ORIGINAL

SUPREME COURT OF FLORIDA

Case No. 89,128

[USDC No. 91-541-CV-UUB]

BERKSHIRE LIFE INSURANCE COMPANY,

Appellant,

v.

BRUCE ADELBERG,

Appellee.

Certified Question From
The United States Court of Appeals
For The Eleventh Circuit

REPLY BRIEF OF APPELLANT

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ARGUMENT

In its opening brief, Appellant Berkshire Life Insurance Company ("Berkshire") demonstrated that the best reasoned, most directly applicable case law concerning the definition of "occupation" for an insured in the sales field requires that the occupation of appellee Bruce Adelberg ("Adelberg") be deemed that of salesman, not that of "yacht salesman." See, e.g., Dawes v. First Unum Life Insurance Co., 851 F. Supp. 118 (S.D.N.Y. 1994); Bill Bard Associates, Inc. v. Totten, 418 So.2d 418 (Fla. 1st DCA 1982).

In response, Adelberg has adopted a two-pronged rebuttal strategy: (1) Adelberg urges this Court to find Berkshire's insurance policy ambiguous -- a finding not made by the district court -- so that Adelberg may exploit the general rule that ambiguous policies are to be construed in favor of the insured: and (2) Adelberg attempts to distinguish or contradict, on a variety of grounds, the case law relied upon by Berkshire. Neither of these tactics is effective, and this Court should therefore reverse the judgment below and hold that Adelberg is a salesman.

I. BERKSHIRE'S INSURANCE POLICY IS NOT AMBIGUOUS

Adelberg argues that the absence of a definition of "occupation" in Berkshire's policy renders the policy ambiguous. Adelberg then insists, relying principally on Dahl-Eimers v. Mutual of Omaha Life Insurance Co. 986 F.2d 1379 (11th Cir.), cert. denied, 114 s. ct. 440 (1993), that the purported ambiguity

requires the policy to be interpreted in favor of Adelberg.' See Answer Brief at 9-11.

Adelberg's analysis misses the mark. The problem in this case is not that the term "occupation" is undefined in the policy, nor that the policy is somehow ambiguous. Indeed, the parties (and the district court) appear to have understood quite well the meaning of "occupation." As one court observed:

> [T]he word "occupation" as used in the subject policy can hardly be said to be ambiguous. It is a relative term in common use with a well understood meaning, but broad in its scope and significance. It encompasses the incidental as well as the main requirements of the vocation, calling or business of a person. It is the field or fields of endeavor which a man or woman follows in order to procure a living or obtain wealth, and a person may engage in more than one occupation at any time. The term is commonly applicable to that field of work in which one is regularly, ordinarily and usually engaged.

Youngwirth v. State Farm Mutual Auto Insurance Co., 140 N.W.2d 881, 885 (Iowa 1966).

The parties here understand what an "occupation" is; the real problem is that the parties here do not agree on what Adelberg's occupation is.[2] It would be virtually impossible to eliminate this

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'Adelberg also claimed that "Berkshire contends '[y]our occupation' in the policy is susceptible to two interpretations: Adelberg's which requires coverage and Berkshire's which denies it." Eleventh Circuit Brief of Appellee at 10. Adelberg is wrong. Throughout this case, and in its Initial Brief, Berkshire has maintained that the only correct interpretation of the policy is that Adelberg's occupation is that of a salesman. Berkshire has never agreed that the policy is "susceptible" to other interpretations. The fact that Adelberg has offered a different interpretation does not mean that his interpretation is reasonable.

[2]More precisely, the parties do not agree on what Adelberg's occupation was at the time of his injury.

type of dispute through the use of general definitions. No discussion of the abstract meaning of "occupation" in the policy would eliminate Adelberg's ability, after the fact, to construct an argument concluding that, as applied to him at the particular time of his injury, "occupation" means "yacht salesman," and then to bootstrap his disagreement with Berkshire into a claim that the policy is ambiguous.

The only way to prevent such a dispute over identifying the insured's occupation from arising would be for the parties to settle the issue in advance by stipulating, in the policy, as to the precise job then held by the insured. Of course, such a stipulation would not be feasible because it would remain useful only so long as the insured retained the exact same job he had at the time the policy was issued. A simple job change, or even the addition of employment duties, either would invalidate the policy or would render it subject to the very disputes about "occupation" that the stipulation was intended to eliminate. Moreover, the use of such stipulations would add considerably to the time and expense of issuing disability policies, and would prevent the issuance of policies in cases where the insurance company and the insured could not agree on the stipulation.

Acknowledging the inherent weakness of his position Adelberg engages in speculation and conjecture, repeatedly arguing that Berkshire "could have" narrowly restricted the term occupation in the Policy, calling it a "major oversight" to have left the term undefined. See Answer Brief at 11. Adelberg's argument, however, ignores the obvious, as one need only look at the cases cited in

Appellee's Answer Brief to confirm that the term "occupation" is typically left undefined in disability insurance policies.[3] Adelberg's argument, moreover, while speculating as to what "could have been done", fails to recognize standard industry practice which simply does not account for the type of hyperspecialization he suggests in underwriting these types of policies.

Adelberg's declarations of "bait and switch" are likewise intellectually dishonest, intended only to invoke outrage so as to obscure legal merit. Indeed, Adelberg "could have" purchased an occupational disability policy which included a recognized specialty definition. See Guardian Life Insurance Company of America v. Cooper, 829 F. Supp. 1247 (D. Kan. 1993) (where an occupational disability policy provided: " . . . we will deem your specialty to be your occupation"). Of course, such a product would be at a higher premium and subject to heightened underwriting scrutiny. In short, Adelberg purchased a policy which protected him in the event of disability from his "occupation", and not his particular job.

Interestingly, Adelberg's "new" and impassioned argument was not presented to the Eleventh Circuit, despite its basis in case

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[3] See, e.g., Groff v. Paul Revere Life Insurance Company, 887 F. Supp. 1519 (S.D. Fla. 1994) ("regular occupation"); McClure v. Life Insurance Company of North America, 84 F.3d 1129 (9th Cir. 1996) ("occupation"); Rahman v. Paul Revere Life Insurance Company, 684 F. Supp. 192 (N.D. Ill. 1988) ("regular occupation"); Dawes v. First Unum Life Insurance Company, 851 F. Supp. 118 (S.D.N.Y. 1994) ("regular occupation"); Danzig v. Reliance Standard Life Insurance Company, 668 F. Supp. 1551 (S.D. Fla. 1987) ("occupation"). Apparently, Adelberg is suggesting that this Court ignore standard industry practice, or that it find all other decisions erroneous.

law available at the time this appeal was before that Court. A review of the cases Adelberg cites as support for his new position reveals that the argument is not worthy of presentation to this Court either, as none of the cases involve the interpretation of the term "occupation." Contrary to Adelberg's contention, Ohio National Life Insurance Assurance Corp. v. Crampton, 822 F. Supp. 1230 (E.D. Va. 1993), is in no way analogous. Answer Brief at 14. Crampton involved whether an exclusion from coverage for criminal activity based on public policy could be read into a disability policy, a far different issue than defining the term "occupation" as it relates to someone in a sales position. Under the Policy in Crampton, unlike in this case, the determination of disability was also dependent on an insured's inability to perform "your own job", and not "occupation". Id. at 1231.

Similarly, the policy in Oglesby v. Penn Mutual Life Insurance Company, 877 F. Supp. 872 (D. Del. 1994), specifically defined "regular occupation" as "your usual work when total disability starts."[4] Id. at 879. Finally, the decision in Groff v. Paul Revere Life Insurance Company, 887 F. Supp. 1519 (S.D. Fla. 1994) is not "directly contrary to the position taken by Berkshire", as Adelberg suggests. Answer Brief at 15. Indeed, the Court in Groff

[4]Adelberg's representation at page 16 of his Answer Brief concerning the holding of the Oglesby Court is disingenuous at best, given the specific definition in the policy of the term "regular occupation." In addition, when the insured requested clarification as to his "regular occupation", the insurer in Oglesby confirmed in writing that his occupation was as an interventional and vascular radiologist -- a recognized medical subspecialty. Adelberg sought no such clarification concerning his sales position.

held, on defendant's new trial motion, that a jury finding of total disability was not against the clear weight of the evidence where the trial evidence established that a physician was unable to perform major head and neck cancer surgeries unassisted, and that such surgeries formerly constituted a major portion of his practice. In other words, the Court would not set aside the juries conclusion that a physician who could not perform certain surgical aspects of his well recognized medical subspecialty was disabled from his "regular occupation". Significantly, the Groff Court did not find the term "regular occupation" to be ambiguous, as Adelberg now argues.[5]

Adelberg concedes that the mere lack of a definition of a particular term does not automatically create an ambiguity in the policy. As the Eleventh Circuit stated in Dahl-Eimers, "ambiguity is not invariably present when a contract requires interpretation ... and failing to define a term does not create ambiguity per se." 986 F.2d at 1382 (citations omitted). The law of Florida is in accord: "Only when a genuine inconsistency, uncertainty, or ambiguity remains after resort to the ordinary rules of construction is the rule [regarding interpretation in favor of the insured] apposite." Excelsior Insurance Co. v. Pomona Park Bar & Package Store, 369 So.2d 938, 942 (Fla. 1979).

Dahl-Eimers involved a dispute over the term "considered experimental" as applied to cancer treatment. The Court found that

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[5]Additionally, the determination of the nature of the insured's occupation was submitted to the jury, unlike in this case, when it was decided on summary judgment immediately before jury selection.

term ambiguous because the policy failed to specify who should decide whether a treatment is "experimental," and failed to identify the medical standards to be used in making such a determination. See 986 F.2d at 1382-84. "[W]e conclude that the phrase 'considered experimental,' standing alone in a major medical insurance policy, is ambiguous as a matter of law . . .." Id. at 1380. Given the high degree of technical expertise necessary to define "experimental" in the medical context, the Court's finding of ambiguity was unsurprising. The gaps in the policy would not have prevented the term "considered experimental" from being applied uncontroversially to any treatment, not simply the particular cancer treatment at issue in the case.

The term "occupation," however, does not present the same type of difficulties, and therefore this case and Dahl-Eimers certainly do not present "an identical issue." Eleventh Circuit Brief of Appellee at 12. Interpreting "occupation" does not involve technical expertise or the selection of formal decision-making bodies and, as discussed above, the dispute here concerns Adelberg's occupation only, not any conceivable occupation. For these reasons, the decision in Dahl-Eimers does not compel a finding here that Berkshire's insurance policy is ambiguous.

Nor is Rahman v. Paul Revere Life Insurance Co., 684 F. Supp. 192 (N.D. Ill. 1988), "most directly on point," as Adelberg contends. Eleventh Circuit Brief of Appellee at 13. Rahman involved a dispute about whether the insured's occupation was that of "cardiologist" or "emergency cardiologist." The court rather unreflectively applied the presumption in favor of coverage in

cases of ambiguity, without first ascertaining whether a true ambiguity, created by differing reasonable interpretations, actually existed. See id. at 194-95. In any event, even a genuine ambiguity regarding "regular occupation" as applied to the field of cardiology has little relevance to the question of how to apply the term "occupation" to Adelberg's situation. Adelberg, as a salesman, does not work in a field characterized by a high degree of technical expertise; rather, his is a "common sense" area of endeavor, in which courts need not accept claims of hyperspecialization at face value. See also Initial Brief at 19-20.

II. ADELBERG SHOULD BE DEEMED A SALESMAN, RATHER THAN A "YACHT SALESMAN," AS A MATTER OF LAW

Much of Adelberg's argument concerning the nature of his occupation is an exercise in begging the question. He repeatedly argues that because Berkshire supposedly did not dispute the fact that he was selling yachts at the time he was injured, the question of the true nature of his occupation already has been decided -- indeed, conceded by Berkshire. See, e.g., Answer Brief at 20. This contention clearly fails. Berkshire has never agreed that Adelberg was working as a "yacht salesman" at the time of his injury. The only "fact" that Berkshire did not contest at trial, given the pre-emptive effect of the ruling by the district court, was the fact that at the time of his injury, Adelberg happened to be selling yachts. The question of Adelberg's actual occupation, however -- salesman or "yacht salesman" -- was contested by Berkshire to the maximum extent permissible under the district

court's ruling. The fact that an insured sells yachts for a while does not make his occupation that of "yacht salesman" for purposes of a disability insurance policy, any more than selling freight (as Adelberg did afterward) makes an insured a "freight salesman" under the policy.

Adelberg also relies heavily on a Florida licensing statute covering yacht sales. See Answer Brief at 19. The narrow regulatory purpose of the statute, however, cannot be transformed into an all-purpose recognition of an occupation of "yacht salesman" for the purpose of an disability insurance policy. Regulations often employ arcane definitions and categories that have little, if any, applicability to everyday life, or even to other areas of the law. Nothing in Berkshire's policy indicates any intent to incorporate supposed occupational categories created by local regulatory statutes. The case law cited by Berkshire, from Florida and other jurisdictions, is a far better guide to the correct interpretation of "occupation," because the cases arise in the insurance context. The district court, moreover, construed the policy without reference to the licensing issue. This Court therefore should give no weight to the terms of the licensing statute.

Adelberg tries to distinguish many of the cases cited by Berkshire in its opening brief on the subject of the proper application of the term "occupation" to a salesman. See Answer Brief at 24-29. His efforts consist largely of attempts to redefine what the cases "really" are about, so that he can then argue that they should **not be followed in the context** of **this case.**

Berkshire will not respond on a point-by-point basis to each of these dissections; the case law is discussed in Berkshire's opening brief, and this Court may examine the precedents as it chooses. Adelberg's general premise, however, should be rejected. A case in which the ultimate issue is one of the existence of disability, for example, may still provide useful, directly applicable authority on the question of the definition of "occupation." Similarly, the fact that Bill Bard Associates, Inc. v. Totten, 418 So.2d 418 (Fla. 1st DCA 1982), involves workers' compensation issues does not detract from its highly relevant and persuasive discussion of the nature of sales jobs, See Initial Brief at 13-14.

Finally, Adelberg complains that Berkshire "inappropriately" refers to the fact that Adelberg, since his injury, has continued to work as a salesman and has continued to earn money doing so. Answer Brief at 29. Adelberg's complaint is odd, given that the fact of his work at Carretta Trucking was not in dispute at trial, and testimony about it was presented to the jury in some detail. Ra-348, Ra-383 to R8-384. Adelberg acknowledged that he earned income from the position, R8-388 to R8-389, a fact that could not have surprised anyone. It is certainly appropriate for Berkshire to argue on appeal that it is inequitable, and contrary to Florida law, for Adelberg to collect disability benefits while at the same time earning income from working as a salesman, the same occupation from which Adelberg claims to be disabled.[6] See Initial Brief at 16. The district court held only that Berkshire could not

[6]The inequity arises directly from the unduly narrow definition of Adelberg's occupation employed by the district court.

introduce evidence of the amount of Adelberg's post-disability income: "I certainly don't have a problem with your putting before the jury that he's currently a salesman . . . But I just don't see the relevance of the amount of income, and, frankly, I don't think it has any relevance and I think it would be highly prejudicial." R6-7. Accordingly, Berkshire did not introduce evidence at trial as to the amount of Adelberg's income, and Berkshire has not relied on any such evidence on appeal. Adelberg's complaint is baseless.

It is significant that Adelberg is able to offer no cases on his behalf in which courts have discussed the meaning of "occupation," in the insurance or a related context, as applied to people in sales positions. In contrast, Berkshire has cited a number of cases that support its argument that it is improper to define sales occupations in extremely narrow terms. The degree of specialization that is sometimes appropriate in medical or other technical fields -- and which, accordingly, the law may recognize in defining occupations -- does not exist in the sales area in which Adelberg has been employed.[7]

Accepting the unduly narrow definition of Adelberg's occupation as "yacht salesman" will enable Adelberg to collect disability benefits of $44,000.00 per year while at the same time

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[7] In a resort to ridicule rather than reason, Adelberg insists that Berkshire's position means that Adelberg would not be disabled as a salesman if he could still sell pencils on the street. See Answer Brief at 21. This is nonsense. Berkshire has never advocated such a view. All the sales jobs held by Adelberg in his sales career have been responsible, professional positions for legitimate employers.

that he earns income as a salesman selling a product other than yachts. Taken to its logical absurdity, Adelberg could work at the same boat dealer selling boats other than yachts', and still collect disability benefits. "Yacht salesman" is simply not, in normal experience, a well-established and recognized occupation, sufficiently distinct to be considered separate from "salesman" in general. Simply put, the district court erred by defining Adelberg's occupation more narrowly than the law requires, and more narrowly than common experience can justify.

CONCLUSION

The district court should have defined Adelberg's occupation, as a matter of law, to be that of a salesman, not that of a "yacht salesman." Berkshire's insurance policy is not ambiguous: it simply leaves "occupation" to be defined according to applicable law. Nothing in the policy indicates an intent on the part of Berkshire to define an insured's occupation as narrowly as the use of "yacht salesman" as an occupation would require.

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[8]Adelberg was allegedly unable to sell yachts because of a knee injury which prevented him from climbing ladders and pivoting in tight quarters such as the engine room and cabin. His injury would thus not prevent him selling smaller pleasure crafts or ski boats which typically do not have ladders, large engine rooms or spacious cabins.

Thus, for the reasons stated above and in Berkshire's Initial Brief, this Court should find, as a matter of law, that the term "occupation", when undefined in an occupational disability policy, should be interpreted to include all similar positions of the same general character in the field in which the insured works, unless the insured is employed in a field with well-recognized and rigorously defined professional specialties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 1997, a true and correct copy of the foregoing Reply Brief of Appellant was served upon the following, by U.S. mail:

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