

NO. A09-1506

State of Minnesota
In Court of Appeals

Western National Insurance Company,

Appellant,

v.

Bruce Thompson and Cindy Thompson,

Respondents.

APPELLANT'S BRIEF, ADDENDUM AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE LEGAL ISSUES

- I. IS IT REASONABLE, WHEN A NO-FAULT INSURER HAS INFORMATION THAT ITS INSURED WORKS FOR HER TREATMENT PROVIDER TO REQUEST AN EXAMINATION UNDER OATH TO ASCERTAIN WHETHER THE INSURED WAS TREATING WITH HER EMPLOYER BEFORE AND UP TO THE TIME OF THE MOTOR VEHICLE ACCIDENT?

- II. WHEN AN INSURED REFUSES AN INSURER'S REASONABLE REQUEST FOR AN EXAMINATION UNDER OATH, IS THE INSURED IN BREACH OF THEIR CONTRACT OF INSURANCE THEREBY VOIDING COVERAGE?

STATEMENT OF FACTS

On September 27, 2008, Respondents were involved in a motor vehicle accident. Through a telephone conversation with Cindy Thompson, Western National became aware that Cindy Thompson was employed by her treating chiropractic and that both her and her husband had been receiving treatment prior to this motor vehicle accident. Following this discovery, Western National requested that Respondents attend an examination under oath pursuant to the policy of insurance. See A-1. As stated in the January 22, 2008 letter to the Respondents, the relevant portions of the Western National Policy of Insurance issued to the Respondents require as follows:

PART E – DUTIES AFTER AN ACCIDENT OR LOSS

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

- B. A person seeking any coverage must:
 - 3. Submit, as often as we reasonably require:
 - b. To examination under oath and subscribe to the same.

See A-3.

Further, the assistance and cooperation clause of the policy of insurance states:

PART E – DUTIES AFTER AN ACCIDENT OR LOSS

- B. A person seeking coverage must:
 - Cooperate with us in the investigation, settlement or defense of any claim or suit.

Id. Pursuant to this policy language, the examinations were set to occur on February 4, 2008. See A-1.

On January 28, 2008, Western National received notice from Respondents' counsel stating that Respondents would not attend. See A-15. By letter dated February 5, 2008, Western National again informed Respondents of the contractual duty to provide an examination under oath. See A-17. Western National also advised Respondents that the refusal to submit to an examination under oath would be a breach of contract and result in the denial of all claims. *Id.* Respondents responded by letter dated February 7, 2008, again refusing to appear for an examination under oath. See A-18.

By letter dated February 14, 2008, Western National denied Respondents claims based upon the failure to cooperate with Western National's investigation and the breach of contract for failure to submit to an examination under oath. See A-20.

After receiving notice of the denial of their claims, Respondents filed for Minnesota No-Fault Arbitration with the American Arbitration Association on February 24, 2008. See A-22, A-33. Western National responded that the denials of coverage based upon the breach of contract for failing to submit to an examination under oath were questions of law which are not appropriate for the jurisdiction of the American Arbitration Association but must instead be presented in district court. See A-44 and A-53.

STATEMENT OF THE CASE

Western National Insurance Company respectfully submits this brief in support of its appeal. Bruce and Cindy Thompson are not entitled to benefits under their policy of insurance. They have breached their policy of insurance by refusing to appear for an examination under oath and failing to cooperate in violation of the clear and unambiguous terms of the policy.

Insurance fraud is a costly and troubling problem for both insurers and insureds. For example, in 1995 property and casualty insurance fraud cost the industry and estimated \$20 billion.¹ An Insurance Research Council study estimates that nearly 36 percent of all bodily injury claims appear to involve fraud and overstatement.² The Minnesota legislature views insurance fraud to be such a serious problem that it requires insurers to “institute, implement, and maintain an antifraud plan.” Minn. Stat § 60A.954.

The most critical element in the fight against insurance fraud is the examination under oath provision in insurance policies like the one at issue here. An examination under oath permits the insurer to obtain necessary and relevant information from the insured about the claimed loss including medical history, prior injuries, treatment and to determine whether the insured or their provider is submitting a fraudulent claim. The Supreme Court of the United States recognized the importance and necessity of this critical fraud-fighting tool more than a century ago. *Clafin v. Commonwealth Ins. Co.*,

¹ *Insurance Fraud: The Quiet Catastrophe* 8 (Conning & Co. 1996).

² *Fraud and Buildup in Auto Injury Claims: Pushing the Limits of the Auto Insurance System* 1 (Insurance Research Institute, September 1996).

110 U.S. 81, 94-95, 3 S.Ct. 507, 514-515 (1884) (stating that the fundamental purposes of an examination under oath is to enable the insurer “to obtain all knowledge and facts [regarding the loss] while the information is fresh in order to protect itself from fraudulent and false claims”).

However, the Respondents have denied Western National its contractual right to take their examination under oath, and in doing so, have failed to comply with the policy’s terms and conditions. Respondents’ brazen attempts to avoid, at all costs, the examination under oath that Western National is legally and contractually entitled to, is a breach of the contract thereby voiding their policy of insurance. Additionally, Respondents’ actions demonstrate a failure to cooperate, resulting in substantial prejudice to the Respondent. Western National respectfully requests that the decision of the trial court be reversed.

LEGAL ARGUMENT

I. BRUCE AND CINDY THOMPSON HAVE BREACHED THEIR CONTRACT OF INSURANCE WITH WESTERN NATIONAL INSURANCE COMPANY THEREBY VOIDING COVERAGE BY FAILING TO SUBMIT TO WESTERN NATIONAL'S REASONABLE REQUEST FOR AN EXAMINATION UNDER OATH.

As stated in the January 22, 2008 letter to the Respondents, the relevant portions of the Western National Policy of Insurance issued to the Respondents require as follows:

PART E – DUTIES AFTER AN ACCIDENT OR LOSS

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

- B. A person seeking any coverage must:
 - 3. Submit, as often as we reasonably require:
 - b. To examination under oath and subscribe to the same.

Respondents failed to submit to an examination under oath as requested by Western National Insurance Company and failed to cooperate in Western National's investigation of their claim. Respondents breached their policy of insurance by refusing to submit to an examination under oath. The Respondents refusal to appear for the scheduled examination under oath also evidences their failure to cooperate, which is further in breach of their contract of insurance.

A. BRUCE AND CINDY THOMPSON FAILED TO SUBMIT TO WESTERN NATIONAL'S REASONABLE REQUEST FOR AN EXAMINATION UNDER OATH IN VIOLATION OF THEIR POLICY OF INSURANCE.

An insured's unwillingness to submit to an examination under oath by express refusal or through a pattern of non-cooperation is a breach of the contract of insurance. *Metropolitan Property and Casualty Insurance Company v. King*, C9-02-1737, 2003 WL 21008323 (Minn. Ct. App. 2003). In *King*, Metropolitan's attorney sent King a letter indicating that an examination under oath had been scheduled for August 2, 2001 and that he must appear in accordance with his contract of insurance. King's attorney sent reply correspondence stating: "Thank you for the correspondence of July 19, 2001. No Thank You." After King's refusal to submit to the examination under oath Metropolitan advised King that his claim was denied for breach of contract. After Metropolitan's denial, King then conditionally agreed to appear for an examination under oath. The court held that King's conditional offer to appear for the examination under oath failed to cure his prior breach of the contract. *Metropolitan Property and Casualty Insurance Company v. King*, C9-02-1737 at *1.

The King case is strikingly similar to the facts of this case. The Respondents' counsel replied in a similar manner, indicating that his clients Bruce and Cindy Thompson would not be submitting to an examination under oath. The Respondents' correspondence was equally as brazen as that of King's Counsel. Respondents placed clearly unreasonable restrictions on Western Nationals ability to investigate the validity of the Respondents claims. Respondents would like this Court to believe that their offer to submit to written questions evidenced cooperation. Offering to respond to written

questions is not complying with the request for the examination under oath. Written questions do not allow the insurer to have a conversation with the insured, judge credibility and investigate the claim. The policy of insurance does not allow the insureds to place such restriction on the examination under oath. The insureds' actions are a carefully constructed façade for the purpose of circumventing their obligations under the contract of insurance. Not only were the tactics an express refusal but also constituted a pattern of non-cooperation.

Specifically, Respondents' express refusal to appear was evidenced by their correspondence dated January 28, 2008. Respondents' attempt at cooperation was futile and insufficient to correct their initial breach. As in *King*, once the insured became aware that his inaction was detrimental to his claim, he offered to appear. However, just as in *King*, such last minute efforts are insufficient to cure the prior breach of contract. Respondents in this case acted with the same intentional disregard for their obligation under their contract of insurance. Because Respondents were aware that their intentional actions could prove fatal to their claims they espoused a willingness to cooperate, but their efforts to cooperate fall short of the requirements within their policy of insurance. These minimal efforts, while an attempt to correct the conduct that resulted in the breach of contract and claim denial are nonetheless insufficient. Western National has been prevented from exercising a legitimate contractual right to ensure that Respondents' claim was in fact legitimate and to ask questions as soon as they became aware that Cindy Thompson worked for the treating chiropractor and that both of the Respondents had been treating with the same chiropractor prior to the accident and at no charge to the

Respondents. Further, the Respondents' chiropractor continued to refuse to provide records for this previous treatment. Their actions directly prejudiced Western National's investigation.

Respondents' express refusal to attend an examination under oath is a breach of a condition precedent that bars recovery. *McCullough v. Travlers Cos.*, 424 N.W.2d 542, 544 (Minn. 1988) (holding that an examination under oath requirement is a "*condition to recovery under the policy*") (emphasis added). Under the rule set forth in *McCullough*, if the insured expressly refuses to attend an examination under oath, summary judgment dismissing the claim is proper. *See Id* at 545. That is precisely what has occurred here. Respondents, through their attorney, explicitly refused to and did not appear for an examination under oath. This intentional refusal to attend the examination under oath is a material breach of the policy, which voids Respondents' policy of insurance as a matter of law. *McCullough* demands no less.

In *McCullough*, the insured brought an action to collect under a fire policy. The *McCullough* court determined, under the specific facts of that case, that the insured had not "refused" to attend the examination under oath and, thus his "failure" to attend an examination under oath did not bar recovery. Unlike this case, it was undisputed that the insured in *McCullough* was willing to attend an examination under oath, but because of scheduling conflicts, the examination under oath never took place. When the insurer scheduled the examination under oath for December 19, 1984, the insured's attorney asked for a continuance because he was unavailable. The insurer agreed to the continuance, but neither party attempted to reschedule. The insured brought suit in

February 1985, and the insurer's answer alleged the suit was barred because the insured had not submitted to an examination under oath. The insured's attorney immediately advised the insurer that the insured was available for an examination under oath, but again the insurer did not attempt to schedule one. Based on these undisputed facts the court held:

[W]e are of the opinion that a failure to submit to an examination is not fatal to the insured's suit **where, as here, the insured has not expressly refused to submit to an examination and has expressed a willingness to be examined shortly after commencing suit.**

Id at 545. (emphasis added). But, where the insured does expressly refuse to submit to an examination under oath, the court acknowledged that summary judgment would be appropriate:

Travelers * * * cites several cases where the insurer was entitled to summary judgment based on the insured's failure to submit to an examination. * * * **In those cases, however, the insured clearly exhibited an unwillingness to submit to an examination whether by express refusal or through a pattern of non-cooperation.** Here, the undisputed portion of the record reflects no similar circumstances entitling Travelers to summary judgment.

Id. (emphasis added). Thus if an insured is "unwilling" to attend an examination under oath, recovery is barred and summary judgment for the insurer is required. Here, unlike the insured in *McCullough*, the Respondents did not express a willingness to attend an examination under oath. Respondents placed unreasonable restrictions on Western Nationals right to conduct examinations under oath by suggesting that they would only answer written questions. Western National's policy of insurance specifically provides that "[a] person claiming coverage under this policy **must... allow [Western National] to take an examination under oath and subscribe the same as often as [Western National]**

may reasonably require. (See A-3). Therefore, Western National's request for an examination under oath was not only reasonable but also required under the Respondents' policy of insurance. Respondents' refusal to attend and the severe restrictions placed on Western National's ability to conduct their examination under oath, presents a clear example of an insured's unwillingness to comply with the policy's terms and conditions. It is a pattern of non-cooperation that violates the policy of insurance. The purpose for Respondents' refusal to attend the examination under oaths was to hamper and/or prevent Western National's investigation. In fact, the Respondents have "exhibited" the very type of "unwillingness" that the Supreme Court has indicated will bar recovery under the policy as a matter of law.

B. BRUCE AND CINDY THOMPSON HAVE FAILED TO COOPERATE WITH WESTERN NATIONAL INSURANCE COMPANY IN VIOLATION OF THEIR POLICY OF INSURANCE.

The request for an examination under oath is a common contractual provision in direct-loss coverage. An examination under oath properly enables an insurer to obtain reliable information and evidence from the insured. *Clafin v. Commonwaelth Ins. Co.*, 110 U.S. 81, 94-95, 3 S.Ct. 507, 514-15 (1884). The examination under oath provision is one of the most powerful investigative tools available to the insurer. It allows the insurer to make an early determination as to the merits of legitimate claims, as well as to expose fraudulent or falsely inflated ones. *Dyno-Bite, Inc. v. Travelers Cos.*, 80 A.D.2d 471, 473-74, 439 N.Y.S.2d 558, 560 (1981). Therefore, it is clear as a matter of law that by failing to appear for the scheduled examinations under oath Respondents have failed to cooperate as required by their policies of insurance.

Additionally, in *Max Y. Weyker v. Allstate Insurance Company*, Hennepin County District Court, Court File No AC02-001942 Judge Steven G. Lange was confronted with a similar situation where the insured offered only to read from his typewritten version of the facts. Judge Lange concluded that the continued reading from the typewritten "Timeline of Facts" in response to questions from Allstate's legal counsel did not constitute fulfillment of the plaintiff's duties to cooperate with Allstate's investigation of the claim. In the present case the Respondents have not even gone as far as the insured in *Weyker v. Allstate*. In *Weyker*, the insured at least appeared whereas in the present case the Respondents failed to appear for the scheduled examination under oaths. See A-62. Other jurisdictions have similarly applied the examination under oath provision to prevent recovery under the policy when an insured fails to submit to an examination under oath constituting non-cooperation. See e.g. *Standard Mut. Ins. Co. v. Boyd*, 452 N.E.2d 1074 (Ind. App. 1. Dist. 1983) (Refusal of insured to submit to examination under oath was material and relieved insurer of its contractual duty to pay the loss); *Robinson v. National Auto. & Cas. Ins. Co.*, 282 P.2d 930 (Cal. App. 2. Dist. 1955) (Insured's refusal to answer material questions at examination under oath was failure to give insurer that degree of cooperation required by provisions of policy); *Pizzirusso v. Allstate Ins. Co.*, 532 N.Y.S.2d 309 (N.Y.A.D. 2 Dept. 1988) (Insured's willful refusal to answer material and relevant questions during examination by insurer constituted material breach of obligation of cooperation); *Bulzomi v. New York Cent. Mut. Fire Ins. Co.*, 459 N.Y.S.2d 861 (N.Y.A.D. 2 Dept. 1983) (Failure to comply with standard policy provision

requiring disclosure by way of submission to examination under oath constitutes material breach and is defense to action on policy).

An insured is in violation of the duty to cooperate when their actions are a substantial and material breach, which prejudices the insurer. *S.G. v. St. Paul Fire & Marine Insurance Company*, 460 N.W.2d 639, 643 (Minn. Ct. App. 1990). The examination under oath requirement is a material provision of the Respondents' policy of insurance and refusal to appear for a scheduled examination under oath is a substantial breach of that contractual provision. As discussed above, the examination under oath is the most important investigative tool at the discretion of the insurer. The examination under oath allows the insurer to make the earliest decision on the validity of the claim. Refusal to appear and the placing of unreasonable restrictions on the examination under oath process is the most blatant form of non-cooperation an insured can employ. An examination under oath, if not performed at the outset of the claims process, is of little benefit. With the passing of time comes the fading of memories and the less likelihood that the insurer is able to accurately and efficiently investigate the Respondents claims.

Western National has further been prejudiced as a result of Respondents' failure to cooperate because Western National was unable to prepare a defense to the arbitration because no examination under oath had been conducted. Western National was unable to compare Respondents' testimony as to their treatment with the CPT codes billed to Western National by Respondents' chiropractic providers. No doubt Respondents will argue that Western National's counsel would have been able to conduct their examination at the arbitration hearing. However, no one would ever suggest or require an attorney to

take a deposition on cross-examination during a jury trial. Additionally, this argument fails to recognize that the policy of insurance specifically allows Western National to take examinations under oath and requires the insured to attend. Once Western National became aware that the Respondents had been receiving care prior to the motor vehicle accident and at a free or reduced charge, they requested the examination under oath to determine the nature and extent of the previous care and if the billing for services occurred merely because of the motor vehicle accident or if they were still receiving free or reduced charges for chiropractic services. The Respondents would have been able to provide information regarding this exact information. Further, as in this case, Respondents had been receiving treatment from this same provider prior to the motor vehicle accident in question. This treatment is of interest as it demonstrates the likelihood of a pre-existing condition or a history of needing chiropractic care. This coupled with the fact that the provider in question refused to provide prior records further supports the need for the examination under oath.

Respondents will undoubtedly argue that the delay between the initial reporting of the claim and the request for the examination under oath are the facts that make the request unreasonable. However, this logic is flawed in several respects. First, Western National did not learn of Cindy Thompson's employment with her treating chiropractor until after the initial filing of the claim, which then prompted the examination under oath request. Second, Western National would have been unable to enforce a contractual provision such as the examination under oath had there been a breach in the contract of insurance by Western National's failure to pay. Additionally, the policy of insurance

places no such restrictions on how quickly a request for an examination under oath must be made with respect the filing of a new claim for benefits. It is clear that Western National has been substantially prejudiced as a result of the Respondents' non-cooperation and the Respondents conduct voids coverage for this loss.

CONCLUSION

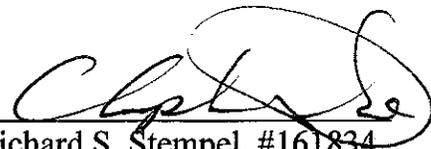
Based upon the arguments above it is Western National's position that the Respondents have failed to comply with their contractual obligation to submit to an examination under oath, which voids coverage for this loss. Further, the Respondents' actions constitute a failure to cooperate, which further voids the policy of insurance. Minnesota law requires that an insured submit to an examination under oath as a prerequisite to recover and therefore Western National respectfully requests that the decision of the district court be reversed.

Dated:

9-14-09

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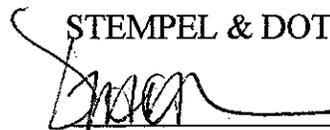
CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minnesota Rules of Appellate Procedure 132.01, Subd. 1 and Subd. 3, for a brief produced with a proportional font. The length of this brief is 352 lines and 3,417 words. This brief was prepared using Microsoft Word 2000.

Dated:

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