaintiffs' counsel that he would not permit him to argue that the insuring agreement was ambiguous." Nevertheless counsel for respondent did argue 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." (See affidavit of respondent's counsel set out in full at pages 10-11 of Appellants' Brief.)

Compare this with the fact that the trial court did not permit appellants' counsel to argue to the jury his theory of the case as recited in plaintiffs' requested instruction number 19. (See paragraph 4 of affidavit of plaintiffs' counsel set forth in full at pages 9-10 of Appellants' Brief.) Requested instruction number 19 explained plaintiffs' theory of the law of this case as follows:

"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."

The point of difference between counsel was sharp and divergent. This court has already ruled that error was committed by the trial court on this crucial issue. Nothing new has been cited or argued by respondent to justify this court's granting of a rehearing. The clear fact remains unchallenged that plaintiffs were denied their right to have their theory of the case presented

to the jury by the trial court's rulings. No new or important issue not previously before this court having been raised by respondent, the petition for a rehearing should be denied.

Plaintiffs are entitled to present to the jury for their determination the issue of whether the insured died from a heart attack *resulting* from the injuries sustained in the auto accident. Until this occurs plaintiffs have not had their day in court. If Mr. DiEnes died as a result of a heart attack induced by injuries, plaintiffs are entitled to recover under the policy language selected by respondent and by the opinion of this court in this case.

POINT II

THERE IS NO PRESUMPTION OF VALIDITY OF A JURY VERDICT WHEN THE PIVOTAL ISSUE IS NEVER REALLY SUBMITTED TO THE JURY.

Under the rulings of the trial court and over the objection of plaintiffs the case was tried and *argued* on the premise that plaintiffs were not entitled to recover if there were contributing causes to Mr. DiEnes' death. As restricted by the trial court's rulings, plaintiffs never had a chance to argue to the jury the pivotal issue in this case, i.e., "whether the insured died from a heart attack *resulting* from those injuries." So long as this issue was never submitted for the consideration of the jury, it would be error to affirm the jury verdict because of a presumption of the validity of the verdict.

There is no basis for such a presumption in the face of the record.

The Petition for Rehearing should be denied.

Respectfully submitted,

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