No. 15-1794

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CAROLE CHENEY
Plaintiff-Appellee
vs.

STANDARD INSURANCE COMPANY and
LONG TERM DISABILITY INSURANCE
Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
No. 1:13-cv-04269
The Honorable Susan E. Cox, Magistrate Judge

REPLY BRIEF OF DEFENDANTS - APPELLANTS STANDARD INSURANCE COMPANY and LONG TERM DISABILITY INSURANCE

Warren von Schleicher
Jacqueline J. Herring
SMITH | VON SCHLEICHER + ASSOCIATES
180 North LaSalle St. Suite 3130
Chicago, Illinois 60601
P 312.541.0300
Attorneys for Defendants/Appellants,
Standard Insurance Company, and
Long Term Disability Insurance

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INTRODUCTION

Carole Cheney ("Cheney") alleges in her Complaint that she permanently ceased working at Kirkland & Ellis on December 19, 2011, and has been continuously Disabled and unable to work since December 20, 2011. Kirkland's personnel records and employer statements confirm that December 19, 2011 was her last day of work. Cheney's allegations are binding judicial admissions that she cannot controvert. Applying the Group Policy's terms, she must prove she became Disabled by December 20, 2011, when her coverage ended. She nevertheless contradicted her judicial admissions and argued in the district court, and now on appeal, that her coverage continued an additional nine months—through September 19, 2012—based on provisions of the Group Policy that only apply to partners who are capable of Active Work and *not Disabled*. Then she argued she became Disabled on some nebulous date based largely on evidence of her medical condition in the summer and fall of 2012. Cheney straddled the inconsistent positions that she was Disabled and incapable of performing Active Work since December 20, 2011, yet also capable of performing Active Work and not Disabled in order to prolong her coverage through September 19, 2012 and triple her monthly disability benefit. And the district court fell for it.

The district court held that Cheney was on holiday vacation and capable of performing Active Work from December 20, 2011 through January 3, 2012, and thus she remained an insured Member "Actively At Work" during that time period. The district court held that

when Cheney's holiday vacation ended, her coverage continued through September 19, 2012 based on a nine-month leave of absence applicable only to partners who are not Disabled.[1] The district court reached the contradictory conclusion that Cheney was Disabled as defined by the Group Policy, but also *not* Disabled for purposes of prolonging her coverage. To achieve that paradoxical outcome, the district court manufactured facts under the guise of taking judicial notice, declared the contractually defined meaning of "Active Work" and "Actively At Work" ambiguous, and ignored provisions of the Group Policy that controvert the district court's conclusions in the August 28, 2014 and March 13, 2015 Opinions.

The district court attained its vacation finding by misapplying the principle of judicial notice. No evidence exists in the record that Cheney was on a holiday vacation from December 20, 2011 to January 3, 2012. The district court, at Cheney's urging, purported to take judicial notice that many people take time off during the holidays, and concluded that Cheney must have taken the holidays off too. (R 52 at 6) (A 6).[2] Vacations are not

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[1] The district court further erred by creating an overlapping period in which Cheney was both on leave of absence from work yet also on holiday vacation. The district court applied the nine month leave of absence beginning December 19, 2011 and ending September 19, 2012, even though the district court inconsistently held that Cheney was purportedly on vacation from December 20, 2011 through January 3, 2012.

[2] Citations to "R _" are to the docket number in the Record on Appeal. Citations to "R 32-35 at STND 00___" are to the last 5 digits of the corresponding page in the Bates numbered Administrative Record, a paper copy of which Cheney filed under seal with the District Court as Part A of Plaintiff's Appendix to Plaintiff's Motion for Judgment. Citations to "R 37 at KE0000___" are to the Bates numbered page of the documents produced by Kirkland in response to a subpoena, which are included as Part C of Plaintiff's Appendix to Plaintiff's Motion for Judgment.

indisputable facts whose accuracy cannot reasonably be questioned under Fed. R. Evid. 201(b). The district court's vacation finding runs afoul of Rule 201(b) and cannot stand on appeal.

The district court rendered meaningless the Group Policy's requirement that to remain a covered Member "Actively At Work" while on vacation, the partner must be capable of Active Work during those vacation days. Actively At Work and Active Work are unambiguous and the definitional opposites of Disability. The Group Policy defines Actively at Work and Active Work, for purposes of the Member definition, as being capable of performing the material duties of one's own occupation, whereas Disability means being unable to perform the material duties of one's own occupation. The district court held that Cheney was on vacation and capable of Active Work, while also Disabled and incapable of Active Work. But Cheney cannot be both Disabled and not Disabled simultaneously. The district court glossed over the inherent contradiction in its Opinions by stating there is no logical incompatibility between working and being disabled. As defined in the Group Policy, however, being Disabled and being capable of Active Work are mutually exclusive and cannot coexist.

Similarly, the district court's finding that Cheney's coverage continued to September 19, 2012, based on a nine-month leave of absence, is illogical and incompatible with the Group Policy's terms. The Group Policy specifies, "A period of Disability is not a leave of absence." The district court ignored that contractual language and held that Cheney was Disabled, yet

also on a nine-month leave of absence and thereby not Disabled, during the same time period. Cheney cannot be Disabled for purposes of obtaining benefits, and simultaneously not Disabled for purposes of prolonging her coverage. But that's precisely the illogical conclusion reached by the district court and advocated by Cheney.

The district court's incompatible findings of Disabled yet not Disabled infected the calculation of disability benefits. Under the Group Policy, monthly benefits must be calculated based on the partner's Predisability Earnings in the tax year prior to the partner's "last full day of Active Work." It is undisputed that Cheney's last full day of Active Work was December 19, 2011, which was the last day she "perform[ed] with reasonable continuity the Material Duties of [her] Own Occupation" as provided by Group Policy's definition of Active Work. The district court erroneously found that Cheney ceased Active Work when her holiday vacation ended on January 3, 2012, and that Predisability Earnings should be calculated based on the prior tax year, 2011.

By using Cheney's Predisability Earnings from 2011 rather than 2010, the district court tripled the monthly disability benefit amount. But extending coverage to January 3, 2012 through the fiction of a holiday vacation does not alter the undisputed fact that December 19, 2011 was the last day Cheney performed the material duties of her occupation and, therefore, her last full day of Active Work. If Cheney is entitled to any benefits, her Predisability Earnings should be calculated based on her 2010 Predisability Earnings, which were the

earnings in effect in the tax year prior to her last full day of Active Work on December 19, 2011.

Errors of law and clearly erroneous factual findings pervade the district court's Opinions. The district court misinterpreted the definition of Disability to require only the inability to perform one material occupational duty, contrary to Seventh Circuit authority. The district court gave no meaning to the contractual definition of Own Occupation, which provides that a licensed professional's occupation is as broad as the scope of the professional license. Rather, the district court held that Cheney's Own Occupation was her legal specialty as a litigation partner at a big law firm. Properly applying the Own Occupation definition, Cheney's occupation is as broad as the scope of her law license.[3]

Cheney, in her Response Brief, argues that this appeal should be barred because Defendants Standard Insurance Company and the Plan did not seek reconsideration or more specific findings under Rule 59(e) or Rule 52(b). (Pl. Resp. pgs. 44-45). She championed the contradictory and illogical findings that the district court adopted to create the current predicament, and now blames Standard and the Plan for not seeking to rectify those errors through post-trial motions. The parties briefed the issues twice before the district court, only to have the district court compound its errors. Standard and the Plan were not required to seek reconsideration and engage in a third round of briefing to earn their right to appeal.

[3] Since 2003, Cheney worked almost exclusively from her suburban home office, writing legal memoranda and conducting legal research. (R 32-35 at STND 00237; R 41 at 7 ¶ 16).

The district court's misinterpretation of the Group Policy's terms, misapprehension of Seventh Circuit law, and clearly erroneous factual findings resulted in Opinions that are legally erroneous, illogical, and internally inconsistent. The Opinions should be vacated and a new trial ordered.

ARGUMENT

I. Cheney Cannot be both Disabled and *Not* Disabled Simultaneously.

Cheney's Complaint alleges that she permanently ceased working on December 19, 2011, and has been continuously Disabled and unable to work since December 20, 2011. (R 1 at ¶¶ 6, 7, 11, 14). The Group Policy specifies that coverage ends on the earliest of several enumerated dates, including "The date you cease to be a Member." (R 32-35 at STND 00789; R 41 at 3-4 ¶ 7). A partner ceases to be a Member when she ceases being Actively At Work, meaning when she ceases "performing with reasonable continuity the Material Duties of your Own Occupation at your Employer's usual place of business." (R 32-35 at STND 00784, 00788; R 41 at 2-3 ¶¶ 5, 6). The Group Policy further provides that a partner remains a Member during regularly scheduled days off, including holidays or vacation days, provided the partner is "*capable of Active Work* on those days." (R 32-35 at STND 00784; R 49 at 2-3 ¶ 5) (emphasis added).

By definition, a partner ceases to be Actively At Work (and thus is incapable of Active Work) when she becomes Disabled and "unable to perform with reasonable continuity the

Material Duties of your Own Occupation." Actively At Work and Disability, therefore, are definitional opposites. Under the Group Policy's terms and the allegations of the Complaint, Cheney has the burden of proving she became Disabled as of December 20, 2011, which is when she allegedly became unable to perform Active Work.

In her Rule 52 trial briefs, however, Cheney changed positions and argued that her coverage extended through September 2012 based on Group Policy provisions that are the antithesis of Disability. By prolonging the duration of her insurance coverage, Cheney sought to prove Disability based on her medical condition long after her coverage terminated, rather than based on the sparse medical evidence of her medical condition as of December 20, 2011.

The district court, in adopting Cheney's arguments, paradoxically held that Cheney was simultaneously Disabled (for purposes of obtaining benefit payments) and not Disabled (for purposes of continuing coverage).

A. The district court's holding that Cheney was "on vacation" and capable of Active Work, yet also "Disabled," is inconsistent and contradictory.

Despite Cheney's judicial admission in the Complaint that she ceased working and became Disabled on December 20, 2011, the district court (at Cheney's insistence) held she was merely on holiday vacation from December 20, 2011 to January 3, 2012, and she remained a covered Member capable of Active Work while on vacation. The district court emphasized that for purposes of satisfying the Member definition, the term "Actively At Work" specifically includes vacation days. (R 52 at 4, 6; R 59 at 6) (A 4, 6; A 32). But the

district court rendered meaningless the contractual requirement that to qualify as a Member while on vacation, the partner must be "capable of Active Work" during those vacation days. The Group Policy states, "For purposes of the Member definition, Actively At Work will include regularly scheduled days off, holidays, or vacation days, *so long as the person is capable of Active Work on those days.*" (R 32-35 at STND 00784; R 41 at 2-3 ¶ 5) (emphasis added). The district court declared the terms Actively At Work and Active Work ambiguous and gave the italicized phrase no meaning whatsoever.

Active Work and Actively At Work, however, are the opposite of Disability, which the parties agree is *un*ambiguous. As a matter of law, Cheney cannot be on vacation from December 20, 2011 to January 3, 2012 (and thus *capable* of performing the material duties of her occupation for purposes of satisfying the "Actively At Work" requirement of the Member definition) and also Disabled during that same time period (and thus *incapable* of performing the material duties of her occupation).

Cheney argues in her Response Brief that she remained Actively At Work through January 3, 2012 simply because she remained on Kirkland's payroll. (Pl. Resp. pgs. 36-37). Actively At Work and Active Work utilize a functional definition, not a payroll status definition. To remain a Member while on a holiday vacation, Cheney must be capable of performing the material duties of her occupation while on vacation, a proposition that Cheney expressly denied in her Complaint, during the pre-suit administrative proceedings,

and in her Rule 52 trial briefs. Actively At Work and Disability are antipodal classifications in the Group Policy. Cheney cannot be both Actively At Work while on vacation and Disabled at the same time.

Cheney tries to straddle the polar opposites of Disability and Actively At Work based on *Hawkins v. First Union Corp. Long Term Disability Plan*, 326 F.3d 914, 917 (7th Cir. 2003). She argues that working full-time and being disabled are not logically incompatible, because a claimant might have struggled at work for years before succumbing to disability. (Pl. Resp. pgs. 37, 42). But Cheney distorts the holding of *Hawkins*. The Seventh Circuit in *Hawkins*, applying the arbitrary and capricious standard, held it was unreasonable for the ERISA administrator to find that the plaintiff was able to work in the future simply because he was able to work with his medical condition in the past. *Id.* at 918. The plaintiff's past work activity was not decisive proof he was capable of working in the future. *Id.* Standard and the Plan do not contend that Cheney's ability to work in the years preceding December 20, 2011 despite her medical condition means that she is functionally able to work after December 20, 2011. Rather, Cheney cannot *simultaneously* be Disabled and unable to perform the material duties of her occupation, yet also Actively At Work and capable of performing the material duties of her occupation while on vacation, as those terms are defined in the Group Policy.

Moreover, Cheney's "vacation" theory contradicts her judicial admissions in the Complaint. "It is a well-settled rule that a party is bound by what it states in its pleadings."

Help At Home, Inc. v. Medical Capital, LLC, 260 F.3d 748, 753 (7th Cir. 2001) (internal quotations omitted). Cheney judicially admitted in the Complaint that she "was disabled as of December 20, 2011," "was continuously disabled from December 20, 2011 onward," and claimed to be entitled to benefits based on a December 20, 2011 date of disability. (R 1 pg. 5 ¶ 11, pg. 6 ¶ 14, pg. 7 ¶ 16).[4] Cheney's judicial admissions are binding and preclude her from taking the contradictory position that from December 20, 2011 to January 3, 2012 she was on vacation and capable of Active Work. *Id.*

The district court's conclusion that Cheney was on vacation lacks any factual support in the record and is based on conjecture. Lacking any evidence, Cheney argues that the district court took "judicial notice of the normal manner in which partner attorneys request time off and take holidays…." (Pl. Resp. pg. 18). Judicial notice permits courts to admit facts that are undisputedly accurate by resort to sources whose accuracy cannot reasonably be questioned. See Fed. R. Evid. 201(b). Judicial notice does not empower courts to speculate and make up facts. "[I]n order for a fact to be judicially noticed, indisputability is a prerequisite." *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997) (citation and quotation marks omitted); accord *Rowe v. Gibson*, 798 F.3d 622, 629 (7th Cir. 2015). Whether Cheney took a holiday vacation from December 20, 2011 to January 3, 2012 cannot be discerned by consulting undisputedly accurate authoritative sources, as if determining the

[4] Based on a December 20, 2011 date of disability and a 180-day benefit waiting period, Cheney's Complaint seeks payment of benefits commencing June 20, 2012. (R 1 pg. 7 ¶ 16).

precise time of nautical twilight at a given location. Science has not established a "normal manner" or "normal time" for Cheney to take vacation.

In her Response Brief, Cheney proclaims "nothing in the record disputes" that she was on vacation and "Kirkland itself independently validated Cheney's claims," insinuating that Kirkland somehow "validated" her vacation theory. (Pl. Resp. pg. 38, citing R 32-35 at STND 00450). No evidence supports her vacation argument. Her record citation is to her attorney's letter with attachments referencing her request to Kirkland in December 2011 to take a leave of absence (approved starting January 3, 2012), not a vacation. The district court acknowledged that Cheney's vacation theory lacks evidentiary support, but improperly imposed the burden on Standard and the Plan to disprove that she was on vacation, stating "there is also nothing in the record to dispute it." (R 52 at 6) (A 6).

But there is evidence in the record to dispute Cheney's vacation theory. Personnel records from Kirkland confirm that Cheney ceased work on December 19, 2011 and did not take vacation time. (R 37 at KE0000033; R 32-35 at STND 00672-673; R 41 at 9 ¶ 25). Kirkland's Employer Statement specifically identifies December 19, 2011 as Cheney's last day of work. (R 32-35 at STND 00665-666; R 41 at 9 ¶ 24). Cheney, through her attorney, repeatedly advised Standard that she permanently ceased working on December 19, 2011 and became Disabled on December 20, 2011. (R 32-35 at STND 00497, 00504, 00508). She admitted in the Complaint she ceased working on December 19, 2011, and has been

continuously Disabled since December 20, 2011, which are binding judicial admissions. (R 1 at ¶¶ 6, 7, 11, 14). She judicially admitted she has been continuously unable to perform the material duties of her occupation since December 20, 2011. She cannot contravene her judicial admissions by arguing she was on vacation and capable of performing the material duties of her occupation from December 20, 2011 to January 3, 2012.

B. Through the fiction of a "vacation," the district court erroneously tripled the monthly benefit amount.

The Group Policy provides that disability benefits are determined based on Predisability Earnings in effect for the year prior to the partner's last day of Active Work:

> Your Predisability Earnings will be based on your earnings in effect on your last full day of Active Work. However, if you are a Partner, your Predisability Earnings will be based on your prior tax year. Any subsequent change in your earnings after that last day of Active Work will not affect your Predisability Earnings.

(R 32-35 at STND 00795; R 41 at 6-7 ¶ 15). The district court, misapplying this provision, held that Cheney's Predisability Earnings must be based on her earnings in effect for 2011, because she purportedly remained Actively At Work while on holiday vacation through January 3, 2012. (R 59 at 6-7) (A 32-33).

But the district court conflated two separate concepts: "Actively At Work" for purposes of satisfying the Member definition, and the "last full day of Active Work" for purposes of determining Predisability Earnings. A holiday vacation might operate to prolong coverage as a Member through the end of vacation (provided the partner is capable of Active Work), but

does not change the last full day the partner actually performed Active Work. Predisability Earnings are determined based on the tax year prior to the partner's last full day of Active Work, not the tax year prior to the partner's last day of being a covered Member.

It is undisputed that December 19, 2011 was the last day Cheney performed any work for Kirkland. Cheney admits in her Complaint that December 19, 2011 was her last full day of work. Extending coverage as a Member to January 3, 2012 through the fiction of a holiday vacation does not alter the undisputed fact that December 19, 2011 was the last day Cheney performed the material duties of her occupation and, therefore, her last full day of Active Work. The district court's vacation fiction does not justify the creation of an additional fiction that Cheney actually performed the material duties of her occupation until January 3, 2012.

If Cheney is entitled to benefits at all, her Predisability Earnings should be calculated based on her 2010 Predisability Earnings, which were the earnings in effect in the year prior to her last full day of Active Work on December 19, 2011.

C. The district court's contradictory finding that Cheney was Disabled, yet simultaneously on a Leave of Absence and *Not* Disabled.

The district court further extended Cheney's coverage to September 19, 2012, by purporting to apply a provision of the Group Policy that extends coverage during a "temporary leave of absence approved by your Employer in advance and in writing and scheduled to last 9 months or less." (R 52 at 7, 8) (A 7, 8). That provision continues coverage during a leave of absence on the condition that the partner is not Disabled. The Group Policy

specifies, "A period of Disability is not a leave of absence." (R 32-35 at STND 00789; R 41 at 3-4 ¶ 7). The district court disregarded that contractual condition, and held that Cheney was simultaneously Disabled and entitled to payment of benefits, and also not Disabled and entitled to continued coverage during a nine-month leave of absence.

The district court's paradoxical holding of "Disabled," and simultaneously "on a leave of absence" and not Disabled, is contradictory and inconsistent with the Group Policy's terms. Cheney cannot be on a temporary leave of absence from January 3, 2012 to September 19, 2012 where "[a] period of Disability is not a leave of absence," and also Disabled during that same time period. Nor can Cheney controvert her judicial admissions in the Complaint and assert she was not Disabled for purposes of continuing her coverage through September 19, 2012.

Cheney argues in her Response Brief that a "literal" application of the Group Policy could lead to absurd results, as employees might cease to be a Member and lose their disability coverage merely for calling in sick. (Pl. Resp. pg. 35). She argues that to avoid such absurd results, courts have not stringently applied similar "active work" provisions, citing two life insurance coverage cases, *Weber v. GE Group Life Assur. Co.*, 541 F.3d 1002, 1012 (10th Cir. 2008) and *Tester v. Reliance Standard Life Ins. Co.*, 228 F.3d 372, 377 (4th Cir. 2000). (Pl. Resp. pgs. 37-38). *Weber* and *Tester* address whether the employees, prior to their death, satisfied the initial life coverage eligibility requirements. Neither case addresses Active Work or

Actively At Work provisions similar to the Group Policy issued to Kirkland. In *Weber*, the policy stated that an employee satisfied the coverage eligibility requirement if "on any day" she was "actively at work." Because the employee performed the duties of her occupation "on any day" (in fact on several days), she was eligible for life insurance coverage. In *Tester*, the court found the term "active" employee ambiguous because the policy's coverage eligibility provision did not define the term "active" and did not utilize the defined terms "actively at work" or "active work" (which were unambiguous). As stated in *Tester*, "The policy's eligibility provision, however, does not include the phrase 'actively at work' or 'active work,' and we will not read those terms into that provision." *Id.* at 376.

In the present case, the Group Policy does not create the coverage absurdities Cheney endeavors to monger. Employees remain covered for up to 90 continuous paid sick days, and Employees who are Disabled remain covered during the 180-day Benefit Waiting Period (at which time disability benefits become payable).[5] (R 32-35 at STND 00789; R 41 at 3-4 ¶ 7). Inexplicably, the district court refused to find that Cheney was taking paid sick days after December 19, 2011. Instead, the district court created absurd results by extending coverage through September 19, 2012 based on provisions of the Group Policy that only apply if Cheney was not Disabled, and then concluding Cheney was Disabled during that time period.

[5] The Group Policy defines the 180-day Benefit Waiting Period to mean "the period you must be continuously Disabled before LTD Benefits become payable. (R 32-35 at STND 00808; R 41 at 4 ¶ 10).

The district court's finding that Cheney satisfied the Group Policy's definition of Disability irreconcilably conflicts with the district court's finding that Cheney's coverage continued based on a "temporary leave of absence" spanning from January 3, 2012 to September 19, 2012 that applies only if she was not Disabled. The Opinions of the district court, therefore, should be vacated and remanded to another district court judge for a new trial.

II. The District Court Misapplied the Legal Standard for "Disability" and Disregarded the Definition of "Own Occupation."

The Seventh Circuit in *McFarland v. Gen. Am. Ins. Co.,* 149 F.3d 583 (7th Cir. 1998) held that when a policy defines "disability" as being "unable to perform the material and substantial duties" of the insured's regular occupation, coverage is provided "as long as the number of 'substantial and material' duties that cannot be performed precludes continuation of employment in the position held before disability." *Id.* at 584, 587. *McFarland* establishes a flexible standard for total disability, to evaluate qualitatively and quantitatively whether the material duties an insured cannot perform at all (or cannot perform for the requisite duration) precludes employment in the insured's occupation.

The district court incorrectly interpreted *McFarland* to establish a "one strike you're out" standard of Disability, in which the inability to perform a single material duty mandates a finding of Disability. Cheney, in her Response Brief, insists that the district court faithfully applied *McFarland* and did not create a "single material duty" standard of Disability. (Pl.

Resp. pg. 32). Cheney's argument is thwarted by the district court's Opinion. The district court declared, "A fair reading of the policy language here supports the view that to be considered disabled, plaintiff must be unable to perform *only a single material duty* of her occupation." (R 52 at 17) (A 17) (emphasis added).

The district court, therefore, erred as a matter of law by applying a "single material duty" test for Disability in violation of *McFarland* and the Group Policy's terms. By applying the wrong legal standard, the district court erred as a matter of law. The Group Policy provides coverage for the insured's Own Occupation as a whole, not line item coverage for each material duty in isolation.

Moreover, the district court failed to apply the Own Occupation definition as written. The district court failed to consider that Cheney's Own Occupation "is as broad as the scope of [her] license." Instead, the district court declared that the seminal issue in the lawsuit is whether Cheney was able to work "as a litigation partner." (R 52 at 22) (A 22). "Whether plaintiff can find other, less demanding, work as a lawyer is not the question." (R 52 at 22) (A 22). Contrary to the Group Policy's explicit definition of Own Occupation, the district court created a specialty occupation for Cheney of "litigation partner at a large law firm."

The district court's incorrect interpretation of Own Occupation derailed the case and produced an erroneous outcome in Cheney's favor. Rather than determine Cheney's Own Occupation in accordance with the breadth of the scope of her law license as required by the

Group Policy, the district court created the specialty occupation of "litigation partner at a large law firm" who works long hours, under intense time pressure and emotional stress. (R 52 at 20-22) (A 20-22).

A new trial should be ordered with instructions for the district court to determine whether Cheney satisfied the definition of Disability as of December 20, 2011 and throughout the Group Policy's 180-day Benefit Waiting Period, construing her Own Occupation to be as broad as the scope of her legal license.

III. A Post-Trial Motion under Rule 52(b) or Rule 59(e) is Not a Mandatory Condition Precedent for Standard's and the Plan's Appeal.

Cheney argues in her Response Brief that this appeal should be barred because Standard and the Plan did not seek more specific findings or reconsideration under Rule 52(b) or Rule 59(e). (Pl. Resp. pgs. 44-45). She championed the contradictory and illogical findings that the district court adopted, and now blames Standard and the Plan for not seeking to rectify those errors through post-trial motions.

The Seventh Circuit has not held that post-trial motions under Rule 52(b) or Rule 59(e) are prerequisites for appeal. See *Forest Labs., Inc. v. Pillsbury Co.*, 452 F.2d 621, 628 n. 9 (7th Cir. 1971) ("[T]he question of the sufficiency of the evidence to support the master's findings of fact may, as a rule, be raised on appeal though no objection has been made below.…") (citing Fed. R. Civ. P. 52(b); 5 Moore, *Federal Practice* ¶ 53.11, at 2991 (2d ed. 1969)); *Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 940 (7th Cir. 2006), *cert. denied*, 549 U.S. 1180 (2007) ("[A] post-

judgment motion is not a prerequisite to an appeal."); *Chicago Coll. of Osteopathic Med. v. George A. Fuller Co.*, 719 F.2d 1335, 1349 n. 24 (7th Cir. 1983) ("A party need not move for a new trial challenging the alleged errors as a prerequisite to appeal.") (citing Wright & Miller, *Federal Practice and Procedure* §2818 (1973)).

Cheney argues that in *Forest Labs., Inc.* the Seventh Circuit held that the appellant waived its objection to a special master's error. (Pl. Resp. pg. 46). However, the Seventh Circuit specified that the special master's error was simply a mathematical "computational error," the appellant "did not challenge the sufficiency of the evidence" on appeal, and "[h]ad an objection been lodged in the district court, the defect could easily have been obviated." *Forest Labs., Inc.*, 452 F.2d at 628 n. 9. *Forest Labs., Inc.* provides no support for Cheney's contention that Rule 52(b) or Rule 59(e) motions are mandatory conditions precedent to challenge findings of fact or conclusions of law on appeal.

Moreover, Standard and the Plan filed particularized proposed findings of fact and conclusions of law in the district court, supported by citations to record evidence and two rounds of briefs. Standard and the Plan also filed specific objections to Cheney's proposed findings of fact and conclusions of law. (R 38; R 39; R 39-1; R 41; R 42; R 44). The district court consciously rejected Standard's and the Plan's proposed findings and adopted Cheney's head-spinning version, by which Cheney was simultaneously Disabled yet not Disabled, and capable of Active Work yet incapable of Active Work. Standard and the Plan were not

required to resubmit their proposed findings to the district court and reargue the case, to preserve their right to appeal.

Finally, Cheney incorrectly portrays Standard and the Plan as appealing only the district court's factual findings and application of allegedly ambiguous contract terms, which are reviewed under the clearly erroneous standard. She wrongly declares that "[Standard] concedes that the underlying terms are ambiguous." (Pl. Resp. pg. 43). Contrary to Cheney's revisionist conception of the issues on appeal, Standard and the Plan have always maintained that the Group Policy's terms are unambiguous. Standard's and the Plan's Opening Brief catalogues the district court's numerous dispositive legal errors in interpreting the Group Policy's unambiguous terms, which Cheney either ignores in her Response Brief or relegates to the back of her Brief. The district court completely misconstrued crucial provisions of the Group Policy, including "Active Work," "Actively At Work," "last full day of Active Work," "Member," "Predisability Earnings," "Disability," and "Own Occupation," which are issues of law properly reviewed on appeal *de novo*.

CONCLUSION

The district court's misinterpretation of crucial terms in the Group Policy, misapprehension of law including Seventh Circuit authority, and clearly erroneous factual findings resulted in written Opinions that are legally erroneous, illogical, and internally inconsistent. Standard and the Plan request that the Seventh Circuit vacate the district court's

August 28, 2014 and March 13, 2015 Opinions and Judgment in their entirety. A new trial should be ordered with instructions for the district court to determine whether Cheney satisfied the definition of Disability as of December 20, 2011 through the 180-day Benefit Waiting Period, construing her Own Occupation to be as broad as the scope of her legal license as required by the Group Policy's terms. Because the district court decided this case by bench trial under Rule 52(a), Circuit Rule 36 should apply. See *Lindquist Ford, Inc. v. Middleton Motors, Inc.*, 658 F.3d 760, 766 (7th Cir. 2011) ("The purpose of Rule 36 is to avoid, on retrial after reversal, any bias or mindset the judge may have developed during the first trial.") (quoting *Cange v. Stotler & Co.*, 913 F.2d 1204, 1208 (7th Cir. 1990)).

Respectfully Submitted,

/s/ Warren von Schleicher
Attorney for Defendants-Appellants
SMITH | VON SCHLEICHER + ASSOCIATES
180 North LaSalle St. Suite 3130
Chicago, Illinois 60601
P 312.541.0300 | F 312.541.0933

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Defendants-Appellants certifies that the foregoing brief:

(i) Complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 5,489 words including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6) and Cir. R. 32(b) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 12.5-point Minion Pro font with footnotes in 11.5-point Minion Pro font.

By: */s/ Warren von Schleicher*
Attorney for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the appeal are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: */s/ Warren von Schleicher*
Attorney for Defendants-Appellants