

IN THE CIRCUIT COURT OF THE 11<sup>TH</sup> JUDICIAL CIRCUIT  
IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 97-17505 CA-27

JACK ARON,

Plaintiff,

v.

PENNSYLVANIA LIFE INSURANCE  
COMPANY, a foreign corporation

Defendant.

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**PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT**  
**AND MEMORANDUM OF LAW IN SUPPORT**

Plaintiff, Jack Aron, M.D., moves for an Order granting Summary Judgment in his favor and against Defendant, Pennsylvania Life Insurance Company (hereinafter "Penn Life"), and as grounds says:

1. Plaintiff sued Defendant wrongfully terminating his individual disability insurance benefits alleging Breach of Contract.
2. Plaintiff's disability policy with the Defendant pays benefits for the life of the insured if the disability is due to an accident, but only to age sixty-five if the disability is due to a sickness.
3. Dr. Aron became disabled from a retinal detachment of the right eye which was caused by an accidental opening of the posterior capsule during surgery.
4. Penn Life ceased disability payments to Dr. Aron on his sixty-fifth birthday claiming that this accident during surgery was the result of a sickness.
5. Neither of the terms accident or sickness are defined in the policy.

6. The only reasonable interpretation under Florida law is that an unexpected happening is an accident.

7. Summary Judgment is proper in any case where there is no genuine issue of material fact. Rule 1.510, Fla.R.Civ.P.

8. Summary Judgment should be granted in this case because there are no genuine issues of material fact of Dr. Aron's entitlement to lifetime disability benefits under the accident provision of the policy; this Motion, Memorandum, and attachments establish there is no genuine issue of material fact.

WHEREFORE, Plaintiff, Jack Aron, M.D., respectfully requests this Court to grant this Motion and render a Summary Judgment in his favor and against Defendant, Penn Life, and for such further relief as this Court deems proper.

**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

**STANDARD OF REVIEW**

The purpose of a summary judgment is to avoid the expense and delay of trial when no issue exists concerning the material facts. National Airlines, Inc. v. Florida Equipment Company of Miami, 71 So.2d 741 (Fla. 1954). When there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, then a motion for summary judgment must be granted. Rule 1.510, Fla.R.Civ. P. Kuhnel v. Sledge, 306 So.2d 194 (1<sup>st</sup> DCA, 1975) *cert. dismd.*, 336 So.2d 105 (Fla. 1975). The function of the Court in passing on a motion for summary judgment is to determine whether there is a genuine issue as to any material fact. Johnson v. Studstill, 71 So.2d 251 (Fla. 1954). The burden of proof is on the moving party to make a clear showing of the

absence of any genuine issue of material fact, Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957), and in reviewing a grant of summary judgment, the record is reviewed in the light most favorable towards the party against whom the summary judgment was entered. Robinson v. City of Miami, 177 So.2d 718 (3<sup>rd</sup> DCA 1965). However, the movant does not have the burden to exclude every possible inference that the opposing party might have other evidence available to prove his case. Harvey Bldg., Inc. v. Haley, 175 So.2d 780 (Fla. 1965). In order to meet his burden, the movant must offer evidence sufficient for finding in its favor upon every element of his claim for relief except those elements admitted by his adversary in his pleadings, or by stipulation, or otherwise during the course of pre-trial.

#### INTRODUCTION AND FACTS

Plaintiff, Jack Aron, M.D., was a successful orthopedic surgeon. In order to protect his income in the event he became disabled and unable to work, Dr. Aron bought an individual disability policy from Massachusetts Indemnity and Life Insurance Company on March 1, 1963 under policy number 27307077-0. The policy is attached as **Exhibit A**. Penn Life later assumed all obligations under the policy. The purpose of the policy was to compensate Dr. Aron five hundred dollars (\$500.00) per month until age sixty-five should he become disabled as a result of a sickness or for his lifetime should he become disabled as a result of an accident.

In approximately 1978, Dr. Aron was diagnosed with cataracts in both eyes. By 1983, his vision had become so poor that he required surgery on both eyes. During the operation on the right eye there was a mishap which caused an accidental opening of the posterior capsule. The surgical accident eventually caused a retina detachment. Although

the retina detachment was repaired, Dr. Aron was left with a permanent vision loss and permanently disabled from his former occupation as a surgeon. The February 3, 1989 report of Dr. Hanscom is attached as **Exhibit B**.

Dr. Aron applied for the disability benefits promised under the terms of the policy. Penn Life paid Dr. Aron monthly benefits until he reached sixty-five years old. Penn Life claimed that Dr. Aron's disability was the result of a sickness, as opposed to an accident, which allowed them to terminate his benefits at age sixty-five. Dr. Aron filed suit to recover the lifetime benefits due him by Penn Life under the accident provision of the policy.

*APPLICABLE FLORIDA LAW & ARGUMENT*

“Insurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties. Ambiguities are interpreted liberally in favor of the insured and strictly against the insurer who prepared the policy.” Prudential Property and Casualty Ins. Co. v. Swindal, 622 So.2d 467, 470 (Fla. 1993)(citations omitted); see also, Firemans Fund Ins. Co. v. Boyd, 45 So.2d 499 (Fla. 1950). “Florida law is equally well-settled that insuring or coverage clauses are construed in the broadest possible manner to effect the greatest amount of coverage.” Westmoreland v. Lumbermens Mutual Casualty Co., 1997 Fla. App. Lexis 11553 (4<sup>th</sup> DCA October 15, 1997); see also, Berkshire Life Ins. Co. v. Adelberg, 698 So.2d 828 (Fla. 1997); Hartnett v. Southern Ins. Co., 181 So.2d 524 (Fla. 1965); Valdes v. Smalley, 303 So.2d 342 (3<sup>rd</sup> DCA 1974).

There is no dispute that Dr. Aron is disabled under the terms of the policy of insurance. The only issue is whether Dr. Aron is disabled as a result of a sickness or an accident under the insurance policy. Applying the principles set forth *supra*, any analysis

of how to classify Dr. Aron's disability must begin by looking to the plain language of the policy. Unfortunately, neither the term accident nor sickness is specifically defined in the policy. The only provision of the policy defining either accident or sickness is Part VII (E), which states:

“CERTAIN DISABILITIES DEEMED SICKNESS. Any disability which is contributed to or caused by inguinal, umbilical, or post-operative hernia or by bacterial infection shall be deemed a sickness in interpreting the provisions of this policy, except that pyogenic infection incurred through a wound (including accidental pricks, cuts, abrasions or any similar accidental break in the continuity of the external surface of the body) shall be deemed an injury in interpreting the provisions of this policy.”

Exhibit A, Part VII (E).

Inguinal, umbilical and hernia are all problems associated with the abdomen or groin area. See, Lawyers' Medical Cyclopeda, Volume 4, §30.155 (definition of hernia); § 30.158 (definition of inguinal hernia); § 30.160 (definition of umbilical herniae) attached collectively as **Exhibit C**. None of these definitions relate to Dr. Aron's disability.

Although the policy does not specifically define “accident,” it does give an illustration of what the term “accident” means. Part II (D)(i) states: “ACCIDENT. The limit of indemnity period for total disability resulting from ***injury*** shall be the lifetime of the insured. Exhibit A, Part II (D)(i) (emphasis provided). Unfortunately, the term “injury” is not specifically defined either. Webster's New World Dictionary of the American Language 725 (2<sup>nd</sup> ed.1980) defines “injury” as: “physical harm or damage to a person, property, etc.” There can be no legitimate argument denying the fact that Dr. Aron's eye was physically harmed and/or damaged during the surgery. If this definition of the term “accident” is used, there is no dispute that Dr. Aron was disabled as a result of an “accident” and, therefore, entitled to lifetime benefits.

It seems quite obvious that Dr. Aron's disability should be covered under the accident provision of the policy. However, assuming *arguendo*, that under Penn Life's insurance policy, the term "accident" could be reasonably interpreted as covering Dr. Aron's disability or excluding Dr. Aron's disability. Even if this were true, the Florida courts have made it clear that the policy will be construed to effect coverage in this situation; the tie goes to the *insured*, not the insurer. Westmoreland, supra. Under Florida law, Dr. Aron's disability should be covered under the accident provision of the policy.

"The Florida Supreme Court has recognized that, when not otherwise defined, the term 'accident' in an insurance policy means 'unintentional.' See Dimmit Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700, 704 (Fla. 1974)("the term accidental is generally understood to mean unexpected or unintended"); Byrd v. Richardson-Greenshields Sec., Inc., 552 So.2d 1099, 1100 n.3 (Fla. 1989)(citing with approval the Webster's Third New International Dictionary definition for "accident" as a "sudden event or change occurring without intent or volition."). . ."

Purrelli v. State Farm Fire and Casualty Co., 698 So.2d 618, 621 (2<sup>nd</sup> DCA 1997).

These results were reached by using the Braleley, supra, test.

"In Braleley v. American Home Assurance Co. [354 So.2d 904 (Fla. 2<sup>nd</sup> DCA), cert. denied, 359 So.2d 1210 (Fla. 1978)], this court aligned itself with those courts which utilize a 'man-on-the-street' test when the term 'accident' is not defined in the policy. That test requires the finder-of fact to consider the facts of the particular case as viewed through the eyes of the average, everyday 'man on the street.' Braleley at 905."

Beneficial Standard Life Ins. Co. v. Forsyth, 447 So.2d 459, 461 (2<sup>nd</sup> DCA 1984).

Dr. Aron became disabled as a result of a detached retina that was caused by a mishap during surgery. The surgeon who performed the surgery was very well respected, "[p]robably the dean of cataract surgery in the West." Deposition of Neil Koreman, M.D., pg. 6, lines 14-21 attached as **Exhibit D**. Dr. Koreman estimated the percentage of a retinal detachment occurring during cataract surgery at *less than one percent*. Deposition of Neil Koreman, M.D., pg. 15, lines 23-25, pg. 16, lines 1-2 attached as **Exhibit E**. Dr. Hanscom agreed that the percentage "would be quite rare, certainly one percent, at the

most, and probably a lot less.” Deposition of Thomas A. Hanscom, M.D., pg.37, lines 16-25, pg.38, 1-2 attached as **Exhibit F**. When he was specifically asked whether he believed an error occurred during the surgery, Dr. Hanscom answered affirmatively:

“Q. Now, whether we get into legal negligence or malpractice, that’s not what we’re here for today, as you know, would you say there was an error in the surgery?

...  
A. Yes.”

Deposition of Thomas A. Hanscom, M.D., pg. 31, lines 3-7 attached as **Exhibit G**.

Dr. Aron was operated on by an expert in the field of cataract surgery. As a result of an error during the surgery, his retina was detached, leaving him disabled. A detached retina occurring as a result of an accident during surgery can be expected to happen in *less than one percent* of surgeries as a whole, and probably much less for such a respected surgeon as Dr. Kratz. An event that occurs less than one percent of the time is not significant. If an event occurs one time in a billion, it could still be said to occur in a certain percentage of cases (less than one percent). By definition, you cannot “anticipate” or “expect” an event to occur in less than one percent of the cases because when the event does occur, it is an anomaly. The retinal detachment that occurred during this surgery was an unexpected and unforeseen result; it was an accident. This would be the interpretation of the “man-on-the-street.” This is also the interpretation of an expert in this field.

“THE WITNESS: I’ll read the Random House Dictionary, English language.

“Accident: An unintentional or unexpected happening that is undesirable or unfortunate, especially one resulting in injury, damage, harm or loss.”

Now, if one takes the dictionary determination of the word ‘accident,’ you would have to call this an accident.”

Deposition of Neil Koreman, M.D. pg. 30, lines 16-24 attached as **Exhibit H**.

Penn Life wrote this policy and it must be construed liberally in favor of coverage for the insured and strictly against the insurer. Swindal, supra. Had Penn Life wanted to exclude mishaps during surgery, it could have used certain exclusionary language commonly found in insurance policies. See, Beneficial Standard Life Ins. Co. v. Forsyth, supra, at 461 (“The policy provides for benefits where the insured suffers injury and the injury results directly and *independently* of all other causes in certain enumerated losses.”)(emphasis provided); Barnes v. The Lincoln National Life Ins. Co., 338 So.2d 898, 900(1<sup>st</sup> DCA 1976) (“Any disability which is *caused or contributed to* by (a) sickness or disease or medical or surgical treatment therefor or diagnosis thereof . . . shall be indemnified only as a disability due to sickness. . .”)(emphasis provided); Continental Casualty Co. v. Suggs, 231 So.2d 530, 531 n.1 (3<sup>rd</sup> DCA 1970) (“Injury” means bodily injury caused by an accident occurring while this policy is in force and resulting directly and *independently* of all other causes in loss covered by this policy.”)(emphasis provided). The policy in this case does not expressly exclude liability when disability is caused by an accident during surgery. Applying the rule of contra proferentem under Florida law leads to the conclusion that Dr. Aron is covered under the accident provision of the Penn Life policy and entitled to lifetime benefits.

#### CONCLUSION

There is no genuine issue of material fact that Dr. Aron’s disability occurred as the result of an accident under the terms of the Penn Life policy. The law is well settled and clear in Florida that ambiguities are to be interpreted in favor of coverage for the insured. If a term can be interpreted two different ways with one interpretation providing coverage

and the second interpretation excluding coverage, then the term must be interpreted as providing coverage under Florida law. The reason for this long-time rule is simple. The insurer actually writes the policy. An insurer can limit its scope of coverage of any occurrence by simply writing in an exclusion for that occurrence.

The term “accident” can be interpreted in Dr. Aron’s case as providing coverage or excluding coverage. Penn Life could have limited its liability under the policy by specifically excluding all accidents during surgery or other language directed to this type of situation. It did specifically exclude certain surgical procedures of the groin and abdomen area; it did not exclude a detached retina caused by a surgical mishap.

*“The principle of the law is firmly imbedded in the jurisprudence of this State that contracts of insurance should be construed most favorably to the insured. To draw such a fine distinction between the words ‘accident’ and ‘accidental means’ would do violence to this principle. It is a classic example of a distinction without a difference. As a practical matter, the average man buying accident insurance assumes that he is covered for any fortuitous and undesigned injury. The average man has no conception of the judicial niceties of the problem and even the most learned judge or lawyer, in attempting to understand and comprehend the niceties of the distinction, is left in a state of bewilderment and confusion.*

Swindal, *supra*, at 471 (emphasis provided).

It is inescapable that the average person would consider an “error” during surgery to be an accident. Dr. Aron was disabled as the result of an “unintentional and unexpected happening that is undesirable.” Random House Dictionary, *supra*. This is the dictionary definition of an accident and should be the law of this case. Summary judgment must be granted in favor of the Plaintiff.

#### CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed/faxed this 21<sup>st</sup> day of August, 1998, to: Peter R. Restani, Esquire, Kuvin, Lewis, Restani & Stettin, P.A., Attorney for Defendant, Pennsylvania Life Insurance Company, 7325 SW 63 Avenue, Suite 201, South Miami, FL 33143.

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