S.C. No. 87032

IN THE MISSOURI SUPREME COURT

KRISTEN DHYNE
Plaintiff/Respondent

v.

STATE FARM FIRE AND CASUALTY COMPANY,
Defendant/Appellant

W.D. No. 63831
Appealed from the Circuit Court
of Jackson County, Missouri
The Honorable Charles E. Atwell, Judge,
Circuit Court No. 02-CV-205430

SUBSTITUTE BRIEF OF APPELLANT STATE FARM FIRE AND CASUALTY COMPANY

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JURISDICTIONAL STATEMENT

This action involves a claim of vexatious refusal to pay between the insured Plaintiff, a Missouri resident, and the insurer Defendant, an insurance company authorized to do business in the state of Missouri. The claim arises out of an accident that occurred in Kansas City, Missouri.

The trial court orders with which this appeal is concerned include the trial court's refusal to grant summary judgment and/or judgment notwithstanding the verdict on a number of matters of law and the court's instructions to the jury.

Defendant alleged throughout the case that, as a matter of law, the conduct herein did not rise to the level of a vexatious refusal to pay, because there was no refusal to pay, much less a refusal that was willful and without reasonable cause. In fact, Defendant never refused to pay. Defendant actually paid the policy limit. And there was no evidence of Defendant persisting in a refusal to pay after becoming aware that there was no meritorious defense, proof of which is also required in such a claim. Moreover, the trial court's instructions to the jury failed to follow the substantive law and deleted essential elements of a vexatious refusal claim, which was misleading and prejudicial.

The Western District of the Missouri Court of Appeals ruled the trial court was deprived of subject matter jurisdiction, because Plaintiff failed to state a viable claim under §375.420 in her first amended petition, as there was no judgment on an underlying claim.

The legal questions raised here involve questions of state law. There is no question herein as to the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, nor of the construction of the revenue laws of this state, title to any state office or the punishment of death. Therefore, this appeal does not involve any of the categories reserved for exclusive appellate jurisdiction of the Supreme Court of Missouri and jurisdiction lies with the Missouri Court of Appeals, Western District. Mo. Const. Art. V, Sec. 3.

STATEMENT OF FACTS

A. Underlying Facts

On February 6, 2001, Plaintiff, Kristen Dhyne (hereinafter "Dhyne"), while exiting an emergency vehicle at approximately 3802 E. 77nd Terrace, Kansas City, Missouri, was struck by a vehicle driven by Michael Perrine. (L.F. 8, Nos. 3 and 4). Michael Perrine was uninsured at the time of the collision. (L.F. 9, No. 6). Dhyne's policy provided $50,000.00 of uninsured motorist coverage per person. (L.F. 47).

Nearly one year after the accident, on January 22, 2002, Dhyne reported the claim to her agent. (Tr. 60 [237]). The claim was sent to State Farm's central claims office on January 25, 2002 and Claims Representative Brandon Hill was assigned the claim on January 28, 2002. (Tr. 60 [237]). (L.F. 36, 48). Hill noted in his activity log that Dhyne had suffered a broken pelvis and right kidney failure, for which she had surgery. (L.F. 48). She also had nerve damage to her right little finger. (L.F. 48). At that point, Dhyne was on light duty, working five hours a day. (L.F. 48).

Mr. Hill told Dhyne he would "need to see about the UBI (uninsured motorist coverage)." (L.F. 39). Hill informed Dhyne he would have to discuss the uninsured motorist coverage with the team manager. (L.F. 39, 49). Dhyne testified at deposition that Hill did not tell her at any point during their phone conversation he was denying her claim. "He never said that they would deny the claim," she testified. "He said he was investigating it." (L.F. 29). Nor did Hill or anyone else at State Farm send her a letter indicating they were denying her claim. (L.F. 30).

On the same day as that conversation, Hill spoke with State Farm Claim Team Manager Frank King. Hill was not sure if uninsured motorist coverage applied if there was workers compensation involved. (L.F. 40). Therefore, Hill also spoke to another team manager, Mary Humphrey, and sought a legal opinion from attorney Dale Beckerman on the issue. (L.F. 43). He received a legal opinion from Beckerman on February 14, 2002. (L.F. 43-44). After conferring with these parties, it was determined there was uninsured motorist coverage. (L.F. 44).

Hill called Dhyne on February 15, 2002, the day after receiving the legal opinion, to inform her there was uninsured motorist coverage. Dhyne, however, never called back. (L.F. 51).

On February 20, 2002, only five days after Hill had tried to call her and three weeks from the time Dhyne had talked to Hill, she filed suit against State Farm. (L.F. 1, 50-51). In this suit, Dhyne initially alleged she was entitled to uninsured motorist benefits and that State Farm's conduct was vexatious, pursuant to RSMo. §375.420, entitling her to damages for vexatious refusal to pay. (L.F. 11).

In State Farm's initial answer to Dhyne's claims, State Farm stated: "Separate defendant State Farm & Casualty Company prays that plaintiff take naught by way of her Petition, but that separate defendant State Farm go hence with its costs herein incurred and expended." (L.F. 63, No. 21).

On May 17, 2002, State Farm was first provided with the amount of Dhyne's lost wages. (L.F. 54-56). State Farm tendered a check for the "per person" policy limit of $50,000.00 for uninsured motorist benefits (L.F. 47; Tr. 11[44]), payable to Kristen Dhyne, her attorney and the workers' compensation carrier. Dhyne, however, refused tender of that check because she alleged State Farm was "attempting to interfere with [her] contractual rights" by placing the work comp carrier on the check. (L.F. 10, No. 12).

The inclusion of the workers compensation carrier on the initial check to Dhyne occurred as a result of State Farm's counsel, Kevin D. Weakley, mistakenly telling Brandon Hill to include the compensation carrier on the settlement draft. As stated by State Farm in response to Interrogatories:

> "Attorney, Kevin D. Weakley, mistakenly told Brandon Hill to include Sedgwick Claims Management Service on the settlement draft. After Mr. Weakley received a letter from John Turner dated August 23, 2002 returning the draft because it listed Sedgwick Claims Management Service, Kevin D. Weakley contacted Brandon Hill at State Farm and told Mr. Hill to reissue a $50,000.00 draft made payable only to Kristen Dhyne and her attorney, John Turner." (L.F. 100).

Six days after receiving the letter from Dhyne's counsel, on August 29, 2002, State Farm issued a draft directly to Kristen Dhyne and her attorney. (L.F. 10-11, No. 12; L.F. 52). This was the policy's limit for an individual uninsured motorist claim. (L.F. 47). After receiving State Farm's check for uninsured motorist benefits, Dhyne dropped her claim for uninsured motorist coverage, leaving as the sole cause of action her vexatious refusal claim. (Tr. 1 [3-4]).

B. Facts Relating To The Summary Judgment Motion

On October 18, 2002, State Farm filed a Motion for Summary Judgment, with supporting suggestions. (L.F. 16, 17-27). State Farm's Motion for Summary Judgment argued that, based on the facts set forth above, State Farm never refused or denied Dhyne's claim, either verbally or by letter, and, therefore, as a matter of law, State Farm did not act vexatiously. (L.F. 17-25). Additionally, State Farm argued Dhyne was not discouraged from making a claim, State Farm was entitled to a reasonable time after being notified of the claim by Dhyne to investigate, and filing suit less than thirty (30) days from the time State Farm was placed on notice did not give it adequate time to investigate the claim. (L.F. 23-25). Finally, given that State Farm paid its policy limits before it was provided with documentary evidence Dhyne's medical bills exceeded the policy limits, State Farm argued its actions could not be deemed willful and unreasonable. (L.F. 25).

Dhyne filed suggestions in response, arguing State Farm had "denied" Dhyne's claim by filing an Answer. (L.F. 58). Dhyne's claim rests upon the assertions in State Farm's Answer, cited above. (L.F. 63, No. 21). Dhyne also argued State Farm denied her claim

because Hill allegedly told her that any money she received would be paid to her workers compensation carrier and that her insurance rates could increase. (L.F. 58).

Oral arguments were heard on the motion. (Supp. Tr.). The court overruled the motion, finding there were genuine issues of material fact in dispute. (L.F. 144).

C. Facts Relating To Various Motions In Limine

Prior to trial, Dhyne filed a motion in limine (Tr. 3 [11]), which the Court sustained. The Court found that State Farm could not directly argue or seek an inference that the mere fact of payment negates the vexatious claim, although State Farm would be permitted to argue it acted reasonably. (Tr. 5 [19]).

State Farm filed a Motion in Limine to exclude any evidence that State Farm placed the workers compensation carrier on the first policy limit settlement draft sent to Dhyne's counsel, as it did not constitute evidence of "vexatious refusal." (L.F. 96-98). State Farm showed that State Farm's counsel mistakenly told Brandon Hill to include the workers compensation carrier on the initial draft. (L.F. 96, 100). After receiving a letter from Dhyne's counsel on August 23, 2002, however, the mistake was quickly rectified by issuance of a new draft without the workers compensation carrier on the draft. (L.F. 96, 100). In response, Dhyne argued that Hill had, in fact, previously told her that the workers compensation carrier would have to be repaid from uninsured motorist proceeds. (L.F. 104-105). The Court overruled this motion, because it "has some relevance to the issue of credibility . . ." (Tr. 13 [49]).

State Farm filed a Motion in Limine seeking to restrict the evidence to events prior to the filing of Dhyne's lawsuit, because the test for vexatious refusal focuses not on the final resolution of the coverage issues, but on how willful and unreasonable the insurer's refusal was

at the time the insurer was asked for coverage. (L.F. 161-162). Specifically, State Farm sought to exclude evidence that State Farm's Answer was allegedly equivalent to a denial of benefits. State Farm argued: (1) the Answer only indicated State Farm's counsel's theories and what facts had not been established by evidence; (2) State Farm was entitled to preserve issues of fact as to any negligence of Dhyne or the ambulance driver; and (3) State Farm had a right to deny Dhyne's allegations and make Dhyne prove the allegations. (Tr. 14-16). Moreover, in answering Plaintiff's First Amended Petition, State Farm "admitted just about everything," as Dhyne's counsel stated. (Tr. 15 [57]; L.F. 13).

The Court also overruled this motion, stating it was "attributable to State Farm as a degree of unreasonableness . . ." (Tr. 16, 19 [73-74]).

State Farm filed a Third Motion in Limine to exclude any evidence that Dhyne was discouraged from making a claim against State Farm, because the conversation in which Dhyne alleged this occurred was after she had reported her loss. (L.F. 163).

Therefore, there was no evidence that anyone tried to discourage her from reporting the claim. (Tr. 6 [22]). The Court, however, also overruled this motion. (Tr. 6 [24]). **D. Facts Regarding The Motion For Directed Verdict**

State Farm filed a Motion for Directed Verdict at the close of Dhyne's evidence. (L.F. 198-203). It argued Dhyne had failed to make a submissible case: 1) there was no evidence State Farm refused to pay her claim and 2) State Farm actually paid her claim as soon as it was provided with Dhyne's medical bills and lost wages information. (L.F. 199). Further, State Farm argued it had not acted "willfully and without reasonable cause," as the facts would appear to a reasonable person before trial. State Farm was entitled to a reasonable amount of time to investigate the claim and it never actually denied the claim. (L.F. 201-202). Finally,

State Farm argued Dhyne did not give State Farm thirty (30) days to investigate the claim before she filed suit, as she was obligated under the policy to do. (L.F. 199-200).

The Court heard oral argument on the directed verdict motion (Tr. 92-94), but denied the motion. (Tr. 94). The motion was renewed at the close of all the evidence, but the court again overruled the motion. (Tr. 106-107 [421-426]).

E. Facts Regarding The Instructions

The parties discussed instructions with the court off the record. (Tr. 107 [427]). Once they were back on the record, the trial court noted State Farm's objection to, *inter alia,* the damage and verdict directing instructions**,** were re-asserted on the record**.** (Tr. 107 [427]).

The trial court gave, as Instruction No. 5, a charge to the jury that:

> Your verdict must be for plaintiff if you believe that defendant State Farm Fire and Casualty Company refused to pay uninsured motorist benefits without reasonable cause or excuse. (L.F. 208, A5 of Appendix).

It refused two instructions offered by State Farm. One instruction stated, in pertinent part:

> The plaintiff must show that defendant State Farm's refusal to pay the loss was willful and without reasonable cause, as the facts would appear to a reasonable and prudent person. (L.F. 213, A7 of Appendix).

The second refused instruction stated:

"Without reasonable cause or excuse" as used in this Instruction means that an insurance company persists in its refusal to pay after becoming aware that it has no meritorious defense. (L.F. 212, A6 of Appendix).

The trial court's reasoning in refusing these instructions was "they are non-MAI instructions and the teaching of MAI is that to define terms that are not defined in MAI, especially when there is a verdict form, usually and frequently constitutes error." (Tr. 108 [430]).

F. The Verdict And Post-Trial Motions

The jury found for Plaintiff Dhyne, awarding $5,150 as a penalty and $18,089.57 in attorney fees. (Tr. 122 [486]; L.F. 205). The Court entered judgment on October 23, 2003. (L.F. 220-221).

On November 6, 2003, State Farm filed a motion for judgment notwithstanding the verdict and/or remittitur, or for new trial, with accompanying suggestions. (L.F. 222-248). On the issue of remittitur, State Farm argued the amount of attorney fees are restricted under Missouri law to the reasonable value of fees after vexatious refusal and prior to tender. (L.F. 228). Additionally, State Farm argued the amount exceeded the evidence, because the jury had returned a verdict for attorney fees of $18,089.57, an amount greater than the $15,955.22 Dhyne introduced into evidence. (L.F. 230).

State Farm also argued Dhyne failed to make a submissible case, because it did not deny Dhyne's claim. (L.F. 232-234). Moreover, Dhyne did not establish that any alleged refusal to pay by State Farm was willful and without reasonable cause. (L.F. 235-238).

State Farm argued judgment notwithstanding the verdict or a new trial should be granted for: 1) Dhyne's hindrance of State Farm's performance; 2) her breach of the policy condition requiring her to give State Farm 30 days prior to filing suit and 3) her failure to perform a precondition to recovery by not notifying State Farm of the accident for almost one year. (L.F. 239-243).

State Farm also argued a new trial was warranted because of the court's refusal to instruct the jury on all the elements of a vexatious refusal claim. (L.F. 243-244). A new trial was also warranted, State Farm argued, because of the trial court's exclusion of evidence of the policy's 30-day notice provision. (L.F. 245-246).

Finally, State Farm argued a new trial was warranted because the court improperly allowed jurors to consider State Farm's answer, which incorrectly implied that State Farm was denying coverage. (L.F. 247-248). Dhyne responded to State Farm's motion (L.F. 250-257), to which State Farm filed reply suggestions. (L.F. 258-272).

The trial court sustained the motion for remittitur, with Dhyne's counsel's acquiescence, but denied State Farm's motion in all other respects. (L.F. 275). State Farm then filed a notice of appeal on February 17, 2004. (L.F. 277).

POINTS RELIED ON

1. The Court of Appeals correctly ruled that it and the trial court lacked jurisdiction over Plaintiff's Section 375.420 claim for vexatious refusal after the insurer paid policy limits and Plaintiff dismissed her claim for a loss under her policy because as a matter of law Plaintiff

failed to allege a cognizable claim under the statute and the court was deprived of subject matter jurisdiction, in that a claim under the statute cannot stand alone, but requires a judgment on an underlying claim, which was not present here, the Court of Appeals could raise this issue sua sponte, though Defendant did raise the issue below, and this was the essence of Defendant's arguments on appeal.

Howard v. Aetna Life Ins. Co., 164 S.W.2d 360 (Mo. 1942)

Victor v. Manhattan Life Ins. Co., 772 S.W.2d 826, 831 (Mo.App. 1989).

Calvert v. Safeco Ins. Co. of America, 660 S.W.2d 265, 269 (Mo.App. 1983).

State ex rel. U.S. Fid. & Guar. Co. v. Walsh, 540 S.W.2d 137, 141 (Mo.App. 1976).

Section 375.420 RSMo.

2. The trial court erred in denying State Farm's motion for summary judgment or, alternatively, for judgment notwithstanding the verdict, because as a matter of law State Farm did not refuse Plaintiff's claim, in that Plaintiff was never told State Farm was refusing her claim, State Farm paid Plaintiff her policy limits, any delay in payment was a result of Plaintiff's failure to provide proof of the amount of her damages and State Farm's Answer was not a refusal.

Morris v. J.C. Penney Life Ins. Co., 895 S.W.2d 73, 78 (Mo.App. W.D. 1995).

Hopkins v. American Economy Ins. Co., 896 S.W.2d 933, 939 [6] (Mo.App.1995)

§ 375.420 R.S.Mo.

Wunsch v. Sun Life Ins. Co. of Canada, 92 S.W.3d 146, 151 (Mo.App. W.D. 2002).

3. The trial court erred in denying State Farm's motion for summary judgment or, alternatively, for judgment notwithstanding the verdict, because as a matter of law State Farm's conduct was not willful and without reasonable cause, nor did State Farm persist in a refusal to pay after becoming aware that there was no meritorious defense, in that State Farm never denied Plaintiff's claim, State Farm paid Plaintiff her policy limits, any delay in payment was a result of Plaintiff's failure to provide proof of her damages and State Farm's claim representative was appropriately seeking a legal opinion regarding coverage when Plaintiff prematurely filed suit.

Lake v. Farm Bureau Mut. Ins. Co. of Missouri, 624 S.W.2d 28 (Mo.App. E.D. 1981).

Groves v. State Farm Mut. Auto. Ins. Co., 540 S.W.2d 39, 42 (Mo. banc 1976).

Hopkins v. American Economy Ins. Co., 896 S.W.2d 933, 939 [6] (Mo.App.1995).

Wunsch v. Sun Life Ins. Co. of Canada, 92 S.W.3d 146, 151 (Mo.App. W.D. 2002).

Section 375.420 RSMo.

4. The trial court erred in instructing the jury on vexatious refusal without including the element of willful and by refusing to define willful and without reasonable cause as persisting in a refusal to pay after becoming aware that there is no meritorious defense, because an instruction that does not follow the substantive law is misleading and requires reversal, in that the court's instruction

erroneously eliminated the scienter element of the claim, as well as the "persisting" element and, thereby, relieved Plaintiff of essential elements on which she had the burden of proof. *Williams v. Finance Plaza, Inc.*, 23 S.W.3d 656, 658 (Mo.App. W.D. 2000).

State v. Edward, 60 S.W.3d 602, 615 (Mo.App. W.D. 2001).

State v. Carson, 941 S.W.2d 518, 520 (Mo. banc 1997).

Section 375.420 RSMo.

ARGUMENT

I. The Court of Appeals correctly ruled that it and the trial court lacked jurisdiction over Plaintiff's Section 375.420 claim for vexatious refusal after the insurer paid policy limits and Plaintiff dismissed her claim for a loss under her policy because as a matter of law Plaintiff failed to allege a cognizable claim under the statute and the court was deprived of subject matter jurisdiction, in that a claim under the statute cannot stand alone, but requires a judgment on an underlying claim, which was not present here, the Court of Appeals could raise this issue sua sponte, though Defendant did raise the issue below, and this was the essence of Defendant's arguments on appeal.

A. Standard of Review

The issue here is whether the Court of Appeals correctly interpreted Section 375.420 as requiring an accompanying claim for loss under a policy. Statutory interpretation is an issue of law that is reviewed de novo. *Blakely v. Blakely*, 83 S.W.3d 537, 540 (Mo. banc 2002). Also at issue is whether the circuit court and the Court of Appeals had subject matter jurisdiction. Where the facts relevant to subject-matter jurisdiction are uncontested, as here, the court's

review is de novo. *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003)

B. The Court of Appeals correctly addressed this issue *sua sponte*, though the issue was raised below and is the essence of State Farm's appeal.

The Court of Appeals was correct in ruling that it first had to determine its jurisdiction, and that the issue of whether a claim has been stated upon which relief can be granted is inherent in every appeal and may be raised, *sua sponte*, by the Court. (Court of Appeals Opinion, p. 3; A_ in Appendix). This Court has so ruled in *Adkisson v. Dept. of Revenue,* 891 S.W.2d 131, 132 (Mo. 1995) and *Bartlett by and through Bartlett v. Kansas City So. Ry. Co.*, 854 S.W.2d 396, 399 (Mo. 1993). The cases cited by the Court of Appeals on this point do not prevaricate. See *Parshall v. Buetzer*, 121 S.W.3d 548, 551 (Mo.App. 2003); *Preferred Physicians Mut. Mgmt. Group, Inc. v. Preferred Physicians Mut. Risk Retention Group*, 916 S.W.2d 821, 823 (Mo.App. 1995); *Commercial Bank of St. Louis Co. v. James*, 658 S.W.2d 17, 21 (Mo. banc 1983).

However, even were this not so, State Farm specifically raised this issue below and it is the essence of its arguments to both the trial court and the Court of Appeals, that once State Farm paid its policy limits and Dhyne dismissed her

claim for uninsured motorist coverage, there was no viable vexatious refusal claim. (See, e.g., L.F. 199, 232-234, where State Farm argued Dhyne had failed to make a submissible case). State Farm also argued to the Court of Appeals that Dhyne did not even allege in her petition that State Farm actually "refused" her claim (L.F. 8-11).

C. The Court of Appeals correctly ruled that a claim under Section 375.420 cannot stand alone, but requires a judgment on an underlying claim.

The Court of Appeals was correct in strictly construing the statute in question, because it is penal in nature, as this Court ruled in *Howard v. Aetna Life Ins. Co.,* 164 S.W.2d 360 (Mo. 1942). See also *Watters v. Travel Guard Int'l*, 136 S.W.3d 100, 108-109 (Mo.App. 2004); *Legg v. Certain Underwriters at Lloyd's of London*, 18 S.W.3d 379, 387 (Mo.App. 1999).

Moreover, the cases cited by the Court of Appeals where Missouri courts have held an award for damages and/or attorney's fees pursuant to Section 375.420 cannot stand alone correctly applied the statute. See *Victor v. Manhattan Life Ins. Co.*, 772 S.W.2d 826, 831 (Mo.App. 1989) (beneficiaries who were not paid under a group life policy until 18 months after payment should have been made and who, unlike Plaintiff here, sought interest for "loss of use" of the

proceeds of the policy, stated a cognizable claim under the statute); *Calvert v. Safeco Ins. Co. of America*, 660 S.W.2d 265, 269 (Mo.App. 1983); *State ex rel. U.S. Fid. & Guar. Co. v. Walsh*, 540 S.W.2d 137, 141 (Mo.App. 1976). See also *Shirkey v. Guarantee Trust and Life Ins. Co.,* 141 S.W.3d 62, FN4 (Mo.App. W.D. 2004).

II. The trial court erred in denying State Farm's motion for summary judgment or, alternatively, for judgment notwithstanding the verdict, because as a matter of law State Farm did not refuse Plaintiff's claim, in that Plaintiff was never told State Farm was refusing her claim, State Farm paid Plaintiff her policy limits, any delay in payment was a result of Plaintiff's failure to provide proof of the amount of her damages and State Farm's Answer was not a refusal.

The trial court was presented with this issue in ruling on State Farm's motion for summary judgment, ruling on State Farm's motions for directed verdict and ruling on its motion for judgment notwithstanding the verdict. (L.F. 17-25, 199, 232-234; Tr. 106, 107). State Farm believes the trial court erred in failing to grant summary judgment on this issue. Dhyne, however, will likely question whether State Farm filed a proper summary judgment motion. (see L.F. 65-66).

Therefore, State Farm alternatively asserts that the trial court erred in ruling on this same issue on the motion for judgment notwithstanding the verdict.

A. Standard of Review

Whichever standard set forth below is used to review the issues, Section 375.420 is penal in nature and is to be strictly construed. *Hopkins v. American Economy Ins. Co.*, 896 S.W.2d 933, 939 [6] (Mo.App.1995). Whether a refusal to pay is vexatious or not must be determined by the situation as presented to the insurer at the time it was called on to pay. *Id.* "Each case literally must be decided on its own merits." Id. at 941.

1. On a motion for summary judgment

Summary judgment is appropriate when the movant shows there is no genuine dispute of material fact and he or she is entitled to judgment as a matter of law. *Wunsch v. Sun Life Ins. Co. of Canada,* 92 S.W.3d 146, 151 (Mo.App. W.D. 2002), citing Rule 74.04; *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp*., 854 S.W.2d 371, 380 (Mo. banc 1993). Appellate review is "essentially de novo." *Id.* The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially. *Id.* The propriety of summary judgment is purely an issue of law. *Id.* As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment.

The facts set forth by affidavit or otherwise in support of the movant's motion are taken as true unless contradicted by the non-movant's response to the summary judgment motion. *Wunsch, supra* at 152. The court reviews the record and all reasonable inferences therefrom in a light most favorable to the non-movant. *Id.*

Once the movant has met its burden under Rule 74.04, the non-movant's "only recourse is to show ... that one or more of the material facts shown by [the movant] to be above any genuine dispute is, in fact, genuinely disputed." *Id*.

In particular, the question of vexatious refusal to pay "will not be one for the jury to pass upon unless there is something of a substantial nature in the case to indicate that the insurer has acted in bad faith and without reasonable cause in relying upon the particular issue." *Sanderson v. New York Life Ins. Co.*, 194 S.W.2d 221 (Mo.App. 1946).

2. On a motion for judgment notwithstanding the verdict

In reviewing the denial of a motion for directed verdict and judgment notwithstanding the verdict, the Court must determine whether the plaintiff made a submissible case. *Missouri Consolidated Health Care Plan v. Community Health Plan,* 81 S.W.3d 34, 38 (Mo.App. W.D. 2002). [citation omitted]. In making this determination, the evidence and all reasonable inferences are reviewed in the light most favorable to the jury's verdict and contrary evidence is disregarded. *Id.*

Whether evidence is substantial and whether the inferences drawn from it are reasonable are questions of law. *Id.* at 39. The court will reverse judgment on the basis that insufficient evidence supported the jury's verdict "only where there is a complete absence of probative fact to support the jury's conclusion." *Id.* When reasonable minds can differ on a question put to a jury, the court should not disturb the jury's verdict. *Id.*

However, a case should not be submitted to the jury unless each and every fact essential to liability is predicated upon legal and substantial evidence. *Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 615 (Mo. banc 1995). Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide a case. *Seippel-Cress v. Lackamp,* 23 S.W.3d 660, 666 (Mo.App. W.D. 2000).

The court will not supply missing evidence or give the plaintiff the benefit of unreasonable, speculative, or forced inferences. *Schubiner v. Oppenheimer Industries, Inc.*, 675 S.W.2d 63, 78 (Mo.App. W.D.1984). The evidence and inferences must establish every element and not leave any issue to speculation. *Care and Treatment of Cokes, In re,* 107 S.W.3d 317, 321 (Mo.App. W.D. 2003).

And if one or more of the elements of a cause of action are not supported by substantial evidence, a motion for directed verdict or judgment N.O.V. should be granted. *Bond v. California Compensation and Fire Co.*, 963 S.W.2d 692, 696 (Mo.App. W.D. 1998). [citation omitted].

B. Introduction

Plaintiff rushed to file suit in this case only days after first reporting her claim to State Farm, apparently hoping to gain damages for vexatious refusal, as demonstrated below. However, the law does not allow damages for vexatious refusal **where there has been no refusal whatsoever**, as here.

Here, Plaintiff attempts to push the concept of vexatious refusal beyond that recognized by Missouri courts, and into an undefined and indefinable "constructive" refusal. No Missouri case has recognized such a claim. A dangerous precedent would be set if such a claim was recognized, as plaintiffs' bar would begin filing vexatious refusal claims immediately upon providing their insurer with a proof of loss. The insurer would not have to actually refuse the claim before being liable for vexatious refusal damages.

C. Missouri law requires an actual refusal to support a vexatious refusal claim.

Plaintiff's sole allegation is State Farm vexatiously refused Plaintiff's claim for uninsured motorist benefits and thereby violated Sec. 375.420 RSMo. (L.F. 8-11). To make a submissible case on vexatious refusal to pay, a plaintiff must show that the defendant's refusal to pay the claim was willful and without reasonable cause, as the facts would appear to a reasonable and prudent person before

trial. *Bickerton, Inc. v. American States Ins. Co.*, 898 S.W.2d 595, 602 (Mo.App. W.D. 1995).

Under Missouri law, the elements of Dhyne's claim are set forth in the statute upon which her claim is based, R.S.Mo. § 375.420, which states:

> "In any action against any insurance company to recover the amount of any loss under a policy of . . . insurance, if it appears from the evidence that such company **has refused to pay such loss without reasonable cause or excuse**, the Court or jury may, in addition to the amount thereof and interest, allow the Plaintiff damages not to exceed 20% of the first $1,500.00 of the loss, and 10% of the amount of the loss in excess of $1,500.00 and a reasonable attorney's fee; and the Court shall enter judgment for the aggregate sum found in the verdict." [Emphasis added]. (Appendix A8).

D. Dhyne does not allege in her petition and there was no evidence presented in response to the summary judgment motion, that State Farm ever refused her claim.

1. Dhyne's petition fails to allege State Farm refused her claim.

Even though this is an essential element of a "vexatious refusal" claim, Dhyne does not allege in her petition that State Farm actually "refused" her claim (L.F. 8-11). Dhyne's theory in her petition is not that State Farm actually refused the claim, but that it "discouraged" Plaintiff from making a claim (L.F. 10, No. 11) and hence demonstrated "vexatious behavior." (L.F. 11). The evidence, however showed that Dhyne reported her claim to her State Farm agent before she was ever allegedly discouraged by Claim Representative Brandon Hill, as demonstrated further below..

2. The trial court erred in not granting summary judgment in favor of State Farm, because there was no genuine issue of fact and State Farm did not refuse Dhyne's claim, as a matter of law.

State Farm's summary judgment motion argued and demonstrated that Dhyne did not even allege that State Farm actually refused her claim. State Farm, in fact, did not refuse her claim. (L.F. 17-25). Dhyne testified at deposition that Brandon Hill, the only State Farm employee to discuss this issue with her, did not tell her at any point during their phone conversation he was denying her claim. **"He never said that they would deny the claim," she testified. "He said he was investigating it." (L.F. 29).** (Emphasis added). Nor did Hill or anyone else at State Farm send her a letter indicating they were denying her claim. (L.F. 30). A party is bound by his or her own testimony on matters of fact (other than estimates of time, distance, or location) unless corrected or explained. *Brandt v. Pelican*, 856 S.W.2d 658, 664 (Mo.

banc 1993); *Wuerz v. Huffaker*, 42 S.W.3d 652, 655, 657-58 (Mo.App.2001). This is because a party's testimony " 'may be of such a character as to have all the force and effect of a judicial admission by which he is bound notwithstanding the testimony of other witnesses to the contrary." *Correale v. Hall*, 9 S.W.3d 624, 629 (Mo.App.1999). [citation omitted]. Here, Dhyne must be bound by her own uncontradicted testimony.

In fact, Hill could not have refused Dhyne's claim, because the claim had already been filed. Dhyne reported the claim to her agent on January 22, 2002, the claim was sent to State Farm's central claims office on January 25, 2002 and Hill was assigned the claim on January 28, 2002. (Tr. 60 [237]).

Moreover, Hill could not have refused Dhyne's claim, because he did not have the authority to refuse her claim if he wanted to, because that was a decision for either a team manager or the claims committee. (Tr. 66 [264], 100 [397]).

Hill simply told Dhyne he would "need to see about the UBI (uninsured motorist coverage)" and would have to discuss the uninsured motorist coverage with his team manager. (L.F. 39, 49). Hill discussed the issue with a team manager, as well as an attorney. It was determined there was uninsured motorist

coverage. (L.F. 40-44). Mary Humphrey, Hill's team manager, testified Hill followed State Farm protocol. (Tr. 95 [377], 97 [386], 100 [397]).

Hill then tried to call Dhyne to tell her there would be coverage and left a message, but she never called back. (L.F. 51). Only five days after Hill left that message and three weeks from the time Dhyne first talked to Hill about her claim, she filed suit against State Farm. (L.F. 1, 50-51). From the time suit was filed until Hill was provided with Dhyne's answers to interrogatories reflecting the amount of her damages, he could not even speak to Dhyne, because she was represented by counsel, and had no way of knowing what her damages were. (Tr. 65, 67, 69 [258-259, 265, 273]).

a. State Farm paid Dhyne's claim as soon as it was provided with proof of her damages, as required by State Farm policy.

State Farm paid Dhyne's claim after it was presented with proof of her medical bills and lost wages, information that State Farm did not have at the time Dhyne claims it acted vexatiously. State Farm was first provided with the amount of Dhyne's lost wages on May 17, 2002. (L.F. 54-56). The first time State Farm was informed as to the amount of Dhyne's lost wages and medical bills was when she answered interrogatories after she filed suit, although she admitted it was her

duty under the policy to inform the insurer of these amounts. (Tr. 65, 67 [258-259, 265]; 68 [272]; 88 [349-352]). When she answered interrogatories in this case, Dhyne listed her lost income as $26,603.22 and her medical bills as $13,373.15. (Tr. 89 [354-355]).

Based on this sworn information, State Farm then tendered a check for the "per person" policy limit of $50,000.00 for uninsured motorist benefits (L.F. 47; Tr. 11[44]), payable to Kristen Dhyne, her attorney and the workers' compensation carrier. Dhyne refused tender of that check because she alleged State Farm was "attempting to interfere with [her] contractual rights" by placing the work comp carrier on the check. (L.F. 10, No. 12). This was an error by counsel, not by State Farm (L.F. 100). In fact, six days after being notified of this, on August 29, 2002, State Farm issued a draft directly to Kristen Dhyne and her attorney. (L.F. 10-11, No. 12; L.F. 52). This was the policy's limit for individual uninsured motorist benefits. (L.F. 47). It is difficult to imagine how the trial court could have possibly

viewed the payment of policy limits as a refusal to pay.

Although Dhyne did not argue that the delay in payment was, in itself, a refusal to pay (L.F. 10-11), any delay in payment was a result of her failure to provide proof of her damages. It is standard policy for State Farm to acquire the medical records prior to payment, in order to confirm that treatment is related to the accident involved and to confirm the amount of damages. (Tr. 99 [396]).

Moreover, in *Wunsch, supra*, 92 S.W.3d at 152, the court held as a matter of law that the insurer had reasonable cause to delay payment of a policy's proceeds to a beneficiary until the insurer received a death certificate, just as

here State Farm had reasonable cause to delay payment until it received proof of Dhyne's damages.

The trial court here, however, went even further than refusing to find from the uncontroverted facts that State Farm did not refuse Dhyne's claim. Prior to trial, Dhyne filed a motion in limine (Tr. 3 [11]), asking that State Farm **not "directly argue or seek an inference" that "the mere fact of payment negates the vexatious claim.**" The Court sustained the motion. (Tr. 5 [19]). This further exacerbated the trial court's error, precluding State Farm from even arguing one of its core theories of defense, even though the evidence demonstrates that State Farm did not "refuse" Dhyne's claim and any delay in paying her claim was the result of the litigation process, because State Farm paid her claim as soon as it was provided with proof of her actual damages.

b. State Farm's Answer was not a "refusal" of Dhyne's claim, but was a denial of her allegations that State Farm acted vexatiously.

Dhyne filed suggestions in response to State Farm's motion that essentially admitted the uncontroverted facts set forth in State Farm's motion (L.F. 58-61), but argued State Farm had "denied" Dhyne's claim by filing an Answer in this

case. (L.F. 58). This claim rests on the following language in State Farm's initial Answer to Dhyne's initial petition:

> "Separate defendant State Farm & Casualty Company prays that plaintiff take naught by way of her Petition, but that separate defendant State Farm go hence with its costs herein incurred and expended." (L.F. 63, No. 21).

However, State Farm had every right to deny the validity of the vexatious refusal claim in its Answer. Dhyne's original petition not only asserted a claim for uninsured motorist benefits, which was eventually dismissed, but also asserted the vexatious refusal claim. After receiving State Farm's check for uninsured motorist benefits, Dhyne dropped her claim for uninsured motorist coverage, leaving as the sole cause of action her vexatious refusal claim. (Tr. 1 [3-4]). In its Amended Answer to that claim, State Farm admitted liability under the policy, but denied it had vexatiously refused Dhyne's claim (L.F. 13-14), which it had every right to do.

An insurer, acting in good faith, has a right "to litigate an open question of law or disputed facts for which there is reasonable or probable cause for belief." *Frost v. Liberty Mutual Ins. Co.*, 828 S.W.2d 915, 920 (Mo.App. W.D. 1992). [citation omitted]. The insurer may insist upon such a judicial determination of open questions of law or fact without incurring a penalty for so proceeding. *Id.*

Dhyne's reasoning is, therefore, illusory and "puts the cart before the horse." Under this flawed reasoning, an insured can file an action for vexatious refusal and, if the insurer denies it, has thereby committed a vexatious refusal, though there was *no vexatious refusal at the time the claim was actually filed*. Obviously, Missouri law does not support such twisted logic.

Whether a refusal to pay is vexatious must be determined by the situation as presented to the insurer at the time it was called on to pay. *Hopkins v. American Economy Ins. Co., supra,* 896 S.W.2d at 939; *Wunsch, supra,* 92 S.W.3d at 153. The test for determining whether the insurer vexatiously refused, therefore, does not take into consideration facts after the insurer was called on to pay. However, under Dhyne's topsy-turvy theory of "refusal," State Farm was apparently obliged to admit it refused coverage, even though it had not.

Moreover, even as to the uninsured motorist claim, there were issues that remained to be settled at the time the original Answer was filed, including what the extent of Dhyne's damages were. This was an issue that was not determined until Dhyne answered interrogatories in this case. (Tr. 65, 67 [258-259, 265]; 68 [272]; 88 [349-352]). The Answer simply indicated what facts had not been established by evidence. It was simply the truth regarding the extent of the knowledge of the attorney who filed the Answer, because Plaintiff did not inform State

Farm of the extent of her damages until interrogatories were answered in this case. For State Farm to have simply admitted every allegation in Plaintiff's petition, even though false, would have misrepresented State Farm's position.

Nonetheless, despite the fact that whether a refusal to pay is vexatious or not must be determined by the situation as presented to the insurer at the time it was called on to pay *(Hopkins, supra,* 896 S.W.2d at 939), in Dhyne's opening statement to the jury, her counsel was allowed to argue, over objection, that State Farm "denied" her claim by filing its answer in which it alleged the comparative fault and/or negligence of Dhyne and others. (Tr. 30-31, 33 [120-123, 130, 132]). Dhyne's counsel later read the Answer into the record. (Tr. 44 [175-176). State Farm objected, because the evidence was irrelevant and inflammatory. (Tr. 44 [173-175]). However, the exhibit was admitted into evidence. (Tr. 44 [175]). This further exacerbated the trial court's previous ruling on the summary judgment motion.

c. State Farm did not "refuse" Plaintiff's claim by "discouraging" the filing of a claim.

Dhyne also argued State Farm "denied" her claim by "discouraging" her from making a claim. (L.F. 10, No. 11). The evidence did not support this assertion, either. However, even if this had been the case, no Missouri court has

held that "discouraging" a claim is equivalent to "refusing" a claim. In fact, as stated previously, Missouri law requires an actual refusal, ordinarily in letter form.

Additionally, State Farm could not have "discouraged" Dhyne from making a claim against State Farm, because the conversation in which Dhyne alleged this occurred was after she had reported her loss. There was no evidence that anybody tried to discourage her from reporting the claim.

There was no evidence of a "refusal to pay" presented by Dhyne in response to State Farm's summary judgment motion and, therefore, the trial court erred in denying summary judgment on this basis. The vexatious delay issue should not go to the jury unless an inference can be drawn that the refusal to pay is unjustifiable and vexatious. *Patterson v. American Ins. Co. of Newark, N.J.*, 160 S.W. 59, (Mo.App. 1913).

E. There was no evidence presented, in response to the motion for judgment notwithstanding the verdict, that State Farm ever "refused" Plaintiff's claim.

State Farm filed a motion for directed verdict at the close of Dhyne's evidence (L.F. 198-203) in which it argued Dhyne had failed to make a submissible case, because, *inter alia,* the evidence failed to establish State Farm refused to pay her claim (Tr. 201-202) and actually paid her claim as soon as it was provided with Dhyne's medical bills and lost wages. (Tr. 199). The

motion was renewed at the close of all the evidence (Tr. 106-107 [421-426]) and raised again in the motion for judgment notwithstanding the verdict. (L.F. 222-248).

In the interest of brevity, State Farm incorporates the facts set forth above as also supportive of the motion for judgment notwithstanding the verdict. Additionally, the following facts were disclosed at trial that further demonstrated there was no "refusal" to pay Plaintiff's claim.

Brandon Hill testified Dhyne reported the claim to her agent on January 22, 2002 and Hill was assigned the claim on January 28, 2002. (Tr. 60 [237]). He called Dhyne same morning and left a message. (Tr. 60 [238]). Dhyne returned the call and the two discussed Dhyne's injuries. (Tr. 60 [239]). Hill testified the policy provides there is no uninsured motorist coverage to the extent any workers compensation or disability benefits were being received. (Tr. 63 [250]). Hill testified he believed at the time it was a valid exclusion under the policy. (Tr. 63-64 [250-254]). He told Dhyne he would need to talk with his supervisor about whether the uninsured motorist claim would be covered with work comp involved. (Tr. 60-61 [240-241]). Dhyne stated she had an appointment and asked that he call her back later. (Tr. 60 [239]).

Hill called her back the next morning, on the 29th, and told Dhyne he would check with his management to see about the uninsured motorist coverage. (Tr. 61 [243]). As he testified, "The way I left it was that I would continue to look into it." (Tr. 69 [276]).

Hill then spoke to State Farm Claim Team Manager Mary Humphrey about the claim and they contacted by phone Attorney Dale Beckerman from the law firm of Deacy & Deacy, who informed them there was uninsured motorist coverage "from dollar one" for the claim. (Tr. 61 [244]). Hill learned for the first time that the policy exclusion regarding "to the extent any workers compensation or disability benefits were being received" was not applicable. (Tr. 63-64 [250-254]).

After he discovered this, Hill telephoned Dhyne the next day, on February 15, 2002, and left a message asking her to call back regarding the uninsured motorist claim, but she never returned his call. (Tr. 65 [257]). A few minutes later, Hill noted in his log that he needed to talk to Dhyne about subrogation on the claim, so State Farm could pursue the uninsured party. (Tr. 65 [258-259]). Hill testified his contacts, including the message left, were entered in the claim activity log on the day each occurred, and they could not be altered or deleted. (Tr. 64 [254-255]).

Hill testified he did not tell Dhyne he was denying her claim, nor was anything sent in writing denying her claim. (Tr. 42 [166]; 66 [263-264]). In fact, he did not have the authority to reject her claim if he wanted to, because that was a decision for either a team manager or the claims committee. (Tr. 66 [264]).

Hill denied telling Dhyne that any uninsured motorist benefits would go to pay her workers compensation carrier, nor that her rates would go up if she made a claim. (Tr. 67 [267-268]).

Mary Humphrey, a team manager for State Farm (Tr. 95 [377]), verified the telephone conversation with attorney Beckerman. (Tr. 96-97). She also testified that State Farm employees, including Hill, are instructed to tell the insureds, when asked about whether rates will increase if a claim is made, to contact their agent. (Tr. 95 [378-379]). The decision on whether to increase rates is made by underwriting, she testified, and Hill could not make that decision. (Tr. 95 [379-380]).

She testified that State Farm requires a claim to be documented by medical records to confirm the treatment received is related to the accident. (Tr. 99 [396]). She also testified State Farm frequently receives letters from attorneys before suit is filed, essentially claiming, “We think you got it wrong, pay up,” but

there was no demand letter from Mr. Turner, Dhyne's counsel, before suit was filed here. (Tr. 101 [401-402]).

Dale Beckerman also verified the conversation concerning coverage. (Tr. 102-

03). He testified that the coverage circumstances here represented an unusual factual and legal situation he had only seen two or three times in his 28 years of practice. (Tr. 102-103 [405, 409]). And, he testified, the law on various insurance provisions changes all the time, so it was appropriate to consult him. (Tr. 103 [409-410]). His opinion was that payment would not benefit the workers compensation carrier and there was, therefore, uninsured motorist coverage for the claim. (Tr. 103 [411-412]).

Dhyne testified that Hill told her any benefits she received from uninsured motorist coverage would "go directly to work comp." (Tr. 84 [335]). She also testified she asked him if her insurance rates would go up if she filed a claim and testified Hill said, "Yes, they could." (Tr. 85 [337]). She testified Hill verified this in a second phone conversation after visiting with his supervisor. (Tr. 85 [338]).

Even assuming the truth of her statements, this would not amount to a "refusal" to pay her claim, as demonstrated previously. As Dhyne again

admitted, Hill never denied her claim, nor did she receive a letter from State Farm denying her claim. (Tr. 86-87 [344-347]). If State Farm denies a claim, it sends out a letter as written notice. (Tr. 100 [400]).

Therefore, Plaintiff utterly failed to make a submissible case, because she failed to prove the first element of her claim, that State Farm "refused" to pay her. State Farm actually paid her the policy limits. There was never a refusal, as the following case law further demonstrates.

F. Missouri case law demonstrates there was no "refusal" to pay here.

Missouri case law demonstrates that, as a matter of law, State Farm did not "refuse coverage."

The closest Missouri case factually to the instant case is *Morris v. J.C. Penney Life Ins. Co.,* 895 S.W.2d 73, 78 (Mo.App. W.D. 1995). In that case, the plaintiff alleged the insurer vexatiously refused to pay, because, *inter alia*, an employee or agent of the defendant insurer, when contacted by telephone for a claim form, offered the view that "it would do no good" to submit a claim form. *Id.* The Court, however, did not find there was sufficient evidence to warrant submission of a vexatious refusal claim, because, "Such a remark could have been an improper attempt to discourage a legitimate claim, or it could have reflected the honest belief of defendant's employee that the claim would not be covered." *Id.* (Emphasis added). The Court went on to find that, although the insurer initially took the position there was no coverage, it subsequently, " presumably

upon advice of counsel, abandoned that position." The Court concluded this evidence, even combined with an erased phone recording of the agent's conversation with the insured, did not "raise an inference of improper motives." *Id.*

Likewise, the evidence here is that, at most, a mistake was made and was subsequently abandoned on the advice of counsel. The evidence here does not "raise an inference of improper motives," much less provide substantial and competent proof of a refusal to pay. Even if Hill told Dhyne that her workers compensation insurer would have to be paid out of her uninsured motorist proceeds, as she alleges, Hill abandoned that position upon the advice of counsel, as in *Morris*. Hill then tried to call Dhyne and he left a message, but she never called back. (L.F. 51). And only five days after Hill left that message and three weeks from the time Dhyne talked to Hill, she filed suit against State Farm. (L.F. 1, 50-51).

In *Miles v. Iowa National Mutual Insurance Co.*, 690 S.W.2d 138, 144 (Mo.App. W.D. 1984), the court held an insurance company's letters to the insured rejecting her proof of loss and later indicating the insured had abandoned his claim by not replying to the rejection of his proof of loss did not constitute denials of liability. That case further demonstrates that even a proven effort to "discourage" an insured's claim is not equivalent to a "refusal to pay."

In *Jacoby v. New York Life Ins. Co.*, 77 S.W.2d 840, 845 (Mo.App. 1934), the court held the insurer did not deny liability, where it refused to approve a claim and

acknowledge liability under the evidence furnished to it, just as State Farm's Answer here allegedly failed to acknowledge liability and State Farm refused to pay until it was provided with proof of damages.

Likewise, in *Barton v. Farmers Ins. Exchange,* 255 S.W.2d 451, 457 (Mo.App. 1953), the court held punitive damages were wrongly awarded to an insured where negotiations were in progress; therefore, the insured "knew there had been no denial of liability . . ." In this case, the investigation of Plaintiff's claim was in progress and, as Dhyne admits, she knew there had been no denial of liability at the time she filed suit.

Missouri courts have held in many similar cases that submitting a vexatious refusal claim was not warranted where the evidence did not support the submission including, *inter alia*: *Lindsey v. Masonry Co., Inc. v. Jenkins & Associates, Inc.,* 897 S.W.2d 6 (Mo.App. W.D. 1995) (there was only a "smidgen" of evidence supporting the claim); *Bechtolt v. Home Ins. Co.,* 322 S.W.2d 872 (Mo. 1959) (insurer had reasonable cause to believe extent of plaintiff's loss was not as great as claimed).

In this case, where Dhyne admits Hill did not "refuse" her claim and State Farm did, in fact, *pay the full policy limit* after it investigated and was provided with Plaintiff's medical bills and proof of lost wages, there was certainly no "vexatious refusal to pay."

III. The trial court erred in denying State Farm's motion for summary judgment or, alternatively, for judgment notwithstanding the verdict, because as a matter of law State Farm's conduct was not willful and without reasonable cause, nor did State Farm

persist in a refusal to pay after becoming aware that there was no meritorious defense, in that State Farm never denied Plaintiff's claim, State Farm paid Plaintiff her policy limits, any delay in payment was a result of Plaintiff's failure to provide proof of her damages and State Farm's claim representative was appropriately seeking a legal opinion regarding coverage when Plaintiff prematurely filed suit.

A. Standard of Review

In the interest of brevity, State Farm incorporates by reference as if fully set forth here the standards of review set forth on Issue II, as the same standard applies to this issue.

B. A "vexatious refusal" claim requires evidence not only of a refusal, but that the refusal was "willful and without reasonable cause," and there was no evidence of such willfulness and unreasonableness here.

This issue was also raised in State Farm's summary judgment motion (L.F. 25) and in its motions for directed verdict (L.F. 201-202; Tr. 106-107) and judgment notwithstanding the verdict. (L.F. 235-238).

Missouri law requires proof that an alleged vexatious refusal to pay be supported by evidence that it was "willful and without reasonable cause, as the facts would appear

to a reasonably prudent person before trial." As the court stated in *Groves v. State Farm Mut. Auto. Ins. Co.*, 540 S.W.2d 39, 42 (Mo. banc 1976):

> "The law is well settled that the penalty for vexatious refusal of an insurance company to pay the claim of its insured should not be imposed **unless the facts and circumstances surrounding the company's refusal to pay show that the refusal was wilful and without reasonable cause or excuse**, **as the facts would have appeared to a reasonable person before trial**." (Emphasis added).

See also, e.g., *Wunsch, supra,* 92 S.W.3d at 193; *Hocker Oil Co., Inc. v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510, (Mo.App. S.D. 1999).

Moreover, as the Court stated in *Wunsch*:

> "Generally . . . a question of reasonableness is a question of fact for the jury rather than a question of law for the court. But, it can be determined as a matter of law based upon undisputed facts . . . This is so because [a] question of fact exists only when fair-minded people, exercising reasonable judgment, could reach different conclusions on the issue in controversy. When reasonable minds could not differ, summary judgment is properly granted."

92 S.W.2d at 153.

This question was not presented to the jury. (see Issue III). The court inappropriately determined the issue as a matter of law, without explicitly ruling on the issue. But, as to State Farm's summary judgment motion, there was no evidence of

"willfulness," even when the court reviews the record and all reasonable inferences in the light most favorable to the non-movant Plaintiff, as demonstrated next. And, as to State Farm's motion for judgment notwithstanding the verdict, a case should not be submitted to the jury unless each and every fact essential to liability is supported by substantial and competent evidence. *Constance v. B.B.C. Development Co.,* 25 S.W.3d 571, 576 (Mo.App. W.D. 2003). [citation omitted].

The actions of State Farm could scarcely be deemed "willful." "Willful" is defined as "conscious; knowing; done with stubborn purpose, but not with malice." Black's Law Dictionary 1773 (4th ed. 1968). Even giving Plaintiff the benefit of all reasonable inferences here, the worst that can be said of State Farm was that Mr. Hill initially made a mistake. He did not actually refuse Dhyne's claim, nor did he commit any act knowing it to be wrong or with "stubborn purpose."

State Farm's act of actually paying the full policy limit on Dhyne's claim cannot be viewed as a "refusal," much less a refusal that was "willful and without reasonable cause or excuse."

Nor could State Farm's original Answer be considered a "refusal," as demonstrated above, much less a willful or unreasonable refusal, as whether a refusal to pay is vexatious or not must be determined by the situation as presented to the insurer at the time it was called on to pay. *Hopkins v. American Economy Ins. Co.*, 896 S.W.2d 933, 939 (Mo.App.W.D. 1995); *Wunsch, supra,* 92 S.W.3d at 153. And, again, Dhyne's

original petition not only asserted a claim for uninsured motorist benefits, which was eventually dismissed, but also asserted the vexatious refusal claim (Tr. 1 [3-4]), which was certainly reasonable for State Farm to deny. Moreover, even as to the uninsured motorist claim, there were issues that remained to be settled at the time the original Answer was filed, including what the extent of Dhyne's damages were, which was not determined until Dhyne answered interrogatories in this case. (Tr. 65, 67 [258-259, 265]; 68 [272]; 88 [349-352]). Under these facts, the Answer could not, as a matter of law, even be a "refusal," much less a willful and unreasonable refusal.

Likewise, State Farm did not willfully and unreasonably refuse Dhyne's claim by "discouraging" her from making a claim. First, as stated previously, no Missouri court has ever held that "discouraging" a claim is equivalent to "refusing" a claim. Additionally, State Farm could not have "discouraged" Dhyne from making a claim against State Farm, because the conversation in which Dhyne alleged this occurred was after she had already reported her loss to her State Farm agent. There was, therefore, no evidence that anybody at State Farm tried to discourage her from reporting the claim, much less did so "willfully and unreasonably."

Again, the evidence here was that, at most, a mistake was made that was subsequently abandoned on the advice of counsel within a reasonable time, as previously demonstrated. Dhyne presented nothing at the summary judgment stage nor in response to the motion for judgment notwithstanding the verdict to dispute this and, therefore, the trial court erred in ruling on both motions.

The vexatious delay issue should not go to the jury unless an inference can be drawn that the refusal to pay is unjustifiable and vexatious. *Patterson v. American Ins. Co. of Newark, N.J.*, 160 S.W. 59 (Mo.App. 1913). Moreover, before a jury should be permitted to consider the issue of vexatious refusal, there must be evidence from which it can find the refusal was willful and without reasonable cause as the facts would appear to a reasonable and prudent man before trial. *Rohlfing v. State Farm Fire & Cas. Co.*, 349 S.W.2d 472, 477 (Mo.App. 1961).

Perhaps the closest case factually to the instant one on this issue is *Lake v. Farm Bureau Mut. Ins. Co. of Missouri*, 624 S.W.2d 28 (Mo.App. E.D. 1981), where the court held the evidence showed a refusal to pay, but not that the refusal was vexatious. As the court stated there, "The evidence shows Farm Bureau's refusal to pay the fire loss but does not demonstrate that such refusal was willful and without reasonable cause or excuse."

Here, however, there was not even a refusal to pay, as State Farm never "refused" Dhyne's claim and *actually paid the policy limits*, much less a refusal that was "willful

and without reasonable cause or excuse, as the facts would have appeared to a reasonable person before trial." Again, giving Plaintiff the benefit of all reasonable inferences here, the worst that can be said of State Farm was that Mr. Hill initially made a mistake, not that he committed any act, much less a "refusal," knowing it to be wrong or with "stubborn or recalcitrant purpose."

C. A vexatious refusal claim also requires evidence that the insurer persisted in its refusal to pay after becoming aware that it has no meritorious defense and there is no such evidence here.

It is only when the insurance company persists in its refusal to pay after becoming aware that it has no meritorious defense that it becomes liable for vexatious delay. *Wunsch v. Sun Life Assurance Co. of Canada,* 92 S.W.3d 146, 154 (Mo.App. W.D. 2002); *Morris v. J.C. Penney Life Ins. Co.*, 895 S.W.2d 73, 76 (Mo. App. 1995). (Emphasis added).

Here, even examining only the facts favorable to Plaintiff, the facts set forth above demonstrate that, if State Farm had denied Plaintiff's claim at all, State Farm was not given an opportunity to persist in "refusing" coverage. The evidence shows Brandon Hill was confused about whether certain policy exclusions would apply to the subject loss.

(Tr. 63-64 [250-254]). He told Dhyne he would need to talk with his supervisor about whether the uninsured motorist claim would be covered with work comp involved. (Tr. 60-61 [240-241]). He testified, "The way I left it was that I would continue to look into it." (Tr. 69 [276]). In an effort to clear-up his confusion, he sought the advice of Mary Humphrey, a State Farm Claim Team Manager, and they contacted Attorney Dale Beckerman of Deacy & Deacy, who informed them there was uninsured motorist coverage "from dollar one" for the claim. (Tr. 61 [244]). Hill learned then for the first time that the exclusion relating to the extent any workers compensation or disability benefits were being received was not applicable. (Tr. 63-64 [250-254]).

When he discovered this, Hill telephoned Dhyne the next day, on February 15, 2002, and left a message asking her to call back regarding the uninsured motorist claim, but she never returned his call. (Tr. 65 [257]). Neither of these acts of seeking legal advice or calling Dhyne back to tell her what was discovered are, of course, the acts of a "vexatious" insurer.

A few minutes later, Hill noted in his log he needed to talk to Dhyne about subrogation on the claim as well, so that State Farm could "go after" the uninsured party. (Tr. 65 [258-259]). Hill testified his contacts, including the

message left, were entered in the claim activity log on the day each occurred, and they could not be altered or deleted. (Tr. 64 [254-255]).

Hill testified he did not tell Dhyne he was denying her claim, nor was anything sent in writing denying her claim. (Tr. 42 [166]; 66 [263-264]). In fact, he did not have the authority to reject her claim if he wanted to, because that was a decision for either a team manager or the claims committee. (Tr. 66 [264]).

There was, therefore, no persistent denial of coverage, but simply a thought Mr. Hill expressed indicating that he did not believe coverage would apply, but he would have to check with his management. Even if this were construed to be a delay in providing coverage, it was resolved when the policy limit was tendered and accepted by Plaintiff, and was not even a "refusal," much less a persistent "refusal." Of course, State Farm was not inclined to persist in "refusing" coverage, if it ever "refused." It tendered the full policy limit as soon as Plaintiff provided her sworn answers to Defendant's Interrogatories, which contained a medical summary itemizing the medical costs and services she received as a result of her injuries, as previously demonstrated.

There was, therefore, no issue of material fact, nor any competent and substantial evidence, that proved State Farm "persisted" in "refusing" coverage, even after becoming aware that it had no meritorious defense. As soon as State Farm knew the nature and extent of Dhyne's medical expenses, it tendered its policy limits of $50,000.

IV. The trial court erred in instructing the jury on vexatious refusal without including the element of willful and by refusing to define willful and without reasonable cause as persisting in a refusal to pay after becoming aware that there is no meritorious defense, because an instruction that does not follow the substantive law is misleading and requires reversal, in that the court's instruction erroneously eliminated the scienter element of the claim, as well as the "persisting" element and, thereby, relieved Plaintiff of essential elements on which she had the burden of proof.

A. Standard of Review

To reverse on grounds of instructional error, the appellant must show that the offending instruction, misdirected, misled or confused the jury. *Williams v. Finance Plaza, Inc.*, 23 S.W.3d 656, 658 (Mo.App. W.D. 2000), citing *Doe v. Alpha Therapeutic Corp.*, 3 S.W.3d 404, 419 (Mo.App. E.D.1999). Furthermore, prejudice must have resulted from the instructional error. *Id.*, citing *Van Volkenburgh v. McBride*, 2 S.W.3d 814, 821 (Mo.App. W.D.1999). However, an instruction that does not follow the

substantive law is misleading and requires reversal. *State v. Edward,* 60 S.W.3d 602, 615 (Mo.App. W.D. 2001).

The standard of review on the trial court's refusal to give a tendered instruction is abuse of discretion. *Linton v. Missouri Highway Transp. Com'n,* 980 S.W.2d 4, 10 (Mo.App. E.D.1998); *Titsworth v. Powell,* 776 S.W.2d 416, 423 (Mo.App. E.D.1989). (Emphasis added).

B. The trial court erred in not instructing the jury on all elements of a vexatious refusal claim and in not defining those elements.

The elements of a vexatious refusal to pay claim include the defendant's refusal to pay the claim, and that the refusal was willful and without reasonable cause, as the facts would appear to a reasonable and prudent person before trial. *Bickerton, Inc. v. American States Ins. Co.*, 898 S.W.2d 595, 602 (Mo.App. W.D. 1995). "Willful and without reasonable cause" has been further defined as an insurer persisting in its refusal to pay after becoming aware that it has no meritorious defense. *Wunsch v. Sun Life Ins. Co. of Canada,* 92 S.W.3d 146, 154 (Mo.App. W.D. 2002). In this case, the parties initially discussed instructions with the court off the record. (Tr. 107 [427]). When the parties were back on the record, the trial court noted State Farm's objection to, *inter alia,* the damage and verdict directing instructions, were re-asserted on the record. (Tr. 107 [427]).

The trial court gave, as Instruction No. 5, a charge to the jury that:

> Your verdict must be for plaintiff if you believe that defendant State Farm Fire and Casualty Company refused to pay uninsured motorist benefits without reasonable cause or excuse. (L.F. 208, A5 in Appendix).

The basis for State Farm's objection to this instruction is clear from State Farm's submission of the following two instructions offered by State Farm and rejected by the trial court. One instruction offered by State Farm stated:

> The plaintiff must show that defendant State Farm's refusal to pay the loss was **willful** and without reasonable cause, **as the facts would appear to a reasonable and prudent person**. (L.F. 213, A7 in Appendix). (Emphasis added).

The instruction followed the elements of a claim for vexatious refusal. See, e.g., *Shaffer v. Bess,* 822 S.W.2d 871, 878 (Mo.App. 1991); *DeWitt v. American Family Mut. Ins. Co.,* 667 S.W.2d 700, 710 (Mo. banc 1984). State Farm's objection was,

therefore, obviously to the deletion of the "willful" element of a vexatious refusal claim.

State Farm also submitted the following instruction, which the court refused:

> If you find in favor of plaintiff on the claim on the insurance policy, and if you believe that defendant State Farm refused to pay without reasonable cause

or excuse, then, in addition to any amount you may award on the insurance policy under Instruction No. _____, you may award plaintiff an additional amount as a penalty not to exceed twenty percent of the first $1,500.00 of the policy not including interest and ten percent of the remainder of such award and you may award plaintiff a reasonable sum for attorney's fees.

"Without reasonable cause or excuse" as used in this Instruction means that an insurance company persists in its refusal to pay after becoming aware that it has no meritorious defense. (L.F. 212, A6 in Appendix).

This instruction was obviously meant to address the legal requirement that "it is only when the insurance company persists in its refusal to pay after becoming aware it has no meritorious defense that it becomes liable for vexatious delay." *Wunsch v. Sun Life Assurance Co. of Canada,* 92 S.W.3d 146, 154 (Mo.App. W.D. 2002); *Morris v. J.C. Penney Life Ins. Co.*, 895 S.W.2d 73, 76 (Mo. App. W.D. 1995).

The trial court's reasoning in refusing these instructions was "they are non-MAI instructions and that the teaching of MAI is that to define terms that are not defined in MAI, especially when there is a verdict form, usually and frequently constitutes error." (Tr. 108 [430]).

Admittedly, the current MAI instruction on this cause of action does not

include the elements noted above. However, the instruction (10.08) improperly removes elements that were Plaintiff's burden to prove. "MAI-CR and its Notes on Use are 'not binding' to the extent they conflict with the substantive law." *State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997). An instruction that does not follow the substantive law is misleading and requires reversal. *State v. Edward*, 60 S.W.3d 602, 615 (Mo.App. W.D. 2001).

The instruction given did not require the jury to find two of the essential elements of Plaintiff's claim ("willfulness" and that the "reasonable and prudent person" standard applied to this determination). The jury was, therefore, misled and State Farm was prejudiced by removing these elements from Dhyne's burden of proof.

Plaintiff will no doubt argue that removing an essential element of his burden of proof was perfectly proper. But where a verdict director effectively omits an essential element of the offense, such an instruction rises even to the level of plain error if the evidence in the case fails to establish the existence of the omitted element "beyond serious dispute." *State v. Harney*, 51 S.W.3d 519, 533-34 (Mo.App.2001) (citation omitted).

Here, there was absolutely no evidence that Brandon Hill's conduct was "willful," as previously demonstrated, so the evidence did fail to establish this element "beyond serious dispute" and, therefore, use of the instruction omitting this element was error that even constituted plain error had State Farm not objected to it. Also, allowing State Farm to argue in opening remarks that an essential element of Plaintiff's case was lacking ("willfulness") without instructing the jury that the element was even required certainly only exacerbated this error, making Defendants' argument inconsequential and without evident legal support in the minds of the jurors.

Finally, although it is admitted that there is no MAI instruction defining the phrase "without reasonable cause or excuse," an instruction given before the adoption of MAI 10.08, however, which defined reasonable cause was found not to be prejudicial in *DeWitt v. American Family Mut. Ins. Co.*, 667 S.W.2d 700, 711 (Mo.banc 1984).

CONCLUSION

For all of the foregoing reasons, State Farm requests this Court affirm the Western District, reverse the trial court's rulings on the issues presented and enter judgement in favor of State Farm as a matter of law, or alternatively, grant State Farm a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this ____ day of September, 2005, I sent a true and correct copy of the above and foregoing Appellant's Brief by U.S. Mail, postage paid and properly addressed to:

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ATTORNEY FOR PLAINTIFF/RESPONDENT

_____
Kevin D. Weakley

CERTIFICATION
AS TO WORD COUNT, VIRUS SCAN AND THAT DISK IS VIRUS FREE

Pursuant to Rule 84.06, Defendant/Appellant hereby certifies that the word count herein, as calculated by the word count system employed, is 13,257 words, and does not exceed the 31,000 word limit provided by the rule. Additionally, Defendant/Appellant certifies that the disks submitted to the Court have been scanned for viruses and are virus-free.

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