NATIONAL LIFE & ACCIDENT INSURANCE COMPANY *v.* WHITFIELD.

4-2642

Opinion delivered October 3, 1932.

1. INSURANCE—WEEKLY INDEMNITY.—Under an accident policy providing for a weekly indemnity of $7 for not exceeding 20 weeks during any 12 months, insurer was liable, in case of total disability from accident, for $140 for every 12 months that total disability continued.
2. INSURANCE—CONSTRUCTION OF POLICY.—Insurance policies in furtherance of the general scheme proposed are liberally construed in favor of the insured and strongly against the insurer.
3. INSURANCE—PROVISION LIMITING LIABILITY.—The rule that insurance policies are construed most strongly against the insurer applies to provisions limiting liability.
4. INSURANCE—BREACH OF CONTRACT—RIGHT OF ACTION.—Upon breach by insurer of a policy providing for weekly indemnity in

case of total disability resulting from accidental injury, insured was entitled to damages.

5. INSURANCE—ACCIDENT POLICY—DAMAGES FOR BREACH.—The measure of damages for breach of a policy providing for weekly indemnity in case of total disability resulting from accidental injury is the present cash value of the past and future installments based on insured's life expectancy.

6. INSURANCE—TOTAL DISABILITY—EVIDENCE.—Evidence *held* to sustain a finding that insured was permanently and totally disabled.

7. INSURANCE—INDEMNITY—EFFECT OF DEATH OF INSURED.—Death of insured after recovering judgment for breach of a contract of indemnity against total disability did not affect the judgment which constituted a recovery of all damages resulting from such breach.

8. INSURANCE—TOTAL DISABILITY—EVIDENCE.—In an action for an insurer's breach of a policy providing for weekly indemnity in case of total disability, the court did not err in refusing to consider tables of mortality of disabled lives.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant prosecutes this appeal from a judgment in an action commenced by appellee, a boilermaker's helper at the Missouri Pacific Railroad shops, for an alleged total disability for life upon a combination insurance policy which provides certain limited benefits arising from accident, sickness and death of the insured.

Appellant denied all the allegations of the complaint and pleaded affirmatively that any disability Whitfield might show himself to be suffering from was due to the ravages of tertiary syphilis, a disease not covered under the policy of insurance.

The policy afforded indemnity against disability caused by accidental injury, in addition, paid a small death benefit, and also provided for payment of $7 per week for a period of time not exceeding 140 days or 20 weeks during any twelve consecutive months for total disability caused by illness or sickness, but specifically exempted the insurance company from all liability where the sickness resulted from venereal disease.

The policy provides for payment of benefits for total disability caused by illness or sickness as follows:

"* * * And in further consideration of the payment in advance of the premium stated * * *, on or before every Monday hereinafter during the life of the insured, * * * which is for insurance against disability for sickness * * *, The National Life & Accident Insurance Company doth hereby agree, subject to the conditions herein, * * * in case of sickness * * * to pay to the insured the weekly benefits named * * *.

"Benefits will be paid for each day that the insured is by reason of illness necessarily confined to bed and * * * disabled from performing work of any nature, provided such confinement or disability is not less than four consecutive days * * *. The total number of days for which benefits will be paid under this policy is limited to one hundred and forty (140) during any twelve consecutive months. Benefits under this clause will be paid each seven days, except when payment is for less than one week, then payment will be made at the rate of one-seventh of the weekly benefits for each day.

"No benefits will be paid for sickness * * * resulting from venereal diseases."

The insured suffered an illness July 17, 1930, caused by valvular heart disease, mitral regurgitation, myocarditis and oedema (swelling) of the lower limbs, which, during all the time thereafter and until his death, May 7, 1932, confined him to his bed and totally disabled him.

On July 17, 1930, he made a claim for disability benefits for one week, and afterwards made two other weekly claims for disability benefits, all three of which were paid, making a total paid to insured in weekly benefits of $21 under the policy. The insured filed two other claims in 1930, both of which appellant company refused to pay, and denied all liability under the policy, for the reason that the sickness and consequent disability of the insured was caused by venereal disease.

After its denial of liability, attorneys were employed by insured to demand payment of the disability benefits due under the terms of the policy, and in reply to their demand, they received a letter from appellant company on May 28, 1931, stating, among other things, that it had received both the demands and claims, and that a Wasserman test showed that insured's disability was due to a venereal disease, and that the claimant had misunderstood its reasons for refusing to pay the claims, saying: "In this he is in error, as we explained to him in the presence of his employer, that the policy does not cover venereal trouble, and his employer stated at that time that no policy did, and he could not expect to recover on claims of this nature. He is fully familiar with this whole case."

Suit was thereafter filed, alleging breach of the contract, and the total and permanent disability of insured, his age of 60 years, and that he had a life expectancy of 14 and 10/100 years; prayed judgment for $1,871 as damages, the amount appellant company would have been required to pay under the policy as reduced to the present value after it had been breached.

A demurrer was filed to the complaint and overruled, and the answer denied the allegations and pleaded exemptions from liability for disability benefits because appellant's sickness resulted from a venereal disease. An amendment was filed to the complaint reducing the amount for which judgment was prayed to $1,440.31.

Many physicians testified, the majority of whom stated that they had made Wasserman tests, and that the sickness causing appellant's disability was not the result of a venereal disease, only one physician testifying that he had found it so, the others saying such finding must have been due to the error of the technician in deciding about the test. They also said that the heart trouble from which appellee suffered was not a result of syphilis, having been caused by a mitral lesion of the heart.

The jury was instructed, the appellant complaining of three instructions given over its exceptions, and from the judgment on the verdict this appeal is prosecuted.

Barber & Henry and *Troy W. Lewis,* for appellant.

Sam T. & Tom Poe, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in not sustaining its demurrer to the complaint, since it alleges the policy limited the indemnity in any event to payment of $7 per week for 20 weeks of any one year, but, as the opinion herein shows, we have concluded that no error was committed in overruling the demurrer, this being a suit for damages for breach of the contract, rather than for indemnity under the terms of the policy.

It is undisputed that appellant company refused to comply with the provisions of the policy and denied liability thereon, alleging that such disability was occasioned by, and the result of, a venereal disease not covered by the policy; or that it had been breached by the company's refusal to pay disability benefits in accordance with the terms thereof.

A fair construction of the terms of the policy binds appellant to pay to the insured during his lifetime and the continuation of a total disability weekly benefits of $7 per week, not exceeding, however, 20 weeks during any one period of 12 consecutive months, said policy providing:

"* * * The total number of days for which benefits will be paid under this policy is limited to one hundred and forty (140) during any twelve consecutive months."

A reasonable construction of this provision necessarily limits the number of days for which disability benefits may be paid to insured during any period of 12 consecutive months, but certainly not to the payment only of that amount for a continuing disability, otherwise this clause would have been omitted from the policy. It does not exclude the inference that the parties contemplated that future benefits would be paid for a disability which

continued during the lifetime of the insured, such clause limiting only the liability of the insurer to the payment of the amount prescribed to 20 weeks during any consecutive 12 months. If this clause had been omitted from the policy, it would have been like the policies involved in the cases of *Commercial Casualty Ins. Co.* v. *McCulley,* 185 Ark. 468, 48 S. W. (2d) 225, and *Travelers' Protective Ass'n* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364.

Other provisions in the policy show it was intended to remain in full force and effect during the lifetime of the insured, if he paid the premiums as required therein. Policies of insurance are construed liberally in furtherance of the general scheme proposed, such policy being construed most liberally in favor of the insured and most strongly against the insurer. *Mosaic Templars of America* v. *Crook,* 170 Ark. 474, 280 S. W. 3, 32 C. J. 1152. This rule of contracts applies with equal force where the provisions of the policy involved are ones of limitation of liability. 1 C. J. 414-15.

It may be true that in case of a lapse of the policy or death of the insured no further claim could be made for a future period of disability as claimed by appellant company, but the limitation of the policy only is to the amount or liability of appellant to the payment of no more benefits in any one year than the 20 weeks as expressly provided. This suit, however, is for damages for breach of a contract, and the jury has found that the contract was wrongfully breached by appellant company, and that the disability here was from an illness or sickness covered by the terms of the policy. The policy provides that the insured must be disabled from performing work of any nature, confined to his bed, etc., and certainly such terms do not indicate that it was limited on this point or a policy providing indemnity for partial disability only.

The breach of the contract, the appellant company's refusal to pay under its terms and denial of any liability thereunder, gave the insured the right to sue for gross

damages for such breach of contract, and the court has held that the measure of such damages is the present cash value of the past and future installments of the weekly indemnity based on the life expectancy of the insured. *Ætna Life Ins. Co.* v. *Pfeifer,* 160 Ark. 98, 254 S. W. 335. The rule as to the measure of damages is not modified by the fact that the insured died long before the end of the period of his life expectancy, the rights of the parties to a contract which has been breached being fixed at the time of the breach thereof. *Van Winkle* v. *Satterfield,* 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853; 6 Paige on Contracts, p. 5623; *Roberts* v. *Benjamin,* 124 U. S. 64, 8 Sup. Ct. Rep. 393, 31 L. ed. 334. The breach of the contract occurred in October, 1930, the suit was brought in August, 1931, and judgment rendered against the company on January 8, 1932, the death of the insured being subsequent to all of these dates, and damages being recoverable for the breach of the contract rather than acceleration of the payment of unmatured installments due under the contract. *Manufacturers' Furniture Co.* v. *Read,* 172 Ark. 642, 290 S. W. 353; *Ætna Life Ins. Co.* v. *Pfeifer, supra.*

The testimony is ample to sustain the jury's finding that the insured was permanently and totally disabled at the time his cause of action arose. *Industrial Mutual Ins. Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457, 29 L. R. A. (N. S.) 635, 21 Ann. Cas. 1029.

No error was committed by the trial court in its refusal to give instruction No. A as requested by appellant, since its effect was to limit the amount of weekly disability benefits which insured might recover in the suit to those maturing before the bringing of the suit on August 3, 1931. This, as already said, is a suit for damages for breach of the contract by denial of liability thereunder, and appellee was entitled to recover all damages resulting from such breach in the one suit, it being the breach of the contract, and not the time of its discharge or the time of the bringing of the suit, that inflicts

the damages, the breach and denial of liability going to the entire contract being a repudiation of any liability thereunder. *Van Winkle* v. *Satterfield, supra; Travelers' Protective Ass'n* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364.

Instruction No. 5 complained of was not erroneous on the measure of damages for the breach of the contract, and was approved in the case of *Ætna Life Ins. Co.* v. *Pfeifer, supra.*

Neither was error committed in the court's refusal to take judicial knowledge of the Hunter Tables of Mortality of Disabled Lives. The policy was not an insurance of a disabled man, but provided indemnity for disability to the insured, and certainly there was no necessity for giving any notice of any further disability under the policy of insurance, if any had occurred thereafter, or payment of a premium therefor, since the policy was breached and liability repudiated by the refusal to pay for the disability that resulted and for which indemnity was claimed as arising from a disease excepted from the provisions of the policy, a risk not covered thereby.

No error was committed in not instructing the jury otherwise, as appellant claims, by the giving of plaintiff's requested instruction No. 4.

We find no error in the record, and the judgment is affirmed.