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IN THE SUPREME COURT OF THE STATE OF UTAH

HARRY C. GREGUHN,
Plaintiff-Respondent,

vs.

MUTUAL OF OMAHA INSURANCE COMPANY and UNITED BENEFIT LIFE INSURANCE COMPANY,
Defendants-Appellants.

Case No. 11544

RESPONDENT'S BRIEF

Appeal from Judgment of the Third Judicial District Court for Salt Lake County, State of Utah
D. Frank Wilkins, Judge

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FILED
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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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vs.

MUTUAL OF OMAHA INSURANCE COMPANY and UNITED BENEFIT LIFE INSURANCE COMPANY,
Defendants-Appellants.

Case No. 11544

RESPONDENT'S BRIEF

PRELIMINARY STATEMENT

The parties will be referred to as in the Court below or Defendants may be referred to as the Insurance Company, Insurance Companies, the Company or Companies. All italics are ours.

STATEMENT OF THE KIND OF CASE

This is an action for benefits claimed due for total disability under two insurance policies.

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DISPOSITION IN THE LOWER COURT

The jury returned a verdict for Plaintiff against Defendants and Judgment was rendered thereon in the amounts of $15,018.75 for past amounts due on both policies to the time of trial, plus six percent (6%) per annum interest, plus $34,207.03 for future installments due on both policies, discounted to present value (R. 39, 40).

RELIEF SOUGHT ON APPEAL

Plaintiff seeks affirmance of the Trial Court's Judgment.

STATEMENT OF FACTS

Both disability policies were in full force and effect on the date of Plaintiff's accident, September 21, 1964.

The policy with United Benefit Life Insurance Company (Ex. P.1) provides for a monthly benefit of $100.00 per month for the life of insured for a total and permanent disability. The term *"total loss of time"* is defined by the policy as *"that period of time during which the insured is able to perform none of his occupational duties, receives no pay for performing work or service of any kind, and is regularly attended by a legally qualified physician, other than himself."* The insuring clause of this policy insures the person named *"against loss of life, limb, or sight resulting directly and*

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independently of all other causes from accidental bodily injuries received while this policy is in force, and against loss of time beginning while this policy is in force and resulting from (1) *accidental bodily injuries received while this policy is in force,* or (2) sickness contracted while this policy is in force . . ."

The policy with Mutual of Omaha (Ex. P.2) provides benefits of $200.00 per month for total disability for the period ending on the first policy renewal date following a 15-year period beginning on the policy date. A "*total loss of time*" defined by this policy "*means that period of time during which you are unable to perform each and every duty of your occupation, receive no earnings for performing other work or service and receive medical treatment; provided, however, after the first twelve months of such period of time, it also means that period of time which you are unable to engage in any other gainful work or service for which you are reasonably fitted by education, training or experience.*" The policy further defines "*injuries*" as meaning "*accidental bodily injuries received while this policy is in force and resulting in loss independently of sickness and other causes.*"

After the accident of September 21, 1964 had been properly reported, the Companies thereafter made monthly payments and Plaintiff submitted reports as required, signed by his treating doctor (Ex. D.13) through May of 1965 (Ex. P.4, P.5). He received a letter from Mutual of Omaha dated June 18, 1965,

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whereby the Company refused to pay any additional benefits. This letter stated in part as follows Ex. P.3):

> " . . . , it was once again reviewed by the Home Office and it has been determined that the loss due to injury sustained on September 22, 1964, would be payable to February 22, 1965. Since disability continues since that date, it would be considered a loss due to sickness caused by the 'spondylolisthesis' and that both policies involved does indicate that with loss due to sickness, and without confinement, not required to remain indoors, that such income would be payable not exceeding three months for any one sickness.
>
> A review of the file indicated that the loss has been non-confining since 2-22-65 and *the drafts for $300.00 would represent the final payment of benefits due because of non-confining total disability.*"

Thereafter, Plaintiff filed the lawsuits in question seeking to recover benefits for total, permanent disability provided by said policies.

Plaintiff is a 54 year old man with a fifth grade education. He has worked for approximately 30 years, all of his adult life, as a brick layer except for a six months period of time when he was a caser and stacker for Fisher Brewery in approximately 1943 (R. 52, 53). He has had no experience other than as a brick layer. Brick laying involves hard physical labor, involving bending, lifting and moving mortar in a wheelbarrow. Plaintiff has, on occasion, worked as a brick contractor, but as a brick contractor, he had to perform the same

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kind of hard physical labor as a brick layer (R. 53, 54). Prior to the accident in question, he had worked continuously and had enjoyed good health. He had never had any complaints of back pain, and had never seen a doctor for complaints in his back (R. 54, 55).

On September 21, 1964, while working for Western States Masonry on a job at 24th South and 8th West, Plaintiff was working along a wall on a scaffold, when, all of a sudden, the plank fell out from underneath him and he had to grab the wall and the scaffold and hang for a period of time to keep from falling approximately 14 feet. He was ultimately rescued (R. 56). Approximately an hour and one-half later, his back started to ache and by 4:00 P.M. it was "killing" him. This pain was in his low back and radiated down his left leg (R. 56, 57).

At the time of the accident, Plaintiff weighed approximately 218 pounds. At the time of trial, he weighed approximately 220 pounds (R. 58).

Plaintiff went home from work and took a hot bath, but the pain did not leave. The next morning he saw Dr. Lamb and was started on physical therapy (R. 58). Dr. Lamb diagnosed Plaintiff's condition as a spondylolisthesis and that he had received some injury causing pressure on the nerve roots at the lower lumbar level accounting for the numbness that he had, and the pain that he had in his back and in his legs (R. 92). Plaintiff was given physical therapy in the hospital in October but he failed to respond (R. 93, 94).

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On October 23, 1964, Dr. Lamb operated on Plaintiff's low back; the operation involving the removal of bone over the spinal canal, the lamina at L-5, an exploration of the nerve roots and disc space between L-5 and the sacrum, and a fusion between L-4 and the sacrum (R. 94).

Dr. Lamb demonstrated and described to the Court a sponlylolisthesis as a lack of bony union between the articulation between L-5 and S-1 (R.87, 88). The result is a condition of instability making the spine more susceptible to injury.

Because of continued pain in the back and finding that there was some motion between the 4th and 5th lumbar vertebrae, Plaintiff was operated on again on February 11, 1966, at which time there was a fusion between L-4 and L-5, and also the joint between L-3 and L-4. His symptoms have persisted since the operation of February 11, 1966 and his case has been followed at regular intervals since that time (R. 94, 95, 96, 97).

Dr. Lamb testified that Plaintiff is permanently disabled for most of the types of work for which he would be equipped and specifically that he is disabled from performing the work of a brick layer as described to him by Plaintiff. As far as his ability to do any physical labor, the doctor testified as follows (R. 98):

"Q. What is your opinion?

A. I don't think that he is going to be able to do any appreciable lifting or any work that re-

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quires activity, any stooping or bending. As a matter of fact, the last time he was in the office, he was complaining considerably of sitting for any length of time.

Q. Has he also complained of standing for any periods of time?

A. Yes."

As to the cause of Plaintiff's disability, Dr. Lamb testified as follows (R. 99):

"Q. Now, doctor, assuming the accident as described and the fact that prior to the accident, Mr. Greguhn had no complaints in his back, and assuming the conditions you have found since and the treatments, and so forth, do you have an opinion as to whether or not the accident that he described on September 21, 1964, probably caused the disability that you've indicated?

A. Yes.

Q. What is your opinion?

A. Well, according to this man's history, he had worked up until that time, and I never felt that he should be released to go back to that type of work. I don't think that he will be able to return to that type of work.

Q. What is your opinion in regard to the cause of his disability?

A. *I think that his disability is related to that accident.*"

Dr. Lamb further testified that there are people having a spondylolisthesis condition who are able to live a normal life (R. 99).

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Concerning the fact that Plaintiff had some degenerative disc disease in his back prior to the accident, Dr. Lamb testified that degenerative disc disease is something that happens to all of us; that at the age of 18, the tissues quit building up and start to degenerate, so we all have a certain amount of this (R. 109). Furthermore, Dr. Lamb testified that assuming that Plaintiff had no complaints in his back prior to the accident as testified to by Plaintiff, that without the accident he could very well have gone on indefinitely without having back complaints (R. 109).

Dr. Boyd Holbrook was called as a witness by *Defendants* and on cross-examination testified in part as follows (R. 155):

> "Q. And I suppose, doctor, that you would agree that if Mr. Greguhn never had any complaints before the accident of September 21, 1964, that he suffered the accident as he described it to you, and that the complaints dated from then, you would agree, would you not, that this accident was the thing that precipitated these symptoms that he later suffered?
>
> A. Yes.
>
> Q. And that these were the things that necessitated the operations?
>
> A. Yes."

Dr. Holbrook also testified that even after the second operation, x-rays showed that there was some definite movement between L-3 and L-4 and suspected movement between L-4 and L-5 (R. 152) Further,

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he stated that the 20% disability rating which he assessed was purely a disability consisting of loss of bodily function and that Plaintiff is totally disabled from being a brick mason (R. 153).

Dr. Wallace Hess, who was called as a witness for Defendants, also found that there was a mild amount of motion at the fourth level and that there was a 20% permanent partial impairment (R. 169). On cross-examination, Dr. Hess stated that his assessment of permanent disability is solely as to bodily function. Also, Dr. Hess indicated that degenerative disc changes are a common occurrence in persons growing older (R. 172).

Plaintiff testified that at the present time, he is unable to bend over and lift objects and that there is no kind of physical work which he is able to do (R. 61, 62). He further testified that in the Summer of 1968, he made application to the Utah State Board of Education, Division of Rehabilitation, for rehabilitation and that his application was denied (R. 63).

Dr. Moroni H. Brown was called as a witness by Plaintiff. He is an Associate Professor of Psychology at the University of Utah, and for 12 years or so has been doing work at the Rehabilitation Center at the University of Utah. He has also been a vocational consultant for the Bureau of Disability Appeals for approximately six or seven years concerning Social Security Appeals. Dr. Brown testified that he had listened to the testimony of Dr. Lamb concerning the injuries

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and disability experienced by Plaintiff. He was asked the following hypothetical question (R. 131):

> "Q. Now, Dr. Brown, I will ask you to assume a few facts concerning Mr. Greguhn. Assume that Mr. Greguhn is a man 54 years of age. Assume that you observed Mr. Greguhn here in court, his general build and dimensions and weight, and so forth. Assume that for the past 20 some odd years Mr. Greguhn has been blind in one eye, having a reasonably good visibility out of the other eye. Assume that his entire adult life, Mr. Greguhn has worked as a brick mason and a brick contractor in this area, except for a short period of time, approximately six months, when he was employed at Fisher Brewery, and was engaged in stacking objects and other things. Assume that Mr. Greguhn has a fifth grade education, and assume the disability that he now has as stated by Dr. Lamb in his testimony, I'll ask you whether or not you have an opinion, assuming all of these facts, as to whether or not Mr. Greguhn can be rehabilitated for any type of employment for profit in this community?
>
> * * *
>
> A. Yes, I have an opinion.
>
> Q. Now I'll ask you the question that counsel is about to object to. Will you tell us your opinion?
>
> * * *
>
> A. I'd be very pessimistic about the chances of his being rehabilitated.
>
> Q. Why is that?
>
> A. I'm taking into consideration the fact that it has been brought out here that he went to the

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fifth grade. I don't know whether he finished the fifth grade or not, but that's his educational background. He has had no other type of training that has been brought out here except his work experience. His work experience has been mentioned here, and has been of a type, according to the testimony of Dr. Lamb, that he cannot continue. I do not see much in the way of transferable skills to other types of occupations, and with his educational background and his age, I would not think it would be very possible for him to go back to school or receive vocational training in some other area."

It was agreed and the Court ruled that testimony concerning a lump sum to represent the present value of future benefits would be taken out of the hearing of the jury (R. 50). Pursuant thereto, Plaintiff produced testimony concerning the present value for the future benefits.

It was stipulated by counsel that if Mr. Ralph Cowan, the Trust Officer of First Security Bank, were called to testify, he would testify that an ordinary person in this community exercising reasonable judgment and prudence could invest money on the present market and receive the rate of 5¼% interest in a safe investment, preserving the principal.

Mr. German Ellsworth Brunson, a Certified Public Accountant, a partner with the firm of Peat, Marwick, Mitchell & Co., testified concerning the computations for the future benefits involved in the insurance policies. Exhibit P.15 gives the figures for both policies,

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both as to the payments in arrear, with interest of 6% per annum to the date of the trial, and as to the future payments provided in both policies. The payments in Policy No. 1 run through September 1, 1979, and in Policy No. 2 for the life expectancy of 19.70 years. The life expectancy was obtained from the United States Life Tables 1959-61, compiled and published by the U.S. Department of Health, Education and Welfare, Public Health Service (R. 124) (Ex. P.15). This exhibit contained the figures which later resulted in the amount of the judgment rendered in favor of Plaintiff against Defendants, full credit having been given in the computations for the benefits which Defendants had paid under its claim that all Plaintiff was entitled to was sick benefits. (R. 123, 124, 125, 126). This exhibit was not given to the jury but was used by the Court after the verdict was rendered for the computation of the amount of the judgment.

On cross examination as to whether or not the tables included persons with health problems, Mr. Brunson stated that the tables related to total population which included persons with and without health problems (R. 126, 127).

The Court instructed the jury in Instruction No. 13A:

> "You are instructed that in order for the Plaintiff to prevail in this action, he has the burden of proving by a preponderance of the evidence: (1) That the incident of September 21, 1964 activated and precipitated a latent condition

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to a disability condition, and (2) That said disability condition, if any, was a total and permanent disability as defined in these instructions.

If you find that the Plaintiff has not proved both of the foregoing, then you must return a verdict in favor of the Defendants and against the Plaintiff of no cause of action."

The Court defined total and permanent disability for the jury in Instruction No. 14 as follows:

> "Total and permanent disability in this case means that the Plaintiff has a condition which disallows him from following his occupation and from doing substantially all the acts that are necessarily and usually performed by one who follows that occupation."

And further, the Court instructed the jury in Instruction No. 16:

> "You are instructed that the words in the Policy with Mutual of Omaha, 'unable to engage in any other gainful work or service for which you are reasonably fitted by education, training or experience', means other work than the usual occupation of the insured, for which he is reasonably fitted by education, training or experience, that he is physically able to perform, which work must be remunerative and not merely nominal."

and further in Instruction No. 17:

> "You are instructed that the words contained in the Policy with United Benefit Life Insurance Company, Omaha, 'that period of time during which the insured is able to perform none of his occupational duties, received no pay for his

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> work of any kind', contemplates the period of time during which the insured is physically unable to perform his regular occupation in the sense that in order to carry on his regular occupation, he must be able to substantially perform all the acts that are necessarily and usually performed by one who follows that occupation."

The jury returned a verdict in favor of the Plaintiff and against Defendants and judgment was rendered thereon (R. 38, 39, 40).

ARGUMENT

POINT I. THE EVIDENCE SUSTAINED THE VERDICT.

The Court correctly instructed the jury as to what they must find by a preponderance of the evidence in order to find in favor of the Plaintiff. The evidence supported their finding, and, therefore, the verdict and judgment must be upheld. Where evidence conflicts, the verdict cannot be reversed on appeal on the ground that it is not supported by the evidence. *Lee vs. New York Life Insurance Co.*, (1938) 95 Utah 445, 82 P.2d 178. Only those jury verdicts which appear to be unsupported by any credible evidence which would justify them in the minds of reasonable men, will be disturbed on appeal. *Reynolds v. W. W. Clyde & Co.* (1956) 5 Utah 2d 151, 298 P.2d 530.

There was ample evidence in this case that the nondisabling, asymptomatic dormant condition of spondy-

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lolisthesis was activated and precipitated to a disabling condition by the accident in question. The evidence brought the case squarely within the holding of *Lee v. New York Life Insurance Co.*, supra, where the Court stated:

> "The rule, as we believe it to be on the facts which the jury was justified in finding, is that where an accidental injury sets in motion or starts activity of a latent or dormant disease and such disease contributed to the death after having been so precipitated by the accident, the disease is not a direct or indirect cause of death, nor a contributing cause within the meaning of the terms of the policy, but the accident which started the mischief and precipitated the condition resulting in death is the sole cause of death."

In that case, deceased had a diseased gall bladder prior to the accident, but the accidental injury to his abdomen, according to the treating doctor, caused an infection to spread and infect the appendix making necessary the operation which caused the death.

The uncontradicted testimony in the case at bar is that Plaintiff worked continuously for many years to the time of the accident with no complaint concerning his back. He had sought no medical assistance for any problems. The case was submitted to the jury squarely within the ruling of the *Lee* case as to whether or not the incident of September 21, 1964, activated and precipitated a latent condition to a disability condition, and whether the disability, if any, was a total and permanent disability as defined by the instructions.

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This case is also squarely within the holding of *Browning v. Equitable Life Assurance Society of the United States* (1937) 94 Utah 532, 72 P.2d 1060. The Court held the disability to be within the classification of an accident causing a diseased condition which together with the accident resulted in the disability. The Court, in a thorough discussion of the problems presented in this type of a case, discussed the meaning of the term "existing disease" as not meaning a temporary disorder or derangement of the bodily organs, system, or functions, nor a tendency or susceptibility to a disease, but a chronic or definite affliction such as would be embraced in the common understanding and meaning of the term "diseased" or "sick". Also, the Court held that the term "independently of all other causes" does not mean uninfluenced or unaffected by any other cause, but means *uncontrolled* by any other cause, that is, that there was no independent intervening cause unproduced or uninfluenced by the injury, which, acting of itself and without stimulation by the injury tends to produce the result.

The Court quotes from the opinion of Chief Justice Rugg of the Massachusetts Supreme Court in the case of *Leland v. Order of United Commercial Travelers of America*, 233 Mass. 558, 124 N.E. 517, as follows:

> "If there is no active disease, but merely a frail general condition, so that powers of resistence are easily overcome, or merely a tendency to disease which is started up and made operative, whereby death results, then there may be

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> recovery even though the accident would not have caused that effect upon a healthy person in a normal state."

The Court stated that any other construction "would be so doctrinaire, so headed toward futility, that it would reduce a policy and its coverage to contradiction and absurdity."

The Court referred to a statement made by Justice Cardozo in *Silverstein v. Metropolitan Life Insurance Co.*, 254 N. Y. 81, 171 N.E. 914, that "a policy of insurance is not accepted with the thought that its coverage is to be restricted to an Apollo or a Hercules."

The opinion in the *Browning* case is referred to at length in the brief of Appellants. However, Appellants are relying on the dissent of Justice Wolfe as to this particular part of the decision and not the ruling of the Court as stated in the opinion of Justice Larson. The ruling of the Court in the *Browning* case clearly supports the instructions and the verdict in the case at bar. The Court summarizes its holding on page 569 as follows:

> "We must therefore hold that where disability results, even though aggravated or intensified by disease which follows as a natural, though not necessary, consequence of an accidental physical injury, or where the disease is induced or set in motion as a result of the injury, the disability or death is deemed the proximate result of the injury and not of the disease as an independent cause."

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It will be recalled that the fact situation of the *Browning* case involved an accidental injury to a finger in which arthritis developed in the joint on account of a toxemia in the body.

A similar result was obtained in the case of *Thibodeaux v. Pacific Mutual Life Insurance Co.*, (1959) 237 La. 722, 112 So.2d 423. This case involved a similar fact situtaion. The Plaintiff sustained a low back injury precipitating an asymptomatic condition of spondylolisthesis to a disability. The Court quoted from 29 Am. Jur. Sec. 932, "Insurance", Pg. 707:

> "In accident insurance the question whether the insurer is liable for an injury depends upon the proximate cause of the loss. The term 'proximate cause', as here used, means the same as in other cases, and a provision requiring loss to be caused by accident 'independent of all other causes' is equivalent to a provision requiring it to be the proximate cause."

And further:

> "A review of authorities convinces us that where an insured has a dormant condition and such condition is awakened by accident, the condition is not deemed the cause of the disability or loss which the insured suffers."

The Court also quotes from the case of *De Blieux v. Travelers' Insurance Co.*, 185 La. 620, 170 So. 14, page 17:

> "Does the provision of the policy 'the effect resulting directly and exclusively of all other causes from bodily injuries sustained during

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> the life of this policy solely through accidental means' mean that there can be no recovery if there is a latent or dormant disease which becomes active through the agency of the accident, and co-operates with the other effects of the accident in bringing about the death?
>
> We think that, if the accident is the proximate cause of the death and sets in motion or starts a latent or dormant disease, and such disease merely contributes to the death after being so precipitated by the accident, it is not a proximate cause of the death nor a contributing cause within the meaning of the terms of the policy."

Defendants in support of their argument that the Court should have directed a verdict in their favor cite the case of *Thompson v. American Casualty Co.* (1968) 20 Utah 2d 418, 439 P.2d 276. This case fully supports the contention of *Plaintiff* herein that a jury question was created by the evidence and that the Court correctly submitted the case to the jury. In the *Thompson* case there were prior conditions which the Defendant claimed cooperated with the accidental injury in causing the disability. The Plaintiff in that case contended that the disability resulted from the accident directly and independently of other causes. The Court reversed the summary judgment which had been granted by the Trial Court in favor of Defendant. The quotation from the *Thompson* case in Defendants' brief was merely a recitation as to the *contention* that was made by the Defendant in that case. The Court held that the conflicting evidence required a jury determination, which is Plaintiff's contention here.

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The case of *Tucker v. New York Life Insurance Company* (1945) 107 Utah 478, 155 P.2d 173, also cited by Defendants in support of their argument that they should have had a directed verdict, is distinguishable from the case at bar. In the *Tucker* case, the evidence was undisputed that the deceased was suffering from *an active and progressive condition* which cooperated with the accidental injury in causing his death. The Court in the *Tucker* case distinguished the *active and progressive* condition from the *dormant* condition in the *Lee* case which was activated by the accident.

It is submitted that the facts in the case at bar show that the prior existing condition which Plaintiff had was dormant.

The Court specifically required in its instructions that before Plaintiff could prevail the jury must find by a preponderance of the evidence that the condition was dormant and was activated and precipitated by the accident.

There was ample evidence in the record to support the jury's finding that it was.

Another Utah case supporting Plaintiff's contention is *White v. National Postal Transport Association* (1953) 1 Utah 2d 5, 261 P.2d 924. The Court in that case held that a jury question was presented where the deceased suffered an accidental blow to his leg and eventually died from a heart condition. The evidence

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showed that the deceased in childhood had been afflicted with rheumatic fever which had left him a mechanically damaged heart. However, since youth, the heart condition had not been active. Prior to the trip on which the accident happened, Plaintiff's doctor had found that his heart condition was under control. As a result of the blow to the leg, his leg was eventually amputated and it was found that he had suffered from Buerger's Disease. The testimony of his doctor described his heart as damaged but that the condition was under control. A doctor testified that as a result of the amputation with its attending shock and bedrest, the inactive heart condition could have been reactivated, that when the heart disease is active, emboli are thrown off by the heart and may lodge in the brain or other vital organs of the body. All of the medical testimony at the trial agreed that in their best judgment, deceased died from the lodging of an emboli in the brain. The Court discussed the *Lee* case and held that the facts were within the holding of the *Lee* case and that the Trial Court correctly submitted the case to the jury, stating that there was evidence that the blow had activated the dormant condition which contributed to the death.

See the following cases which hold that latent, dormant conditions precipitated by an accident are within the terms of such policies as the policies in question:

Kansas City Life Insurance Co. v. Hayes (10 Cir. 1950) 184 F.2d 327, a claim on double indemnity

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provision of life insurance policy if death "resulted independently and exclusively of all other causes, solely from bodily injury effected directly by external, violent and accidental means"—evidence showed that deceased suffered a fall down his basement steps and later the same morning found dead in his car in driveway — autopsy revealed that death was caused by a ball thrombus in the left auricle which had become dislodged and impacted in the mitral orifice — there was testimony that a fall or blow to the body in the area of the heart might loosen or dislodge the thrombus if slightly appendant—held, jury question as to whether accidental fall set in motion a latent or dormant disease or diseased condition resulting in death of insured.

Pacific Mutual Life Insurance Co. v. Meldrim (1919) 24 Ga.App. 487, 101 S.E. 305. The Court stated:

> "To hold in any case that a contract which stipulates that the loss for death should be payable only when the loss results solely and exclusively from an injury, would be to hold that death must, in every case, be instantaneous and the immediate effect of the injury in question, for it is a matter of common knowledge that almost every human being has some weak spot in his organism which might to a larger or smaller degree contribute to bring about death in a particular case, although another person under the same circumstances might not have died. Except in the case of a human being who is in perfect health, or unless death is instantaneous, death never supervenes when it cannot be said that

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there was perhaps more than one cause which contributed to the fatality. If a company which writes accident insurance insures one who is suffering from a number of maladies against loss of life solely and exclusively due to the accident, and an accident happens which perhaps would not have caused the death of a normally healthy person and yet which, by precipitating the baneful effects of the maladies, shortens the life of the person in question by any appreciable length of time, no matter how short, the injury, as the underlying essential proximate cause, must at least be said to produce the result which otherwise would not have happened at the time and place at which it occurred."

United Insurance Co. v. Ray (1960) 271 Ala. 543, 125 So.2d 704, - crushed vertebrae when hit by tree limb - Defendant claimed pre-existing diseased vertebrae - held within terms of policy.

Egan v. Preferred Accident Insurance Co. (1936) 223 Wisc. 129, 269 N.W. 667, prior existing arthritic condition in back - Defendant claimed total disability partly if not wholly due to prior existing arthritic condition - contention rejected by the Court and disability held to be within terms of policy.

Scanlan v. Metropolitan Life Insurance Co. (7th Cir., 1937) 93 F.2d 942 - action for accidental death benefit where it appeared that insured died of a blood clot becoming stuck in the lungs shortly after insured had been in an automobile accident, and further that at the time of the accident, deceased suffered from varicose veins - medical experts testified that the accident

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may have aggravated that condition and caused the clot - Court affirmed a verdict for the Plaintiff holding that the evidence supported the verdict and stated as follows:

> "One may recover on an accident policy such as here in issue although the insured suffers from bodily infirmities. If the accident brought about the conditions from which death resulted, the fact that the insured was ill, aged or infirm, or had bodily or mental infirmities, would not bar recovery provided the accident excited the bodily infirmity into activity and death resulted. . . . The infirmity may have made the insured less able to resist, but if the accident caused the condition, which in turn affected the weak spot which did not resist as well as a healthy body, the cause is nevertheless the accident, and recovery cannot be avoided or evaded."

Also see *Maryland Casualty Co. v. Hazen* (1938) 182 Okl. 623, 79 P.2d 577; *Escoe v. Metropolitan Life Insurance Co.* (1942) 178 Misc. 698, 35 N.Y.S. 2d 833; *New York Life Insurance Co. v. Wise* (1952) 207 Okl. 622, 251 P.2d 1058; *Railway Officials and Accident Association v. Coady* (1899) 80 Ill.App. 563; and *Jones v. General Accident Fire and Life Assurance* Corp. (1935) 118 Fla. 648, 159 So. 804.

Instruction 13A instructed the jury strictly within the rule laid down in the *Lee* case and left it for the jury to decide whether or not the accident of September 21, 1964 activated and precipitated a latent condition to a disability condition. The jury verdict was

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supported by the evidence. Plaintiff's uncontradicted testimony was that he had no complaints of back pain and worked steadily for many years prior to the accident and that the symptoms which Dr. Lamb found persisted thereafter. Dr. Lamb and Dr. Holbrook both testified that the accident precipitated an asymptomatic spondylolisthesis to a symptomatic point and necessitated the operations subsequently performed. Obviously, there was ample evidence to support the verdict of the jury as to the disability being caused by the accident.

The finding of the jury that Plaintiff was suffering from a total permanent disability was likewise amply supported by the evidence. All doctors agreed that Plaintiff had a permanent disability and that he could not engage in physical labor. Dr. Holbrook, called by Defendant, testified that in his opinion Plaintiff could never perform the work of a brick mason. Plaintiff testified that a brick contractor must also perform hard physical labor when called upon. Dr. Moroni Brown, who is an expert in rehabilitation, testified that in his opinion, due to the disability, age, fifth grade education and Plaintiff's general condition including the fact that he has sight in only one eye, Plaintiff cannot be rehabilitated for remunerative work in this community.

Instructions No. 14, 16 and 17 were taken from the case of *Colovos vs. Home Life Insurance Co. of New York,* (1934) 83 Utah 401, 28 P.2d 607. The Court stated in part in the *Colovos* case at page 406:

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"It is the opinion of this Court that the term used, 'engaging in any occupation and performing any work for compensation or profit,' has a well defined meaning. It means ability to follow any recognized occupation, and to do substantially all the acts that are necessarily and usually performed by one who follows that occupation. It could not be said that a man could engage in an occupation if he were able to do only one or two of the acts customarily performed by one engaged in such an occupation. Furthermore, there is an element of continuity in following an occupation; . . . furthermore, 'compensation or profit', as used in the paragraph quoted from the policy, is qualified, and relates to the preceding words, 'engaging in any occupation and performing any work,' and contemplates that the compensation or profit to be received from the occupation engaged in, or work done, shall, in a fair sense, be remunerative, and not merely nominal, and in the case at bar a small farmer who could not do substantially all of the labor that usually is necessary to be done, or a peddler who cannot lift or handle the bags of produce he is accustomed to peddle, could not conduct his farming or his peddling for profit or compensation in a remunerative sense."

The *Colovos* case was followed by the *Browning* case, supra, in holding that an oral surgeon who could not perform substantially all of the acts necessary in his profession was totally disabled within the terms of the policy in question.

Thus it can be seen that the jury verdict holding that Plaintiff was totally and permanently disabled is

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well supported by the evidence in this case to the effect that Plaintiff cannot perform his usual and ordinary occupation as a brick mason or brick contractor or any other occupation for which he is fitted by experience and education, his education being only a fifth grade education and his experience being solely in the field of hard manual labor.

POINT II. THE TRIAL COURT CORRECTLY ALLOWED DAMAGES FOR FUTURE BENEFITS.

The evidence in this case showed that Plaintiff was totally and permanently disabled within the meaning of the policies in question. The evidence further showed that Defendant repudiated its obligation under the policies by unequivocally refusing to pay any benefits based on a total permanent disability.

Plaintiff performed all of his duties under the policies by submitting his periodic reports. Defendants repudiated their obligations under the policies as found by the jury.

The better reasoned line of authorities in the United States supports the holding of the Trial Court in the case at bar that the insurance company cannot repudiate the contract and then be able to pay off in periodic installments as provided in said policies, but must respond in damages for the anticipatory breach of the contract.

The best way in which damages for the breach can

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be calculated is the method used in the case at bar, used in many of the cases cited herein. This method is the one customarily presented to juries in personal injury and death cases by taking the life expectancy of the Plaintiff and discounting to the present value the benefits for the total life expectancy in the one policy and for the period of time involved in the other. Exhibit P.15 contains the precise calculations both for the past amounts due and for the future benefits reduced to present value as supported by the testimony of Ralph Cowan as to the rate of return an ordinary prudent person could expect in this community with sound investments of his money.

The case of *Federal Life Insurance Co. v. Rascoe* (6th Cir. 1926) 12 F.2d 693, cert. den. 273 U.S. 722, 47 S.Ct. 112, is the leading case for the rule urged by Plaintiff. The Court held in the *Rascoe* case that where a contract is executory, the rule that there can be no anticipatory breach of a unilateral contract for the payment of money at some future date does not apply. The Court held that where the right of an insured to collect disability benefits payable in installments depended upon her furnishing regularly to the insurer every thirty days a physician's report stating fully her condition and the probable duration of her disability and there was an unequivocal repudiation of the contract by the insurer, she would have the right to recover damages for breach of the entire contract. The Court observed:

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> "This is a single contract. The fact that defendant is required to perform in part at stated intervals does not change its unitary character into a multiplicity of contracts, each relating to but one installment. If there has been an actual breach, coupled with repudiation, of this one contract, then, to avoid a multiplicity of suits, public policy requires that plaintiff may maintain but one action for the entire damages occasioned by such breach."

Plaintiff in the *Rascoe* case was suing for benefits on a disability policy and Defendant had paid a certain amount of benefits including the hospital and medical bills, and then refused to make more payments. The Court held that this was a repudiation of the contract on the part of the Defendant insurance company.

Another leading case for this rule is the case of *Aetna Life Insurance Co. v. Phifer* (1923) 160 Ark. 98, 254 S.W. 335. In this case the insurance company denied all liability under the permanent total disability clause and also claimed that the policy had lapsed for non-payment of premiums after the disability began. The Court held that this was a renunciation of the contract and that plaintiff could sue for the future benefits reduced to present value.

In the case of *Milburn v. Royal Union Mutual Life* (1921) 209 Mo.App. 228, 234 S.W. 378, the Court applied the same rule stating in part at page 381:

> "Plaintiff cites *Knisely v. Leathe,* 256 Mo. 341, 166 S.W. 257, in support of his contention that the law of this State is well settled that

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when defendant failed to perform its contract and defaulted, all the installments thereby became due and payable.

We think this is good law and applies in this case . . . this principal is so fundamental that citations are unnecessary. . . . It is well settled that the law frowns on a multiplicity of cases where one action will suffice."

The case of *Indiana Life Endowment Co. v. Reed* (1913) 54 Ind. App. 450, 103 N.E. 77, stated:

"With few exceptions, the Courts of England and America have held that the renunciation of an executory contract, either before or after the time of performance has arrived, or the refusal to carry out the provisions of a contract in course of performance, gives the right of action to the injured party for the damages sustained by reason of such breach or repudiation of the contract. A denial of all liablity, where liability has attached, is held to give the injured party the right to treat the contract as broken or repudiated and to pursue his remedy for damages for the breach, and to recover, once for all in a single suit all that may be ultimately due him."

Also see the following cases which support this rule: *Travelers Protective Association of America v. Stephens* (Ark. 1932) 49 S.W.2d 365; *Robbins v. Travelers Insurance Co.* (1934) 151 Misc. 151, 269 N.Y.S. 841; *Metropolitan Life Insurance Co. v. Schneider* (Ind. 1935) 193 N.E. 690; *Prudential Insurance Co. v. Sweet* (1934) 253 Ky. 643, 69 S.W.2d 748; *Aetna Life Insurance Co. v. Davis* (1933) 187 Ark. 398, 60 S.W.

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2d 912; *Equitable Life Assurance Co. v. Pool* (Ark. 1934) 71 S.W.2d 455; *Travelers Insurance Co. v. Lancaster* (Ga. 1935) 180 S.E. 641; *Williams v. Mutual Benefit Health and Accident Association* (5th Cir. 1938) 100 F.2d 264.

Plaintiff urges the Court to adopt the more enlightened rule for the reason that justice is better served by allowing a Plaintiff in such a case as this to recover his entire damages in one law suit. The Defendants in Exhibit P.3 repudiated all obligations for payment of total permanent disability benefits. To attempt to argue otherwise is in opposition to common sense. The statement made by the insurance company was definite and unequivocal. The company denied absolutely that the accident caused a total and permanent disability to the Plaintiff. How can it be argued that this is not a repudiation of the obligation of the Company?

The other rule leads to a multiplicity of lawsuits which is contrary to sound public policy. The Company should not be allowed to repudiate its policy and then pay out monthly according to the terms of the policy. It should pay damages for its breach.

According to Defendants' brief, the Company would still require monthly proofs of disability. What would prevent the Company from again refusing to accept the proofs of disability as it did previously? The jury found that Plaintiff was totally and permanently disabled. The rule urged by Defendants would require Plaintiff to run the gauntlet each and every month.

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The *Colovos* case, supra, has been cited as authority for the rule that future benefits cannot be collected in this type of a lawsuit. However, the statement made by the Court was dicta inasmuch as future benefits were not sought.

Defendants argue that Plaintiff's disability could miraculously improve and therefore damages should not be assessed for the future benefits. Defendants make this argument in the face of all of the medical evidence that the disability which Plaintiff has is permanent. If his disability is permanent, then certainly it cannot lessen in the future.

POINT III. DEFENDANTS MADE NO ISSUE AS TO PLAINTIFF'S LIFE EXPECTANCY.

Defendants claim that the Court erred in taking away from the jury the determination of life expectancy of Plaintiff. Defendants make this claim in spite of the fact they offered no evidence that Plaintiff's life expectancy would be shortened on account of his physical condition.

The record will show that counsel made no objection when the Court decided to take the damage evidence out of the presence of the jury. Certainly, had counsel wished to dispute any of the evidence offered as to damages, he had the right to do so, but did not avail himself of this right. Counsel did cross-examine German Ellsworth Brunson, the certified public ac-

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countant who prepared the tables, and was told that the life expectancy tables included statistics as to all persons whether in good or bad health. Had counsel desired to offer testimony that Greguhn's life expectancy would be diminished, he had the right to do so. Since the life expectancy table was not challenged and was the only evidence produced as to Plaintiff's life expectancy, then, of course, the Court had the right to use the table as prepared by Mr. Brunson to assess the total amount of damages.

The use of life expectancy with tables based thereon has for many years been an acceptable method of proving damages in personal injury cases involving permanent disability and in wrongful death cases. What better way could be used for determining the total value of the insurance policies in question?

Defendants are in no position to complain for the first time in this Court that the life expectancy of Plaintiff should have been given to the jury when they made no such request or offered no evidence at all disputing the life expectancy as shown in the tables.

Furthermore, Defendants neither requested instructions nor excepted to the Court's instructions concerning the issue of life expectancy and cannot, therefore, raise the question on appeal. See *Pettingill v. Perkins* (1954) 2 Utah 2d 266, 272 P.2d 185.

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CONCLUSION

The case was submitted to the jury on instructions based on the law of the *Lee* and *Colovos* cases. The evidence supported a finding that the accident of September 21, 1964 activated and precipitated a latent, dormant condition to a disability condition. The evidence was undisputed that Plaintiff is suffering from a permanent disability which is total under the definitions in the policies. The Company repudiated its clear obligation under the policies on proper proof submitted to it. Justice demands that the judgment of the lower court be affirmed.

Respectfully submitted,

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