

IN THE COURT OF APPEALS

8/12/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00786 COA

EDWARD POPE APPELLANT

v.

SOUTHERN SECURITY LIFE INSURANCE

COMPANY, INC. AND KING T. EVANS, SR. APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: ELLIS TURNAGE

ATTORNEYS FOR APPELLEES: WILLIE L. BAILEY

WILLIAM B. RAIFORD, III

NATURE OF THE CASE: CIVIL - INSURANCE

TRIAL COURT DISPOSITION: ACTUAL DAMAGES OF \$500 AND PUNITIVE DAMAGES OF \$10,000; \$3,000 ATTORNEYS FEES; \$1,900 COSTS

MOTION FOR REHEARING FILED: 8/27/97

MANDATE ISSUED: 11/12/97

BEFORE McMILLIN, P.J., HERRING, HINKEBEIN, AND KING, JJ.

HINKEBEIN, J., FOR THE COURT:

In January of 1995 the Circuit Court of Washington County found in favor of Eugene Pope [Pope] on his claims against Southern Security Life Insurance Company, Inc. [Southern Security] and its agent, King T. Evans [Evans]. Pope, however, asserts that the trial court committed reversible error in its rulings relating to punitive damages against Evans and on the matter of attorneys' fees. Pope appeals to this Court on the following grounds:

I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING A DIRECTED VERDICT ON THE ISSUE OF PUNITIVE DAMAGES IN FAVOR OF DEFENDANT KING T. EVANS, SR. AT THE CLOSE OF ALL EVIDENCE?

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO AWARD APPELLANT ATTORNEYS' FEES BASED UPON HIS ATTORNEY'S REGULAR HOURLY RATE MULTIPLIED BY THE NUMBER OF HOURS OF WORK REASONABLY AND NECESSARILY EXPENDED ON THE CASE?

Holding both of Pope's assignments of error to be of merit, we reverse the judgment of the lower court and remand for a new trial on the issue of punitive damages against Evans, and for the trial court to make on-the-record findings as to a reasonable amount of attorneys' fees. The judgment of the circuit court as to actual damages against Evans and punitive damages against Southern Security is affirmed.

FACTS

In June of 1990 Pope informed Evans, his insurance agent, that he wished to procure a \$500 burial

insurance policy. Evans assured Pope that he would take care of the necessary paper work and obtain the coverage that Evans desired. Pope tendered \$13.70 per month to Evans in payment of the policy premium for the months of June, July, and August. Evans acknowledged receipt of these premiums by initialing a premium receipt card retained by Pope. After his mother passed away on August 4, 1990, Pope contacted Evans to make a claim on the \$500 burial insurance policy. After discussing the matter with Pope, Evans contacted Southern Security regarding the amount of burial insurance reflected in their records for Pope. Southern Security informed Evans that they had neither any record of the \$500 policy in question, nor any record indicating that Evans ever applied for such policy.⁽¹⁾

Evans subsequently admitted that he had failed to make an application for the policy for which Pope was remitting premiums, and that he had also failed to forward Pope's monthly premiums to Southern Security. Evans offered to refund to Pope \$41.10, representing the total amount of the premiums he had collected from Pope. Pope, however, refused Evans' refund offer and instead filed suit against Evans and Southern Security, seeking both actual and punitive damages for the defendants' actions. At trial the court directed a verdict in favor of Pope for \$500 in actual damages caused by Evans' negligence. The court also directed a verdict in favor of Evans as to the issue of punitive damages arising out of his negligence in dealing with Pope. The court then submitted to the jury the separate issue of Southern Security's individual liability for punitive damages for failing to adequately investigate Pope's claim. The jury returned a verdict of \$10,000 in punitive damages against Southern Security. It is from this litigation that the instant appeal is taken.

ANALYSIS

I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING A DIRECTED VERDICT ON THE ISSUE OF PUNITIVE DAMAGES IN FAVOR OF DEFENDANT KING T. EVANS, SR. AT THE CLOSE OF ALL EVIDENCE?

Pope contends that the trial court committed reversible error in directing a verdict in favor of Evans as to the issue of punitive damages. Pope asserts that Evans' conduct in failing to procure the burial insurance policy that Pope remitted premiums for "amounted to an intentional wrong, insult, abuse or such gross negligence" as to warrant submitting this issue to the jury for consideration of punitive damages. Pope claims that "[a] material dispute exist[ed] on important fact[s] concerning Evans' actions and conduct," and that Evans "repeatedly lied that the new insurance policy had been issued." Evans and Southern Security respond by asserting that whether a plaintiff is entitled to a jury instruction on punitive damages is a matter committed to the sound discretion of the trial judge, and that a punitive damages instruction should only be given where a reasonable trier of fact could have found either malice or gross neglect/reckless disregard by the defendant. The defendants conclude by arguing that the evidence presented by Pope was not sufficient to justify a punitive damages instruction being given to the jury; therefore, the trial court was correct in directing a verdict in favor of Evans.

In ruling on a motion for directed verdict the time-honored standard to which this Court is bound is as follows:

The [c]ircuit [c]ourt -- and this Court on appeal -- are required to consider the evidence in the light

most favorable to the plaintiffs . . . giving those plaintiffs the benefit of all favorable inferences that may reasonably be drawn from the evidence. Unless the evidence is so lacking that no reasonable jury could find for the plaintiffs, the motion must be denied.

Lewis v. Griffith, 664 So. 2d 177, 188 (Miss. 1995) (quoting *Wall v. Swilley*, 562 So. 2d 1252, 1256 (Miss. 1990)). Regarding punitive damages, we note that they are warranted only where the prevailing plaintiff has demonstrated that the defendant's actions amounted to "a willful or malicious wrong or the gross, reckless disregard for the rights of others." *Valley Forge Ins. Co. v. Strickland*, 620 So. 2d 535, 540 (Miss. 1993). Furthermore, punitive damages are appropriate only in extreme cases and should be allowed "only with caution and within narrow limits." *Beta Beta Chapter of Beta Theta Pi Fraternity v. May*, 611 So. 2d 889, 894 (Miss. 1992).

After reviewing the evidence presented by Pope, this Court is convinced that whether Evans' actions were willful or malicious was indeed a legitimate question of fact that should have been presented to the jury via a jury instruction as to punitive damages. At trial Pope testified that Evans told him that the requested coverage was in force and that he would get the policy to Pope "as soon as he got it back [from Southern Security]." Pope also indicated that on one occasion he telephoned Evans to inquire as to the status of the policies, but that Evans' wife said that he was not at home. Pope stated that he left a message for Evans but that Evans never returned the call. Pope also stated that when he confronted Evans about the failure to procure the policy, Evans told him that he [Pope] "didn't know much about insurance" and that he [Evans] could cancel Pope's insurance. Pope then testified that Evans told him to take him to court "if you think I did you so wrong."

Considering this evidence in the light most favorable to Pope it is clear that the directed verdict requirement, for the evidence to be so lacking that no reasonable jury could find for the plaintiffs, was not satisfied in this case. It is the opinion of this Court that a reasonable jury could have found that Evans' conduct toward Pope rose to the level of willful or malicious behavior so that punitive damages would have been appropriate. Because of this material issue of fact, we hold that the lower court committed reversible error in granting the directed verdict in favor of Evans as to the issue of punitive damages.

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO AWARD APPELLANT ATTORNEYS' FEES BASED UPON HIS ATTORNEY'S REGULAR HOURLY RATE MULTIPLIED BY THE NUMBER OF HOURS OF WORK REASONABLY AND NECESSARILY EXPENDED ON THE CASE?

Pope contends that the trial court's failure to make specific on-the-record findings to substantiate its rejection of the fee claimed by his attorney constitutes reversible error. Pope argues that the trial court must provide a clear and concise explanation of its reasons for arriving at the amount of fee awarded. Evans and Southern Security respond that the amount of attorneys' fees awarded was reasonable and supported by the evidence before the judge. The defendants contend that, assuming the fee awarded was reasonable as to the amount and was supported by the evidence before the judge, the awarding of attorneys' fees is a matter within the sound discretion of the trial court and should not be disturbed in the absence of a manifest abuse of discretion.

We have reviewed the transcript of the post-trial hearing at which Pope was awarded attorney fees in

the amount of \$3000 and expenses of \$1900. In reviewing the transcript, we note that it does reflect that the trial judge provided some on-the-record explanation as to the evidence he considered. However, there seems to be no specific determination as to the method by which the attorneys' fees were awarded. This Court has held that "the amount of attorneys' fees should be supported by credible evidence and should not be plucked out of the air." *Dynasteel Corp. v. Aztec Indus.*, 611 So. 2d 977, 986 (Miss. 1992). Therefore, some method of calculating the amount of attorneys' fees awarded should have been made part of the record.

It has been stated in several prior cases that the amount of fee awarded depends on the consideration of several factors, including "the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, as well as the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case." *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982). These factors necessarily should have been considered by the trial judge in determining his award of attorneys' fees.

We conclude that the trial judge abused his discretion in failing to articulate in to the record a detailed explanation as to why he rejected Pope's claim for \$80,000 in attorneys' fees, or precisely how he concluded that \$3000 was appropriate under the circumstances. Because the trial judge failed to articulate his reasoning into the record and failed to state which evidence he found persuasive and how he arrived at the particular dollar amount he did, we must reverse and remand for a hearing on this issue. At the hearing on attorneys' fees the trial judge shall dictate his findings into the transcript as to how and why he arrived at whatever amount he finds to be a reasonable attorneys' fee under the facts at bar.

THE JUDGMENT OF THE CIRCUIT COURT OF WASHINGTON COUNTY IS AFFIRMED IN PART AND REVERSED AND REMANDED IN PART FOR NEW TRIAL IN ACCORDANCE WITH THIS OPINION. THE JUDGMENT OF THE CIRCUIT COURT

AS TO ACTUAL DAMAGES AGAINST EVANS AND PUNITIVE DAMAGES AGAINST SOUTHERN SECURITY IS AFFIRMED. COSTS ARE TO BE DIVIDED EQUALLY BETWEEN THE APPELLANT, POPE, AND THE APPELLEES, EVANS AND SOUTHERN SECURITY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

1. It is undisputed that Southern Security wrote other burial insurance policies for Evans, for an aggregate of \$1100 in coverage. Southern Security promptly paid Evans' claim on these policies, which were not implicated by the issues before the lower court or this Court on appeal.