

OLD AMERICAN LIFE INS. CO. v. THEODORE WILLIAMS

5-3998

407 S. W. 2d 110

Opinion delivered October 24, 1966

1. APPEAL & ERROR—ABSTRACT OF RECORD—DENIAL OF MOTION FOR AFFIRMANCE UNDER SUP. CT. RULE 9.—Appellee's motion for affirmance under Rule 9 denied where the abstract of the record was sufficient.
2. INSURANCE—PROOF OF LOSS—WEIGHT & SUFFICIENCY OF EVIDENCE.—Insured's testimony held amply sufficient to support trial court's finding of fact as to insured's loss of sight.
3. INSURANCE—ACTIONS ON POLICIES—AMOUNT OF RECOVERY.—Insurer's argument that the amount of premiums accruing between the filing of the complaint and date of trial should have been deducted from the judgment held without merit where insured's right to recover was not dependent upon the policy's having been in force at the time of the trial and the point was raised for the first time on appeal.
4. INSURANCE—ACTIONS ON POLICIES—ALLOWANCE OF ATTORNEY'S FEES.—A fee of \$600 for counsel's services for insured in the trial court and on appeal held to be the maximum that should be awarded under total recovery of \$663.27, the judgment not establishing plaintiff's right to additional recovery in the future.
5. INSURANCE—ACTIONS ON POLICIES—RECOVERY OF COSTS UNDER RULE 24 (c).—Where appellant obtained a reduction in the allowance of appellee's attorney's fee from \$1,000 to \$600, it was entitled under Rule 24 (c) to recover its costs.

Appeal from Pulaski Circuit Court, Third Division,
Tom Gentry, Judge, modified and affirmed.

Jack Young, for appellant.

L. A. Hardin, for appellee.

GEORGE ROSE SMITH, Justice. In this action upon a health and accident insurance policy the plaintiff recovered the full amount sued for: Six hundred dollars for the loss of sight in his right eye, \$63.27 for temporary disability, the statutory penalty, and an attorney's fee of \$1,000. In substance there are three contentions for reversal. (At the outset we deny the appellee's motion for affirmance under Rule 9, as we find the abstract of the record to be sufficient.)

First, the insurer insists that the plaintiff's right eye had been sightless for several years before it was surgically removed following an accident in 1965. In the court below this was an issue of fact upon which the testimony is in conflict. Williams testified that before the accident he could see well enough with his right eye to recognize people and "to tell time and do things." There is some medical evidence to the contrary, but Williams's testimony is amply sufficient to support the trial court's finding of fact.

Second, the appellant argues that the court should have deducted from the judgment the amount of premiums accruing between the filing of the complaint and the date of trial. This argument is without merit, not only because it is raised in this court for the first time but also because the plaintiff's right to recover was not dependent upon the policy's having been in force at the time of trial. As far as the record shows, the insured may have intended for the policy to lapse.

Third, the insurer correctly contends that the trial court allowed an excessive attorney's fee. The total recovery was \$663.27. That is the whole case; the judg-

ment does not establish any right in the plaintiff for an additional recovery in the future. We are of the opinion that a fee of \$600 for counsel's services in the trial court and in this court is the maximum that should be awarded.

With the indicated modification the judgment is affirmed. Under Rule 24 (c) the appellant recovers its costs.
