1968

Opal Whitlock v. Old American Insurance Company : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

OPAL WHITLOCK,
Plaintiff and Respondent,

v.

OLD AMERICAN INSURANCE COMPANY,
Defendant and Appellant,

Case No. 11019

RESPONDENTS' BRIEF

Appeal from Judgement of the 5th District Court for Iron County, Honorable C. Nelson Day, Judge.

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STATEMENT OF FACTS

Respondent feels appellant's statement of the facts is somewhat argumentative and inadequate and submits the following as an aid to understanding the case at hand.

On April 3, 1961, Arthur Whitlock obtained a policy of insurance, limited to accidental death, from Old American Insurance Company.

In May of 1962 Arthur Whitlock was operated on for cancer in Salt Lake City, Utah, had one lung removed, and returned to his residence in Enterprise, Utah, where

he carried on a relatively normal life until he was severely injured in an automobile accident on the 24th day of September 1962.

After his operation Arthur Whitlock was in good spirits. He was not despondent or unhappy. He loved to talk. He was up and about all the time; he watched television, read quite a bit and even worked in the yard. (Tr. 10, 11, 22, 24, 96, 97, 104, 105, 121)

On September 24, 1962, while enroute from Enterprise, Utah to Cedar City, Utah, Mr. Whitlock suffered severe injuries in a one car automobile accident in which a 17 year old fellow passenger was killed. (Tr. 116, 117) The evidence shows that Mr. Whitlock received a severe blow to the head causing a brain concussion. There immediately developed a large blood clot, swelling, and discoloration above his right ear, and the right side of his face and neck was discolored. (Tr. 15, 64, 98, 106, 107, 119)

After the accident there was a marked change in Mr. Whitlock's attitude and activities. His movement was severely restricted and he never got out of bed. He wouldn't talk or eat much ,and he refused to read. He did not act natural nor was he interested in his surroundings. He was not responsive to loved ones who visited him at the hospital. He complained constantly of pain in his head and eye. He would hold his head in his hands and complain of pain. (Tr. 14, 15, 16, 18, 20, 21, 22, 24, 100, 106, 107, 108, 109, 123)

ARGUMENT

POINT I. THERE IS SUFFICIENT COMPETENT EVIDENCE TO SUPPORT THE JURY VERDICT IN FAVOR OF DECEDENT'S WIDOW AND AGAINST THE INSURANCE COMPANY.

This case was tried to a jury which brought in a unanimous verdict in favor of the decedent's widow and against the insurance company. This was not error. There was sufficient competent evidence to support the jury's conclusion that Arthur Whitlock died from injuries received shortly before in an automobile accident. The uncontroverted evidence showed that decedent entered the Iron County Hospital on the 24th of September, 1962, immediately following a serious automobile accident in which one fellow passenger was fatally injured. The uncontroverted evidence further shows that Mr. Whitlock suffered very severe injuries about the head. He was examined at the time of admission to the hospital by Dr. Graff, who testified concerning decedent's condition on admission as follows: (Tr. 64)

Q. And what was his appearance when you saw him?

A. (by Dr. Graff) When he came to the hospital?

Q. Yes.

A. Well, he was pretty well in shock and had a bruise and hematoma above the right ear.

Q. What do you mean by hematoma?

A. Oh, big blood clot, swelling, discoloration.

Dr. Graff stated that decedent's symptoms could indicate that the head injury was the direct and immediate cause of Arthur Whitlock's death. (Tr. 66) Plaintiff's exhibit Number 8 is a claim form submitted to the Old American Insurance Company. On this form, signed by Dr. Graff as the attending physician, the primary cause of death is listed in Paragraph 13 as "Brain Concussion." Dr. Graff was asked whether Paragraph 13 was inconsistent with his (Graff's) experience, diagnosis and treatment of Arthur Whitlock. Dr. Graff testified that it was not. (Tr. 66, 78)

Decedent's wife, testified that after the cancer operation, but before his accident, decedent was normally conversant; that he was not despondent or unhappy; that he watched television and read quite a bit; that he was up and about and also worked at times about the house. (Tr. 10, 11) This testimony was substantiated by Gloria Cox step daughter of decedent. (Tr. 103, 104, 105, 106) Ada Spears' testimony was similar (Tr. 95, 96, 97) Sidney Boyce Whitlock testified that the decedent read a lot; that he worked outside hoeing weeds and irrigating; and that just prior to the accident while enroute to Cedar City, Utah the decedent was laughing and joking. (Tr. 119, 121, 122)

The evidence shows however that immediately following the accident, decedents attitude and activity suffered a marked and demostrable change.

Decedent's wife testified that following the accident

the decedent didn't act natural; that his movement was severly restricted and he didn't get out of bed; that he wouldn't talk or read and didn't seem to be interested in anything; that he didn't know his small son and didn't seem to care. (Tr. 14, 15, 16, 18, 20, 21, 22, 23, 24) Testimony of Gloria Cox supplements and substantiates the above testimony of Mrs. Whitlock. (Tr. 106, 107, 108) Ava Spears gave similar testimony. (Tr. 98, 99, 100)

Decedent's wife further testified that after the accident decedent complained strongly and continually of pain in his head and eye. (Tr. 23)

Ada Spears testified that before the accident decedent did not complain much, (Tr. 96), but after the accident he would put his hands to his head and say that his head hurt. (Tr. 100)

Sidney Boyce Whitlock testified that after the accident decedent kept grabbing his head like he was in pain. (Tr. 121)

Gloria Cox testified concerning decedent's pain, beginning on Page 109, Line 6 of the transcript of the testimony as follows:

> He would just hold his whole head. He would just get his hands up there and just press his hands on his head and I could see his hands shake and would; and I asked him on numerous occasions if he was in pain and he said that he was.

The foregoing testimony indicates a direct, substantial moribund change in decedent caused by the head injury and not cancer. The jury could and did conclude

that the direct and immediate cause of death was injury suffered in the automobile accident.

Whether Mr. Whitlock died as a direct result of the accident was properly a question for the jury. *Lee v. New York Life Ins. Co.*, 95 Utah 445, 82 P.2d 178 (1938). Accord, *Griffin v. Prudential Ins. Co. of America*, 102 Utah 563, 133 P.2d 333 (1943); *Hassing v. Mutual Life*, 108 Utah 198, 159 P.2d 117 (1945).

In *White v. National Postal Transport Ass'n.*, 1 Utah 2d 5, 261 P.2d 924 (1953), in which this court affirmed a verdict for the beneficiary on far less compelling facts, there was testimony that insured had "advanced heart disease." The certificate of insurance provided for the payment of $4,000 if death resulted solely from accidental injuries. The insured was struck on the calf of his right leg. The leg had to be amputated and tests of the leg revealed Buerger's disease. Some months later the insured died, apparently from blood clots to the brain or other vital organs. The insurance company refused to pay on the grounds that the accidental bump on the leg sustained by the insured was not directly, independently and exclusively the cause of death, but that the heart disease and Buerger's disease were, at least, contributing causes. The jury found for the plaintiff. The Utah Supreme Court affirmed the jury verdict concluding:

> "Viewing the evidence as a whole and in a light most favorable to the respondent we find no error in submitting the case to the jury."

The Court said the jury could find either that the acci-

dental blow to the leg reactiviated decedent's heart disease or started an unbroken chain of events which led to the death, independently of any contributing cause.

Just as in *White,* supra, there is ample, competent evidence in the instant case from which the jury could, and did, find decedent's death to be covered by the insurance policy.

There is substantial evidence to support the jury verdict and it is well established in this jurisdiction that the trial courts findings not against the preponderance of the evidence will not be disturbed on appeal. *Osborne v. Peters,* 69 Utah 391, 255 P. 435 (1927). *Glenn v. Rich,* 106 Utah 232, 147 P.2d 849 (1944).

POINT II. THERE WAS NO ERROR IN THE INSTRUCTIONS TO THE JURY AND IN ANY EVENT IN THE ABSENCE OF A A COMPLETE TRANSCRIPT OF THE INSTRUCTIONS AS GIVEN, IT MUST BE PRESUMED THAT THEY WERE CORRECT.

The transcript before this court does not contain the entire instructions given by the trial judge. Only selected portions of the instructions are quoted in the appellant's brief. However, when read together and not in fragments even these portions of the instructions show that the correct standard was applied by the trial court.

Utah law clearly does not permit the insurer a windfall simply because the insured's physical condition was less than perfect. See *White v. National Postal Transport Ass'n.,* 1 Utah 2d 5, 261 P.2d 924 (1953).

Even those portions of Instruction 4 quoted in Appellant's brief (page 8) show that the language there assertedly used, adequately and properly instructed the jury. In addition to the language complained of by appellant the instruction speaks of the requirement of death as a direct result of injuries received in the accident. Read as a whole, even without the benefit of the entire instructons, it must be concluded that the court properly instructed the jury.

There is substantial precedent in Utah for the proposition that an insurance company may still be liable, although a preexisting disease is present where the accident is regarded as the proximate or primary cause of the harm. In *Browning v. Equitable Life Assur. Soc'y. of the United States,* 94 Utah 532, 72 P.2d 1060 (1937), re. hear. 94 Utah 570, 80 P.2d 348 (1938), the insured was an oral surgeon who received injuries to his index finger from a fall. The insured subsequently developed arthritis in his index finger which caused him to be disabled. There was evidence that insured had toxemia in his body prior to the accident, which caused the development of arthritis. The court stated:

> "There being some supporting evidence, the finding of the trial judge will not be disturbed. We must therefore hold that where disability results, even though aggravated or intensified by a 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, disability or

> death is deemed the proximate result of the injury and not of the disease as an independent cause."

Furthermore, in *Handley v. Mutual Life Ins. Co.,* 106 Utah 184, 147 P.2d 319 (1944), the Court interpreted an insurance policy which provided for indemnity if the insured died "as a direct result of bodily injury affected solely through external, violent, and accidental means independently and exclusively of all other causes." The court found that it was unnecessary that the accident be the sole cause of death, but was sufficient if the accident was the dominant cause.

Decisions from other jurisdictions lend weight to the argument that the accident may be the dominant or proximate cause of death and the insurance company will still be liable.

In *Brooks v. Metropolitan Life Ins. Co.,* 27 Cal. 2d 305, 163 P.2d 689 (1945), the California Supreme Court said that the correct rule is that the presence of a preexisting disease or infirmity will not relieve the insurer from liability if the accident is the proximate cause of the death. Accord, *Scanlan v. Metropolitan Life Ins. Co.,* 93 F.2d 942, 946 (7th Cir. 1937), *Hughes v. Provident Mutual Life Ins.,* 258 S.W. 2d 290 (Mo. App. 1953).

Respondent contends that there was substantial evidence from which the jury could find that the automobile accident, in the language of *White v. National Postal Transport Ass'n., supra,* "started an unbroken chain of circumstances which led to [decedent's] death independently of any contributing cause."

The general rule is reviewing the propriety and correctness of instructions is that an appellate court should consider the charge as a whole. *Cope v. Davidson*, 30 Cal. 2d 193, 180 P.2d 873 (1947). The instructions should be read together and not piecemeal. *Phoenix v. Harlen*, 75 Ariz. 290, 255 P.2d 609 (1953).

The entire charge given by the trial court in the instant case is neither in the record nor the transcript. It is appellant's duty to include in the record those instructions given, and those refused. *Robbs v. Central Sur. & Ins. Corp.*, 188 Kan. 506, 363 P.2d 427 (1961). Where the entire charge given by the trial court is not in the record, the appellate court cannot presume that the instructions given were erroneous. *Inland Power & Light Co. v. Grieger*, 91 F.2d 811 (9th Cir. 1937); *Revlon Inc. v. Buchanan*, 271 F.2d 795 (5th Cir. 1959). In *Buchanan v. Crites*, 106 Utah 128, 150 P.2d 100 (1944), the Court states:

> "If the record on appeal is not sufficient to determine a material question because appellant has failed to bring enough of the record before the appellate court, doubt should be resolved in favor of sustaining trial courts judgment."

While appellant complains of the instructions given by the trial court, it did not submit instructions purporting to state correctly the law in the subject area. Merely complaining of the instructions given is insufficient in the absence of better instructions.

CONCLUSION

For the reasons above stated, the plaintiff respectfully prays this Court to dismiss the appeal and to affirm the judgment rendered on the jury verdict below.

Respectfully submitted,

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