No. 07-1006
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LAWRENCE B. LEVY, M.D.,	)	
	)	
Plaintiff,	)	**Appeal from the United States**
	)	**District Court for the Northern**
vs.	)	**District of Illinois, Eastern Division**
	)	
MINNESOTA LIFE INSURANCE	)	**Hon. Sidney I. Schenkier**
COMPANY (f/k/a MINNESOTA	)	**United States Magistrate Judge**
MUTUAL LIFE INSURANCE CO.,	)	**No. 03 C 5141**
	)	
Defendant.	)	

BRIEF OF THE DEFENDANT MINNESOTA LIFE INSURANCE COMPANY

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DEFENDANT'S CIRCUIT RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The following information is submitted pursuant to Cir. R. 26.1 and Fed. R. App. P. 26.1:

1. Represented Parties: Minnesota Life Insurance Company.

2. Law firms whose partners or associates have appeared for the defendant: Smith, von Schleicher & Associates.

3. Other persons known to have an interest in the outcome:

   (i) Securian Financial Group, Inc.; Securian Holding Co.; Minnesota Mutual Companies, Inc.; Standard Insurance Company; Stancorp Financial Group, Inc. (parent corporation of Standard Insurance Company);

   (ii) None.

Signature of Counsel of Record:

_____

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement of the plaintiff, Lawrence Levy ("Levy"), is incomplete and incorrect. Levy initiated this suit on July 24, 2003 by filing a Complaint for Declaratory Judgment ("Complaint") in the United States District Court for the Northern District of Illinois. In the Complaint, Levy seeks a declaration that his disability was due to "injury," and that he therefore is entitled to receive lifetime disability benefits under two disability insurance policies issued by the defendant, Minnesota Life Insurance Company ("Minnesota Life"). In addition to declaratory relief, Levy seeks to recover disability benefits under the policies accrued since June 11, 2003, attorneys' fees and other relief under Illinois law. Section §155 of the Illinois Insurance Code, 215 ILCS 5/155, authorizes an award of attorneys' fees, plus a statutory penalty not to exceed $60,000.00, when an insurer's refusal to pay policy benefits was vexatious and unreasonable. Levy alleges, in the Complaint, that the amount in controversy exceeds $75,000.00.

Federal jurisdiction is based on 28 U.S.C. §1332. Levy resides in and is a citizen of the State of Illinois. Minnesota Life is a corporation duly organized and existing under the laws of the State of Minnesota, with its principal place of business in St. Paul, Minnesota. Minnesota Life, therefore, is a citizen of the State of Minnesota. At the time Minnesota Life filed its appearance on October 14, 2003, the amount in controversy was in excess of $88,466.06. Venue was proper in the United States District Court for the Northern District of Illinois, because Levy resides in the Northern District of Illinois, the purported breach occurred in the Northern District of Illinois, and Minnesota Life transacts business in the Northern District of Illinois.

On November 5, 2003, the parties filed a Consent to Exercise of Jurisdiction by a United States Magistrate Judge. On December 4, 2006, United States Magistrate Judge Sidney I.

Schenkier of the United States District Court for the Northern District of Illinois (hereafter, "district court") issued a Memorandum Opinion and Order granting summary judgment in favor of Minnesota Life pursuant to Fed. R. Civ. P. 56(c), and denying the motion for summary judgment filed by Levy. (Pl. SA 064-82).[1] The district court's grant of summary judgment constitutes a final judgment pursuant to Fed. R. Civ. P. 54(a). On December 29, 2006, Levy filed a timely notice of appeal. The United States Court of Appeals for the Seventh Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. §1291 and Fed. R. App. P. 3 and 4.

ISSUES PRESENTED FOR REVIEW

Whether Lawrence Levy, by reason of his osteoarthritis/degenerative joint disease, was unable to perform the material duties of his occupation as a physician due to "sickness," or alternatively, due to "injury," as those terms are defined by the Policies.

STATEMENT OF THE CASE

Levy is an insured under two disability insurance policies issued by Minnesota Life, one in 1980 (Policy No. 1439211H) and one in 1982 (Policy No. 1521179H) (collectively, "Policies"). Both Policies contain the same coverage terms (although the monthly indemnity differs).[2] The Policies provide a maximum benefit period to age sixty-five if the insured becomes unable to perform the duties of his regular occupation due to "sickness," which the Policies define to include "disease or illness." The Policies provide lifetime benefits if the insured becomes unable to perform the duties of his regular occupation due to "injury," which the Policies define to include "accidental bodily injury."

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[1] Citations to "Pl. App. Br. _" are to Levy's Appellate Brief. Citations to "Pl. SA _" are to Levy's Short Appendix and citations to "Def. Supp. SA _" are to the Supplemental Short Appendix of the Defendant.

[2] The combined monthly indemnity under the Policies is $7,000.00.

The parties do not dispute that since March 1, 1996, Levy has been "disabled" as defined by the Policies. The parties dispute, however, whether Levy's disability was due to "sickness" or "injury." Levy contends that his disability was due to "injury," and that he is entitled to receive lifetime disability benefits. Minnesota Life contends that Levy's disability was due to "sickness," and that disability benefits properly terminated when Levy attained age sixty-five.

On December 4, 2006, the district court issued a Memorandum Opinion and Order finding, as a matter of law, that Levy's disabling condition of osteoarthritis/degenerative joint disease falls within the Policies' sickness coverage. The district court held that the Policies' "due to" language necessitates a determination of the immediate cause of the disability, and not the proximate cause of the disability. It is undisputed that the immediate cause of Levy's disability was osteoarthritis/degenerative joint disease, which is a disease and, therefore, a "sickness" under the Policies. Accordingly, the district court held that Minnesota Life properly ceased paying benefits to Levy after he attained age sixty-five, pursuant to the Policies' "sickness" coverage.

STATEMENT OF FACTS

Levy worked as a physician at Dwight Correctional Center, as an independent contractor, until his contract was cancelled on February 29, 1996. (Pl. SA 0029, ¶ 7).[3] Levy was fifty-seven years old at the time his contract with Dwight Correctional Center was cancelled.

On April 16, 1996, after exploring alternate employment opportunities, Levy submitted a Disability Claimant's Statement to Minnesota Life in which he claimed to be disabled due to right knee pain. (Pl. SA 00239-30, ¶ 8). At the time he submitted his claim, Levy was not under the care of a physician for his knee symptoms. Upon learning that he must submit "proof of

[3] Levy admitted all statements of fact set forth in Defendant's Local Rule 56.1 Statement of Material Facts. (Def. Supp. SA 075; Pl. SA 0028-40).

loss" in the form of medical documentation, however, Levy sought medical attention from Chadwick Prodromos, M.D., an orthopedic surgeon, who examined Levy on April 20, 1996. Dr. Podromos diagnosed Levy with osteoarthritis/degenerative joint disease. (Pl. SA 0034-35, ¶¶ 32-33).

In 1996, Minnesota Life initially declined Levy's claim on the basis that the Policies had lapsed due to non-payment of premiums. The parties subsequently resolved their initial coverage dispute, and Minnesota Life agreed to pay disability benefits to Levy until he attained age sixty-five (June 11, 2003), which is the maximum benefit period under the Policies for a disability due to "sickness."[4] The parties did not resolve (and expressly reserved their right to adjudicate) whether Levy's disability falls within the Policies' "sickness" or "injury" coverage. (Pl. SA 0040, ¶¶ 59-60).

Applicable Provisions of the Policies

The Policies define "disability" and "disabled" as follows:

> Whenever we use the word "disability" or "disabled" in this policy we mean that, due to sickness or injury you are unable to perform the substantial and material duties of your regular occupation.

The Policies define "injury" and "sickness" as follows:

> **injury**
> An accidental bodily injury you sustained while this policy is in force.
>
> **sickness**
> A disease or illness which is diagnosed or treated while this policy is in force.

(Pl. SA 0028-29, ¶¶ 3-4).

[4] June 11, 2003 is the first anniversary of the Policies' issuance following Levy's 65th birthday.

Levy Endeavors to Attribute his 1996 Arthritic Disease to a 1987 Basketball Injury

Levy, in an April 16, 1996 letter to Minnesota Life enclosing his Disability Claimant's Statement, attributed the cause of his osteoarthritis/degenerative joint disease to a relatively minor incident that occurred nearly a decade earlier, in the summer of 1987, when he purportedly fell on his knee while playing basketball at a picnic. (Pl. SA 0030, ¶ 11). At the time of the 1987 basketball incident, Levy experienced pain and swelling in his right knee for only two to three weeks, which he self-treated with anti-inflammatories until his symptoms subsided. (Pl. SA 0030, ¶ 11). Levy did not seek medical attention for his alleged injury.

Several months after his knee symptoms had subsided, Levy again experienced knee pain, but "with no apparent precipitating event." (Pl. SA 0030, ¶ 11). Levy did not seek medical attention for his symptoms in 1987 or 1988. Levy, in fact, did not obtain medical treatment until February 3, 1989, when he was examined by Bruce Hallmann, M.D., an orthopedic surgeon.

Levy's Medical Care and Treatment with Dr. Hallmann in 1989

On February 3, 1989, Dr. Hallmann diagnosed Levy with a degenerative meniscus tear, which he successfully repaired on February 14, 1989 through arthroscopic surgery (performed on an out-patient basis). (Pl. SA 0031-32, ¶¶ 17, 19-20). Dr. Hallmann opined that Levy's degenerative meniscus tear may have been the result of progressive degenerative changes and may have been symptomatic of early osteoarthritis. As stated by Dr. Hallmann during his deposition:

> Q: You described that he [Levy] had a complex degenerative tear of the posterior horn of the medial meniscus. That is a condition that can be caused as a result of progressive degenerative changes, is that correct?
>
> A: [by Dr. Hallmann]: Yes. It is.

Q: And is it true, Doctor, that degenerative joint disease in the knee can be caused by a gradual and progressively naturally occurring process?

A: Yes, it can.

Q: And is it also true, Doctor, that a meniscus tear can be reflective of an early sign of osteoarthritis?

A: Yes. Individuals can develop degenerative meniscal cartilage tears in association with osteoarthritis.

(Pl. SA 0032, ¶ 20).

In fact, Dr. Hallmann, in his February 14, 1989 Report of Operation, specifically described Levy's meniscus tear as a "complex *degenerative* tear." (Pl. SA 0031-32, ¶ 19) (emphasis added). Dr. Hallmann testified:

> This was not a fresh meniscal cartilage tear. It wasn't a matter that the cartilage had a very clear and clean – it was not a clean or clear cartilage tear. The cleavage planes were not well defined. They had already become degenerated. They had become frayed, fibrillated, [of] irregular character and contour. So this was not a recent tear of the medial meniscus. [A]nd, in fact, degenerative changes had already taken place at the tear site.

(Pl. SA 0033, ¶ 23).

According to Dr. Hallmann's medical records, Levy never indicated that his knee symptoms were precipitated by a 1987 sports injury. To the contrary, Dr. Hallman's records reflect that Levy had a "long history of problems with his right knee" predating 1987. (Pl. SA 0032-33, ¶¶ 21-22). Dr. Hallmann testified:

> I would just tell you that ordinarily, if that had been a matter that I had thought that the patient had given me a specific history of a problem two years before this event [the 1989 surgery], I would have probably indicated that it had been a year or two prior to this surgery. When I say a long history of many years, I don't usually mean just a year or two. It's usually longer than that.

(Pl. SA 0033, ¶ 22).

In March 1989, after taking approximately three weeks off to recover from the arthroscopy, Levy returned to work and resumed his occupational duties as a physician. (Pl. SA 0033, ¶ 25). Levy did not seek further medical treatment from Dr. Hallmann after 1989. (Pl. SA 0033, ¶ 26). In fact, after 1989, Levy did not seek medical treatment from any physician for his knee condition until April 20, 1996, which is *after* he had submitted his Disability Claimant's Statement to Minnesota Life. (Pl. SA 0034, ¶ 27).

Levy's Certification of Non-Injury and Non-Recurrence of Knee Problems

During the 1992 to 1994 time period, Levy's coverage under the Policies had lapsed on multiple occasions due to non-payment of premiums. In order to obtain reinstatement of his coverage, Levy certified, on four separate occasions, that he has not sustained an "injury" under the Policies, has fully recovered from his 1989 knee condition, and has had no recurrence of knee problems since 1989.

Specifically, on July 20, 1992 and on May 5, 1993, Levy signed a Notice of Policy Lapse and Reinstatement Offer with respect to Policy No. 1439211H, in which he certified that he "has not suffered a disability, [or] been injured or sick" since the end of the Policy's premium payment grace period. (Pl. SA 0034, ¶ 28). On July 9 and 11, 1994, Levy signed a Notice of Policy Lapse and Reinstatement Offer with respect to Policy No. 1521179H, in which he again certified that he "has not suffered a disability, [or] been injured or sick" since the end of the Policy's premium payment grace period. (Pl. SA 0034, ¶ 29).

On October 4, 1994, Levy applied for life insurance coverage with Minnesota Life. Levy's signed life insurance application identifies the following prior surgery: "Rt. Knee Arthroscopic Surgery Full Recovery." (Pl. SA 0034, ¶ 30) (emphasis in original). In response to the application questions regarding medical treatment, Levy's life insurance application states:

> About 4½ years ago had arthroscopic surgery on right knee—done outpatient—*no problems since*. Doesn't recall name of doctor—was at McNeal Hospital in Berwyn, Illinois.

(Pl. SA 0034, ¶ 31) (emphasis added). Levy testified that he read the answers in his life insurance application prior to signing the application. (Pl. SA 0034, ¶ 31).

Levy's Medical Care and Treatment with Dr. Podromos Starting in 1996

When he submitted his Disability Claimant's Statement to Minnesota Life on April 16, 1996, Levy was not under the care of a physician. Upon learning that he must support his disability claim with "proof of loss," however, Levy sought medical treatment from Dr. Prodromos, who examined Levy on April 20, 1996. Dr. Podromos diagnosed Levy with osteoarthritis/degenerative joint disease: "Assessment: Right knee DJD versus medial meniscal injury." (Pl. SA 0034-35, ¶¶ 32-33).[5] Dr. Prodromos confirmed, during his deposition, that Levy's osteoarthritis/degenerative joint disease, in fact, is a *disease*, and in particular, a "…*disease* of the articular cartilage as well as the subchondral bone." (Pl. SA 0035-36, ¶¶ 35, 40).

Dr. Prodromos obtained an MRI of Levy's right knee, which was evaluated by radiologist Paul Backas, M.D., on April 22, 1996. Dr. Backas opined, in his Radiology Report, that Levy's "lateral meniscus is intact," the ligaments "are intact," and there is "no macromeniscal tear identified."[6] (Pl. SA 0035-36, ¶ 37). Dr. Backas concluded that the MRI study was "consistent with degenerative change." As stated by Dr. Backas:

> Thinning, altered signal intensity and medial subluxation of body medial meniscus consistent with *degenerative change* with *no macromeniscal tear* identified.

[5] Dr. Prodromos testified that he uses the terms "osteoarthritis" and "degenerative joint disease" synonymously and interchangeably. (Pl. SA 0035, ¶ 34).

[6] Dr. Prodromos noted that the reference to "no macromeniscal tear" on the MRI should state "no micromeniscal tear." (Pl. SA 0036, ¶ 38).

(Pl. SA 0035-36, ¶ 37) (emphasis added).

On April 27, 1996, Dr. Prodromos reviewed the MRI and concurred that Levy has degenerative joint disease. Dr. Prodromos opined that the MRI "would appear to be consistent with DJD and not internal derangement." (Pl. SA 0036, ¶ 39). Dr. Prodromos also reviewed Dr. Hallmann's February 14, 1989 surgical report which noted Levy's "complex degenerative tear." Dr. Prodromos opined that "[b]oth the diagnosis and the procedure at that time certainly were consistent with his current advanced *degenerative joint disease*." (Pl. SA 0036, ¶ 41) (emphasis added). On May 11, 1996, Dr. Prodromos signed the APS restricting Levy to performing sedentary work. As stated in Dr. Prodromos's medical chart:

> I explained to [Levy] that his best bet would be to find sedentary work. I think if he is working seated with only occasional standing or walking, I would expect him to do reasonably well. He concurred. I filled out a disability form for him that essentially states these findings.

(Pl. SA 0036, ¶ 44).

Dr. Prodromos testified, during his deposition, that Levy's 1996 arthritic symptoms were *indirectly* caused by Levy's 1989 degenerative meniscal tear. As stated by Dr. Prodromos, in response to questions from Levy's counsel:

> It is my opinion to a reasonable degree of orthopaedic surgical certainty that his [Levy's] severe right knee pain was – is directly attributable to the meniscal tear, *indirectly*. When I saw him he wasn't hurting because of a meniscal tear. It was occurring because the *meniscal tear had caused* the sequence of events of articular cartilage damage and arthrosis and pain in his knee.

(Pl. SA 0037, ¶ 45) (emphasis added). Importantly, Dr. Prodromos never opined that Levy's 1989 degenerative meniscal tear was caused by Levy's alleged 1987 basketball injury.

From 1996 to 2002, Dr. Prodromos examined Levy four times: on September 26, 1997, January 13, 1998, November 28, 1998 and March 25, 2002. (Pl. SA 0037, ¶ 48). During that

period, Dr. Prodromos completed six supplemental APS forms repeating his diagnosis of osteoarthritis/degenerative joint disease. (Pl. SA 0048, ¶ 48).

The Medical Opinions of Dr. Waldram

On December 6, 2005, David Waldram, M.D., an orthopedic surgeon consulted by Minnesota Life, concurred with the diagnosis of osteoarthritis/degenerative joint disease, based on his review of Levy's medical records and the deposition testimony of Drs. Hallmann and Prodromos. Dr. Waldram, in his expert report, concluded that Levy's arthritic disease has degenerative origins and was not caused by Levy's purported 1987 sports injury:

> It is my orthopedic opinion that the claimant has degenerative arthritis of his right knee, and that his arthritis is not in all medical probability related to the injury of 1987.

(Pl. SA 0039, ¶ 55). Dr. Waldram opined that the 1989 Report of Operation contains findings consistent with degenerative arthritis and a degenerative meniscal tear, and that these degenerative conditions predated the 1987 basketball incident. (Pl. SA 0039, ¶ 56).

Dr. Waldram further opined that osteoarthritis typically presents unilaterally and asymmetrically; the fact that Levy's arthritis appears in his right knee, therefore, does not support that the arthritis was caused by the 1987 basketball incident. (Pl. SA 0039, ¶ 57). Indeed, Dr. Waldram determined that Levy also displays symptoms of osteoarthritis in his spine, left knee and right hip.[7] (Pl. SA 0039-40, ¶¶ 53, 58). Levy, too, testified that he has symptoms of arthritis in his spine. (Pl. SA 0039, ¶ 53). Dr. Waldram concluded that Levy's right knee osteoarthritis/degenerative joint disease began prior to 1987 and was not caused by the 1987 basketball incident. (Pl. SA 0039, ¶¶ 55, 56).

[7] Dr. Waldram testified that Levy's right hip arthritis could not be related to overcompensation on account of the right knee arthritis, because overcompensation would occur on the opposite side, or left hip. (Pl. SA 0039-40, ¶ 58).

SUMMARY OF THE ARGUMENT

Whether Levy is eligible to receive disability benefits to age sixty-five (as Minnesota Life contends) or to receive lifetime disability benefits (as Levy contends) turns on whether Levy's inability to work in his occupation is *due to* "sickness" or "injury." The district court held that the Policies' "due to" language places the focus on the immediate cause of the insured's inability to work, and not on the possible proximate causes of the insured's inability to work. Because it is undisputed that Levy's disabling condition is a disease, namely, osteoarthritis/ degenerative joint disease, the district court correctly held that the immediate cause of Levy's disability is a disease. Hence, Levy's disability falls within the Policies' "sickness" coverage, which by definition includes disease.

Whereas the district court adopted (and Minnesota Life advocates) a straightforward interpretation of the Policies' "sickness" and "injury" coverage that comports with common sense, Levy advocates an interpretation that is needlessly prolix, strained and unnatural. Levy tries to shift the Policies' focus away from his disabling condition—which Levy's physicians all agree clearly is a disease—by fixating on a minor, non-disabling injury that allegedly set the early stage for his disease.

Levy argues that his 1996 arthritic disease was proximately caused by a proverbial old sports injury, allegedly sustained in 1987. He proclaims that his disease is not a disease at all (at least for insurance coverage purposes), simply because an injury *might* have been a factor in a protracted sequence of events culminating in the onset of his disease. According to Levy's interpretation, a disabling "sickness" might fall within the Policies' "injury" coverage, and conversely, an "injury" might fall within the Policies' "sickness" coverage, depending on murky

events that might have occurred long before (and in Levy's case, a decade before) the onset of disability.

The Policies, however, provide insurance in the event an insured is unable to work due to a disabling condition, not insurance for remote events that precede the onset of disability. Levy was not disabled by his old 1987 basketball injury. Indeed, Levy continued to work as a physician for almost a decade after that injury. Rather, Levy is disabled by a degenerative arthritic *disease*. Because Levy's disabling condition is a disease, his disability properly falls within the Policies' "sickness" coverage, and Minnesota Life properly declined to pay benefits beyond age sixty-five. Accordingly, the district court's entry of summary judgment in favor of Minnesota Life should be affirmed.

ARGUMENT

I. Standard Of Appellate Review.

A district court's grant of summary judgment pursuant to Fed. R. Civ. P. 56 is reviewed by the appellate court *de novo*. *Cerutti v. BASF Corp*., 349 F.3d 1055, 1060 (7th Cir. 2003).

Summary judgment is appropriate when "[t]he pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). If no genuine issue of material fact exists, the sole question is whether the moving party is entitled to judgment as a matter of law. *Logan v. Commercial Union Ins. Co*., 96 F.3d 971, 978 (7th Cir. 1996), *citing Miranda v. Wisconsin Power & Light Co.,* 92 F.3d 1011, 1014 (7th Cir.), *cert. denied*, 519 U.S. 1034 (1996).

In order to avoid summary judgment, Levy must present specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). When the undisputed factual record, taken as a whole, would not permit a rational trier of fact to find in favor of Levy, then Levy has failed to demonstrate that there are disputed issues of fact and summary judgment should be affirmed in favor of Minnesota Life. *See Scaife v. Cook County*, 446 F.3d 735, 739 (7th Cir. 2006).

Because this is a diversity case and there is no issue of conflict of law, the substantive law of Illinois applies. *See State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 669 (7th Cir. 2001); *Wood v. Mid-Valley Inc*., 942 F.2d 425, 426 (7th Cir. 1991).

II. Levy's Osteoarthritis/Degenerative Joint Disease, As A *Disease*, Comes Within The Policies' "Sickness" Coverage.

As the Seventh Circuit recognized in *Senkier v. Hartford Life & Accident Ins. Co*., 948 F.2d 1050 (7th Cir. 1991), courts can do no better than to leave the interpretation of an insurance policy to "common understanding as revealed in common speech." *Id*. at 1052, *quoting Connelly v. Hunt Furniture Co.*, 240 N.Y. 83, 85, 147 N.E. 366, 367 (1925). Lay persons have "a clear if inarticulate understanding" of their coverage, and that common understanding will not be improved by "head-spinning" efforts to obtain a legal definition. *Senkier*, 948 F.2d at 1053.[8]

Courts, therefore, should construe the meaning of an insurance policy according to the ordinary and popular meaning of the policy's terms. *Outboard Marine Corp. v. Liberty Mutual Ins.*, 154 Ill.2d 90, 108, 607 N.E.2d 1204, 1212 (1992), *Butera v. Attorneys' Title Guarantee*

[8] The *Senkier* court specifically rejected the "mysterious" effort by one Illinois court to define "disease" (in the context of a worker's compensation case) as "that which 'originates from a source that is neither traumatic nor physical.'" *Senkier*, 948 F.2d at 1053, *quoting Lutrell v. Industrial Commission*, 154 Ill.App.3d 943, 955, 507 N.E.2d 533, 542 (2nd Dist. 1987). The *Lutrell* court's attempt to formulate a judicial definition of "disease" is contrary to the everyday meaning of "disease." Many diseases, in fact, have traumatic or physical origins. *See, e.g., Zurich Ins. Co. v. Raymark*, 118 Ill.2d 23, 514 N.E.2d 150 (1987) (observing that mesothelioma disease may result from a sequence of events triggered by microscopic asbestos fibers puncturing the cellular lining of the lungs).

Fund, Inc., 321 Ill.App.3d 601, 747 N.E.2d 949 (1st Dist. 2001); *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill.2d 64, 74, 578 N.E.2d 926 (1991). Courts should avoid contractual interpretations that are unreasonable, strained, or that would lead to illogical or absurd results. *U.S. Fire Ins. Co. v. Hartford Ins. Co.*, 312 Ill.App.3d 153, 726 N.E.2d 126, 128 (1st Dist. 2000).

Minnesota Life, therefore, advocates (and the district court adopted) a common sense interpretation of the Policies' terms. The Policies provide that an insured is "disabled" when, "due to sickness or injury, [the insured is] unable to perform the substantial and material duties" of his regular occupation. The Policies' definition of "disability" places the focus on the condition that renders the insured unable to work, and not on the *cause of the cause* of the disabling condition.

The reasonable expectation of the parties is that coverage will be determined based on the disabling condition, and not based on sheer speculation about relatively minor, non-disabling events that occurred a decade before the onset of disability. When it is the *disease* that prevents the insured from working—such as Levy's osteoarthritis/degenerative joint disease—then benefits for that disability properly are capped at age sixty-five. An insured may not extend "sickness" benefits beyond age sixty-five simply by espousing theories about a traumatic etiology of his disease.

It is undisputed that Levy's disabling condition of right knee osteoarthritis/degenerative joint disease clearly is a disease. Indeed, Levy's treating physician, Dr. Prodromos, accurately described Levy's degenerative joint disease as a "*disease* of the articular cartilage as well as the

subchondral bone." (Pl. SA 0035-36, ¶¶ 35, 40).[9] Levy was not "unable to work" due to the 1987 sports injury or even due to the 1989 degenerative meniscus tear. Rather, Levy became unable to work as of March 1, 1996 due to degenerative joint disease. Consequently, Levy's disabling condition of osteoarthritis/degenerative joint disease falls within the Policies' sickness coverage.

Rather than focus on his disabling disease, which is the undisputed *immediate cause* of his inability to work, Levy engages in a head-spinning effort to re-characterize his disease as an "injury" based on conjecture about an elusive "proximate cause" of his disease. The fact that the medical condition resulting in his disability clearly qualifies as a disease simply is of no consequence to Levy.

Levy attempts to anchor his proximate cause theory in Illinois case law interpreting the scope of coverage in accidental death and dismemberment policies, and in particular, on *Faulkner v. Allstate Life Ins. Co*., 291 Ill.App.3d 706, 684 N.E.2d 155 (5th Dist. 1997). The policy in *Faulkner* provided coverage for accidental death or dismemberment "*caused* by an accident…*directly and independently of all other causes*." *Id*. at 156 (emphasis added).

The *Faulkner* court observed that the exclusionary causation language in accidental death and dismemberment policies, if interpreted literally, would preclude coverage in nearly every case, because contributory causes always will be present. Given the infinite interplay of causes, it would be virtually impossible to segregate any single cause as operative at any time and place to the exclusion of all other causes. *Faulkner* held, therefore, that the insured's loss falls within the policy's accidental death and dismemberment coverage if the accidental injury *proximately*

[9] *See also Dorland's Illustrated Medical Dictionary* 1199 (28th ed. 1994) (defining osteoarthritis as "a noninflammatory degenerative joint disease…characterized by degeneration of the articular cartilage, hypertrophy of bone at the margins, and changes in the synovial membrane").

caused the loss. *See also Carlson v. New York Life Ins. Co*., 76 Ill.App.2d 187, 222 N.E.2d 363 (2nd Dist. 1966). Otherwise, the policy's coverage would be illusory, because it would be impossible in many instances to attribute the insured's death to an injury directly and independently of all other causes:

> The infinite interplay of causes makes it impossible to segregate any single cause as operative at any time and place to the exclusion of all others, if cause is to be viewed as a concept of science or philosophy.

Carlson, 222 N.E.2d at 368, *quoting Silverstein v. Metropolitan Life Ins. Co*., 254 N.Y. 81, 171 N.E. 914 (1930).

Levy's Policies, however, do not mandate a proximate cause analysis. The Policies define "disability" as the inability to perform the duties of one's occupation "due to injury or sickness," and not as the inability to perform the duties of one's occupation due to a disability that is *caused* by an injury or sickness *directly and independently of all other causes*. The Policies' language, therefore, differs significantly from the language of the policy at issue in *Faulkner*. Levy's disabling condition is a disease and, *a fortiori*, a "sickness." Nothing in the Policies' terms require yet a second level of inquiry, in order to determine whether the disabling "sickness" or "injury" itself was proximately caused by a "sickness" or "injury."

Unlike *Faulkner*, there is absolutely no concern that the Policies' coverage might be illusory in the absence of a proximate cause analysis. To the contrary, Levy's proximate cause approach eviscerates the distinction between the Policies' "sickness" and "injury" coverage and defies common sense. Given the infinite interplay of causes, one can always find some type of injury in the etiology of a sickness, or alternatively, a sickness that predisposes one to the increased risk of injury.

By attempting to incorporate principles of proximate cause, Levy essentially is asking the court to rewrite the Policies in order to create two separate and distinct classifications of "disease": diseases caused by injury (which would allow for lifetime benefits), and, apparently, diseases caused by disease, illness or some inherent frailty exclusive and independent of all injury and trauma (which would cap benefits at age sixty-five pursuant to the "sickness" coverage). Nothing in the Policies' terms warrants the creation of two antithetical subcategories of "disease," each with a different maximum benefit period. To the contrary, the Policies define "sickness" to include "disease or illness," with no exception for diseases purportedly having some physical injury or trauma as part of the disease etiology. It defies common sense for Levy to insist that a disease, in order to qualify as a "sickness" under the Policies, must spontaneously generate out of thin air, independent of external environmental factors and physical trauma.

Levy's proposed causation approach would render the Policies' distinction between "sickness" and "injury" essentially meaningless. One can always find physical trauma, even at the cellular level, somewhere in the etiology of disease, because such is the nature of disease. Injury and bodily trauma, in short, can and frequently do exist as part of the early progression of disease. When an insured is disabled due to the traumatic injury, the insured would be covered under the Policies' "injury" coverage. When the trauma merely triggers a subsequent disease process, and it is the *disease* (and not the traumatic injury itself) that limits the insured from working, then the insured would be covered under the Policies' "sickness" coverage.

An insured might contract hepatitis (leading to liver disease) or the HIV virus (leading to AIDS) through a puncture with a tainted syringe. The injury, though minor and non-disabling, provides the mechanism for transmitting the virus. These same viruses, however, also might be transmitted through non-injurious contact, such as through consensual intercourse. In each

instance, the disabling medical condition clearly is a disease. It would defy common sense, and lead to uncertainty and confusion among insureds and insurers alike, to classify the same disease as a "sickness" in one instance and as an "injury" in another instance, based merely on differences in the method of transmission.

Conversely, a disabling "injury" is not somehow transformed into a "sickness" based on proximate cause. An automobile collusion might result in traumatic and debilitating injuries. It would defy common sense, however, to inquire into the *cause behind the cause* of those injuries, for purposes of determining whether the resultant disability is due to "injury" or "sickness." Suppose the accident never would have occurred but for the insured's loss of control due to a mild epileptic seizure, or due to somnolence caused by medication taken to treat a disease. The insured's debilitating injuries should not be reclassified from "injury" to "sickness" just because a disease triggered the sequence of events culminating in the insured's injuries. The presence of contributory causes does not alter the fact that the hypothetical insured's disabling condition itself is directly and immediately "due to injury" sustained in the automobile collision.

Since Levy contends that a disease proximately caused by an injury should qualify as an "injury" under the Policies, then consistency of interpretation compels the opposite conclusion as well: an injury proximately caused by disease must qualify as a "sickness." Yet, as the above hypothetical demonstrates, it defies common sense to reclassify a disabling traumatic injury as a "disease" merely because a disease proximately caused the injury.

Under Levy's proximate cause approach, courts would be compelled to decide coverage questions by chasing the elusive possible *cause behind the cause* of disability. Litigants, too, would speculate about remote causes of disability based on purported events that occurred decades before the onset of disability, such as Levy's speculation that his 1996

osteoarthritis/degenerative joint disease was caused by falling on his knee while playing basketball at a picnic in 1987. No one will ever know which came first, the chicken or the egg. Similarly, no one will ever know whether the injury caused the disease, or *vice versa*, nor does it matter. The issue of proximate causation is irrelevant in determining that Levy's disabling condition — osteoarthritis/degenerative joint disease—clearly is a "disease" and, *by definition*, a "sickness" under the Policies.

Levy's proximate cause analysis, moreover, has no logical stopping point. Levy apparently assumes that the chain of causation in the etiology of his disease commences at the picnic in the summer of 1987. Why must the chain of causation start on that date? The cycle of causation never ends. Perhaps a disease proximately caused Levy's 1987 basketball incident. An unremarkable event such as falling on one's knee—which might have been completely innocuous in any healthy individual—might produce, in a person with a diseased cartilage such as Levy, an injury such as a torn meniscus. It may be the case, therefore, that Levy's osteoarthritis/degenerative joint disease itself proximately caused Levy's torn meniscus, which, in turn, further aggravated Levy's disease.

Indeed, there is evidence that Levy manifested telltale symptoms of his arthritic disease prior to 1987. Dr. Hallman's medical records establish that Levy has had a "long history of problems with his right knee" that predated the 1987 basketball incident. (Pl. SA 0032-33, ¶¶ 21-22). Dr. Hallman also confirmed that "[i]ndividuals can develop degenerative meniscal cartilage tears in association with osteoarthritis[,]" and that a meniscal tear may be an early sign of osteoarthritis. (Pl. SA 0032, ¶ 20).

Based on Dr. Hallman's findings, Dr. Waldram concluded that Levy's right knee osteoarthritis/degenerative joint disease began prior to 1987. (Pl. SA 0039, ¶¶ 55, 56). The

proximate cause of Levy's meniscal tear, therefore, might have been osteoarthritis and not the alleged basketball injury. The fact that Levy also has osteoarthritis in his spine, left knee and right hip further supports a disease as the proximate cause of the 1989 meniscal tear. (Pl. SA 0039-40, ¶¶ 53, 58).

Levy's proximate cause analysis, thus, knows no reasonable bounds. Lurking behind one proximate cause, one always can find another proximate cause waiting in the wings. Levy's assumption that the proximate cause should begin at the picnic in the summer of 1987, and that his 1987 basketball injury should trump all other possible proximate causes, is entirely arbitrary and unsupported by the terms of the Policies and the medical evidence.

Levy's proximate cause analysis also would be unfair for many insureds whose expectation of coverage would be thwarted. The Policies provide that the "injury" must be "sustained while this policy is in force" (Pl. SA 0028-29, ¶¶ 3-4). Levy, of course, claims that he sustained his injury in 1987, which is after the Policies' effective dates of 1980 and 1982, respectively. Other insureds, however, might be left without any coverage for their disability if the injury that proximately caused their disease was sustained prior to the policy's effective date.

Consider, for example, a hypothetical insured who (like Levy) purchased his policy in 1980, and became disabled due to an arthritic disease in 1996. Assuming that an old sports injury proximately caused the arthritic disease, the insured's disability would be due to "injury," at least according to Levy's interpretation. The insured would have a reasonable expectation of coverage (and rightly so), because his disability arose after the policy's effective date. If, however, the injury that proximately caused his disease was sustained in 1979, which is before the policy's effective date, the hypothetical insured's disability would be excluded from coverage, because the injury was not "sustained while this policy is in force." The proximate

cause approach, which appears to be a good deal for Levy, turns out to be a bad deal for other insureds who, following Levy's proximate cause argument, would have no coverage for their disability.

Levy might respond to the hypothetical insured's coverage predicament by arguing that the insured's arthritis, if proximately caused by an injury sustained prior to the policy's effective date, should be covered under the policy by default as a "sickness." Such a response underscores the arbitrariness of Levy's proximate cause approach. If the Policies' terms are to be applied consistently, the same arthritic disability caused by the same sports injury should not be treated as an "injury" in Levy's case, and as a "sickness" in the hypothetical insured's case.

Levy simply refuses to interpret the terms of the Policies as written; he is self-servingly rewriting the terms to suit his coverage needs after-the-fact, without any consideration of the broader ramifications of his approach. Far from adding clarity to the Policies' coverage, Levy's proximate causation argument introduces confusion, inconsistency and uncertainty into the coverage equation. Levy's proximate cause analysis, therefore, renders the Policies' coverage ambiguous. *U.S. Fire Ins. Co.*, 726 N.E.2d at 128 (courts should avoid contractual interpretations that are unreasonable, strained, or that would lead to illogical or absurd results).

The language of an insurance policy should be interpreted according to the common meaning of its terms. *Id.* Ordinary people purchase these policies, so they should know the type of coverage they have purchased. One should not be compelled to tackle highly conceptual issues of pathology, disease etiology and theoretical physics in order to determine the scope of coverage. Nor do the terms of the Policies warrant the court to engage in such theoretical machinations in order to conclude that Levy's disabling osteoarthritis/degenerative joint disease, *as a disease*, falls within the Policies' "sickness" coverage.

III. Levy Fails To Create A Genuine Issue Of Fact Even Under A Proximate Cause Standard.

Even under a proximate cause analysis, Levy cannot establish a question of fact sufficient to defeat summary judgment. The "linchpin" of Levy's claim for lifetime benefits is that a relatively innocuous 1987 basketball injury proximately caused his 1996 disabling arthritic disease. Levy, however, fails to offer any evidence whatsoever linking the injury to his arthritic disease.

Levy tries to mask this evidentiary deficiency by misrepresenting Dr. Prodromos's testimony. Levy states, in his Appellate Brief, that "Dr. Prodromos testified that Dr. Levy is disabled due to the right knee injury." (Pl. App. Br., pg. 6, *citing* Pl. SA 049-58). But Levy is not being square with the court. The pages of the deposition transcript in Levy's short appendix, which Levy erroneously attributes to Dr. Prodromos (Pl. SA 59-60), in fact is from the deposition of Levy himself.[10]

Dr. Prodromos never testified that Levy is disabled due to a right knee injury. To the contrary, Dr. Prodromos clearly identified Levy's disabling condition as a disease, namely, osteoarthritis/degenerative joint disease:

> Q: [A]t the time that you examined [Levy] on April 20th of 1996, what did you determine the condition of his right knee to be?
>
> A: [by Dr. Prodromos]: He had – I wrote in my assessment, "Right knee DJD versus medial meniscal injury."
>
> Q: All right. And so did you diagnose him on that date as having degenerative joint disease in his right knee?
>
> A: Yes.

(Def. Supp. SA 029, Prodromos Dep., pgs. 6-7).

[10] Minnesota Life has attached hereto, as Defendant's Short Appendix, the complete transcript of the deposition of Levy, Dr. Prodromos and Dr. Waldram (without exhibits). *See* Def. Supp. SA 001-074.

Levy also distorts Dr. Prodromos's testimony with respect to the cause of his 1989 meniscal tear. Levy incorrectly represents to the court that Dr. Prodromos testified that "(1) Dr. Levy had developed osteoarthritis of the right knee; (2) it was caused by the meniscal tear that was identified in Dr. Hallman's February 14, 1989 operative report; and (3) *that the tear was caused by the basketball injury*." (Pl. App. Br., pg. 6) (emphasis added). Dr. Prodromos never testified that Levy's 1989 meniscal tear was caused by the 1987 basketball injury. Dr. Prodromos merely testified that Levy's osteoarthritis/degenerative joint disease occurred "[b]ecause the meniscal tear had caused the sequence of events or articular cartilage damage and arthrosis and pain in his knee." (Pl. SA 0037, ¶ 45). Thus, while Dr. Prodromos attributed Levy's 1996 arthritic disease to the 1989 degenerative meniscal tear, Dr. Prodromos did not attribute Levy's meniscal tear to the 1987 basketball injury.

The only testimony that links Levy's 1989 meniscal tear to the alleged 1987 basketball injury is Levy's own testimony. Although Levy was a physician, his medical practice focused primarily on the area of urology, and not orthopedics or rheumatology. (Pl. SA 0037, ¶ 50; Def. SA 003, Levy Dep., pg. 12). Levy has acknowledged that he lacks the appropriate medical expertise to diagnose or treat meniscal tears such as the one he experienced in 1989:

> Q: Do you have the medical expertise to diagnose, treat, and care for a knee condition such as that knee condition that you have had and have in your right knee?
>
> A: [by Levy]: Well, I can't treat it. I don't do surgery. The diagnosing took specialized tests, which we had an orthopedic surgeon and radiologist review.
>
> Q: And would you have been qualified to do that?
>
> A: Not necessarily.
>
> ***
>
> Q: If someone came in with complaints of a right knee condition similar to the complaints that you had in 1989--

A: Yes.

Q: --would you have had the expertise to diagnose and treat that condition, or would you have referred that patient to a specialist?

A: I would have referred them to a specialist.

(Pl. SA 0038, ¶ 52; Def. SA 005, Levy Dep., pgs. 18-19). *See Harris v. Day*, 115 Ill.App.3d 762, 451 N.E.2d 262, 266 (4th Dist. 1983) ("[W]here the injury complained of is remote in time from the accident or the condition is one that is shrouded in controversy as to origin, such as the intervention of either a prior or subsequent injury or disease, layman testimony may be insufficient to establish a *prima facie* showing of a causal relationship."), *quoting Hyatt v. Cox*, 57 Ill.App.3d 293, 206 N.E.2d 260, 263 (4th Dist. 1965).

Other than Levy's lay opinion about the proximate cause of his disease (which is insufficient to create a genuine question of fact), there is absolutely no evidence linking the 1987 basketball injury as the proximate cause of Levy's 1996 arthritis disease:

(i) Dr. Hallman testified that Levy's meniscal tear was degenerative in nature and pre-dated the alleged 1987 basketball injury;

(ii) On his disability claim form, Levy stated that at the time of his 1987 basketball injury, he had experienced symptoms of pain and swelling for only two to three weeks, which subsided for several months until the pain allegedly returned "with no apparent precipitating event";

(iii) After the 1989 knee surgery, Levy was able to work for seven years, during which he never sought further medical attention for his knee;

(iv) Levy, in his 1994 life insurance application, represented that he had made a "full recovery" from the 1989 surgery and that he had experienced "no problems since" that surgery;

(v) At various times between 1992 and 1994, Levy certified that he had not experienced a disability, been injured or sick;

(vi) Levy's arthritis was not localized merely at his right knee, because Levy also has had symptoms of arthritis in his spine, left knee and right hip;

(vii) The MRI obtained by Dr. Prodromos on April 22, 1996 establishes that Levy's right knee symptomatology was "consistent with degenerative change";

(viii) Dr. Waldram testified that the alleged 1987 basketball injury was not the cause of Levy's 1996 disabling condition of osteoarthritis/degenerative joint disease.

Even if one were to assume that an old 1987 sports injury caused Levy's 1996 disabling disease, it is the disease that is disabling, not the injury. Levy, therefore, was not "unable to work" due to the alleged 1987 basketball injury. Rather, Levy became unable to work as of March 1, 1996 due to osteoarthritis/degenerative joint disease.

CONCLUSION

The Policies provide insurance in the event an insured is unable to work due to a disabling condition, not insurance for remote events that precede the onset of disability. The reasonable expectation of the parties is that coverage will be determined based on the nature of the disabling condition, and not based on speculation about relatively minor non-disabling events that occurred a decade before the onset of disability. The district court correctly held that, because Levy's disabling condition is a disease, his disability properly falls within the Policies' "sickness" coverage. Accordingly, the district court's grant of summary judgment in favor of Minnesota Life should be upheld.

Signature of Counsel of Record:

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant, Minnesota Life Insurance Company, hereby certifies, pursuant to Fed. R. App. P. 32(a)(7)(C), that the Brief of the Defendant complies with the type-volume provisions of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 25 pages excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In addition, this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003, Times New Roman font in 12 point size, with footnotes in 11 point size.

Signature of Counsel of Record:

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CERTIFICATE OF SERVICE

The undersigned counsel of record hereby certifies that two (2) copies of the Brief of the Defendant, Minnesota Life Insurance Company and Defendant's Supplemental Appendix, together with one (1) copy in digital format, were served upon counsel for the Plaintiff, Lawrence Levy, by messenger, plainly addressed to Mr. James J. Stamos, 30 West Monroe Street, Suite 1600, Chicago, Illinois 60603, before the hour of 5:00 p.m. on this 20th day of July 2007.

Signature of Counsel of Record:

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CIRCUIT RULE 31(e) CERTIFICATION

The undersigned counsel of record for Defendant, Minnesota Life Insurance Company, hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the Brief of Defendant and all of the appendix items that are available in non-scanned PDF format. The undersigned counsel of record hereby certifies, pursuant to Circuit Rule 31(e)(1), that a digital version is not available of the appendix items contained within Defendant's Supplemental Short Appendix of Defendant, Minnesota Life Insurance Company.

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