

**85-LW-3309 (10th)**

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Midland Mutual Life Insurance Co., Plaintiff-Appellee

v.

Conley Newsome, Sr., Defendant-Appellant.

Midland Mutual Life Insurance Co., Plaintiff-Appellant

v.

Conley Newsome, Sr., Defendant-Appellee.

No. 84AP-1003 (REGULAR CALENDAR), No. 84AP-1030 (REGULAR CALENDAR).  
10th District Court of Appeals of Ohio, Franklin County.  
Decided on March 28, 1985.

APPEAL from the Franklin County Common Pleas Court.

MESSRS. PORTER, WRIGHT, MORRIS & ARTHUR, MR. MASON EVANS and MR. CRAIG D. BARCLAY, for plaintiff.

MESSRS. DENMEAD, GERRITY & TSITOURIS, and MR. TIMOTHY D. GERRITY, for defendant.

DECISION

MOYER, J.

This matter is before us on the appeal of defendant, Conley Newsome, Sr., from a judgment of the Franklin County Common Pleas Court on a jury verdict in favor of plaintiff, Midland Mutual Life Insurance Company, and upon the appeal of plaintiff from the trial court's order overruling plaintiff's motion for summary judgment.

Defendant raises the following three assignments of error in support of his appeal:

- "1. The trial court erred in charging the jury as to the sole issue for their consideration.
- "2. The verdict of the jury is contrary to the manifest weight of the evidence.
- "3. Appellee's policy definition of total disability with attached rider is contrary to law."

Plaintiff asserts the following assignment of error in support of its appeal:

"The trial court erred in overruling Midland's motion for summary judgment."

Plaintiff's assignment of error is overruled because any error committed by the trial court in overruling plaintiff's motion for summary judgment is nonprejudicial in view of our disposition of the three assignments of error raised by defendant.

In June of 1979, defendant requested plaintiff to issue him a disability policy of insurance, and indicated on the application that his occupation was owner and president of N & W Garage, Inc. Although the application indicated the applicant was to "describe duties," defendant stated only that he was the owner and president. During the application approval process, plaintiff learned that defendant's responsibilities were general administration, hiring and firing employees, maintaining a high level of business, repair work and making sure that the business maintained its consistency. Defendant did not indicate to plaintiff that his duties also included those of an automobile mechanic. A policy was issued with a rider that excluded disability insurance for any disability which was related to defendant's

preexisting back injury.

In February of 1981, plaintiff paid defendant upon a claim for an injury to his back under another policy issued to N & W Garage. In July of 1981, defendant submitted a claim to plaintiff for total disability under his individual policy for a shoulder injury that allegedly occurred when he fell in December of 1980. After negotiations with plaintiff on behalf of defendant, plaintiff paid defendant monthly benefits under his individual policy in November of 1981. In order to continue receiving the disability benefits thereafter, defendant submitted eight monthly disability reports to plaintiff which indicated that he was totally disabled. However, at trial he admitted that he was able to perform his administrative duties during that period of time.

In February of 1982, plaintiff initiated an investigative report to determine defendant's activities. Defendant stated at trial that, after he injured his shoulder, he was responsible for the overall operation of the garage; that he was still president and owner; that he did not stop going to the garage on a daily basis; and that he continued to deal with customers and suppliers, gave estimates over the telephone and made financial decisions for his company. The exhibits include certifications of Dr. Cameron, defendant's treating physician, who certified that defendant had no physical disability and that he was physically and psychologically fit to ride in a variety of motorcycle speed competition events. He is the same doctor who testified that defendant was totally disabled in order that he could receive disability benefits from plaintiff. The doctor testified that he knew professional motorcycle competition involved "racing from variable to extremely high speeds under the most exacting conditions. Motorcycle racing requires demanding physical endurance." In fact, defendant finished fourth in the world hillclimbing motorcycle competition in 1983 and 1984. The evidence includes the testimony of another doctor who testified that defendant was not totally disabled.

In August of 1982, plaintiff discontinued defendant's total disability benefits and demanded that defendant pay back the benefits he had received.

The issue presented by defendant's first assignment of error is whether the trial court erred in its charge to the jury with respect to the definition of "total disability." The definition section of plaintiff's disability policy defines total disability as follows:

"Total Disability' means (a) that you are completely unable, due to injury or sickness, to engage in your regular occupation, (b) that you are being regularly attended for such injury or sickness by a licensed physician other than yourself, and (c) that you are unable, due to such injury or sickness, to engage in any different occupation which would provide average monthly earnings equal to at least 90% of your average monthly earnings for the two years ending on the date total disability commenced. \*\*\*"

During his charge to the jury, the trial court gave the jury the following instruction:

"Let me read to you how totally disabled is defined in the contract of insurance that he had in effect at the time.

"Total disability means that you are completely unable, due to injury or sickness, to engage in your regular occupation.

"Now, if you find that Conley Newsome was able to engage in the regular duties of his occupation, then he was not totally disabled.

"If, on the other hand, you find that he was not able to engage in the duties of his regular occupation, completely, then your verdict should be for the Plaintiff, Midland Mutual.

"Let me say that over again so that you get it straight. If you find from the evidence that Conley Newsome was completely disabled from performing the duties of his regular occupation, then your verdict should be for him.

"If, on the other hand, you find that he was able to engage in the regular duties of his occupation to some extent, then your verdict should be for Midland Mutual." (Tr. 226.)

Counsel for defendant directed the trial court's attention to the fact that the court used the phrase "to some extent," and objected to that part of the charge. The objection was overruled, and, during the jury's deliberation, a question was sent to the court, which was as follows: "Total disability, does this mean he should not be able to do all, most or some of his duties?" In response to the jury's question, the trial court again instructed the jury as follows: "The terms of the policy define total disability as follows: That you are completely unable, due to injury, to engage in your regular occupation." The jury then rendered a verdict in favor of plaintiff.

Defendant complains that the trial court misled the jury when it told them that, if they found that defendant was able to engage in the regular duties of his occupation "to some extent," the verdict should be for defendant. The assignment of error is not well taken for two reasons. The first is that the portion of the charge about which defendant complains was not misleading because it is consistent with the definition of total disability, and because the trial court clearly stated the definition of total disability at least two times in a way that defendant agrees was correct. Where the total charge to a jury is not prejudicial and the error complained of is stated in only a sentence or a phrase, appellate courts should not reverse the verdict of a jury. See *Snyder v. Stanford* (1968), 15 Ohio St. 2d 31. In the case before us, even if the trial court did misspeak by including three words that should not have been in the charge, the jury was clearly instructed correctly when they requested a clarification from the judge during their deliberation.

The second reason is that the charge could not have been prejudicial in view of the substantial evidence which tended to prove that defendant was not totally disabled. The first assignment of error is not well taken and is overruled.

The second assignment of error has no merit. In fact, it is difficult to imagine how the jury could have returned a verdict in favor of defendant upon the facts in this case. Defendant purchased a policy of total, not partial, disability insurance from plaintiff. His application for the policy indicated that his duties were simply owner and president of N & W Garage, Inc. Defendant's own testimony indicated that he was performing many of the duties of owner and president of N & W after the injury to his shoulder for which he claims total disability benefits are due him. Finally, there is the rather incredulous testimony of Dr. Cameron, who examined defendant and was of the opinion that defendant was both totally disabled for purposes of receiving money from the plaintiff and in perfectly normal condition to be able to compete in motorcycle hillclimbing competition. The doctor's opinion with respect to the latter activity apparently was the more accurate, as defendant was a fourth place winner in world competition in 1983 and 1984.

The evidence upon which defendant relies in arguing that the jury's verdict was against the manifest weight of the evidence simply was not persuasive in view of the fact that defendant's duties obviously were not confined to the work of an automobile mechanic. Even assuming he did work as a mechanic in his own business before his shoulder was injured and did not perform such work after his shoulder was injured, he was not totally disabled in view of the testimony and other evidence which indicated that his performance of substantial administrative and executive duties was virtually unaffected by the injury to his shoulder. The second assignment of error is overruled.

In support of his third assignment of error, defendant argues that the definition of total disability in plaintiff's insurance policy violates R.C. 3923.01 and 3923.011 because it would be virtually impossible for a person to be entitled to benefits under plaintiff's policy, for the reason that a person who could perform a very minor duty of his or her occupation would not be completely disabled. We need not analyze defendant's misapplication of R.C. 3923.011, or his argument on this issue, because there is substantial evidence which tended to prove that defendant is not the person referred to in the hypothetical example in defendant's argument. Defendant was capable and apparently did, by his own admission, perform most of the duties of his regular occupation after December 1980, and therefore was not prejudiced by the policy language about which he complains in this assignment of error. The third assignment of error is not well taken and is overruled.

For the foregoing reasons, the judgment of the trial court is affirmed.

Judgment affirmed.

MCCORMAC and NORRIS, JJ., concur.