IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

THE ESTATE OF CAROLYN PRICE,
by and through Howard Price, Duly
Appointed Executor of the Estate of
Carolyn Price,

Plaintiff, : Case No. 3:10-cv-360

District Judge Walter Herbert Rice
Magistrate Judge Michael R. Merz

-vs-

:

THE MINNESOTA MUTUAL LIFE
INSURANCE COMPANY,

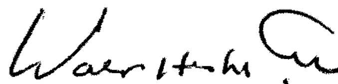
Defendant.

ORDER ADOPTING REPORT AND RECOMMENDATIONS

The Court has reviewed the Report and Recommendations of United States Magistrate Judge Michael R. Merz (Doc. #20), to whom this case was referred pursuant to 28 U.S.C. § 636(b), and noting that no objections have been filed thereto and that the time for filing such objections under Fed. R. Civ. P. 72(b) expired on January 7, 2011, hereby ADOPTS said Report and Recommendations.

Accordingly, the Motion to Dismiss of Defendant The Minnesota Mutual Life Insurance Company is hereby GRANTED. Plaintiff's Complaint is DISMISSED with prejudice for failure to state a claim upon which relief can be granted.

January 11, 2011.



Walter Herbert Rice
United States District Judge

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-vs- Magistrate Judge Michael R. Merz
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THE MINNESOTA MUTUAL LIFE
INSURANCE COMPANY,

Defendant.

REPORT AND RECOMMENDATIONS

This case is before the Court on the Motion to Dismiss of Defendant The Minnesota Mutual Life Insurance Company ("Minnesota Mutual")(Doc. No. 10). Plaintiff opposes the Motion (Response, Doc. No. 17), and Minnesota Mutual has filed a Reply in support (Doc. No. 19).

The case was referred to the Magistrate Judge in the Preliminary Pretrial Conference Order for all pretrial matters through the discovery cut-off (Doc. No. 14, PageID 90). A motion to dismiss, being classified as dispositive under the Magistrates' Act, requires a report and recommendations rather than a decision.

While the Complaint is captioned as a "Complaint for Wrongful Death," it is actually a breach of contract action on an insurance policy on the life of Plaintiff's decedent. The case was initially filed in the Miami County Common Pleas Court and removed to this Court on the basis that the parties are of diverse citizenship. The Court thus has original jurisdiction under 28 U.S.C. § 1332 and removal was proper and is not contested.

A federal court exercising supplemental or diversity subject matter jurisdiction over state law claims must apply state substantive law to those claims. 28 U.S.C. §1652; *Gasperini v. Center for Humanities, Inc.*, 528 U.S. 415, 427, n. 7 (1996); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), overruling *Swift v. Tyson*, 41 U.S. 1 (1841)(Story, J., holding that "the laws of the several states" in the Judiciary Act of 1789 means only the statutory law of the States). In applying state law, the Sixth Circuit follows the law of the State as announced by that State's supreme court. *Savedoff v. Access Group, Inc.*, 524 F.3d 754, 762 (6th Cir. 2008); *Ray Industries, Inc. v. Liberty Mut. Ins. Co.*, 974 F.2d 754, 758 (6th Cir. 1992); *Miles v. Kohli & Kaliher Assocs.,* 917 F.2d 235, 241 (6th Cir. 1990). "Where the state supreme court has not spoken, our task is to discern, from all available sources, how that court would respond if confronted with the issue." *Id.; In re Akron-Cleveland Auto Rental, Inc.,* 921 F.2d 659, 662 (6th Cir. 1990); *Bailey v. V & O Press Co*., 770 F.2d 601 (6th Cir. 1985); *Angelotta v. American Broadcasting Corp.,* 820 F.2d 806 (1987). The available data to be considered if the highest court has not spoken include relevant dicta from the state supreme court, decisional law of appellate courts, restatements of law, law review commentaries, and the "majority rule" among other States. *Bailey*, 770 F.2d at 604. "Where a state's highest court has not spoken on a precise issue, a federal court may not disregard a decision of the state appellate court on point, unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1485 (6th Cir.1989); *accord Northland Ins. Co. v. Guardsman Products, Inc.*, 141 F.3d 612, 617 (6th Cir.1998). This rule applies regardless of whether the appellate court decision is published or unpublished. *See Talley v. State Farm Fire & Cas. Co.*, 223 F.3d 323, 328 (6th Cir.2000); *Puckett,* 889 F.2d at 1485. *Ziegler v. IBP Hog Market*, 249 F.3d 509, 517 (6th Cir. 2001).

The Motion to Dismiss was made under Fed. R. Civ. P. 12(b)(6) whose purpose is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if

everything alleged in the complaint is true. *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993), citing *Nishiyama v. Dickson County, Tennessee*, 814 F.2d 277, 279 (6th Cir. 1987). Put another way, "The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief; it is not a procedure for resolving a contest about the facts or merits of the case." Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: Civil 2d §1356 at 294 (1990).

The test for dismissal under Fed. R. Civ. P. 12(b)(6) was recently re-stated by the Supreme Court:

> Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed.2004)("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true (even if doubtful in fact), *see, e.g., Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams,* 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)(" Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

Bell Atlantic Corp. v. Twombly, 550 U.S.544, 555 (2007).

> [W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, " 'this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court.' " 5 Wright & Miller § 1216, at 233-234 (quoting *Daves v. Hawaiian Dredging Co.*, 114 F.Supp. 643, 645 (D. Hawaii 1953)); see also *Dura [Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005),, at 346, 125 S.Ct. 1627; *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc* ., 289 F.Supp.2d 986, 995 (N.D.Ill.2003) (Posner, J., sitting by designation) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase").

Bell Atlantic, 550 U.S. at 558; *see also Association of Cleveland Fire Fighters v. City of Cleveland,*

Ohio, 502 F.3d 545 (6th Cir. 2007). To survive a motion to dismiss under Rule 12(b)(6), the allegations in a complaint "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief." *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008), quoting *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007)(emphasis in original).

Bell Atlantic overruled *Conley v. Gibson*, 355 U.S. 41, 45-46, specifically disapproving of the proposition that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

In *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949-1950 (2009), the Supreme Court made it clear that *Twombly* applies in all areas of federal law and not just in the antitrust context in which it was announced. Following *Iqbal*, district courts faced with motions to dismiss must first accept as true all of the factual allegations contained in a complaint. This requirement "is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." 550 U.S. at 555. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. 550 U.S. at 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929. Determining whether a complaint states a plausible claim for relief will be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. *Iqbal,* ___ U.S. ___, 129 S. Ct. 1937, 1949-1950 (2009); *Tam Travel, Inc. v. Delta Airlines, Inc. (In re Travel Agent Comm'n Antitrust Litig.)*, 583 F.3d 896, 903 (6th Cir. 2009). Under *Iqbal*, a civil complaint will only survive a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. ... Exactly how implausible is "implausible" remains to be seen, as such a malleable standard will have to be worked out in practice." *Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 629-630 (6th Cir. 2009).

The Complaint alleges that Minnesota Mutual sold an accidental death insurance policy to the decedent, Carolyn Price, and that she died April 12, 2008, as "a direct and proximate result of an accidental methadone intoxication prescribed to the decedent pursuant by the decedent's treating physicians' orders, causing a cardiac arrest." (Complaint, Doc. No. 4, ¶ 3, PageID 30).

Minnesota Mutual asserts that no accidental death benefit is payable on that state of the facts, relying on the following policy language:

> **When will the accidental death benefit be payable?**
>
> We will pay the accidental death benefit upon receipt of written proof satisfactory to us that you died as the result of an accidental injury.
> ***
> **What does death by accidental injury mean?**
>
> Death by accidental injury as used in this policy means that your death results directly and independently of all other causes from an accidental drowning or from an accidental injury which was unintended, unexpected, and unforeseen. Your death must occur within 180 days after the date of the injury. In no event will we pay the accidental death benefit where your death results from or is caused directly or indirectly by any of the following:
> ***
> (4) drugs, poisons, gases or fumes, voluntarily taken, administered, absorbed, inhaled, ingested or injected.

(Memorandum, Doc. No. 11, quoting Ex. A at PageID 67.) Minnesota Mutual's position is that, because the Complaint alleges that the methadone was taken voluntarily, Plaintiff has pled facts which preclude it from recovering.

In response to the Motion, Plaintiff has not sought to amend to change the assertion of the means of death. Rather, he asserts that the word "drugs" in the policy is ambiguous and that ambiguity should be construed against the insurer (Memorandum, Doc. No. 17, PageID 99). He claims that the term "drugs" in common usage means illicit drugs. *Id.*

The construction of an insurance policy is a question of law for the court and normal contract rules apply to the interpretation. *King v. Nationwide Insurance Co.,* 35 Ohio St. 3d 208, 519 N.E.

2d 1380 (1988); *Olmstead v. The Lumbermen's Mutual Insurance Co.*, 22 Ohio St. 3d 212, 490 N.E. 2d 584 (1970). The terms of the contract are ambiguous if they are reasonably susceptible of more than one meaning, *King, supra*, and the court determines as a matter of law whether there is ambiguity. *United Nat'l Ins. Co. v. SST Fitness Corp.*, 182 F. 3rd 447, 449 (6th Cir. 1999). Where an insurance policy's language is clear and unambiguous, the court must give that language its plain and ordinary meaning. *Weiss v. St. Paul Fire and Marine Ins. Co.*, 283 F.3d 790 (6th Cir. 2002); *Burris v. Grange Mutual Companies,* 46 Ohio St. 3d 84, 545 N.E. 2d 83 (1987), overruled on other grounds, *Savoie v. Grange Mutual Companies,67* Ohio St.3d 500, 620 N.E.2d 809 (1993); *Karabin v. State Auto Mutual Ins. Co.*, 10 Ohio St. 3d 171, 173, 462 N.E. 2d 381 (1984); *Park-Ohio Industries, Inc., v. Home Indemnity Co.*, 975 F.2d 1215, 1220 (6th Cir. 1992).

The question before the Court is not whether the term "drugs" is intrinsically ambiguous, but whether it is ambiguous in the context of this insurance policy. The evident purpose of the quoted policy language is to exclude coverage for death resulting from the voluntary ingestion of drugs. Such an ingestion is not accidental, but purposeful. The purpose may not be to cause death. Indeed, as alleged in the Complaint here, the purpose inferable from the allegation was to follow a doctor's prescription, the purpose of which is to maintain or regain health[1]. But the point of the exclusion is to limit coverage to deaths that result from accidental occurrences, not accidental deaths that result from purposeful acts.

Given that evident purpose of the language, there is no good reason to find the word "drugs" to mean only illicit drugs. The language would also naturally exclude illicit uses of drugs that have licit purposes, e.g., suicide by overdose on prescription drugs which had been prescribed for the person committing suicide.

Plaintiff offers no source for the notion that the word "drugs" in common usage means "illicit

[1]Excepting situations of physician-assisted suicide by prescription, as in Oregon.

drugs." Webster's Third International has as the common usage "a substance used as a medicine or in making medicine." Finally, Minnesota Mutual cites other cases in which courts have found "drugs" as used in this insurance policy context not to be ambiguous. (Reply, Doc. No. 19, PageID 123, citing *Cummings v. Minnesota Life Ins. Co.*, 711 F. Supp 2d 1287 (N.D. Okla 2010), and *Kukoleck v. Minnesota Life Ins. Co.*, 2005 WL 3447623 (N.D. W. Va. Dec. 15, 2005)).

It is therefore respectfully recommended that the Motion be granted and the Complaint be dismissed for failure to state a claim upon which relief can be granted. This is the unusual situation where a plaintiff has pled (and therefore judicially admitted) facts which establish a defendant's complete defense. For that reason, the dismissal should be with prejudice.

December 21, 2010.

s/ **Michael R. Merz**
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(e), this period is automatically extended to seventeen days because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(B), (C), or (D) and may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F. 2d 947 (6th Cir., 1981); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).