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James P. Knuckles v. Metropolitan Life Insurance Company, A Corporation : Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES P. KNUCKLES,
Plaintiff-Respondent.

vs.

METROPOLITAN LIFE
INSURANCE COMPANY,
a corporation,

Defendant-Appellant.

Case No.
12254

REPLY BRIEF OF APPELLANT

STATEMENT OF FACTS

So that there may not exist any misconception about the contents of the record below, defendant-appellant will address itself to certain factual assertions of plaintiff-appellee.

In his brief, plaintiff-appellee would infer categorically that plaintiff cannot wear a contact lens comfortably without irritation. (*See* Brief of Appellee at 5, 16.) Plaintiff was examined by Dr. Rowland H. Merrill at the instance of defendant and the contact lens prescribed for plaintiff was examined and measured by a contact lens manufacturer in Salt Lake City, Utah, at the instance

of Doctor Merrill. At trial Doctor Merrill testified as follows concerning the results of that examination:

Q. Thank you. Now, Doctor, have you ever treated a patient for cataract removal?

A. Cataract is a very common condition and I have done hundreds of operations for cataracts and fitted them after to improve that vision with either glasses or contact lens.

Q. Would you explain to the Court what your treatment normally consists?

A. After the operation for the cataract, we usually wait anywhere from one month to three or four months before we prescribe glasses. Now it depends on the patient, upon his vision whether we prescribe glasses or contact lens. The vast majority of people involved who have had cataract operations and have had experience with contact lens and glasses prefer the contact lens to the glasses. Because their vision is better, they have a wider field of vision and their vision is more normal.

Q. Is the standard procedure among members of your profession to fit people who have suffered the loss of lens with a contact lens?

A. Here again it depends upon the patient, the age of the patient, some people are so shaking [sic] that they can't put a contact lens in the eye. And yet I have people over eighty who successfully wear contact lenses and the majority of people as I said before prefer contact lenses and we usually fit contact lenses unless there is some specific reason why we shouldn't fit a contact lens.

Q. The patients that you have treated for cataract removal, have they adjusted well to the use of the contact lens?

A. The vast majority of people do because when we operate on a cataract we cut the eye half open. Across the top. That destroys all the nerve fibers that go down to the cornea. Some of which degenerate, the majority of which do not regenerate, so the eye is less sensitive after an operation for cataract that it is before an operation for cataract. These people usually tolerate contact lenses very well because as I say, their vision is improved. Their sensitivity of the cornea is reduced and they make ideal patients.

Q. How did you have occasion to examine the plaintiff, Mr. Knuckles?

A. Yes, I examined Mr. Knuckles on June 22d, 1970, in my office in Salt Lake City.

Q. Of what did your examination consist?

A. Well, my examination consisted of the internal examination which revealed that the patient was aphakic. Aphakia means the lens of the eye has been removed. It also revealed the fact that the patient had had an operation for a muscle imbalance. And it revealed that his field was normal and his vision with the contact lens which he was wearing, was twenty, twenty-five minus one or two letters.

Q. Now you mentioned that Mr. Knuckles was wearing his contact lens, is that correct?

A. He was wearing the contact lens when he came into the office.

Q. Now you were here in this court this morning and you heard Mr. Knuckles complain of

his difficulty in wearing the contact lens. On the basis of your examination of Mr. Knuckles and of his lens, do you have an opinion concerning the cause of his discomfort?

A. The comfort in wearing the contact lens depends upon several factors. One is the motivation of the patient. Another is the eye sensitivity of the patient. And thirdly, it depends upon the fit of the contact lens itself. Now this contact lens of Mr. Knuckles I had examined by one of our contact lens makers in Salt Lake City. He revealed that the lens had bad edges. By bad edges we mean the edges are not smooth and they were rough. There was no bevel of the contact lens. It was a large lens, a lens which ordinarily I would expect to be an uncomfortable lens. With some improvement in the grinding of the lens I think the lens could be made much more acceptable to the patient. More tolerable.

Q. Now, Dr. Merrill, assuming that Mr. Knuckles was fitted with a smaller and properly fitting contact lens and based on your examination of Mr. Knuckles and your experience with other patients who are using cataract, I mean using contacts with cataract operations, do you have an opinion within a reasonable degree of medical certainty whether or not the plaintiff should be able to wear contact lenses comfortably?

A. I think if the patient wanted to wear the lens, if it were perfectly fitted lens, smooth, well-machined and not too heavy, he could wear it comfortably.

(Tr. at 32-35.) Thus, the undisputed evidence in the record is that plaintiff could wear a modern, properly fitting lens comfortably if he wanted to. Moreover, the

evidence is also uncontroverted that with normal glasses alone and without a contact lens, plaintiff still had a visual acuity of 20/20 or normal vision. (Letter dated April 24, 1967, from James P. Rigg, Sr., M.D. to James Alexander, M.D., marked as Exhibit 1 to and identified in the deposition of James P. Rigg, Sr. at 29.) Therefore, any alleged discomfort of plaintiff was respect to the contact lens can be remedied and there is absolutely no evidence to demonstrate that plaintiff belongs to that small minority of people who for some reason do not adjust to contact lenses. Dr. Merrill testified that he could not recall a single cataract patient of his that did not adjust well to a contact lens. (Tr. at 36.) Even if plaintiff did belong to that small minority of people who cannot wear contact lenses, his vision could be 20/20 with normal glasses. The issue on appeal remains the same — whether or not under the terms of the insurance policy corrective lenses of any type must be considered.

Also, mention should be made of the fact that plaintiff failed to inform his own doctor about any categorical or inherent difficulty in wearing his contact lens. In the deposition of Robert W. Rigg, M.D., the physician who prescribed the contact lens, the following statements are found:

Q. Has he ever expressed to you, as far as your recollection or your notes would indicate, any particular problem in wearing the lens?

A. He related one specific instance I wrote down here, when he said he couldn't wear it at work. I presume because of the work he was doing. It probably got dust and dirt and such

under the contact. I don't even know whether he's wearing it now; but he has at times worn it and worn it quite well.

Q. What makes you say that he has at times worn it and worn it well?

A. Well, because he's related that he has been able to wear it at times. In other words, — well, or that he hasn't. For instance in November of '68, he mentioned according to him that he was not wearing his contact because of his work. And, actually, I'm not even sure how much he had been wearing it successfully because I have no specific references as to what his total hours of unwearing have been. I've only seen him twice since his last muscle surgery on his eye; so I really can't say that I could speak with any authenticity as to how much he's wearing it because he might be wearing it all the time and he might not. I don't know today what he's been doing.

Q. So, he hasn't indicated to you one way or the other?

A. I have not seen him.

(Deposition of Dr. Robert W. Rigg at 13.)

It would seem that if plaintiff actually had great difficulty in wearing the lens during his off duty hours and if he really was concerned about improving his vision, he would have indicated his alleged problems in wearing the lens to his physician sometime between 1968 and the date of trial. In plaintiff's own deposition taken before trial, he again failed to mention that he could not wear the lens outside of his place of employment:

Q. When were you fitted with the contact lens?

A. Let's see, that's been I think about the last part of '68.

Q. How often do you wear it?

A. Well, I can't wear it down to the mine. And usually when I get home it's a bother to put it on just for a few minutes. So I get it out on my days off and wear it a lot of time and try to get used to wearing it. When I have a lot of time.

(Deposition of plaintiff at 32.)

Here, plaintiff says nothing about irritation, only that the lens is a "bother" to put on. He even stated that "he wears it a lot of time." Dr. Merrill testified that plaintiff should be able to adjust to the contact lens during his off duty hours so that he could wear the lens comfortably. (Tr. at 35-36.) In sum, the evidence would indicate that plaintiff might have been exaggerating his discomfort with the lens at trial. Any real discomfort can be explained on the basis of the defects in the lens diagnosed pursuant to Doctor Merrill's examination. In any event, plaintiff's ability or inability to wear a contact lens comfortably did not enter into the lower court's determination. (Paragraph 3 of Order dated September 14, 1970.)

Plaintiff-appellee also makes the assertion that the prognosis for the life of plaintiff's injured eye is 10 years. (Brief of Appellee at 16.) There is absolutely no basis

in the record relative to plaintiff's injury that would support the conclusion that the expected life of plaintiff's eye is 10 years. The basis for plaintiff's assertion is probably the following statements by Dr. Robert W. Rigg:

Q. With a man the age of Mr. Knuckles, is there any possibility that he'll outlive that eye?

A. It's been reported that the average age of a cataract, an eye that has had a cataract removed, is about ten years. They are more prone to have retinal detachment and other conditions of their eye than the average eye, than a normal eye, I should say.

Q. What is this statistic of ten years that you mentioned?

A. This has been quoted. That's all. But, some go along fine for a long period of time and some don't. Some of this also relates to the initial injury, as to how severe it was and what was the original problem.

(Deposition of Robert W. Rigg at 19-20.) This statement is in no way connected to plaintiff's injury, nor is the source of the alleged report given, nor is the opinion offered as the concerted opinion of Doctor Rigg. *Certainly, if plaintiff at some later date does in fact suffer the total and irrecoverable loss of sight as feared, then is when a claim should be brought under this policy.*

ARGUMENT

POINT I

THE CASES CITED BY PLAINTIFF-APPELLEE ARE NOT IN POINT.

Plaintiff-appellee has failed to cite one case that is in point to the facts and issues presented in this case. There is only one case cited in appellee's brief that was concerned with a policy containing the language identical with the language of the insurance policy in this case. And in that case, *Clark v. Standard Acc. Ins. Co.*, 43 Cal. App.2d 563, 111 P.2d 354, *reh. denied* 43 Cal. App. 2d 563, 112 P.2d 298 (1941), the plaintiff suffered a detached retina and there is no evidence that any medical procedures could ever rectify plaintiff's sight. All of the remaining decisions cited by appellee either construe policies which require only the "entire loss of sight" and not the "total *and* irrecoverable loss of sight," or interpret workmens compensation decisions which do not apply to the facts of this case.

Appellee relies on various workmens compensation decisions which stand for the proposition that artificial lenses do not change the permanent character of the injury to the claimant and can therefore be disregarded. However, the issue in this case is not whether plaintiff's loss of sight is permanent, but whether plaintiff's sight is total and cannot be recovered, remedied or rectified. As indicated in *Wallace v. Insurance Company of North America*, 415 F.2d 542 (6th Cir. 1969), the word "permanent" as used in a Kentucky workmens compensation

statute did not imply an attempt to recover sight as did the term "irrecoverable" as used in the applicable insurance contract. It is inconceivable that the use of corrective lenses could be disregarded in determining the issue of the extent of the recovery of sight.

Appellee argues by analogy to a situation in which a claimant has lost a limb and thereafter is fitted with an artificial appliance. It is asserted that the artificial appliance itself, like the lenses in this case, points up the fact of the loss and the permanency of the injury. Appellant does not argue that there was a loss and that the loss without surgery and corrective lenses would be permanent. Nevertheless, the issue in this case is whether this loss has been rectified by surgery and corrective lenses. The facts of this case are more appropriately analogous to a situation in which a person suffered an injury to an arm or a leg, causing a temporary diminution in the use of said limb, but which could be entirely rectified through the use of a steel pin or an unobtrusive brace. Certainly, in this type of situation, there would be no grounds for recovery under an insurance policy which insured against the severance of an arm or a leg at a particular point or even against the total and irrecoverable loss of use. It is incongruous to speak in terms of total and irrecoverable loss of use if the subject limb were capable of normal function. The language cited by the court in *Southland Life Insurance Company v. Dunn*, 71 S.W.2d 1103 (Tex. Civ. App. 1934) is applicable:

One who sustains a broken arm suffers the loss of the use of such arm. If proper treatment

be not had, such loss may become irrecoverable, but no one would contend that a mere broken arm ordinarily constitutes an entire and irrecoverable loss of its use.

We can see no valid reason why one who has suffered the entire loss of sight by cataracts on his eyes is not governed by the same considerations. The evidence is certainly sufficient to raise an issue as to whether an ordinarily prudent person under such circumstances would undergo an operation for removal of the cataracts. The evidence also shows the loss of sight may be restored or substantially improved. In the one event the loss of sight would be recovered; in the other event it would be partially recovered, thus creating a partial rather than a complete disability.

In either event the plaintiff in this case could not recover because under the terms of the policy the loss of sight in both eyes must be "entire and irrecoverable."

CONCLUSION

The plaintiff has not suffered the total and irrecoverable loss of sight in one eye within the meaning of the policy. Through surgery and the use of modern corrective lenses, plaintiff has indeed recovered the sight lost resulting from his unfortunate injury. The cases cited by plaintiff-appellee are not applicable to the legal issues presented in this case. This Court should avoid the result warned against in the case cited by plaintiff-appellee of *Browning v. Equitable Life Assur. Soc. of the United States*, 94 Utah 532, 544, 72 P.2d 1060, 1065-66 (1937):

But the cases annotated in this same note show that by a process of judicial erosion the courts have

in many cases so "liberalized" the language of the policy as to extend it beyond what was fairly within its terms.

In *Cato v. Aetna Life Ins. Co.*, 164 Ga. 392, 138 S.E. 787, at page 790, it is stated:

Policies of insurance will be liberally construed in favor of the object to be accomplished, and provisions therein will be strictly construed against the insurer. * * * But the contract of insurance should be construed so as to carry out the true intention of the parties. * * * The rights of the parties are to be determined by the terms of the policy, so far as they are lawful. The language of the contract should be construed as a whole, and should receive a reasonable construction, and not be extended beyond what is fairly within the terms of the policy. Where the language is unambiguous and but one reasonable construction of the contract is possible, the court must expound it as made."

The decision of the trial court should be reversed, with orders that defendant-appellant is entitled to a judgment against plaintiff dismissing the action with prejudice as requested in defendant's Motion to Amend the Findings of Fact, Conclusions of Law and Judgment.

Respectfully submitted,

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