

1968

Opal Whitlock v. Old American Insurance Company : Brief of Appellant

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In the Supreme Court of the State of Utah

OPAL WHITLOCK,

Plaintiff and Respondents,

OLD AMERICAN INSURANCE COM-
PANY,

Defendant and Appellant.

Case No. 11019

BRIEF OF APPELLANT

AS APPEALED FROM THE JUDGEMENT OF THE
FIFTH JUDICIAL DISTRICT COURT
FOR IRON COUNTY, UTAH

HONORABLE C. NELSON DAY, JUDGE

PATRICK H. MENTON,

13 West Hoover Avenue,

Cedar City, Utah.

Attorney for Appellant

J. HARLAN BURNS

95 North Main Street

Cedar City, Utah

Attorney for Respondent

FILED

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Clerk, Supreme Court, Utah

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BRIEF OF APPELLANT

Nature of The Case

The nature of this case amounts to the interpretation of an insurance policy. The issue date of the policy was 3 April 1961, in which Old American Insurance Company, defendant and appellant, issued a limited policy to the insured Arthur Whitlock, General Delivery, Enterprise, Utah, with the beneficiary, Opal Whitlock his wife. Arthur Whitlock had purchased this policy which was a very limited accident insurance policy which contained the provision Part Three:

"This policy does not cover any loss or disability resulting directly or indirectly, in whole or in part, from (a) any mental or bodily sickness or disease. . "

Mr. Whitlock died in the Iron County Hospital on or about the 18th day of October, 1962, after having been under disability for several months from an operation in which one lung had been removed because of cancer. At the time of the death, Mr. Whitlock had been suffering from cancer, and on the 24th of September, 1962, was involved in an automobile accident while enroute to the Iron City Hospital for either a cold or the cancer, as the case may be, in an automobile driven by his son. He was in the hospital until the 18th day of

October, 1962, at which time he died. The death certificate said "Metastatic Carcinoma" which is cancer and made no mention whatsoever of any injury as a result of the accident. Later on in preparation of the lawsuit, plaintiff submitted four claims P.. Ex. 5, 6, 7 and 8, in which the principal cause of death was listed as metastatic carcinoma, with the secondary cause of death in three of them listed as injuries from the accident. The defendant insurance company tendered \$272.00 for hospitalization, under the theory that he had been in the hospital because of the accident, but refused to pay \$2400.00 for loss of life benefit under the terms of the policy. The primary question to be determined under the terms of this policy was whether or not the death was under the loss of life provisions of the policy.

Disposition in Lower Court

This case was tried before a jury in Parowan, Iron County, State of Utah on 21 December, 1966. The jury brought in a verdict in favor of the plaintiff for \$2400. Thereafter a judgment in line with this verdict, or a judgment on the verdict was entered after defendant had filed a motion for judgment n. o. v. and an alternative motion for a new trial, both of which were denied by the trial court.

Relief Sought on Appeal

The defendant-appellant seeks a modification of this judgment in that instead of being a judgment for \$2400.00, same should be a judgment against the defendant-appellant in the sum of \$272.00 without interest and less costs of court and costs of appeal incurred by the defendant-appellant, the defendant insurance company having previously tendered the \$272.00 within a reasonable period after the hospitalization of Arthur Whitlock.

Statement of Facts

It is the position of the defendant-appellant that the facts in the above entitled matter are as follows: That the policy which is the subject matter of this action was a policy of Old American Insurance Company, 4900 Oak Street, Kansas City, Missouri, being Policy Number V36-810, issued to the insured, Arthur Whitlock, General Delivery, Enterprise, Utah, Beneficiary, Opal Whitlock, wife, and that plaintiff's Exhibit 1 is a true and correct

copy of said policy. Said policy makes a provision for the payment of loss of life benefit of \$2400.00 with the further provision that in the event this is paid, it is in lieu of all other benefits. That said policy was very limited, being for a very minor premium, to-wit, \$12.00 a year. Part Three thereof, under the heading of Exclusions reads as follows:

"This policy does not cover any loss or disability resulting directly or indirectly, in whole or in part, from (a) any mental or bodily sickness or disease, or (b) intoxication of the Insured, or (c) war or any act incident thereto, or (d) bodily injuries sustained while engaged as a volunteer or paid fireman or law enforcement officer, or (e) while driving or riding in any automobile engaged in a race or speed test, or (f) while driving any automobile for compensation or hire; nor does it cover (g) any period of disability during which the Insured is not under the regular care of a licensed physician, surgeon or osteopath."

The interpretation of these exclusions is the material matter of this particular case. The insured, Arthur Whitlock, had been operated on for cancer approximately May of 1962. He was incapacitated at the time and after the removal of a lung because of cancer, the insured, Arthur Whitlock, went home to pass his remaining days, and on or about the 24th day of September, 1962, he had his son take him to Cedar City for a check up. Shortly before the vehicle in which they were traveling arrived at Cedar City, Utah, it was involved in an accident. Thereafter, Mr. Whitlock was hospitalized until on or about the 18th day of October, 1962, at which time he expired. A doctor, A. L. Graff, M. D., of Cedar City, Iron County, State of Utah, signed a death certificate in the following language: "Metastatic Carcinoma", and in a layman's language, the cause of death as shown by the death certificate was lung cancer. With lung cancer being the cause of death, this does not come under the provisions of the policy hereinabove identified, and payment provisions for loss of life have never become effective. The defendant did tender \$272.00 for hospitalization as a result of the accident, which has not been cashed and has not been returned. The cause of death was such that it did not come under the provisions of the insurance policy for payment of the loss of life benefits of said policy.

ARGUMENT

Point 1

THE PLAINTIFF FAILED TO SUBMIT ANY EVIDENCE EITHER TO SUBSTANTIATE VERDICT OR TO PLACE DEATH UNDER SAID INSURANCE POLICY.

Very probably the basic question in connection with this matter is whether or not the cause of death was such that it could be interpreted as under the policy. This policy which was before the trial court and which is before the Supreme Court as Exhibit No. 1, across its face bears the stamp "THIS IS A LIMITED POLICY, READ IT CAREFULLY," and "THIS POLICY PROVIDES BENEFITS FOR LOSS OF LIFE, LIMB, SIGHT OR TIME AND HOSPITALIZATION FROM ACCIDENTAL BODILY INJURY, TO THE EXTENT HEREIN PROVIDED."

Under the heading "Loss of Life" the policy makes the following statement:

"LOSS OF LIFE. When injuries sustained as the result of any accident covered by this policy cause the loss of the Insured's life within thirty days from the date of the accident, the Company will pay the amount specified therefor in the Amount of Benefits Schedule. Such payment shall be in lieu of all other benefits under the policy."

Thereafter, under the heading, "Part Three, Exclusions" there is the following statement:

"This policy does ^{not} ~~now~~ cover any loss or disability resulting directly or indirectly, in whole or in part, from (a) any mental or bodily sickness or disease, or (b) intoxication of the Insured, or (c) war or any act incident thereto, or (d) bodily injuries sustained while engaged as a volunteer or paid fireman or law enforcement officer, or (e) while driving or riding in any automobile engaged in a race or speed test, or (f) while driving any automobile for compensation or hire; nor does it cover (g) any period of disability during which the Insured is not under the regular care of a licensed physician, surgeon or osteopath."

While the trial court found, with the jury verdict, that plaintiff should recover \$2400.00, which in effect means that the trial court found that the death did come within the provisions of the policy, and to do this it

would have to find that the death did not in any way "directly or indirectly, in whole or in part, from any mental or bodily sickness or disease," it is extremely hard to reconcile a finding of this nature with the facts. It was admitted quite freely by all parties that the insured was dying from cancer. The death certificate was put in evidence as Defendant's Exhibit No. 3, and said death certificate bears no reference to any cause except the cancer.

The only qualified person who testified concerning the cause of death was Dr. A. L. Graff who was also the doctor who signed the death certificate. In relation to this matter, there was never any question in Dr. Graff's entire testimony but that the cancer, if not the exclusive cause of death, was at least a contributing cause of death. In the Reporter's transcript of testimony which has been included in the Designation of Record in the above entitled matter, Dr. Graff's testimony runs from Page 63 to Page 91. Dr. Graff had known Mr. Whitlock for ten or fifteen years before death. This may be found in Reporter's transcript beginning on Line 17 of Page 63, in which Dr. Graff was asked, in line 20, "How long did you know Mr. Whitlock?" by counsel, and the answer was, "Oh, ten of fifteen years, I imagine." Then on Page 65, plaintiff's attorney asked, on Line 22, "Doctor, over the period of time, what did you observe with respect to his symptoms and--", and the answer, commencing on Line 24, is as follows, "Well, I knew he had cancer of the lung, which had been operated on, metastasis of the liver." In relation to the injury having anything to do with the death, on cross-examination, Page 67, Line 2, the doctor was asked, "What was the extent of the skull injuries?" And his answer was, on Line 3, "Well, the only thing that demonstrated was the external hematoma and then the fact he was knocked out, so he told me. He was out, so he had a concussion, naturally." And upon being cross-examined about the death certificate, the following questions and answers took place, beginning on Page 69, on Line 25 of the transcript of the testimony:

Q Doctor, look closer at this document. Right here, (indicating) you have immediate cause of death, 18-a.

A Yes.

Q How do you pronounce those words?

A Metastatic carcinoma.

Q What does this mean?

A Carcinoma travels from the original site, which was the lung, to the other parts of the body; and the ones I could feel was the liver, and it could have been through the brain, but I am not sure.

Q Then, can you tell me what that is?

A Well, that is carcinoma.

Q What does that all mean when we take the medical terminology out of it and put it where we understand it?

A Well, it means he had a cancer of the lung and they had removed it; but before they removed it, part of the cancer cells had scattered into other parts of the body.

Q And, in other words, the immediate cause of death in your death certificate was cancer?

A That is what I put down.

Then concerning other parts of the death certificate, on Page 70 of the transcript, Line 29, the doctor was asked the question, "Now, I call your attention here to Part 2 under Item 18, 'Other significant conditions contributing to death but not related to the terminal disease condition given in Part 1-a above.' What did you write in there?" And his answer, Page 71, Line 2, was, "Well, there isn't any writing in there. I wrote it down below here. (Indicating.)"

A complete examination of the testimony of Dr. Graff shows that at no time did he ever feel that the cancer was not a contributing factor to the death, even though it was quite apparent that he was attempting to testify in favor of the plaintiff. There is no question that the doctor, at the time of signing the death certificate, felt that the cancer was the cause of death. In interpreting the hospital records that were offered in evidence as defendant's Exhibit 4, Page 86 of the transcript, commencing on Line 12, and running through line 19, the doctor was asked, "Now, Doctor, I call your attention to the first page in the record as it now stands after the other sheet has been removed. Would you examine that, please and on the right side under Systematic Review, there is the notation, 'The cancer in liner enlarged very rapidly and patient finally died.' Is that in your hand writing?" The answer was, "That is." Then at the bottom of Page 86, on line 30, the doctor was asked, "'Physical findings, metastatic carcinoma of liner can be felt,

pulse rapid and weak.' Is that in your hand writing?" The answer, Page 87, Line 2, was "Yes, sir."

Thereafter, there was a discussion on the word, "liner" and it became clarified that the witness meant "liver."

When one compares the nature of Dr. Graff's testimony with the language of the policy, it becomes quite apparent that even under conditions in which Dr. Graff was attempting to make a very favorable impression for the plaintiff, he could not at any time testify that the cancer was not at least a contributing factor to the cause of death. Under these conditions, the exclusion provisions of the policy takes the death out from under the provisions of the policy and even under the most favorable interpretation there should be no payment of death benefits under this policy.

Point II

INSTRUCTION NO. 4 SUBMITTED THE CASE TO THE JURY ON A STANDARD DIFFERENT FROM THAT EXPRESSED IN THE POLICY.

Defendant's requested instructions, Nos. 3, 4, and 5, none of which were given, and the failure to give of which was objected to by the defendant, set forth the standard that was in line with the language of the policy. The policy, as has been previously stated, required the finding that there was no contributing health cause in the death. It is quite apparent that the death was a cancer death, or at least that the cancer contributed thereto. Defendant's requested Instruction No. 3, required an interrogatory type verdict which would have placed the matter squarely on cancer or some other cause. Defendant's requested Instruction No. 4 required the jury to made a finding that the death was caused by the accident before there could be any award outside of the sum of \$272.00 already tendered. Also it placed squarely upon the jury the task of interpreting the contract of insurance. Instruction No. 5 requested by the defendant specifically set forth the death certificate as the prima facie evidence of the cause of death and required a definite affirmative finding of any other cause of death before there was any variation thereof. These requested instructions are quite material when one finds in item 18 of the death certificate which is before the court as defendant's Exhibit No. 3: "Cause of Death, Part I.

Death was caused by: Immediate cause (a) Metastatic Carcinoma, due to (b) Carcinoma of Lung" which in everyday language is "lung cancer," and then in Part II, the death certificate contains the following statement: "Other significant conditions contributing to death but not related to the terminal disease condition given in Part (a), and one finds that this particular portion was left blank and not answered.

The trial court, however, in violation of request, and in violation of the language of the policy, in its Instruction No. 4, in paragraphs 3 and 4 thereof, instructed the jury as follows:

"You are instructed further that if you find from a preponderance of the evidence that the plaintiff's deceased husband, Arthur Whitlock, died as a result of injuries received in such an accident and where death occurred within thirty days of the date of accident, where the said injuries so received in the said accident materially and substantially contributed to cause his death, then you should find the plaintiff entitled to recover from the defendant under the policy provisions for the sum and amount of \$2,400.

"If on the other hand you cannot so find from the preponderance of the evidence either that the plaintiff's deceased's husband died as a direct result of injuries received in the accident, or that such death did not occur within the thirty day period from the date of the accident, or that the injuries received in the accident did not materially and substantially contribute to cause his death, then and in that event you should find that the plaintiff is entitled to recover from the defendant only for the hospital and disability benefits."

The sum total of Instruction No. 4 as given by the trial court changed the standard from that set forth in the policy to the standard of materially and substantially contributing to the cause of the death, and turned the matter wide open for jury speculation.

It is to be noted that the jury was instructed without counsel being given an opportunity to read any instructions, and after a request for a continuance until morning, by the defendant, said request being made at 5:25 in the evening, the jury was instructed at 7:00 o'clock; the trial court was in an extreme hurry, and the

instructions of the court were read without an opportunity of counsel to examine the instructions before reading by the court. At the conclusion of the reading of the instructions, but before argument, counsel asked to approach the bench, and raised the question of Instruction No. 4 being in language different from that in the policy. The transcript of the testimony simply shows that counsel approached the bench, on Line 2, Page 151. After the jury retired, a record was made of the previous conversation at the bench before the argument. On Page 152 at Line 8, the record was established: "I wish to object, your Honor, as a matter of record and to make this a matter of record, that the instructions were handed to counsel and given to the jury before counsel had a chance to read them and that upon reading them and after they had been read to the Jury before the matter was argued, that the defendant raised a question on Instruction Number 4, that it is not the language of the contract and was misled--," whereupon the court interrupted on Line 16 as follows: "This is true, the record will show that Mr. Fenton and Mr. Burns did come up to the bench and that the attention of the Court was drawn with particularity to Instruction Number 4 and particularly the last paragraph thereof. I believe you pointed that out, Mr. Fenton." And on Line 22 the answer is, "That's correct." The court thereupon continued on Line 23: "And at that time, you, I believe, exhibited to me a photocopy, I presume it was, of the Exhibit Number 1. Frankly, I had not read Exhibit Number 1. I don't think that I read any of the exhibits, for that matter, in total. In any event, I interrupted you."

Then the record continues on Line 29 of Page 152, and on to Page 153, "And may the record also show that your honor overruled counsel's objection to this Instruction Number 4 in the present form at that time." The Court answered: "Yes, I did so." This amounts to the sum total that the court failed to read the contract, instructed the jury, and failed to give counsel an opportunity to read the instructions before they were given to the jury, and when the question of the variance was raised, refused to make an adjustment thereon, even though the question of variance was raised before argument, which was the first opportunity counsel had to raise any question as to the variance between the instructions and the contract.

Utah law is quite clear that any time there is a question of an accident, with an existing disease, and the existing disease, which cooperating with the accident, results in injury or death, the accident is not the sole cause or the cause independent of all other causes within the meaning of an accident policy. Under these conditions, we are now before the Court with the question of whether or not the accident, if any injury occurred therefrom, was the sole and existing cause of death, and there is absolutely no proof that it was even a contributing cause to the death. Under these conditions, the action of the trial court in allowing the matter to be speculated on with an erroneous instruction, certainly raised a presumption of prejudice on the part of the court, and against the defendant. Utah law is quite clear on the point pertaining to a policy of this nature. A great deal of the law that has been written comes under double indemnity clauses when the death is caused by accident. Utah law holds that wherever there is a double indemnity clause or a triple indemnity clause in an insurance policy, in the event a death is caused by accident, that the accident must be the sole cause of the death, or the cause independent of all other causes within the meaning of an accident policy, and is the proper standard to apply to the matter before the Court. *Browning vs. Equitable Life Assurance Society of the United States*, 94 Utah 532, 72 Pac. 2d 1060, insofar as the principal case is concerned and the rehearing on same, found at 94 Utah 570, 80 Pac. 2d 348, sets forth a very comprehensive discussion of this type of insurance policy. This takes in a situation where the accident is not the sole cause, but where it, together with the disease, are cooperating causes of death, which would be much more favorable to the plaintiff than the case at hand, and comes up with the conclusion as follows:

“When at the time of an accident there was an existing disease, which cooperating with the accident resulted in injury or death, the accident is not the sole cause or the cause independent of all other causes within the meaning of an accident policy.”

This is much stronger than our case at hand. The most favorable construction we could get from the testimony and the evidence from the standpoint of the plaintiff is that we have a death certificate that says

death was caused by cancer, and the report submitted by the plaintiff in Exhibits 5, 6, 7 and 8, to the Company indicate that the death was caused by the cancer; then in the later report, that the accident was a contributing cause, and the strongest the doctor would say about signing the death certificate was that he meant to put that the accident might have had something to do with the death on the death certificate. This is quite different from the situation in the Browning case where there was a bona fide question that the accident was not the sole cause, and where it, together with the disease are cooperating causes of death. In our case at hand, there is no question.

In the case of *Handley vs. Mutual Life Insurance Company of New York*, which can be found at 106 Utah 184, 147 P. 2d 319, the same doctrine is ratified, which quotes the Browning case by the Utah State Supreme Court. Also in the case of *Tucker vs. New York Life Insurance Company*, 107 Utah 478, 155 P 2d 173, on Page 482 in the Utah Report, The Utah State Supreme Court, again in construing the language of the insurance contract, referring to the Browning case, goes into three classes of cases in which this situation arises, and a quotation is as follows:

"When at the time of the accident there was an existing disease which, cooperating with the accident, resulted in the injury or death, the accident cannot be considered as the sole cause, or as the cause independent of all other causes. *Smith vs. Federal Life Ins. Co.*, D. C., 6 f. 2d 283; *Cretney v Woodmen Acc. Co.*, 196 Wis. 29, 219 N. W. 448, 62 A. L. R. 675; *Leland v Order of United Commercial Travelers of America*, 233 Mass. 558, 124 N. E. 517, 520."

In all of these transactions, there is a far more favorable situation to the plaintiff than the case at hand. In all of these cases there is a cooperating existing disease. In the matter at bar, the most favorable we can say the plaintiff's position is that the accident might have been some contributing factor, and that until the lawsuit was thought of, there was never an indication of the accident having anything to do with the death. It was simply a case of death by cancer.

There is quite a revealing discussion in *Corpus Juris* and *Corpus Juris Secundum* about the same def-

inition, which endorses the action of the Utah Supreme Court. They also approach it from a slightly different standpoint, and in doing so again quote the Browning case. In 45 Corpus Juris Secundum, Page 785 in Section 756 under Insurance pertaining to the proximate cause of injury or death as a heading, in connection with double indemnity and other cases of that nature, there is the following quote:

“The accident must be the proximate cause of the injury, disability, or death for which indemnity is claimed, in order to hold the insurer liable therefor.”

It goes on to express the thought that the accident must be the proximate cause of the injury, disability, or death for which the indemnity is claimed, and insurer cannot be held liable if the accident was not the proximate cause, or was only a remote cause, although the injury was a result of insured's conduct as an intervening cause. This is in language that is nearly as strong as the language of the policy that is before the court at this time. A footnote in citing the Browning vs. Equitable Life Assurance case cited above, states that the accident policy can have no broader meaning than the words used in the policy, to-wit, “sole proximate cause” and indicates that the death must be the exclusive result of the accidental means.

It seems that under the circumstances, where the court puts a jury on a different standard than the contract, where it is called to the court's attention before argument, and exception is taken to the instruction that does so, after argument, there is no question but that the court was aware of the matter at the time and refused to make any adjustment whatsoever, and that under these conditions the court issued an instruction against objection and put the determination of a case concerning a contract on a different basis from that in the contract. Said instruction put the finding on a preponderance of evidence basis, rather than on the language of the contract which was, “excluding any loss or disability resulting directly or indirectly, in whole or in part from any mental or bodily sickness or disease.” There can be no question but that this exclusion was not complied with, and that the language of the court placed the jury on a different standard.

In the case of Lee vs. New York Life Insurance Company, 95 Utah 445, 82 P. 2d 178, the Supreme court

of Utah differentiated between the Lee case and the Browning case, by and for the reason that there was conflicting testimony which the jury was justified in believing. In the case at bar there is no conflicting testimony. There is no testimony whatsoever that goes farther than Dr. Graff's. The most Dr. Graff could say was that the accident might have contributed to the death. Under these conditions, the case at bar is parallel with the Browning case. Nor does this conflict with the principle of the Browning case which takes the position that an insured, to bring himself under the benefits of the policy, after an accident has the affirmative duty of bringing himself under the terms of the policy.

In the case of Tucker vs. New York Life Insurance Company, 107 Utah 478, 155 P. 2d 173, cited above, the Browning case is endorsed by the Utah State Supreme Court, and on Page 482, in discussing the three types of cases in which the court has to make the decision, and referring to the Browning case, and quoting from the Browning case, Classification (3) is as follows:

"When at the time of the accident, there was an existing disease which, cooperating with the accident, resulted in the injury or death, the accident cannot be considered as the sole cause, or the cause independent of all other causes."

Thereafter, there is a long list of citations. This is particularly interesting, in view of the circumstances as we have in the case at bar, in which the strongest interpretation that can possibly be put upon Dr. Graff's language is that the accident may have been a contributing cause. However, at no time has Dr. Graff eliminated the fact that the cancer was the cause of death, or at least was a contributing cause, and under those circumstances this accident cannot be considered as the sole cause, or the cause independent of all other causes, under the interpretations of the Tucker case under any condition. Especially is this true when one becomes aware that everyone was simply waiting for Mr. Whitlock to die from cancer.

Point III

PLAINTIFF'S PROOF FAILED TO SHOW THAT THE CAUSE OF DEATH WAS COVERED BY POLICY.

Under the most liberal construction that can be

placed on the policy and Dr. Graff's testimony, there is no question that plaintiff failed to sustain her burden of proving that the accident was the cause of death. There is no question that the most liberal interpretation that can be put on plaintiff's proof is that a bodily sickness or disease at least contributed to the death. Although no autopsy was performed, and the doctor stated he could not be sure what was the cause of death without same, it was quite apparent from the doctor's testimony that in all probability if plaintiff had desired, she could have had the body exhumed, and could have provided more definite information. This was entirely under plaintiff's control, and when they did not do so, they abandoned any claim to rights under the particular policy, that might have been shown by an autopsy. It is the plaintiff's duty to provide the proofs under these circumstances. This is especially true, considering that the body is under the control of the plaintiff. Bearing in mind that on the official records the death was from cancer, there is no reason for payment of the insurance under this loss of life provision until such time as affirmative proof is provided by the plaintiff otherwise. This has not been done, and the plaintiff has failed in her duty of proof, regardless of the trial court's instructions. Based upon the standards as set forth in the *Browning vs. Equitable Life Assurance Society of the United States*, as cited above, the *Handley vs. Mutual Life Insurance Company of New York*, and the *Tucker vs. New York Life Insurance Company*, and the principles of the Utah Supreme Court as set forth in the *Browning vs. Equitable Life Assurance Case*, and implemented by the other cases, all to the effect that until such time as the plaintiff proves that the accident was the sole cause of death, there should be no payment under a policy of this nature, and the trial court and the jury both erred in connection with the trial of this matter. Defendant's requested Instruction No. 2 should have been given to the jury by the trial court, to-wit, "No cause of action."

CONCLUSION

In conclusion, the defendant-appellant is of the opinion that the trial court erred, and has shown bias and prejudice in that its Instruction Number 4 as given to the jury set the matter up on a standard of materially and substantially contributing to the cause of death. This defendant-appellant is further of the opinion that there

was no proof offered whatsoever that would justify a decision under any circumstances in favor of the plaintiff. Under these conditions, it is the contention of this defendant-appellant that this matter should be reversed; that the \$272.00 that was tendered to the plaintiff by the defendant-appellant shortly after the death should be awarded to Mrs. Whitlock without interest, and that from this amount there should be deducted the defendant-appellant's court costs and cost of appeal.

Respectfully submitted,
PATRICK H. FENTON
Attorney for
Defendant-Appellant