S.C. No. 87032

IN THE SUPREME COURT OF MISSOURI

KRISTEN DHYNE,
Plaintiff/Respondent,

v.

STATE FARM CASUALTY COMPANY,
Defendant/Appellant

Appealed from the Circuit Court of Jackson County, Missouri
The Honorable Charles E. Atwell, Judge

SUBSTITUTE BRIEF OF RESPONDENT

TURNER & SWEENY
John E. Turner - MO - 26218
Christopher P. Sweeny - MO - 44838
10401 Holmes Road
Suite 450
Kansas City, MO 64131
(816) 942-5100
[FAX: (816) 942-5104]
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

POINTS RELIED ON WITH PRIMARY AUTHORITIES

POINT I

The Trial Court Properly Exercised Jurisdiction Over This Matter Because Plaintiff's Petition Stated A Claim Upon Which Relief Can Be Granted In That 1) A Cause Of Action Can Be Stated Under §375.420 RSMo Even If The Insurer Has Paid Its Policy Limits And Interest; And 2) Even If A Cause Of Action Under §375.420 RSMo Requires At Least A Claim For Interest, Plaintiff's Petition Stated A Claim For Interest, And Therefore, Plaintiff's Petition Stated A Claim Upon Which Relief Can Be Granted.

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

Wollard v. Lloyds and Companies of Lloyds, 539 So.2d 217 (Fla. 1983)

Overcast v. Billings Mutual Ins. Co., 11 S.W.3d 62, 67 (Mo. banc 2000)

§375.420 RSMo

POINT II

The Trial Court Did Not Err In Denying State Farm's Motion For Judgment Notwithstanding The Verdict Because State Farm Refused To Pay Respondent's Uninsured Motorist Claim In That State Farm Did Not Pay Respondent Kristen Dhyne's Claim For More Than Seven Months After Being Notified Of The Claim; For More Than Six Months After Obtaining A Legal Opinion That Its Policy Provided Coverage For The Claim; And For More Than Three Months After Receiving Sworn Testimony Regarding Ms. Dhyne's Damages.

Sanders v. Ins. Co. of North America, 42 S.W.3d 1, 8 (Mo.App. 2000)

Brown v. State Auto Ins. Assoc., 265 S.W.2d 741 (Mo.App. 1954)

Wollums v. Mutual Benefit Health and Accident Assoc., 46 S.W.2d 259 (Mo.App. 1932)

McCarty v. United Ins. Co., 259 S.W.2d 91 (Mo.App. 1953)

Missouri Supreme Court Rules 55.03, 55.07.

POINT III

The Trial Court Did Not Err In Denying State Farm's Motion For Judgment Notwithstanding The Verdict Because The Evidence Viewed In The Light Most Favorable To The Respondent Demonstrates That State Farm's Refusal To Pay Ms. Dhyne's Uninsured Motorist Claim Was Willful And Without Reasonable Cause, And That State Farm Persisted In Its Refusal To Pay After Becoming Aware That There Was No Meritorious Defense In That State Farm Effectively Told Ms. Dhyne That She Did Not Have Uninsured Motorist Coverage For An On The Job Injury Even Though She Did And After Being Told By Its Attorney That There Was Coverage, State Farm Persisted In Its Denial Of Ms. Dhyne's Claim.

DeWitt v. American Family Mutual Ins. Co., 667 S.W.2d 700, 710 (Mo.banc 1984)

Hounihan v. Farm Bureau Mut. Ins. Co. of Mo., 523 S.W.2d 173 (Mo.App. 1975).

McCarty v. United Ins. Co., 259 S.W.2d 91 (Mo.App. 1953)

Travelers Indemnity Co. v. Woods, 663 S.W.2d 392 (Mo.App. 1983)

Missouri Supreme Court Rules 55.03 and 55.07.

POINT IV

The Trial Court Did Not Err In Giving Instruction Number 5 Regarding Vexatious Refusal Because Defendant Failed To Object To The Instruction And The Instruction Sufficiently Set Forth The Substantive Law In That It Followed Both The Wording Of The Applicable Missouri Approved Instruction And The Statute Upon Which Plaintiff Was Relying - §375.420 RSMo.

DeWitt v. American Family Mutual Ins. Co., 667 S.W.2d 700, 710 (Mo.banc 1984)

Eagle v. Redman Building Corp., 946 S.W.2d 291, 294 (Mo.App. 1997)

Farley v. Wappapello Foods, Inc., 959 S.W.2d 888, 893 (Mo.App. 1997)

Shannon v. Wal-Mart Stores, Inc., 974 S.W.2d 588, 592 (Mo.App. 1998)

§375.420 RSMo

Missouri Supreme Court Rule 70.03

MAI 10.08

STATEMENT OF FACTS

A. INTRODUCTION

The standard of review for this case requires that this Court view the evidence and all reasonable inferences in the light most favorable to the jury's verdict; all evidence contrary to the jury's verdict must be disregarded. Appellant's Statement of Facts selectively recounts those portions of the evidence that support its position. For example, State Farm asserts that its claims representative called Ms. Dhyne on February 15, 2002 after being told by his team manager and attorney Dale Beckerman that Ms. Dhyne had coverage for her uninsured motorist claim. (Appellant's Brief at 4). Respondent Dhyne, however, testified that no one from State Farm ever called her after January 29, 2002. (Tr. 338, 340). Viewed in the light most favorable to the Respondent, State Farm's claims representative did not call Respondent Dhyne after being told by a team manager and an attorney that there was coverage for Ms. Dhyne's claim. Because of Appellant's general failure to set forth the facts in the light most favorable to the jury's verdict, Respondent provides her own Statement of Facts.

B. DHYNE MAKES A CLAIM FOR UNINSURED MOTORIST BENEFITS

Respondent Kristen Dhyne worked as a paramedic for MAST ambulance. On February 6, 2001, after exiting the ambulance she had been driving, she was hit by an uninsured motorist. Less than a year after the collision, Ms. Dhyne reported the accident and her injuries to State Farm. (Tr. 237). On January 28, 2002 State Farm's corporate representative, Brandon Hill, was assigned Ms. Dhyne's claim and called her. (Tr. 237). During this first conversation, Ms. Dhyne told Mr. Hill that she would like to make an

uninsured motorist claim, and she detailed her injuries for Mr. Hill. (Tr. 335). Mr. Hill noted in his activity log that Ms. Dhyne had suffered 1) a broken pelvis; 2) right kidney failure for which she required surgery; and 3) nerve damage to her right little finger. (Tr. 239 and L.F. 48). Mr. Hill also noted that in almost a year after the collision, Ms. Dhyne was still on light duty working only five hours a day. (Tr. 239 and L.F. 48).

Mary Humphrey, a team manager at State Farm, testified that people making claims do not generally know what State Farm needs, and therefore, it is the role of the adjuster, Mr. Hill in this case, to ask the questions of the insured. (Tr. 393). If an adjuster feels as though he needs to run down all of the medical information, he is told to ask the person the name of the doctors. (Tr. 396). Mr. Hill recorded Ms. Dhyne's injuries and work status in his activity log, but did not request any medical records or bills. (Tr. 347). Nor did Mr. Hill ever ask for a medical authorization. (Tr. 350).

C. STATE FARM'S DENIAL

Ms. Dhyne had an automobile policy with State Farm that provided $50,000.00 in uninsured motorist coverage. (L.F. 47). Hill acknowledged that a State Farm insured who is hit by an uninsured motorist is covered under the uninsured motorist coverage even if the insured was working at the time they were injured. (Tr. 164-165). Nonetheless, on January 29, 2002, Mr. Hill told Respondent Dhyne that her claim was not covered under her uninsured motorist policy except for that part of her lost wages that was not being paid by the workers' compensation carrier. (Tr. 165-168, 276). Mr. Hill admitted at trial that what he had told Ms. Dhyne was wrong. (Tr. 159).

Mr. Hill also told Ms. Dhyne that if she made an uninsured motorist claim, her rates could go up. (Tr. 337). And that even if she recovered any money from her uninsured motorist coverage, it would go directly to the workers' compensation carrier. (Tr. 335). Ms. Dhyne's expert, attorney Walter Simpson, testified at trial that Mr. Hill's comments were not only contrary to Missouri law, they were contrary to the policy itself. (Tr. 298-299). Consequently, Mr. Simpson opined that there was no reasonable cause or excuse for Mr. Hill to make such a representation. (Tr. 298-299).

Finally, during their first conversation on January 28, 2002, Mr. Hill told Ms. Dhyne that he would check with his supervisors about whether she had coverage. Mr. Hill called Ms. Dhyne back the next day and told her that he had checked with his supervisor and that his supervisor agreed that any benefits she collected would go to the workers' compensation carrier and that there was no uninsured motorist coverage for her injury other than that part of her wages which were not being paid by the worker's compensation carrier. (Tr. 276 and 337). Mr. Hill never told Ms. Dhyne that he was going to call her back after that second phone call and in fact, he never did call her back. (Tr. 338 and 340).

D. EVEN AFTER STATE FARM'S ATTORNEY SAID THAT THERE WAS COVERAGE, STATE FARM DENIED DHYNE'S CLAIM

Approximately two weeks after effectively telling Ms. Dhyne that she did not have uninsured motorist coverage for her on-the-job injury, Mr. Hill was told by State Farm's attorney Dale Beckerman that there was coverage. (Tr. 276 and 385). Mr. Hill spoke to Mary Humphrey who is a team manager at State Farm. Ms. Humphrey told Mr. Hill that

she believed Ms. Dhyne did have uninsured motorist coverage for her loss, and suggested that they call attorney Dale Beckerman. (Tr. 383-384 and 385). Mr. Beckerman agreed that uninsured motorist coverage would apply in Ms. Dhyne's case. (Tr. 385). Mr. Hill never conveyed this information to Ms. Dhyne. (Tr. 340).

Ms. Dhyne then filed this action against State Farm. Although State Farm called Mr. Beckerman of the Deacy & Deacy firm for his opinion regarding coverage, it did not hire Mr. Beckerman for this action. State Farm hired Wallace, Saunders, Austin, Brown & Enochs. State Farm's corporate representative acknowledged that he did not notify State Farm's new attorneys that Dale Beckerman had said that there was coverage under the uninsured motorist provisions of Ms. Dhyne's policy. (Tr. 263). State Farm, through its new attorneys, then filed an Answer wherein it denied Ms. Dhyne's claim and asked that she "take naught by way of her petition, but that separate defendant, State Farm, go hence with its costs herein incurred and expended." (Tr. 175-176).

E. AFTER RECEIVING SWORN TESTIMONY THAT MS. DHYNE'S SPECIAL DAMAGES EXCEEDED $39,000.00, STATE FARM REFUSED TO PAY HER CLAIM FOR THREE MORE MONTHS

On or about May 17th, 2002, in response to State Farm's interrogatories, Ms. Dhyne disclosed that she suffered lost wages in the amount of $26,603.22 and incurred medical bills in the amount of $13,373.15. (Tr. 353-355). For about three months after receiving this information, State Farm did not pay the claim. Finally, on August 19th, Brandon Hill signed and sent a check made payable to Kristen Dhyne and Sedgwick

Claims Management. (Tr. 186 and 189). Sedgwick was the workers' compensation carrier handling Dhyne's workers' compensation claim. (Tr. 341).

Mr. Hill admitted that the way the check was written prevented Ms. Dhyne from being able to negotiate, sign and cash the check without Sedgwick's involvement. (Tr. 189). He further acknowledged that sending the money to Ms. Dhyne in that form prevented her from accessing her uninsured motorist benefits. (Tr. 189). Finally, he admitted that Sedgwick did not have any right to the money. (Tr. 189).

Counsel for State Farm claimed that Sedgwick was put on the check because counsel was relying on Kansas law; however, Mr. Hill did not recall counsel for State Farm saying anything about Kansas law. (Tr. 190-191). More importantly, Kansas law, like Missouri law, does not entitle the workers' compensation carrier to any part of an injured person's uninsured motorist benefits. (Tr. 294-295). Ms. Dhyne was not paid her uninsured motorist benefits in a manner in which she could actually negotiate the check until August 29, 2002: more than three months after State Farm had received Ms Dhyne's interrogatory answers. (Tr. 271-272).

F. DHYNE'S FIRST AMENDED PETITION

On October 16, 2002, Ms. Dhyne filed her first amended petition. (L.F. 8) Because State Farm had finally paid $50,000.00 in uninsured motorist benefits by the time Ms. Dhyne filed her amended petition, that fact was reflected in the petition, and she did not claim that she was still entitled to that amount. (L.F. 11). However, she did claim that she was entitled to interest, attorney fees and penalties. (L.F. 11). In paragraph twelve (12) of her petition, she stated, "Plaintiff is entitled to an additional

award of damages not to exceed 20% of the first $1,500.00 and 10% of the amount of the loss in excess of $1,500.00 and a reasonable attorney fee and interest." (L.F. 11). In her prayer for relief, Plaintiff prayed for, among other things, interest and costs. (L.F. 11).

G. INSTRUCTION CONFERENCE

At the beginning of the instruction conference, the Court announced:

> As I indicated before, we have discussed the instructions to some degree off the record, and I will go through the instructions I intend to give. After each instruction, if there is an objection in the record that you wish to make, you certainly can.

The Court further stated, "I would ask that if there is an objection to a particular instruction, I will ask you to make it once I recite that instruction." (Tr. 427). Finally, the Court noted, "as to the damage and verdict directing instructions, [State Farm's] issues of sufficiency that have been raised in [its] directed verdict motion, they're considered reasserted for the purposes of this conference." (Tr. 427). In its directed verdict motions, State Farm argued that as a matter of law Plaintiff failed to meet her burden of showing that State Farm refused to pay uninsured motorist benefits without reasonable cause or excuse. (Tr. 368-375, 421-424). No objection was raised in either of State Farm's directed verdict motions to the language in proposed Instruction number 5. (Tr. 368-375, 421-424).

After the Trial Court read instruction 5, State Farm's counsel made no objection. (Tr. 428-29). After reciting all of the instructions, the Court asked if counsel wanted to make any additional record; State Farm's counsel answered, "No, your Honor."(Tr. 431).

H. THE JURY'S VERDICT AND THE COURT'S RULINGS ON MOTIONS

When Appellant State Farm filed its Motion for Summary Judgment, this case was pending before the Honorable Jon R. Gray. On May 15, 2003, Judge Gray entered his Order overruling Appellant's Motion for Summary Judgment. (L.F. 144).

On the day of trial, this case was transferred to the Honorable Charles Atwell. At the close of Respondent's evidence, Appellant State Farm moved for a directed verdict. Judge Atwell denied the motion. (Tr. 368-376). At the close of all the evidence, Appellant State Farm again moved for a directed verdict. (L.F. 421-424). Judge Atwell denied the motion. (Tr. 424-426).

The case was then submitted to the jury, and the jury returned a unanimous verdict in favor of Respondent Kristen Dhyne. (L.F. 205). Counsel for State Farm then asked that the jury be polled. (Tr. 487). All twelve jurors then acknowledged that they agreed with the verdict. (Tr. 487-488). On October 23, 2003, Judge Atwell entered his Judgment consistent with the jury verdict. (L.F. 220-221). State Farm filed, among other things, its motion for judgment notwithstanding the verdict. (L.F. 224). On April 5, 2004, the Trial Court denied State Farm's motion. (L.F. 275). This appeal followed.

ARGUMENT

POINT I

The Trial Court Properly Exercised Jurisdiction Over This Matter Because Plaintiff's Petition Stated A Claim Upon Which Relief Can Be Granted In That 1) A Cause Of Action Can Be Stated Under §375.420 RSMo Even If The Insurer Has Paid Its Policy Limits And Interest; And 2) Even If A Cause Of Action Under §375.420 RSMo Requires At Least A Claim For Interest, Plaintiff's Petition Stated A Claim For Interest, And Therefore, Plaintiff's Petition Stated A Claim Upon Which Relief Can Be Granted.

A. STANDARD OF REVIEW

The Court of Appeals found that based on its interpretation of §375.420 RSMo., Plaintiff's petition failed to state a claim upon which relief could be granted. The interpretation of a statute is a question of law, and therefore, is reviewed under the de novo standard. See *Williams v. Kimes, 996 S.W.2d 43, 44-45 (Mo.banc 1999).* In reviewing a petition to determine if it states a claim upon which relief can be granted, the facts pleaded in the petition are taken as true. See *Moore v. Missouri Highway Transp. Comm., 169 S.W.3d 595, 598 (Mo.App. 2005).* The allegations in the petition are reviewed to determine whether principles of substantive law invoked would entitle petitioner to relief. Id. at 598-599. Finally, the petition is construed in the light most favorable to the plaintiff, and is given the benefit of every reasonable intendment. Id.

B. INTRODUCTION

In finding that Plaintiff's amended petition failed to state a claim upon which relief could be granted, the Court of Appeals concluded:

> In her First Amended Petition, the Respondent did not seek to recover a loss under her uninsured motorist policy. Instead, she simply sought damages and attorney's fees, under §375.420. As we discussed, *supra*, such a claim is not cognizable under the statute such that Respondent failed to state a claim upon which relief could be granted under §375.420." Id. at *5.

The Court of Appeals misinterprets §375.420 RSMo and further misreads Respondent's Petition. First, the Court of Appeals misinterpreted §375.420 RSMo by allowing the literal sense of its terms to prevail over the intention of the act. Second, Respondent's Petition sought damages not only for attorney's fees and penalties under §375.420 RSMo, but also for interest. As the Court of Appeals noted, a claim of interest is sufficient to support an award of damages and/or attorney's fees, pursuant to §375.420 RSMo. Id. at *4 citing *Victor v. Manhattan Life Ins. Co., 772 S.W.2d 826, 831 (Mo.App. 1989).*

C. THE WESTERN DISTRICT'S INTERPRETATION OF §375.420 RSMo FAILS TO FOLLOW THE INTENTION OF THE LEGISLATURE

In *Dairyland Ins. Co. v. Hogan, 605 S.W.2d 798, 800 (Mo. banc 1980)* the Missouri Supreme Court noted that the "cardinal rule" of statutory construction is that "'the intention of an act will prevail over the literal sense of its terms', otherwise it might lead to absurd consequences…." (citation omitted). In a more recent case, this Court noted that "the construction of statutes is not to be hyper-technical, but instead is to be

'reasonable and logical and [to] give meaning to the statutes.'" *Lewis v. Gibbons, 80 S.W.3d 461, 465 (Mo.banc 2002)* (citation omitted).

The statute at issue here, §375.420 RSMo, states:

> In any action against any insurance company to recover the amount of any loss under a policy of automobile, fire, cyclone, lightening, life, health, accident, employers liability, burglary, theft, embezzlement, fidelity, indemnity, marine or other insurance except automobile liability 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 twenty percent of the first fifteen hundred dollars of the loss, and ten percent of the amount of the loss in excess of fifteen hundred dollars and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict.

In *Overcast v. Billings Mutual Ins. Co., 11 S.W.3d 62, 67 (Mo. banc 2000),* this Court recognized that an insured, who is wrongfully refused payment, is not compensated for litigation expenses, and thus, is not made whole by an action in which he only recovers consequential damages flowing from the breach. The Court found that the provisions of attorney's fees and penalties in §375.420 RSMo "obviously aim to make the contracting party whole in a practical sense and to provide an incentive for insurance companies to pay legitimate claims without litigation." Id. at 67. Likewise, the Eastern District in *Bertolino v. Vince Kelly Constr. Co., Inc., 963 S.W.2d 331, 335 (Mo.App. 1998)* noted

that the intention of §375.420 "is to deter a surety or insurance company from vexatiously refusing to pay after it has become aware that it has no meritorious defense."

The Western District's interpretation of §375.420 RSMo is hyper technical and as a result allows the literal sense of the terms to prevail over the intention of the act. This is directly contrary to the "cardinal rule" of construction.

Under the Western District's interpretation of the statute, an insurance company can vexatiously refuse to pay an insured's claim, even after it becomes aware that it has no meritorious defense, without suffering any consequence at all so long as it pays all that it owes under the insurance contract before trial. It cannot be that the legislature intended for insurance companies that vexatiously refuse to pay a claim, even after they become aware that they have no meritorious defense, to escape the provisions of §375.420 by simply paying all that is due under the contract prior to trial.

If interpreted this way, the statute provides no incentive for insurance companies to pay legitimate claims. Rather, insurance companies can deny coverage for every single claim, even when they know there is coverage. If the insured does not hire a lawyer or does not pursue the claim, the insurance company will have saved money that it rightfully owed to its insured. On the other hand, if the insured does pursue the claim and hires an attorney to file a lawsuit against the insurance company, the insurance company has lost nothing. It can continue to deny the claim or offer to settle the matter for some amount less than what is owed under the policy without fear of any repercussions because they know that as long as they pay all that is owed under the policy before trial, they will not owe any vexatious damages. This illustration demonstrates that the Western

District's interpretation not only fails to follow the intent of the legislature, it leads to an absurd and unjust result. See *Gibson v. Walker, 380 So. 2d 531 (Fla.App. 1980).*

In *Gibson*, the plaintiff's trailer was stolen and he filed a claim with his insurance company. The insurance company initially refused to pay the loss and the insured filed suit. Id. at 532. After suit was filed, the insurer paid the full policy limits of the policy. Id. The case proceeded to trial on the issue of attorney's fees and interest. Id. The Florida Court of Appeals held that even though the insurer had paid the full policy limits of the policy, the insured was entitled to recovery of attorney's fees through the final judgment. Id. at 534.

In Florida, attorney's fees are recoverable in a suit by the insured against his insurer by virtue of §627.428 F.S.A. That statute provides in part,

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured…under a policy or contract executed by the insurer, the trial court…shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation…. (emphasis added).

The *Gibson* Court noted several Florida decisions discussed the statute and the award of attorney's fees, but found *Cincinnati Insurance Co. v. Palmer, 297 So.2d 96 (Fla.App. 1974)* to be the most persuasive. Citing *Palmer*, the *Gibson* Court found:

> the statutory obligation for attorney's fees cannot be avoided simply by paying the policy proceeds after suit is filed but before judgment is actually entered because to so construe the statute would do violence to its purpose which is to discourage

litigation and encourage prompt disposition of valid insurance claims without litigation. Id. at 533.

In reaching this conclusion, the *Gibson* Court noted that §627.428 F.S.A. becomes a part of the insurance policy.

The *Palmer* Court, upon which the *Gibson* Court relied, reasoned:

> [I]t is neither reasonable nor just that an insurer can avoid liability for statutory attorney's fees by the simple expedient of paying the insurance proceeds to the insured or beneficiary at some point after suit is filed but before final judgment is entered, thereby making unnecessary the entry of final judgment. … We think the statute must be construed to authorize the award of an attorney's fee to an insured or beneficiary under a policy or contract of insurance who brings suit against the insurer after the loss is payable even though technically no judgment for the loss claimed is thereafter entered favorable to the insured … due to the insurer voluntarily paying the loss before such judgment can be rendered. Id. at 99.

See also *Jordon v. Nat'l Grange Mutual Ins. Co. 393 S.E.2d 647 (W.V. 1990)* where the Court stated the issue before it as, "whether an insured may recover reasonable attorney's fees from his or her own insurer which are necessarily incurred to reach a settlement of an action on an insurance claim." Id. at 648. The Trial Court found the insureds were not entitled to any such fees; the West Virginia Supreme Court reversed.

The insureds in *Jordon* suffered a fire loss for which they were insured up to $40,000.00. The insureds demanded $40,000.00, and the insurer refused. Thereafter, the insureds obtained counsel and filed a lawsuit. Id. Prior to trial, the insurance company

agreed to pay its $40,000.00 policy limits. Id. The West Virginia Supreme Court concluded that "a determination by the trier of the facts is not essential" for the insured to recover a reasonable attorney's fee.

In support of this conclusion, the *Jordon* Court noted that in cases under the Federal Freedom of Information Act, a complainant who substantially prevails is eligible to recover reasonable attorney's fees. See 5 USC §552(a)(4)(E) (1988). Under this statute, a judgment on the merits is not a prerequisite to an award of reasonable attorney's fees, and an award of such fees is not barred because the action is mooted before judgment by the administrative agencies furnishing the requested materials. "The purpose of allowing recovery of reasonable attorney's fees in that situation is to remove the incentive for resistance to the plaintiff's request based upon the defendant's knowledge that many plaintiffs do not have the financial resources or economic incentives to pursue their requests through expensive litigation." Id. at 650.

The Court found that the same rationale was applicable to an insurance policy and that awarding attorney's fees to the insured "would discourage" this type of conduct. Id. The Court noted that courts elsewhere have held that an insurer may not avoid liability for its insured's reasonable attorney's fees by settling the case and tendering payment, of all or substantially all of the amount of the claim after the insured's action has been filed but before a judgment has been entered. Id. at 650-651 citing *Wollard v. Lloyds and Companies of Lloyds, 439 So.2d 217 (Fla. 1983); Olewinsky v. Aetna Casualty and Surety Ins. Co., 560 A.2d 1301 (N.J. Super. 1988); VanHouten v. New Jersey*

Manufacturers Ins. Co., 387 A.2d 419, 421 (N.J. Super 1978) and *Brown v. Johnson, 275 S.E.2d 876 (S.C. 1981).*

At issue in *VanHouten* was whether New Jersey Rule 4:42-9(a)(6) allowed for recovery of attorney's fees if a claim for PIP benefits is settled after a lawsuit is filed but before trial. The Rule provides, "no fee for legal services shall be allowed in the taxed costs or otherwise, except…(6) *in an action upon a liability or indemnity policy of insurance*, in favor of a successful claimant. (italics original). The Court found:

> It is incongruous to require plaintiff to bypass a settlement offer and proceed to trial in order to "earn" counsel fees, especially when a settlement and trial would have substantially achieved the same result. Also compelling plaintiff to try the case under these circumstances would be contrary to the strong public policy and judicial commitment that justice be served by encouraging the settlement of claims thereby avoiding or terminating litigation. 387 A.2d at 421.

In *Wollard v. Lloyds and Companies of Lloyds, 539 So.2d 217 (Fla. 1983),* the Florida Supreme Court followed *Gibson* and *Palmer*, *supra*, and found that an insured is entitled to an award of attorney's fees even if the insurer has paid the full policy limits prior to trial. In reaching this conclusion, the Florida Supreme Court stated:

> Requiring the plaintiff to continue litigation in spite of an acceptable offer of settlement merely to avoid having to offset attorney's fees against compensation for the loss puts an unnecessary burden on the judicial system, fails to protect any interest – the insureds, the insurers or the publics – and discourages any attempt at settlement. This literal requirement of the statute exalts form over substance to the

detriment of public policy and such result is clearly absurd. It is a basic tenant of statutory construction that statutes will not be interpreted so as to yield an absurd result. Id. at 218-219 (citations omitted).

Likewise, here, the Western District's interpretation of §375.420 "exalts form over substance" and fails to fulfill the purpose of the statute. This Court has found that the "obvious aim" of the statute is "to make the contracting party whole in a practical sense and to provide an incentive for insurance companies to pay legitimate claims without litigation." *Overcast, 11 S.W.3d at 67*. If an insurer's obligation to pay attorney fees and penalties under the statute can be avoided by the insurer paying its policy limits after its vexatious conduct but before trial, then insureds who had to hire an attorney to recover their policy limits will not be made whole. In addition, the statute will provide no incentive for insurers to pay legitimate claims without litigation because the obligation to pay fees and penalties under the statute can be avoided by the insurer even after it vexatiously refuses a legitimate claim and suit has been filed.

To achieve the intent of the statute, Respondent respectfully suggests that §375.420 RSMo should be interpreted in such a way as to allow an insured to recover attorney's fees and penalties if an insured has had to file an action to recover insurance benefits that an insurer has vexatiously refused to pay. And that a vexatious insurer should not be allowed to avoid paying fees and penalties by paying the benefits after its vexatious refusal.

D. EVEN UNDER THE WESTERN DISTRICT'S INTERPRETATION OF §375.420 RSMo, PLAINTIFF'S PETITION STATED A CLAIM

Even if the Western District's interpretation of §375.420 is correct, and an insured is required to state both a cause of action for an underlying claim on the contract, and a claim for vexatious refusal, Plaintiff's petition stated such a claim.

In *Victor v. Manhattan Life Ins. Co., 772 S.W.2d 826, 831 (Mo.App. 1989)* the insurer argued that once it paid its policy limit, there was no unpaid loss, and therefore, §375.420 RSMo did not apply. There, like here, the insured had made a claim for interest under the policy. And the Court found that the loss of use of the policy limits was a loss under the policy sufficient to invoke the vexatious refusal statute. Id. In reaching this conclusion, the *Victor* Court noted:

> An opposite interpretation would be contrary to the obvious purpose of the statute, which is to impose a penalty in addition to restoring policy loss, formerly recoverable by common law actions. This statute was not designed to create a defense not formerly available to life insurance companies.

On page 7 of its opinion, the Court of Appeals concluded that Respondent's Petition failed to state a claim for relief because her Amended Petition requested "only, a judgment for damages and attorney's fees, under §375.420." The Court apparently overlooked the fact that Plaintiff's amended Petition also sought interest. On page 4 of her petition, Respondent alleged that she was entitled to the penalties set forth in §375.420 RSMo and interest. (L.F. 11). In her prayer for relief, Respondent again stated, "Plaintiff prays judgment against Defendant State Farm in such sum as would be fair,

reasonable and just in amount for damages as a result of the vexatious conduct of the Defendant as provided in §375.420 RSMo **and interest**…." (L.F. 11)(emphasis added). Thus, even if the Western District's interpretation of §375.420 is correct, Plaintiff, by demanding not only penalties and fees, but also interest, stated a claim for damages under the contract itself, and therefore, she stated a claim upon which vexatious damages could be awarded. *Victor*, 772 S.W.2d at 831.

For the foregoing reasons, Respondent respectfully requests that Appellant's Point I be denied.

POINT II

The Trial Court Did Not Err In Denying State Farm's Motion For Judgment Notwithstanding The Verdict Because State Farm Refused To Pay Respondent's Uninsured Motorist Claim In That State Farm Did Not Pay Respondent Kristen Dhyne's Claim For More Than Seven Months After Being Notified Of The Claim; For More Than Six Months After Obtaining A Legal Opinion That Its Policy Provided Coverage For The Claim; And For More Than Three Months After Receiving Sworn Testimony Regarding Ms. Dhyne's Damages.

A. INTRODUCTION

Appellant State Farm argues that the Trial Court erred in denying its motion for summary judgment and in the alternative argues that the Trial Court erred in denying its motion for judgment notwithstanding the verdict. A denial of a motion for summary judgment is not appealable, and therefore, Respondent Kristen Dhyne will limit her response to State Farm's claim that the Trial Court erred in denying its motion for JNOV. See *Sanders v. Ins. Co. of North America, 42 S.W.3d 1, 8 (Mo.App. 2000)* where the Court denied the appellant's points relating to denial of summary judgment because the denial of a motion for summary judgment is not appealable even when the appeal is taken from the final judgment.

B. STANDARD OF REVIEW

In reviewing the Trial Court's denial of a motion for a directed verdict, this Court is to view the evidence and all reasonable inferences in the light most favorable to the

jury's verdict. *Missouri Consolidated Health Care Plan v. Community Health Plan, 81 S.W.3d 34, 38 (Mo.App. 2002).* All evidence contrary to the jury's verdict must be disregarded. Id. A judgment challenged on the basis of the sufficiency of the evidence can be reversed "only where there is a complete absence of probative facts to support the jury's conclusion." Id. (emphasis added). Finally, where reasonable minds can differ on a question put to a jury, the jury's verdict must not be disturbed. Id.

Here, there was ample evidence demonstrating that State Farm vexatiously refused Respondent Dhyne's uninsured motorist claim. At a minimum, reasonable minds could differ on the question, and therefore, the jury's verdict should be affirmed.

C. STATE FARM REFUSED DHYNE'S UNINSURED MOTORIST CLAIM

1. State Farm's "Filing" of the Claim Does Not Prove that It Did Not Refuse the Claim.

In support of its argument that it did not refuse Respondent Dhyne's claim, State Farm argues that it "could not have refused Dhyne's claim, because the claim had already been filed." (See Appellant's Brief at 26). State Farm explains that Dhyne reported the claim to her agent on January 22, 2002 and the claim was filed with State Farm's Central Claims Office on January 25th, 2002. According to State Farm, this "filing" of Ms. Dhyne's claim conclusively proves that it did not refuse the claim. State Farm fails to cite any authority at all in support of this argument.

If State Farm's argument was true, an insurer could never be held liable for vexatious refusal so long as it "filed" an insured's claim in its claims office. This is not the law. See *Brown v. State Auto Ins. Assoc., 265 S.W.2d 741 (Mo.App. 1954).*

Brown involved a property damage claim under an automobile insurance policy. The adjuster assigned to the claim did not refuse or deny the claim; rather, he procured a proof of loss from the insured in the amount of $346.37 and mailed the insured a draft in that amount. Id. at 742-743. The insured sent the draft back and advised the insurer that he had assigned all of his interest in the automobile and the policy to the plaintiff. The plaintiff refused to accept $346.37 as settlement for the property damage claim and sued the insurer. Id. at 743. The Trial Court entered judgment in favor of the plaintiff, including an award for vexatious refusal to pay. The Court of Appeals affirmed. Id.

The insurer in *Brown* presumably "filed" the claim with its claims office because it accepted the proof of loss, and then even offered to the pay the amount of the proof of loss. Nonetheless, the Court still found that the insurer could be and was liable for vexatious refusal to pay. Thus, the fact that State Farm "filed" Ms. Dhyne's claim does not entitle it to judgment as a matter of law.

2. A Vexatious Refusal Claim Does Not Require Proof that the Insurer Stated Orally or in Writing that It Was Refusing the Claim

State Farm next argues that it was entitled to judgment as a matter of law because it never stated orally or in writing that it "refused" Kristen Dhyne's claim. (See Appellant's Brief at 33). Again, Appellant fails to cite any case law or authority that has held or found that an insurance company's failure to state in writing or orally that it is denying or refusing a claim indisputably demonstrates that it has not vexatiously refused a claim. Taking Appellant's argument to its logical conclusion, an insurance company could receive a claim and do nothing in response for as long as it chose and never be

found to have vexatiously refused to pay an insured's claim so long as it never orally or in writing denied or refused the claim. Appellant's argument is not supported by the law or logic. See *Morris v. J.C. Penney Life Ins. Co., 895 S.W.2d 73, 79 (Mo.App. 1995)* where this Court found that "where there is evidence that an insurer's bad faith efforts have **hindered** a legitimate insurance claim, the action for vexatious refusal should be submitted to the jury." (emphasis added).

See also *Wollums v. Mutual Benefit Health and Accident Assoc., 46 S.W.2d 259, 267 (Mo.App. 1932).* In *Wollums*, the plaintiff sued his accident insurance carrier for vexatious refusal to pay. The Trial Court found in favor of the insured and the insurer appealed. On appeal, the insurer argued that there was no evidence of its vexatious refusal to pay, and therefore, the Court should have directed a verdict in its favor. Id. at 264. The Court of Appeals disagreed. Id.

In holding that there was sufficient evidence for the jury to find vexatious refusal, the Court of Appeals noted, "although negotiations for settlement had extended for over a period of more than a year, no conclusion was ever arrived at by defendant as to whether it would or would not pay the claim." Id. at 267. In other words, the insurer had never decided if it was refusing or denying the claim, and therefore, never orally or in writing "refused" or "denied" the insured's claim. Nonetheless, based on the evidence before it, the Court of Appeals found that the insurer was subject to a vexatious refusal to pay claim. Id. Thus, contrary to State Farm's argument, even if it never orally or in writing refused or denied Ms. Dhyne's claim, it is not entitled to judgment as a matter of law.

In *Brown v. State Auto Ins. Assoc., 265 S.W.2d 741 (Mo.App. 1954),* discussed above, the insurer did not deny or refuse the claim; in fact, the insurer accepted the claim and offered to pay the exact amount stated in the insured's proof of loss. Nonetheless, the Court found that the insured could be and was liable for vexatious refusal. Id. at 743.

Finally, see *McCarty v. United Ins. Co., 259 S.W.2d 91 (Mo.App. 1953).* In that case, the insurer did not deny or refuse the insured's claim but offered her substantially less than what she was due under the policy. Id. at 93. Despite the fact that there was not an actual denial or refusal of the claim, the Court found that the insurer could be held liable for vexatious refusal.

In *Brown* and *McCarty*, there was no written or oral statement by the insurer that it was "refusing" to pay; however, the insurers in both those cases did in fact refuse to pay the entirety of the insured's claim. Likewise, here, even if there was no written or oral refusal, State Farm did in fact refuse to pay Dhyne's claim for approximately six months after it knew there was coverage and its investigation was complete. And like *Brown* and *McCarty*, an actual written or oral refusal is not necessary.

As the cases discussed above indicate, an insured may be liable even if it does not actually state orally or in writing that a claim is refused or denied. But even if there was such a requirement, State Farm orally and in writing refused Ms. Dhyne's claim.

3. State Farm Stated Orally and in Writing that it Was Refusing Kristen Dhyne's Claim

State Farm orally denied Ms. Dhyne's claim when she first reported it. When Respondent Dhyne made her uninsured motorist claim, State Farm claims representative

Brandon Hill told her that she did not have coverage under her uninsured motorist policy except for that part of her lost wages that was not being paid by the workers' compensation carrier. (Tr. 165-168 and 276). Mr. Hill admitted at trial that what he told Ms Dhyne was untrue, and that Ms. Dhyne did have coverage for the entirety of her uninsured motorist claim. (Tr. 165-168). This evidence alone is at least as compelling as the evidence in *Brown* and *Wollums*, discussed above, and demonstrates that State Farm orally denied the bulk of Ms. Dhyne's claim.

State Farm repeatedly asserts in its Brief that Ms. Dhyne admitted that Mr. Hill did not say he was denying the claim and that he was investigating further. At the end of their first conversation, Mr. Hill did indicate that he was investigating further. (Tr. 337). However, there was no such indication made after the second and final conversation. (Tr. 338). In fact, during the second conversation, Mr. Hill indicated that he had checked with his supervisor, and there was no coverage for Ms. Dhyne's damages except for the one-third of her lost wages not covered by workers' compensation. (Tr. 165-168). Mr. Hill's testimony that during the second conversation he told Ms. Dhyne that he was continuing to investigate conflicts with Ms. Dhyne's testimony. Under the applicable standard of review, Dhyne's testimony on this point is accepted as true. Thus, although Dhyne acknowledged that Hill did not say that he was "denying" the claim, Mr. Hill admits that he did tell her that she did not have coverage for all but one-third of her lost wages. (Tr. 165-168 and 276). And, after the second conversation, there was no indication that he was investigating the matter any further. (Tr. 338).

State Farm's Answer to the Petition in this case was a written refusal of Ms. Dhyne's claim. In a pleading it filed with the Trial Court, Appellant State Farm noted that its "investigation of Plaintiff's claim did not exceed thirty (30) days from the time when State Farm received notice of Plaintiff's claim on January 25, 2002." (L.F. 25). During that thirty day period, State Farm learned: 1) how the accident happened, 2) what damages Kristen Dhyne suffered, and 3) that its policy did in fact provide coverage for the entirety of Ms. Dhyne's claim. (L.F. 48 and Tr. 383-385). Despite this information, State Farm refused to pay Ms. Dhyne's claim for uninsured motorist benefits. Instead State Farm filed an Answer to Ms. Dhyne's Petition denying Ms. Dhyne's claim stating that Ms. Dhyne should "take naught by way of her Petition…." (Tr. 175-176). Thus, State Farm's Answer was a written refusal to pay Kristen Dhyne's claim. Again, this evidence alone is more compelling than the evidence in *Brown* and *Wollums*, discussed above, and is sufficient to demonstrate that State Farm refused Kristen Dhyne's claim.

On page 31 of its Brief, State Farm argues, "under Dhyne's topsy-turvy theory of 'refusal', State Farm was apparently obliged to admit it refused coverage, even though it had not." (emphasis original). State Farm apparently misunderstands the issue. State Farm was not obliged to admit it refused coverage; rather, after its team manager and attorney Dale Beckerman confirmed that there was coverage for Ms. Dhyne's claim, State Farm was obliged to admit that it had coverage. See Missouri Supreme Court Rules 55.03 and 55.07. State Farm's Answer did not do this.

Interestingly, State Farm's Amended Answer, filed after it paid its $50,000.00 policy limits, admitted coverage under the policy but denied that it had vexatiously

refused Ms. Dhyne's claim. (L.F. 13-14). Why didn't State Farm admit coverage under the policy in its original Answer? At the time it filed its original Answer, its team manager and attorney had already confirmed that there was coverage. State Farm's failure to admit coverage in its original Answer despite knowing that there was is sufficient evidence for the jury to infer that State Farm's denial of coverage was without reasonable cause.

D. ISSUES RAISED ONLY IN THE ARGUMENT SECTION OF APPELLANT'S BRIEF ARE WAIVED

Throughout its Brief, State Farm complains of various evidentiary rulings made by the Trial Court. However, none of Appellant's Points Relied On claim that the Trial Court erred in admitting any evidence. Appellant's complaints pertaining to issues not raised in the Points Relied On are waived. See *Schriner v. Edwards, 69 S.W.3d 89, 96 (Mo.App. W.D. 2002)* where the Court stated, "issues raised only in the argument portion of a brief are not preserved for review." (citation omitted).

One such complaint that State Farm asserts is that the Trial Court admitted, over State Farm's objection, State Farm's original Answer wherein it denied coverage. (Appellant's Brief at 30-31). None of State Farm's Points Relied On raise any allegation that the Trial Court erred in admitting this evidence. Rather, State Farm's Point Relied On claims only that its "Answer was not a refusal." (See pg. 19 of Appellant's Brief). Consequently, the issue has been waived. Id.

Even if the Court considers the merits of this issue, State Farm's point should be denied. In *Hopkins v. American Economy Ins. Co., 896 S.W.2d 933 (Mo.App. 1995)* the

Court, in discussing the evidence which was favorable to the submission of a vexatious refusal instruction, cited the defendant's Answer in which it made certain denials of facts which were later admitted. Id. at 940. The *Hopkins* Court further noted that facts occurring up until the time of **trial** are admissible to show a company's vexatious refusal to pay. Id. at 939, including note 4 (emphasis added).

State Farm also complains about the consideration of facts that occurred after it was called on to pay Ms. Dhyne's claim. It argues that "the test for determining whether the insurer vexatiously refused … does not take into consideration facts after the insurer was called on to pay." (Appellant's Brief at 31). (emphasis original). This evidentiary issue is raised in the argument section of State Farm's brief; however, none of its Points Relied On challenge the admission of facts occurring after the insurer was called on to pay. Thus, this issue has been waived. See *Schriner v. Edwards, 69 S.W.3d at 96*.

Even considering the merits of Appellant's argument, it should be denied. The very case State Farm relies on for this argument, *Hopkins v. American Economy Ins. Co., 896 S.W.2d 933 (Mo.App. 1995),* defeats rather than supports its argument. As discussed above, the *Hopkins* specifically found that facts occurring up until the time of trial are admissible to show a company's vexatious refusal to pay. Id. at 939, including note 4 (emphasis added). Furthermore, as noted by State Farm, an insurer is liable for vexatious refusal if it persists in its refusal to pay, even after becoming aware that it has no meritorious defense. *Wunsch v. Sun Life Ins. Co. of Canada, 92 S.W.3d 146, 153-154 (Mo.App. 2002).* The only way to know if an insurer persists in its refusal to pay after

becoming aware that it has no meritorious defense is to take into consideration facts after the insurer was called on to pay.

Appellant's evidentiary arguments were not raised in its Points Relied On, and therefore, they have been waived. However, as demonstrated above, even if these evidentiary arguments are considered, they should be denied.

E. CASES RELIED UPON BY APPELLANT ARE NOT APPLICABLE

Appellant claims that *Morris v. J.C. Penney Life Ins. Co., 895 S.W.2d 73 (Mo.App. 1995)* is "the closest Missouri case factually to the instant case." In *Morris*, there was a coverage question regarding whether a life insurance policy began providing coverage at the time it was solicited over the phone or three days later when it was issued. Id. at 76. The Trial Court considered the issue one of first impression and the Court of Appeals found that there were "no previous rulings in Missouri on this issue."

Here, there is no issue of coverage. Within three weeks of receiving Respondent's claim, State Farm was informed by its attorney, Dale Beckerman, that there was coverage for the claim. Moreover, the issue here was not one of first impression. There were at least two previous rulings in the state of Missouri involving the interplay between uninsured motorist coverage and workers' compensation benefits. See *Yaakub v. Aetna Casualty and Surety Co., 882 S.W.2d 743, 745 (Mo.App. 1994)* citing *Barker v. Palmarin, 799 S.W.2d 117, 118 (Mo.App. 1990).*

The *Morris* Court concluded, "giving reasonable deference to the Trial Judge's determination of this matter, we hold the Trial Court's determination that the issues raised by J.C. Penny Life Insurance Company were reasonably litigable was not

erroneous." Id. at 76-77. Here, there was no litigable issue. Nor was there any question of coverage. Consequently, the *Morris* case is in no way factually close to this case.

The *Morris* case went on to examine the evidence to determine if J.C. Penney Life Insurance Company showed a vexatious or recalcitrant attitude even though there was a litigable issue. The Court noted that an insurer's stated grounds for denying a claim must involve a reasonably litigable issue. Id. at 76. Here, the insurer stated false grounds for denying coverage to Ms. Dhyne and within three weeks of denying coverage to Ms. Dhyne, State Farm was informed by its attorney that there was coverage for Ms. Dhyne. Consequently, there was no reasonably litigable issue for State Farm to persist in refusing or denying Ms. Dhyne's claim.

Contrast the conduct of the insurance company in *Morris* with State Farm's conduct here. In *Morris*, the insurer, presumably upon advice of counsel, abandoned its position denying coverage. The Court further noted that there was no evidence that the insurer continued to assert a position that there was no coverage after a formal claim was filed. Finally, the insurer made no effort to discourage submission of the claim. Here, State Farm, even after being advised by its attorney, Dale Beckerman, that there was coverage, did not abandon its position, but continued to deny Ms. Dhyne's claim. Furthermore, State Farm attempted to discourage her claim by telling her that her rates could go up and that any money she got under the policy would have to be paid to the worker's compensation carrier. (Tr. 335 and 337). Finally, even though State Farm knew that the workers' compensation carrier was not entitled to any of Ms. Dhyne's uninsured motorist benefits, it put the workers' compensation carrier on the settlement

draft thereby making it impossible for Ms. Dhyne to negotiate the draft. (Tr. 186 and 189). This comparison of facts demonstrates that *Morris* is not applicable.

However, the Court should note that the *Morris* Court found, "where there is evidence that an insurer's bad faith efforts have **hindered** a legitimate insurance claim, the action for vexatious refusal should be submitted to the jury." Id. at 79 (emphasis added). Thus, the primary case upon which State Farm relies defeats its argument that there must be an actual refusal or denial for plaintiff to assert a vexatious refusal claim. Plaintiff must only show that an insurer's bad faith efforts "hindered" a claim. Id.

Here, State Farm effectively told Ms. Dhyne that she did not have uninsured motorist coverage for her injury, that if she did receive any money, it would all be paid to the workers' compensation carrier, and that if she filed a claim her rates could be increased. (Tr. 276, 335, and 337). When State Farm finally conceded that it owed the $50,000.00 policy limits of Ms. Dhyne's uninsured motorist coverage, it sent her a draft that was made payable to her and the worker's compensation carrier. (Tr. 196, 189, and 341). State Farm admitted at trial that the workers' compensation carrier did not have any right to the money and that putting the workers' compensation carrier on the draft hindered Ms. Dhyne's access to her uninsured motorist benefits. (Tr. 189). At a minimum, this evidence demonstrates that State Farm hindered Ms. Dhyne's legitimate insurance claim, and therefore, this claim was properly submitted to the jury. Id.

State Farm next relies on *Miles v. Iowa National Mutual Ins. Co., 690 S.W.2d 138 (Mo.App. 1984).* In *Miles*, the Trial Court directed a verdict against plaintiff because plaintiff failed to put into evidence the fact that he had filed a proof of loss with the

insurance company. Filing of a proof of loss was necessary under the insurance contract, and therefore, a necessary element to plaintiff's claim. Plaintiff attempted to overcome this deficiency by claiming that the defendant had denied the claim prior to the time he was required to file his proof of loss. The Court rejected this argument and found that the letters the insurer sent to the plaintiff simply articulated the fact that the plaintiff's proofs of loss were not in proper form and the letter implicitly invited, or at least clearly left it up to the plaintiff to submit a new or corrected proof of loss. Id. at 143.

The *Jacoby v. New York Life Ins. Co., 77 S.W.2d 840 (Mo.App. 1934)* case cited by State Farm also involves sufficiency of a proof of loss form submitted by an insured. Here, the insurance contract did not require a certain proof of loss to be submitted and State Farm is not claiming that the uninsured motorist claim reported by Kristen Dhyne was somehow insufficient. Consequently, *Jacoby*, like *Miles*, has no applicability to this case. Furthermore, in neither of those cases did the adjuster tell the insureds that there was no coverage. Rather, the adjuster informed the insureds that their proofs of loss were somehow deficient. Here, State Farm's adjuster effectively told Kristen Dhyne that she did not have uninsured motorist coverage for her injury. (Tr. 276). Thus, State Farm's reliance on *Jacoby* and *Miles* is misplaced.

Barton v. Farmers Ins. Exchange, 255 S.W.2d 451 (Mo.App. 1953) cited by Appellant is also inapplicable. In that case, there were negotiations in progress at the time the plaintiff filed his claim. The Court found that because the negotiations were in progress, the insured knew there had been no denial of liability. Here, there were no negotiations in progress at the time the lawsuit was filed. Rather, State Farm effectively

told Ms. Dhyne that she did not have uninsured motorist coverage for her injury, that if she did receive any money, it would all be paid to the workers' compensation carrier, and that if she filed a claim her rates could be increased. (Tr. 276, 335, and 337).

Lindsey Masonry Co., Inc., v. Jenkins & Assoc., Inc., 897 S.W.2d 6 (Mo.App. 1995) is also inapplicable. In that case, "there was no evidence that St. Paul…had no reasonable cause to deny the claim." Id. at 17. Here, State Farm was told by its attorney, Dale Beckerman, that there was coverage. Nonetheless, State Farm denied the claim. Furthermore, State Farm made representations to Ms. Dhyne that were wrong, and Respondent's expert, attorney Walter Simpson, testified that State Farm had no reasonable cause to make those representations. (Tr. 298-299).

The *Jenkins & Associates* case is also distinguishable because it involved a bond in which the surety's liability is secondary; the surety pays only in the event the principal is found liable and fails to pay the claim. In *Jenkins*, the principal was not found liable, and therefore, the surety was not required to pay. Id. at 17. Here, State Farm was obligated to pay under its policy.

Finally, Appellant's reliance on *Bechtolt v. Home Ins. Co., 322 S.W.2d 872 (Mo. 1959)* is misplaced. In that case, there was no evidence that the insurer ever denied coverage to the insured. Rather, there was a dispute over the extent of the insured's loss. Here, the insurer denied coverage for Kristen Dhyne's uninsured motorist claim. (Tr. 276). Furthermore, there is no evidence here, as there was in *Bechtolt*, that there was a dispute as to the extent of Ms. Dhyne's loss or that Ms. Dhyne had exaggerated her loss.

F. CONCLUSION

Contrary to Appellant's argument, Missouri law does not require evidence of an actual written or oral refusal before an insured can pursue a claim for vexatious refusal. Evidence that an insurer delayed or hindered a claim is sufficient. Even if an actual oral or written refusal was required, the evidence sufficiently demonstrated that State Farm's adjuster orally denied that Ms. Dhyne had coverage for her claim. Furthermore, State Farm refused Ms. Dhyne's claim in writing when it filed its original Answer asking that Respondent Dhyne "take naught" by way of her Petition. For the foregoing reasons, Respondent respectfully requests that Appellants Point II be denied.

POINT III

The Trial Court Did Not Err In Denying State Farm's Motion For Judgment Notwithstanding The Verdict Because The Evidence Viewed In The Light Most Favorable To The Respondent Demonstrates That State Farm's Refusal To Pay Ms. Dhyne's Uninsured Motorist Claim Was Willful And Without Reasonable Cause, And That State Farm Persisted In Its Refusal To Pay After Becoming Aware That There Was No Meritorious Defense In That State Farm Effectively Told Ms. Dhyne That She Did Not Have Uninsured Motorist Coverage For An On The Job Injury Even Though She Did And After Being Told By Its Attorney That There Was Coverage, State Farm Persisted In Its Denial Of Ms. Dhyne's Claim.

A. INTRODUCTION

Appellant State Farm argues that the Trial Court erred in denying its motion for summary judgment and in the alternative argues that the Trial Court erred in denying its motion for judgment notwithstanding the verdict. A denial of a motion for summary judgment is not appealable, and therefore, Respondent Kristen Dhyne will limit her response to State Farm's claim that the Trial Court erred in denying its motion for JNOV. See *Sanders v. Ins. Co. of North America, 42 S.W.3d 1, 8 (Mo.App. 2000)* where the Court denied the appellant's points relating to denial of summary judgment because the denial of a motion for summary judgment is not appealable even when the appeal is taken from the final judgment.

B. STANDARD OF REVIEW

In reviewing the Trial Court's denial of a motion for a directed verdict, this Court is to view the evidence and all reasonable inferences in the light most favorable to the jury's verdict. *Missouri Consolidated Health Care Plan v. Community Health Plan, 81 S.W.3d 34, 38 (Mo.App. 2002).* All evidence contrary to the jury's verdict must be disregarded. Id. A judgment challenged on the basis of the sufficiency of the evidence can be reversed "only where there is a complete absence of probative facts to support the jury's conclusion." Id. (emphasis added). Finally, where reasonable minds can differ on a question put to a jury, the jury's verdict must not be disturbed. Id.

Here, there was ample evidence demonstrating that State Farm vexatiously refused Respondent Dhyne's uninsured motorist claim. At a minimum, reasonable minds could differ on the question, and therefore, the jury's verdict should be affirmed.

C. STATE FARM'S REFUSAL TO PAY DHYNE'S BENEFITS WAS WILLFUL AND WITHOUT REASONABLE CAUSE

As stated in *Hopkins v. American Economy Ins. Co., 896 S.W.2d 933, 941 (Mo.App. 1995)* the "very character" of a vexatious refusal case makes it "hard to define what factual mix must be present to make a jury case." The Court further noted, "each case literally must be decided on its own merits." Id. (citation omitted). Direct and specific evidence to show vexatious refusal is not required, "the jury may find vexatious delay upon a general survey and a consideration of the whole testimony and all the facts and circumstances in connection with the case." See *DeWitt v. American Family Mutual Ins. Co., 667 S.W.2d 700, 710 (Mo.banc 1984)* (citation omitted). A general survey and

consideration of all the facts in the light most favorable to the jury's verdict demonstrates that State Farm acted willfully and without reasonable cause.

1. State Farm's Initial Denial of Coverage Was Willful and Without Reasonable Cause or Excuse.

Mr. Hill acknowledged that as part of State Farm's claims staff, he had the responsibility to be familiar and in compliance with the insurance laws and regulations and to treat policyholders consistent with the requirements of the law. (Tr. 159). Mr. Hill further acknowledged that under Missouri law, a State Farm insured who is hit by an uninsured motorist is covered under the uninsured motorist coverage even if the insured is on the job when they are hit. (Tr. 164-165). The jury could certainly infer that because Mr. Hill had the responsibility to know the laws and regulations of the state of Missouri, that he knew this was the law in Missouri when he spoke to Ms. Dhyne. Nonetheless, he told Ms. Dhyne that she did not have coverage under her uninsured motorist policy except for that part of her lost wages that was not being paid by the workers' compensation carrier. (Tr. Tr. 165-168 and 276). Mr. Hill admitted at trial that what he told Ms. Dhyne was wrong according to Missouri laws and regulations. (Tr. 167).

State Farm seeks to cast Mr. Hills' denial of coverage as a "mistake." However, the jury could infer that because Mr. Hill had the responsibility to know the laws and regulations of the state of Missouri that he did in fact know the laws and regulations of the state of Missouri, and therefore, he knew what he told Ms. Dhyne was wrong. This evidence alone demonstrates that State Farm's conduct was "willful". See *Hounihan v. Farm Bureau Mutual Ins. Co. of Missouri, 523 S.W.2d 173, 175 (Mo.App. 1975).*

In *Hounihan,* the Court of Appeals held that the denial of liability under an insurance policy without stating any ground for the denial was sufficient to warrant the submission of a vexatious refusal claim. In this case, State Farm denied that Ms. Dhyne had coverage under the uninsured motorist portion of her policy for her medical bills, pain and suffering and all but one-third of her lost wages. (Tr. 276). State Farm told Ms. Dhyne that she did not have coverage for those things because her workers' compensation carrier was handling all of her medical bills and two-thirds of her lost wages. (Tr. 166). State Farm admitted at trial that what they had told Ms. Dhyne was wrong. (Tr. 167). If the insurer in *Hounihan* could be liable for vexatious refusal when it denied coverage without stating any ground, then State Farm's denial of liability for Ms. Dhyne's claim giving a false reason supports the submission of a vexatious refusal claim.

The *Hounihan* Court also found that "a trier of fact may find that the refusal to pay was vexatious from the insurer's failure to establish the grounds on which the refusal was based." Id. at 397. Here, there is no question that State Farm failed to establish the grounds on which its refusal was based. State Farm's adjuster denied that Ms. Dhyne's policy provided her coverage because the worker's compensation carrier was paying her bills. Within about two weeks, the adjuster was told by a team manager and an attorney that he was wrong. Thus, not only did State Farm fail to establish the grounds on which it refused Ms. Dhyne's claim, it demonstrated through its team manager and attorney that the grounds upon which if refused coverage were wrong.

In *DeWitt v. American Family Mutual Ins. Co., 667 S.W.2d 700, 710 (Mo.banc 1984),* the insurer, like State Farm here, claimed that its delay in paying a mortgage

holder covered under a fire policy was due to a "mistake." Id. at 710. Despite the insurer's testimony that its failure to pay was a "mistake" the Supreme Court found that the insured's evidence was sufficient to submit the issue of vexatious refusal to the jury. Likewise, here, the evidence was sufficient to submit the issue to the jury.

2. State Farm Persisted in Its Refusal Even After Becoming Aware That It Had No Meritorious Defense.

Approximately three weeks after effectively telling Ms. Dhyne that she did not have uninsured motorist coverage for her on the job injury, Mr. Hill was told by team manager, Mary Humphrey, and State Farm's attorney, Dale Beckerman, that there was coverage. (Tr. 276 and 385). Nonetheless, Mr. Hill never called or wrote Ms. Dhyne to tell her that she did in fact have coverage. (Tr. 340).

Although State Farm called Mr. Beckerman of the Deacy & Deacy firm for his opinion regarding coverage, Mr. Beckerman, who said there was coverage, was not hired to represent State Farm in this action. Rather, State Farm hired Wallace, Saunders, Austin, Brown & Enochs. State Farm's corporate representative acknowledged that he did not notify its new attorneys that Dale Beckerman had found that there was coverage under the uninsured motorist provisions of Ms. Dhyne's policy. (Tr. 263). State Farm, through its new attorneys, then filed an Answer to Ms. Dhyne's lawsuit wherein it denied Ms. Dhyne's claim stating that plaintiff "take naught by way of her petition, but that separate defendant, State Farm, go hence with its costs herein incurred and expended." (Tr. 175-176). State Farm was obliged to admit that it had coverage. See Missouri Supreme Court Rules 55.03 and 55.07.

In a pleading State Farm filed with the Trial Court, it noted that its investigation of Ms. Dhyne's claim was completed within thirty days after receiving notice of the claim on January 25, 2002. (L.F. 25). Thus, State Farm had completed its investigation before filing its original answer. Through its investigation, State Farm knew that Kristen Dhyne was hit by an uninsured motorist while standing beside her ambulance. State Farm also learned about Ms. Dhyne's damages including that she 1) was taken by ambulance to an emergency room; 2) was hospitalized for two weeks; 3) suffered a broken pelvis; 4) had surgery for right kidney failure; 5) suffered nerve damage to her right little finger; 6) lost seven months of wages; and 7) was still in physical therapy and only working light duty almost a year after the accident. (See Appellant's Brief at 3 and L.F. 48). Most importantly, State Farm's team manager and attorney Dale Beckerman confirmed that State Farm's policy provided coverage for the claim. (Appellant's Brief at 3-4 and Tr. 383-384 and 385). Nonetheless, State Farm did not pay Ms. Dhyne's claim but instead filed an Answer asking that she "take naught."

Even after conceding that it owed the policy limits of Ms. Dhyne's uninsured motorist coverage, State Farm continued to hinder Ms. Dhyne's access to her benefits. The check State Farm sent in payment of the policy limits was made payable to Kristen Dhyne and Sedgwick Claims Management, the workers' compensation carrier handling Ms. Dhyne's workers' compensation claim. (Tr. 186, 189, 341). The name of the workers' compensation carrier was put on the check even though State Farm's corporate representative, Mr. Hill, acknowledged that the workers' compensation carrier did not have a right to the money. (Tr. 189). Mr. Hill further acknowledged that sending the

check to Ms. Dhyne with the workers' compensation carrier on the check prevented Ms. Dhyne from accessing her uninsured motorist benefits. (Tr. 189).

State Farm attempts to escape responsibility for putting the workers' compensation carrier on the check by claiming it was a "mistake" made by its lawyer. First, State Farm overlooks the fact that its attorney acts as its agent, and therefore, the acts of its attorney are imputed to it. *Cotleur v. Danziger, 870 S.W.2d 234, 238 (Mo. banc 1994).* Second, the evidence supports an inference that the compensation carrier was intentionally, not mistakenly, put on the check. Counsel for State Farm claimed that he was following Kansas law when he instructed State Farm to put the workers' compensation carrier on the check. (Tr. 190-191). Kansas law, like Missouri law, does not entitle the workers' compensation carrier to any part of an injured person's uninsured motorist benefits. (Tr. 294-295). Thus, the explanation offered by State Farm was untrue. Furthermore, when Ms. Dhyne first made her claim, State Farm told her that the workers compensation carrier would get whatever uninsured motorist benefits she received. (Tr. 335). Based on this evidence, the jury could find that State Farm's placement of the workers compensation carrier on the check was not a mistake but intentional.

The foregoing evidence demonstrates State Farm's willfulness and its persistence in delaying payment of Ms Dhyne's claim even after learning that it had no meritorious defense. Thus, the evidence sufficiently supported Respondent's vexatious refusal claim against State Farm. See *McCarty v. United Ins. Co., 259 S.W.2d 91 (Mo.App. 1953).*

In *McCarty*, an insured submitted her claim under a hospital expense policy. Id. at 92. Upon receipt of the claim, the insurer sent the plaintiff a draft in the sum of $5.00.

Id. at 93. The insured returned the draft and again asserted her claim for medical expenses in the amount of $62.50. Id. At no time did the insurer deny or refuse the insured's entire claim. Rather, the insurer explained that only part of the insurance bills was covered under the policy, and therefore, they were not liable for the entire $62.50. Id. Despite the fact that the insurer never denied coverage for the entirety of the insured's claim, and in fact acknowledged there was coverage for at least part of the insured's claim, the Court of Appeals found that the insurer's conduct was sufficient to support the submission of a vexatious refusal claim. Id. at 94. The Court concluded, "in our opinion the facts…show the defendant took an arbitrary position." Id.

Likewise, here, there is sufficient evidence for the jury to conclude that State Farm took an arbitrary position in denying coverage for Ms. Dhyne's medical bills, pain and suffering and all but one-third of her lost wages. State Farm's adjuster was told within three weeks of denying Ms. Dhyne's claim that he was wrong. Nonetheless, he never communicated to Ms. Dhyne that she did in fact have coverage. Furthermore, State Farm denied Ms. Dhyne's uninsured motorist claim in its original Answer to Respondent's Petition and asked that Respondent take naught. These facts are as compelling as those in *McCarty*, and therefore, the Trial Court did not err in submitting this issue to the jury.

See also *Travelers Indemnity Co. v. Woods, 663 S.W.2d 392 (Mo.App. 1983)* where the insurer denied a fire loss claim under the suspicion that the insured had intentionally set the fire. Id. at 397. The insurer hired an expert who concluded that the fire was intentionally set. Nonetheless, the Court found that a jury could conclude that

the expert was not to be believed and that the insurer had no reasonable cause to believe him, and therefore, could conclude that the insurer's refusal to pay was vexatious. Id.

Here, State Farm did not have an expert or any other witness testify that it was reasonable for State Farm to believe that there was no coverage for Ms. Dhyne's medical bills, pain and suffering and all but one-third of her lost wages. The facts support the jury's verdict, and therefore, Appellant's Point III should be denied.

3. State Farm Persisted in Its Refusal Even After Receiving Dhyne's Interrogatory Answers.

State Farm attempts to overcome its persistent refusal to pay Ms. Dhyne's claim by alleging that "it tendered the full policy limit as soon as plaintiff provided her sworn answers to defendant's interrogatories…." (Appellant's Brief at 49). State Farm received the interrogatory responses it references on or about May 17th, 2002. (Tr. 353-355). It did not pay Ms. Dhyne's claim until August 29th, 2002. Thus, contrary to its claim, State Farm did not tender the full policy limit as soon as plaintiff provided her sworn interrogatory answers. Rather, it delayed three additional months before paying the claim. No explanation whatsoever has been provided for this additional delay.

In *DeWitt v. American Family Mutual Ins. Co., 667 S.W.2d 700, 710 (Mo.banc 1984)*, a case where the Supreme Court found sufficient evidence to submit a vexatious refusal claim, the Court noted that the insurer "could not honestly explain why there was an additional nine week delay in paying the second mortgagee." Likewise, here, State Farm provides no explanation why there was an additional twelve week delay in paying Ms. Dhyne's claim after State Farm had received her interrogatory responses.

4. State Farm Engaged In Inappropriate Claims Handling

In addition to refusing to pay Ms. Dhyne's claim for over six months after it knew its policy provided coverage for the claim, State Farm told Ms. Dhyne false information in an attempt to discourage her from pursuing her claim. (Tr. 335,337, and 298-299). This conduct demonstrates a vexatious and recalcitrant attitude on the part of State Farm, and further supports the jury's verdict.

State Farm told her that any money she was entitled to under her uninsured motorist coverage would have to be paid to the workers compensation carrier. (Tr. 335). In fact, when State Farm finally sent Respondent's counsel a draft on August 19, 2002, it was made payable to, among others, the workers' compensation carrier. (Tr. 186, 189, and 341). The law in Missouri is well settled that a workers' compensation insurer is **not** entitled to be reimbursed from the proceeds of an uninsured motorist claim. See *Yaakub v. Aetna Casualty and Surety Co., 882 S.W.2d 743, 745 (Mo.App. 1994).*

Mr. Hill's statement to Ms. Dhyne that she would have to pay the money she received under her uninsured motorist claim to the workers' compensation carrier was not only contrary to Missouri law, but contrary to the contract of insurance itself. (Tr. 298-299). Consequently, there was no reasonable cause or excuse for State Farm to make such a representation. (Tr. 298-299).

State Farm also told Ms. Dhyne that her insurance rates could be increased if she pursued her uninsured motorist claim. (Tr. 337). This statement is contrary to Missouri Insurance Regulations which prohibit an insurance company from raising someone's

rates when they are not at fault for an accident. (Tr. 306). This evidence further demonstrates State Farm's vexatious and recalcitrant attitude.

D. CONCLUSION

Viewed in the light most favorable to the verdict, the evidence supported the jury's unanimous verdict. State Farm adjuster Brandon Hill told Ms. Dhyne that her uninsured motorist coverage did not cover various items of her damages when in fact they were covered. When team manager Mary Humphrey and attorney Dale Beckerman confirmed that there was coverage, State Farm persisted in its denial of Ms. Dhyne's claim. Even after receiving Ms. Dhyne's interrogatory responses itemizing over $39,000.00 in special damages, State Farm refused to pay her claim for three more months. When State Farm finally conceded that the money was owed, they hindered Ms. Dhyne's access to the money by putting the worker's compensation carrier on the check. Twelve jurors and two judges have reviewed this evidence; all fourteen, presumably, reasonable minds found it sufficient to support a finding of vexatious refusal.

The evidence sufficiently supported the jury's verdict, and therefore, Respondent respectfully requests that Appellant's Point III be denied.

POINT IV

The Trial Court Did Not Err In Giving Instruction Number 5 Regarding Vexatious Refusal Because Defendant Failed To Object To The Instruction And The Instruction Sufficiently Set Forth The Substantive Law In That It Followed Both The Wording Of The Applicable Missouri Approved Instruction And The Statute Upon Which Plaintiff Was Relying - §375.420 RSMo.

A. STANDARD OF REVIEW

To reverse the Trial Court for instructional error, this Court must find that the instruction read to the jury "mislead, misdirected, or somehow confused the jury resulting in prejudice" to the complaining party. See *Thornton v. Gray Automotive Parts, Co., 62 S.W.3d 575, 582 (Mo.App. 2001).* The Trial Court should not be reversed because of inappropriate jury instructions unless the instructional error is substantive with substantial potential for prejudicial effect. See *Fowler v. Park Corp., 673 S.W.2d 749, 756 (Mo.banc 1984).* Even if an instruction deviates from MAI, this Court cannot reverse unless there is a "substantial indication of prejudice." See *Linton v. Missouri Highway and Transportation Commission, 980 S.W.2d 4, 10 (Mo.App. 1998).*

Resolution of the basic question of whether jury instructions are confusing or misleading is, in the first instance, addressed to the Trial Court's discretion." See *Hutson v. Bot Investment Co., Inc., 3 S.W.3d 878, 883 (Mo.App. 1999).* The Trial Court has "the best opportunity" to determine whether an instruction is misleading or confusing; consequently, on review, the Trial Court's ruling will not be reversed unless there is a

showing of an abuse of discretion. Id. Here, the instruction followed MAI 10.08 and the language of §375.420 RSMo, and therefore, the Trial Court did not abuse its discretion in finding that the instruction did not mislead or misdirect the jury.

B. STATE FARM FAILED TO PRESERVE THIS ISSUE FOR APPEAL

Missouri Supreme Court Rule 70.03 requires a party to make specific objections to instructions to preserve the issue for appeal. Rule 70.03 states:

> Counsel shall make specific objections to instructions considered erroneous. No party may assign as error the giving or failure to give instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

Here, counsel for State Farm failed to make any objection to Plaintiff's proffered instruction number 5 other than arguing that the evidence was not sufficient to support the giving of the instruction. (Tr. 427-429 and 431). Consequently, Appellant's current argument that the instruction was erroneous because it failed to include certain language and define certain terms is not properly preserved; this point should be denied. Id.

At the beginning of the instruction conference, the Court announced:

> As I indicated before, we have discussed the instructions to some degree off the record, and I will go through the instructions I intend to give. After each instruction, if there is an objection in the record that you wish to make, you certainly can.

The Court further stated, "I would ask that if there is an objection to a particular instruction, I will ask you make it once I recite that instruction." (Tr. 427). After the

Court recited instruction number 5, counsel for State Farm made no objection. (Tr. 428-429). After reciting all the instructions, the Court asked if counsel would like to make any additional record. Counsel for State Farm responded, "No, your Honor." (Tr. 431).

State Farm seems to suggest that the Trial Court noted State Farm's specific objections to the language of instruction number 5 citing page 427 of the transcript. The Trial Court noted only that State Farm objected to the giving of the verdict director and damage instruction because of an insufficiency of the evidence. (Tr. 427). Specifically, the Court stated, "as to the damage and verdict directing instructions, [State Farm's] **issues of sufficiency** that have been raised in your directed verdict motions, they're considered reasserted for the purposes of this conference." (Tr. 427) (emphasis added). In its directed verdict motions, State Farm argued that as a matter of law Plaintiff failed to meet her burden of showing that State Farm refused to pay uninsured motorist benefits without reasonable cause or excuse; it did not comment on the language of instruction number 5. (Tr. 368-375 and 421-424). State Farm's objection based on a lack of evidence did not properly preserve State Farm's current objection to the language of the instruction. See *Eagle v. Redman Building Corp., 946 S.W.2d 291, 294 (Mo.App. 1997).*

In *Eagle*, the defendant asserted as a point of error that the language of the damage instruction was improper. The Court of Appeals noted that at trial, the defendant objected to the submission of the damage instruction only on the basis that the evidence did not support the submission of the instruction. Counsel for defendant did not argue that the specific language used in the instruction was somehow improper. Thus, the Court found that defendant failed to preserve the issue for review. Id. Similarly, here,

State Farm objected to the verdict director only on the basis that it was not supported by the evidence; State Farm did not argue that the language of the instruction was somehow improper. Thus, State Farm has failed to preserve this point for review.

See also *Farley v. Wappapello Foods, Inc., 959 S.W.2d 888, 893 (Mo.App. 1997).* In that case, the defendant argued on appeal that the verdict director failed to submit every element necessary for plaintiff's recovery. After reciting Supreme Court Rule 70.03, the Court of Appeals stated that it had carefully examined defendant's objections at trial to plaintiff's verdict director and did not find any complaint that the instruction omitted certain elements. The Court concluded, "consequently, that claim of error is not preserved for review." Id. at 893. Likewise, here, State Farm did not object to Ms. Dhyne's verdict director alleging that it omitted certain elements. Thus, it failed to properly preserve this point for review.

State Farm seems to suggest at page 52 of its Brief that the instructions that it proffered as a verdict director and damage instruction were sufficient to preserve its current objections to the language of the verdict director. This argument is not supported by law. See *Shannon v. Wal-Mart Stores, Inc., 974 S.W.2d 588, 592 (Mo.App. 1998).*

In *Shannon*, the defendant offered a different verdict director than that offered by the plaintiff. The proffered instruction was rejected. Id. at 592. "After rejecting Wal-Mart's proffered instruction, the circuit court offered Wal-Mart an opportunity to object further." Id. Wal-Mart declined. The Court of Appeals noted that a litigant's failure to object specifically to an instruction preserves nothing for review. Consequently, Wal-Mart's failure to object to the instruction did not preserve the issue for review and the

defendant's point was rejected. Id. Similarly, here, State Farm failed to object to Plaintiff's verdict director. Its proffer of an alternative instruction as noted in *Shannon v. Wal-Mart* does not properly preserve the point for appeal. Consequently, State Farm's Point IV should be denied.

State Farm does not request plain error review of this point, but even if it did, plain error review would not be appropriate. "Plain error is not a doctrine available to revive issues already abandoned by a selection of trial strategy or oversight." *King v. Unidynamics Corp., 943 S.W.2d 262, 266 (Mo.App. 1997)* (citation omitted). Here, counsel for State Farm either chose not to object to Plaintiff's verdict director as a trial strategy, or failed to object to the instruction because of oversight. Either way, plain error review is not available. Id.

C. EVEN IF THE COURT REVIEWS THIS POINT, IT SHOULD BE DENIED BECAUSE RESPONDENT'S INSTRUCTION FOLLOWED THE LANGAUGE OF THE APPLICABLE MAI AND STATUTE.

1. The Instruction Followed The Language of MAI 10.08

The language in instruction number 5 to which State Farm objects is the exact language from Missouri Approved Instruction 10.08. That instruction states as follows:

> If you find in favor of plaintiff on the claim on the insurance policy, and if you believe that defendant insurance company refused to pay without reasonable cause or excuse, then in addition to any amount you may award on the insurance policy under instruction number ___ you may award plaintiff an additional amount as a penalty not to exceed 20% of the first $1,500.00 of the award on the policy

not including interest and 10% of the remainder of such award and you may award plaintiff a reasonable sum for attorney's fees. (emphasis added).

Because Respondent only submitted her claim for penalties and fees to the jury, she constructed her verdict director to submit only the issue of State Farm's vexatious refusal to pay. The instruction stated:

> Your verdict must be for plaintiff if you believe that defendant State Farm and Casualty Company refused to pay uninsured motorist benefits without reasonable cause or excuse. (L.F. 218). (emphasis added).

The language "refused to pay…without reasonable cause or excuse" is the precise language used in MAI 10.08. Not only is the instruction consistent with the language of MAI 10.08, it is also consistent with the instruction previously approved by the Missouri Supreme Court in *DeWitt v. American Family Mutual Ins. Co., 667 S.W.2d 700, 711 (Mo. banc 1984).* Although Respondent State Farm cites and relies on this case; it omits the fact that this Court rejected the very argument State Farm is advancing here.

In *DeWitt*, the defendant challenged the plaintiff's verdict director for vexatious refusal to pay. That instruction stated:

> If you find in favor of plaintiff, Betty M. DeWitt, on her claim for loss and you believe the conduct of the defendant in **refusing to pay the loss was without reasonable cause or excuse**, then in addition to the damages to which you find plaintiff entitled to for her loss, you may award plaintiff an additional amount as damages…. Id. at 711 (emphasis added).

In rejecting the defendant's challenge to the instruction, this Court noted that the instruction paralleled the language of §375.420 RSMo., and that the instruction did not misdirect, confuse or mislead the jury. Id. Likewise, here, Respondent's verdict director paralleled the language of §375.420, and did not misdirect, confuse or mislead the jury.

2. The Instruction Followed the Language of §375.420 RSMo

The Supreme Court's decision in *DeWitt* is consistent with its prior holdings that "in cases involving a statutory violation it is generally sufficient to couch a verdict directing instruction substantially in the language of the statute." See *e.g., Rooney v. Lloyd Metal Products Co., 458 S.W.2d 561, 570 (Mo. 1970).* This case involved State Farm's violation of §375.420 RSMo. That statute states in pertinent part:

> In any action against any insurance company to recover the amount of any loss under a policy of automobile…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…. (emphasis added).

The highlighted language in the statute is precisely the language Respondent Dhyne used in her verdict directing instruction. Thus, Respondent's verdict directing instruction sufficiently set forth the substantive law in a manner that did not misdirect, confuse or mislead the jury. *DeWitt, 667 S.W.2d at 711.* Because Respondent Dhyne's verdict director appropriately submitted the issue to the jury, the Trial Court did not abuse its discretion in giving the instruction, nor did it abuse its discretion in refusing the instructions proffered by Appellant State Farm.

As Appellant State Farm admits on page 24 of its Brief, "under Missouri law, the elements of Dhyne's claim are set forth in the statute upon which her claim is based, RSMo §378.420…" Although State Farm admits that §375.420 RSMo sets forth the elements of Kristen Dhyne's claim, it argues that Respondent Dhyne's Instruction which follows the precise language of §375.420 RSMo fails to properly set forth the elements of her claim. Appellant's argument is defeated by its admission on page 24 of its Brief and also by the Missouri case law set forth above.

D. CONCLUSION

Appellant State Farm failed to object to the language of Respondent's verdict directing instruction, and therefore, Appellant has not properly preserved this point for review. Nonetheless, even if this Court reviews the merits of this point, it should be denied because the instruction properly set forth the substantive law by following not only the language of the appropriate MAI but also the language of the statute upon which this claim was based. For these reasons, Respondent respectfully requests that State Farm's Point IV be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the Trial Court's Judgment.

TURNER & SWEENY

John E. Turner - MO - 26218
Christopher P. Sweeny - MO - 44838
10401 Holmes Road
Suite 450
Kansas City, MO 64131
(816) 942-5100
FAX: (816) 942-5104
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of the foregoing and a disc were duly mailed, postage prepaid this 7th day of October, 2005, to:

Mr. Kevin Weakley
10111 W. 87th Street
P.O. Box 12290
Overland Park, KS 66282-2290

CERTIFICATION PURSUANT TO RULE 84.06

1. Appellants' Attorneys: Christopher P. Sweeny, Turner & Sweeny, 10401 Holmes Road, Suite 450, Kansas City, Missouri, 64131, Missouri Bar No. 44838 and John E. Turner, Turner & Sweeny, 10401 Holmes Road, Suite 450, Kansas City, Missouri, 64131, Missouri Bar No. 26218.

2. This brief contains 15,909 words in compliance with Rule 84.06(b).

3. This brief contains 1,531 lines.

4. The disc has been scanned and is virus-free.

_____

Christopher P. Sweeny