1970

James P. Knuckles v. Metropolitan Life Insur-Ance Company, A Corporation : Brief of Appellant

Utah Supreme Court

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

BRIEF OF APPELLANT

Appeal by Defendant-Appellant From Judgment of the District Court of Grand County
Honorable Edward Sheya, Presiding

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IN THE SUPREME COURT OF THE STATE OF UTAH

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NATURE OF THE CASE

The appeal concerns the right of plaintiff-respondent to recover under the terms of a group death and dismemberment insurance policy because of an eye injury.

DISPOSITION IN LOWER COURT

The lower court held in favor of plaintiff ruling that plaintiff had suffered the "total and irrecoverable loss of sight of one eye" within the meaning of the group insurance policy.

RELIEF SOUGHT ON APPEAL

Defendant-appellant seeks reversal of the lower court's decision.

STATEMENT OF FACTS

The facts of this case are relatively simple and undisputed.

On February 23, 1967, while he was operating an ore loading machine at his place of employment, plaintiff was struck in the right eye by a foreign object. (Tr. at 8) The foreign object penetrated the crystalline lens of the eye causing a traumatic cataract or opaqueness of the lens to form. (Deposition of James P. Rigg, Sr. at 9-12.) Between February 27, 1967 and March 1, 1968, plaintiff underwent three operative procedures to remove completely the crystalline lens. (*Id.* at 14-20.) Plaintiff's physician furnished plaintiff with a contact lens for the injured eye, together with a bifocal forward lens. (Deposition of Robert W. Rigg at 6; Tr. at 15.) During 1969, plaintiff had two surgical procedures performed to correct a muscle imbalance in his injured eye. (Deposition of James P. Rigg, Sr. at 10.)

At the present time plaintiff's injured eye is physiologically normal except for the loss of the crystalline lens and a slight scar on the cornea. (Deposition of James P. Rigg, Sr. at 25.) Plaintiff's physician testified that with the corrective lenses, plaintiff has essentially normal vision or 20/20 minus three visual acuity. (*Id.* at 27.) Without correction, plaintiff can see large objects, lightness and darkness. However, the naked eye is of little practical use to plaintiff. (Tr. at 11, 39.)

Plaintiff was insured as an employee of Texas Gulf Sulphur Company under a group insurance policy with defendant for accidental death or dismemberment. The policy provided for payment to the insured of a specified amount in the event the insured suffered the "total and irrecoverable loss of sight of one eye." (Plaintiff's Exhibit 1, at 3.)

After the hearing in this matter, the lower court held that the plaintiff had suffered the "total and irrecoverable loss of sight of one eye" within the meaning of the subject policy, reasoning that plaintiff had lost the practical use of his eye and that the effect of artificial lenses on plaintiff's sight need not be taken into consideration. (Tr. at 42-44; paragraph 3 of Order dated September 14, 1970.)

ARGUMENT

POINT I

THIS ENTIRE CASE INVOLVES A QUESTION OF LAW.

The basic issue in this case is an issue of law; namely, whether plaintiff has suffered the total and irrecoverable loss of sight within the meaning of the subject policy when he enjoys normal vision with the aid of corrective lenses. At trial, there was no dispute that because of the removal of the crystalline lens, plaintiff's naked eye is of little practical use to him. It was also undisputed that with the corrective lenses prescribed by his physician, plaintiff's vision in the injured eye is essentially normal. On the basis of these undisputed

facts, the lower court reached its decision based on its interpretation of the applicable law. Because this case presents a legal question, the lower court's interpretation of the law carries with it no presumptive validity. This Court is the proper and ultimate tribunal to decide the question of law on which this case turns.

POINT II

THE PLAIN MEANING OF THE SUBJECT INSURANCE POLICY DEFEATS PLAINTIFF'S RECOVERY.

Insurance contracts "are subject to the same construction as any other contract, in accordance with the expressed intent of the parties." *Utah Farm Bureau Ins. Co. v. Chugg,* 6 Utah 2d 399, 402, 315 P.2d 277, 279 (1957). Although there is a rule that doubt or ambiguity in a contract of insurance is to be continued in favor of the insured and against the insurer, *see Browning v. Equitable Life Assur. Soc. of the United States,* 94 Utah 532, 543-45, 72 P.2d 1060, 1065-66 (1937), the rule does not have the effect of "making a plain contract doubtful or ambiguous and then interpreting it in favor of the insured." *Home Life Ins. Co. of New York v. Stewart,* 114 F.2d 516, 517 (10th Cir. 1940). No forced or strained meaning will be given to words that is contrary to the obvious intent of the parties, *Sump v. St. Paul Fire and Marine Ins. Co.*, 21 Mich. App. 160, 175 N.W.2d 44, 46 (1970). The natural and obvious meaning of the provisions in a contract is to be adopted in preference to a fanciful, curious or hidden meaning. *Home Life Ins. Co. of New York v. Stewart, supra* at 517.

In order to be entitled to coverage, plaintiff's loss of sight in his injured eye must be "total and irrecoverable." These terms are not indefinite or ambiguous. *See Sump v. St. Paul Fire and Marines Ins. Co., supra; Bolich v. Provident Life & Acc. Ins. Co.,* 205 N.C. 43, 169 S.E. 826, 828 (1933). Webster defines "total" as meaning "complete," "utter," or "absolute." Irrecoverable is defined as meaning "not capable of being recovered, regained, remedied or rectified." (Webster's New International Dictionary (2d ed. 1943).) In light of these definitions, plaintiff's loss of sight is neither total nor irrecoverable.

Plaintiff is not blind in his injured eye. (Tr. at 39.) His eye is physiologically normal except for the loss of the crystalline lens. (Deposition of James P. Rigg, Sr. at 25.) He can see large objects and darkness and light. (Tr. at 11.) Therefore, his loss of sight is not complete, utter or absolute.

Moreover, plaintiff's impairment of vision has been virtually restored by surgery and by the use of a small contact lens. The extent of sight recovery is candidly detailed by plaintiff's physician, Dr. James P. Rigg, Sr., in his correspondence to the company physican of plaintiff's employer, Dr. James Alexander:

> James Alexander, M.D.
> Moab, Utah 4-10-67
>
> P.S. It was a pleasure to see James Knuckles again a few days ago. With a correction, he read about 20/80 with the right eye which is signifi-

cantly good. I believe that eventually with a contact lens he will have almost normal vision.

J.P.R.

April 24, 1967

James Alexander, M.D.
Moab, Utah

My dear Alex:

You will be amazed — James Knuckles, with a correction, read 20/20 today. I see no reason why he should not return to work at your discretion. We would like to evaluate him in three weeks; but it should be another six or eight weeks before contact lens can be prescribed. Naturally, he will have protective safety glasses.

Jubilantly yours,

James P. Rigg, Sr., M.D.

JPR:gf

James Alexander, M.D.
Re: James Knuckles

May 6, 1967

James Knuckles was in a day or two ago. He is doing all right, but a little capsular remnant has floated into the direct line of vision. But I could still get 20/25 visual acuity. This is gratifyingly good. It will be necessary, however, to hold up the contact lens for at least another month or two. We are, however, gratified with his progress.

Most sincerely,

James P. Rigg, Sr., M.D.

JPR:gf

December 9, 1967

James Alexander, M.D.
Moab, Utah

My dear Alex:

James Paul Knuckles is fantastic. He read 20/15 with his right eye with the contact lens and a small correction in the rayban. This is spectacular. There [sic] little fleck of cortex which I had visualized which was partially obstructing has apparently resorbed. We think this is marvelous.

Again wishing you and your lovely family and [sic] great Yuletide Season, I am,

Most sincerely yours,

James P. Rigg, Sr., M.D.

JPR:gf

March 4, 1968

James Alexander, M.D.
Moab, Utah

My dear Alex:

We did a discission on Paul Knuckles and split a capsular membrane which had formed. The day following surgery with his contact lens he read 20/15 — phenomenal, colossal and beyond anticipated hopes!

Most sincerely,

James P. Rigg, Sr., M.D.

JPR:gf

(Letters marked at Exhibit 1 to and identified in the Deposition of James P. Rigg, Sr., (see Rigg's Deposition at 29).)

In a letter to plaintiff dated March 4, 1968, Dr. Rigg stated:

> March 4, 1968
>
> Mr. Paul Knuckles
> Box 643
> Moab, Utah
>
> My dear Paul:
>
> It was thrilling to see you the other day and the visual acuity with the contacts was stupendous, colossal and great; besides being good.
>
> Wishing you the very best, I am,
>
> Most sincerely yours,
>
> James P. Rigg, Sr., M.D.

(*Id.*) Through modern medical science, plaintiff has essentially normal vision. Plaintiff's loss of sight has been recovered, remedied and rectified within the meaning of the policy.

The lower court recognized that under the policy there must be an effort made to restore sight but attempted to distinguish between sight recovered by surgical methods and sight recovered through "artificial" means such as lenses. Such a distinction is not warranted by the plain meaning of the policy. The term "irrecoverable" is not specifically limited in the policy to the recovery of vision merely through surgical procedures. The policy does not differentiate among various procedures, designed to restore vision such as eye exercises, medication, corrective lenses and surgery. The policy merely refers to "irrecoverable" loss of sight. Physicians specializing in treatment of the eye are trained not only

in surgical procedures but also in the prescribing of medication, corrective lenses and eye exercises. (See Tr. at 32.) If the policy requires that an insured submit to modern surgical techniques to restore vision, it should also require the wearing of lenses that are prescribed by the very doctors performing the surgery. To disregard the effect of the contact lens on plaintiff's vision is to ignore significant, optical advancements and to emphasize surgical advancements only. Plaintiff's own physician testified that the post-surgical use of contact lenses with individuals suffering from a traumatic cataract has been greatly developed during the last ten to fifteen years and is now common practice. (Deposition of James P. Rigg, Sr. at 35-36.) The effect of modern medical procedure is to replace the crystalline lens of the eye with a comparable-sized contact lens on the outside of the eye. Thus, cataract patients can now have normal vision and lead normal lives through the progress of science. Today millions of persons wear glasses and contact lenses comfortably, and they are not considered handicapped or disabled. (Tr. at 32-33.) Therefore, on the basis of the plain meaning of the insurance contract, there is no rational basis for the lower court's distinction.

The policy itself is entitled: "Insurance for Death or *Dismemberment* by Accidental Means." (Plaintiff's Exhibit 1, at 3.) (Emphasis added.) The schedule of losses in the policy explicitly details the losses for which insurance was contemplated:

> 1. The full amount of Insurance for Death or Dismemberment by Accidental Means in force

> under the Group Policy on account of the Employee at the date of the accident is payable for any of the following losses: loss of life, total and irrecoverable loss of sight of both eyes, loss of both hands by severance at or above wrist-joints, loss of both feet by severance at or above ankle-joints, loss of one hand and of one foot by severance at or above wrist- and ankle-joints respectively, or such loss of one hand or of one foot together with total and irrecoverable loss of sight of one eye.
>
> One half the amount of Insurance for Death or Dismemberment by Accidental Means in force under the Group Policy on account of the Employee at the date of the accident is payable for any of the following losses: loss of one hand by severance at or above wrist-point, loss of one foot by severance at or above ankle-joint, or total and irrecoverable loss of sight of one eye.

Id. By its express terms, the policy does not provide coverage unless there is an actual severance of the body member, or, in the case of eye injuries, unless there is "total and irrecoverable loss of sight." The policy does not purport to insure for diminution of function or use. The courts have uniformly held under identical provisions in other insurance contracts that actual severance of the body member at the designated place is necessary. 44 *Am. Jur. 2d* Insurance §1602 (1969). When the provisions relating to loss of sight are read in context with the provisions relating to the other body members, it would appear that the contracting parties were contemplating insurance for a blindness that could *never* be restored, just as a severed hand or foot can never be restored.

Surely, if the plain meaning of words is to be given effect, and if the contractual relationships that were established on those words are to be upheld, plaintiff is not entitled to recover under the subject policy. A person who through medical science has recovered normal vision cannot at the same time have suffered the "total and irrecoverable loss of sight of one eye."

POINT III

MOST OF THE DECISIONS OF OTHER COURTS THAT ARE IN POINT DENY REVOVERY TO A CLAIMANT WHO HAS RECOVERED VISION THROUGH CORRECTIVE LENSES.

The trial court in the instant case erred when it reasoned that there is a liberal interpretation applied to insurance contracts requiring the "total and irrecoverable loss of sight" so that a person who enjoys normal corrected vision can recover thereunder. When an insurance contract insures against "loss of sight," "loss of entire sight," "entire loss of sight," "blindness," or "total blindness," it is true that many courts have interpreted this language to mean that literal blindness is not required but only the loss of practical use of sight. *See Annot.,* 87 A.L.R. 2d 481, 486-490 (1963). Nevertheless, there is considerable authority that has interpreted the same language to require total blindness. *E.g., Gilliland v. Order of Ry. Conductors of America,* 216 Ala. 13, 112 So. 225 (1927); *State Farm Mutual Automobile Ins. Co. v. Sewell,* 223 Ga. 31, 153 S.E.2d 432 (1967); *Gibson v. Combined Insurance Co. of America,* 171 So. 2d 727 (La. 1965); *Sump v. St. Paul Fire and Marine Ins. Co.,* 21 Mich. App. 160, 175 N.W.2d 44, 46

(1970); *Mulcahey v. Brotherhood of Ry. Trainmen,* 229 Mo. App. 610, 79 S.W.2d 759 (1934). However, when the insurance contract insures against the "total (or entire) *and irrecoverable* loss of sight," the courts have uniformly denied recovery if the claimant's vision has been restored through surgery and corrective lenses.

In *Wallace v. Insurance Company of North America,* 415 F. 2d 542 (6th Cir. 1969), plaintiff was insured against the loss of an eye which was defined as the "entire and irrecoverable loss of sight." Plaintiff was struck in the right eye by a metallic object and a traumatic cataract developed. The cataract was removed and plaintiff was fitted with a contact lens together with glasses. Plaintiff had 20/60 vision in the injured eye with the correction, but without the lenses could see only about half as well as the normal eye can see under clear water. Plaintiff's vision deteriorated somewhat because of the formation of a secondary cataract. The medical evidence indicated that with a "discission" operation plaintiff's vision with the prescribed lenses would return to 20/20. The court held that plaintiff's sight was not irrevocably lost since it could be completely or substantially restored by means of reasonably simple surgery and the use of artificial lenses. In reaching its decision, the court distinguished a Kentucky workmen's compensation case which did not take into account the effect of lenses, on the grounds that the workmen's compensation statute compensated for the "total and *permanent* loss of sight of an eye." (Emphasis added.) The court reasoned that the term "permanent" did not require an attempt to recover sight, whereas the term

"irrecoverable" requires that the insured make an attempt to determine whether sight could be recovered through glasses or surgery.

In *Home Life Ins. Co. of New York v. Stewart,* 114 F.2d 516 (10th Cir. 1940), a policy of disability insurance insured against the "irrecoverable loss of sight in both eyes." Plaintiff had developed cataracts in both eyes and through surgery had the lenses of the eyes removed. While plaintiff's vision without glasses was only 20/400, with glasses plaintiff had normal vision. The Court reversed the lower court and held that plaintiff had not irrecoverably lost the sight of both eyes within the meaning of the policy. The Court stated:

> It is well settled in Colorado that in case of doubt or ambiguity a contract of insurance is to be construed in favor of the insured and against the insurer. . . . But that rule does not go to the extent of making a plain contract doubtful or ambiguous and then interpreting it in favor of the insured. Too, the natural and obvious meaning of the provisions in a contract is to be adopted in preference to a fanciful, curious or hidden meaning.
>
> The provision of the policy in question does not insure against the loss of the lens or any other physical part of the eye. It insures against the loss of sight. The coverage is limited by the plain language of the contract to the loss of function, and does not embrace the loss of any part of the physical eye. And the loss must be irrecoverable. Through a cataractous condition the insured lost substantially all of the sight in both eyes. And it may be that under the law of Colorado he was not obligated to submit to surgery

as a prerequisite to recovery upon the policy. . . . But we do not explore that question because with commendable courage he voluntarily underwent two operations for the removal of the lenses. He wears glasses, and it is stipulated that with their use he has normal vision. No case cited by the parties or discovered through our own research is squarely in point. But in Southland Life Ins. Co. v. Dunn, Tex.Civ.App., 71 S.W. 2d 1103, recovery was sought upon a disability policy which provided that, without prejudice to any other cause of disability, the entire and irrecoverable loss of sight in both eyes would be considered as total and permanent disability. Due to a cataractous condition, plaintiff had suffered such impairment of sight in both eyes as to prevent him from performing the substantial duties of any occupation or labor, and his condition was permanent. But the undisputed evidence was that through removal of the cataracts by surgery, and the use of glasses, the restoration of normal or substantially normal vision could reasonably be expected. The court held that the loss of sight was not irrecoverable within the meaning of the policy, that instead it was wholly or partially recoverable, and that in either event recovery could not be had. That case seems to bear analogous application.

* * *

Glasses are worn by a substantial proportion of people of all ages. Many of them have very little vision in the natural eye, but with the use of glasses their vision is substantially normal for all practical purposes. They pursue their businesses and professions with success. They meet in competition those with normal vision in the natural eye, and they are not seriously handicapped. It cannot be said that they have suffered the irrecoverable loss of sight. Here it is stipulated that for the purpose of this case, the insured

has normal vision when he wears glasses. A court cannot say in a single judicial breath that he has suffered the irrecoverable loss of his sight within the meaning of the policy and at the same time that he has normal vision. The two are so diametrically in conflict that they cannot be brought into parallelism. The provision in the contract embraces the loss of sight by atrophy of the optic nerve or in some other manner which is irrecoverable, but it cannot be reasonably construed to cover a case where sight was lost but through surgery and the use of glasses normal vision is again enjoyed.

The judgment is reversed and the cause remanded.

114 F.2d at 518.

In the case referred to in the above quoted material, *Southland Life Insurance Company v. Dunn,* 71 S.W.2d 1103 (Tex. Civ. App. 1934), total and permanent disability was defined as the "entire and irrecoverable loss of sight of both eyes." Plaintiff had a senile cataract in one eye and a secondary cataract in the other. The medical evidence indicated that both cataracts could be removed through a relatively simple operation without pain or suffering and without any great risk to plaintiff's health and that in the vast majority of cases where such operations were performed and proper glasses prescribed, the party's vision was either entirely or substantially restored. The lower court refused to give requested instructions concerning the questions of whether plaintiff's vision could be restored through an operation and whether a reasonable man would undergo such an operation. Instead, the trial court apparently ignored

the potential effect of surgery and glasses and asked the jury to decide if plaintiff's impairment was "permanent," meaning "a lasting disability which will not pass away." The Texas Court of Civil Appeals held that the instructions were erroneous and remanded the case. The Court stated:

> The plaintiff's theory is that he has become wholly and permanently disabled because he has suffered the entire and irrecoverable loss of the sight of both eyes by the development of cataracts. The true fact issue is whether he has suffered the entire and irrecoverable loss of the sight of both eyes.
>
> If so, he has become wholly and permanently disabled within the meaning of the policy. If the loss of sight is not irrecoverable, then liability on the part of defendant has not attached. This is obvious under the terms of the policy.
>
> Webster defines "irrecoverable" as "not to be recovered, regained, or remedied; as, an irrecoverable loss."
>
> An entire loss of the use of a limb or organ of the body, which loss may be completely or substantially recovered, regained, or remedied, by proper medical or surgical treatment and which treatment would be undergone by an ordinarily prudent person under the same or similar circumstances, is not to be justly considered as an irrecoverable entire loss.
>
> It is either a completely recoverable loss or a loss which is partially recoverable.
>
> One who sustains a broken arm suffers the entire 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."

The assignments are sustained which complain of the refusal to submit the requested issues indicated.

71 S.W. 2d at 1106. (Emphasis added.)

In another case, although not directly in point, the effect of surgery and glasses was considered. In *Pacific Mutual Life Insurance Company v. Feldman*, 99 F.2d 83 (6th Cir. 1938), *cert. denied,* 306 U.S. 636, 59 S.Ct. 485 (1939), the plaintiff was insured under a disability policy if he became "totally and permanently unable to perform any work or engage in any occupation or profession" or if he suffered the "irrecoverable loss of the entire sight of both eyes." Because of cataracts, plaintiff's loss of vision was 93⅓% and 80% in his right and left eye, respectively. Plaintiff's right eye was oper-

ated on and he was fitted with glasses. Thereafter, he had normal vision in his right eye. The Court of Appeals ruled that the effect of the surgery and glasses should have been considered by the lower court and that since plaintiff's eyesight had been recovered, he had not been permanently disabled within the meaning of the policy. The court ruled that a verdict should have been directed for the insurance company.

In each of the foregoing cases, the courts were construing private contract law and were not interpreting a state compensation stature. In each case, the policy contained provisions almost identical with the "total and irrecoverable loss of sight" provision of the policy in the instant case. In each, the court interpreted the policy to mean that if lost vision could be restored by surgery and by corrective lenses, recovery could not be had. These cases are the only decisions directly in point and represent the best reasoned view on the issues presented in this case. This precedent should be followed by this Court.

POINT IV

WORKMEN'S COMPENSATION DECISIONS ARE NOT AUTHORITY FOR THE ISSUES PRESENTED IN THIS CASE.

The trial court and counsel for plaintiff have placed emphasis upon the decisions of this and other courts involving workmen's compensation cases. Admittedly, this court has upheld awards of the State Industrial Commission which have disregarded the effect of corrective lenses in the awarding of sums for total blindness.

See Goodyear Service Store v. Industrial Comm'n, 21 Utah 2d 249, 444 P.2d 119 (1968); *Western Contracting Corp. v. Industrial Comm'n,* 15 Utah 2d 208, 390 P.2d 125 (1964). Nevertheless, this precedent is not authority in the instant case for the following reasons:

First, in both the *Goodyear Service Store* case and the *Western Contracting Company* case, *supra,* this Court deferred to the findings of the Industrial Commission. In the latter case, this Court stated:

> Whether the injury resulted in total blindness to the eye was within the prerogative of the Industrial Commission to determine. They having so found under the evidence in the instant case, we are not persuaded that they acted capriciously, arbitrarily, or unreasonably, in which event the award must be affirmed.

15 Utah 2d at 210, 390 P.2d at 127. This language was quoted in the *Goodyear Service Store* case as a justification for upholding the Commission's findings in that case. 21 Utah 2d at 254, 444 P.2d at 122. No doubt this result is motivated by the statute which provides that the findings of fact by the Industrial Commission are conclusive and final and are not subject to review, Utah Code Ann. §35-1-85 (Repl. vol. 1966), since this Court has also upheld a decision of the Industrial Commission which *did* take into account the effect of glasses in fixing compensation for permanent disability. *See Moray v. Industrial Comm'n,* 58 Utah 404, 416-17, 199 P. 1023, 1028 (1921). The instant case involves no factual issues and this Court is obligated to determine the legal question involved. However, it should be pointed out

that the standards for blindness and for industrial compensation were developed and promulgated long before the present medical procedure was developed to remove cataracts and to replace the injured lens of the eye with a contact lens. (Deposition of James P. Rigg, Sr. at 38.) Thus, the standard used by the Industrial Commission, which apparently ignores significant developments in medical science, should not be the standard applied to the facts of this case involving a private insurance contract which conditions payment upon prior complete medical treatment.

Second, the specific language of the Utah workmen's compensation statute differs significantly from the language used in the policy of insurance in this case. Section 35-1-66, Utah Code Annotated (Supp. 1969), allows compensation for "total blindness of one eye." The insurance contract insures against the "total *and irrecoverable loss* of sight of one eye." (Emphasis added.) Thus, under Utah's workmen's compensation, there is no requirment that blindness be "irrecoverable" as well as "total." From a legal standpoint, blindness may be complete or total at the time of injury and yet be capable of being rectified or recovered through proper medical treatment. *See Wallace v. Insurance Company of North American,* 415 F.2d 542 (6th Cir. 1969); *Reliable Life Insurance Co. v. Steptoe,* 435 S.W.2d 630 (Tex. Civ. App. 1968). Certainly, the use of this additional "irrecoverable" requirement in the insurance policy so differentiates the basic structure of the policy from the workmen's compensation statute that no valid comparison with the decisions interpreting the compensation statute is possible.

Of all the workmen's compensation statutes in the United States, only the statutes of Rhode Island and West Virginia contain the language "total (or entire) and irrecoverable loss of sight of one eye." Rhode Island General Laws §28-33-19(d) (Supp. 1969); West Virginia Code §23-4-6(d) (Supp. 1970). The statutes of the other states are similar to Utah's in that they speak in terms of "total blindness," "loss of an eye," or "loss of sight." It is clear from the wording of the statutes[1] that the Rhode Island and West Virginia legislatures conceived the phrase "total (or entire) and irrecoverable loss of sight" to mean a loss of sight that could *never* be restored through surgery or lenses since each has made an additional provision for partial loss of sight. Thus a comparison of the language of insurance policy in this case with identical language of workmen's compensation statutes, demonstrates that plaintiff is not entitled to recovery.

Third, even among the workmen's compensation decisions interpreting the statutes of the other states, there is a great unreconcilable conflict on the issue of whether the effect of corrective lenses should be taken into account in setting the award. *See Lambert v. Industrial Comm'n,* 411 Ill. 593, 104 N.E. 2d 783, 788-89 (1952); 58 *Am. Jur.*

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[1]"For the entire irrecoverable loss of sight of either eye, or the reduction to one tenth (1/10) or less [of] normal vision with glasses, or for loss of binocular vision for a period of one hundred sixty weeks."

Rhode Island General Laws §28-33-19 (d) (Supp. 1969).

"Total and irrecoverable loss of sight of one eye shall be considered a thirty-three percent disability. For the partial loss of vision in one, or both eyes, the percentage of disability shall be determined by the commissioner, using as a basis the total loss of one eye."

West Virginia Code § 23-4-6 (d) (Supp. 1970).

Workmen's Compensation §290, at 785 (1948); Annot., 142 A.L.R. 822, 832-35 (1943); Annot., 73 A.L.R. 706, 716-18 (1931); Annot., 8 A.L.R. 1324, 1330 (1920). Even when the state statutes are silent on this issue, many of the decisions have required as a matter of law that the extent of vision impairment be measured only after glasses or other corrective means are taken into account. *(See id.)* It is submitted that if the requirement of irrecoverableness had been used by many of the legislatures, most of the present conflicts in decisions would never had occurred. If the effect of corrective lenses is such a heated point under many workmen's compensation statutes that are silent on the effect of lenses, certainly this Court should require the taking of lenses into account when private, contracting parties provided for coverage only if sight could not be recovered by any means.

And fourth, this Court in *Western Contracting Corporation v. Industrial Commission, supra,* recognized the sharp conflict in the authorities on the question of whether the effect of optical lenses should be considered in determining awards under workmen's compensation statutes. It was felt, however, that the Utah workmen's compensation statute was among those statutes most favorable to the disregarding of the effect of corrective lenses, especially since the legislature had provided for reduced amounts of compensations for certain injuries that allowed the use of artificial limbs but had failed to make any such distinction with respect to blindness. *See* 15 Utah 2d at 209-10. Nevertheless, if the Utah legislature had required the "total and irrecoverable loss

of sight" before a claimant could be compensated under the act instead of just "total blindness," there is little doubt that the result in the *Western Contracting Company* case, *supra,* would have been different and that the effect of corrective lenses would have had to have been taken into consideration by the Commission as a matter of law.

CONCLUSION

Plaintiff has not suffered the total and irrecoverable loss of sight in one eye. With corrective lenses, plaintiff enjoys normal vision. Under such conditions, it would be anomalous to hold that plaintiff had suffered the "total and irrecoverable loss of sight" within the meaning of the subject insurance policy. If plaintiff's sight is capable of being rectified through the use of a contact lens, he is not entitled to recover under the policy. The decision of the trial court should be reversed, with orders that defendant 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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