

[1] It is to be noted that the real estate appraiser, Mr. Manier, was shown to have had knowledge of the area at the time period involved and that he was not asked to simply deduct the "cost to cure" from the sales price to arrive at his conclusion and, thus, the mere fact that he considered the "cost to cure" as an element in making his appraisal did not render his testimony inadmissible, nor did it destroy the effect of his opinion.

[2] As is stated in Nichols, *Law of Eminent Domain*, Sec. 14.247, the general rule is that as is the case in other elements of damage, the actual or estimated cost of specific items of construction or reconstruction are not recoverable as such, but may be utilized as elements bearing upon the market value of the property in question.

Counsel for the plaintiffs cite several cases from other jurisdictions bearing upon this question, among which is *Steiger v. City of San Diego*, 163 Cal.App.2d 110, 329 P.2d 94 (1958), where the landowners sought to recover damages resulting from the construction of a drainage system which caused water to erode their property. In that case it was said:

"The measure of damages is not the cost of installation of a pipe to carry the water through plaintiffs' land; however it properly may be considered by the trial court for evidence of the decrease in market value."

To like effect is *State v. Bruening*, 326 S.W.2d 305 (Mo.1959), and *Currie v. Glascock*, 212 S.W. 533 (Tex.Civ.App.).

Most authorities seem to hold that the "cost to cure," while not an element of damages in itself, nevertheless, may be considered as relevant to whether there was any diminution in value to the property because of the taking or because of the encumbrance.

[3] Counsel for appellant argues that because the plaintiffs were able to sell their property at a profit some time after the purchase, they should not be entitled to recover more than nominal damages since the burden is on them to show that the

existence of the easement has inflicted upon them an actual loss.

This question was before the Court of Appeals on the prior appeal and this position was definitely rejected by the Court which, as is seen from the quotation from the Opinion of the Court hereinabove, it was said:

"The determinative date of damage is the date of plaintiffs' purchase, January 16, 1973, and not the date of sale by plaintiffs to the Remicks in August 1974."

In Thompson on Real Property, Section 3158, (1962), the general rule is stated to be:

"The measure of damages is not affected by a rise in the value of the land involved." Citing *North v. Brittain*, 154 Tenn. 661, 291 S.W. 1071.

It is to be noted that there is no evidence in this record which disputes or is contrary to the opinion evidence offered by Mr. Manier.

For the reasons hereinabove stated, the assignments of error are overruled and the judgment of the Chancellor is affirmed.

AFFIRMED.

TODD and DROWOTA, JJ., concur.



**Robbie H. VAUGHN, Administratrix of the Estate of William Vaughn, Deceased, Plaintiff-Appellee,**

v.

**AMERICAN HERITAGE LIFE INSURANCE COMPANY et al., Defendant-Appellant.**

Court of Appeals of Tennessee, Middle Section.

July 28, 1978.

Certiorari Denied by Supreme Court Oct. 30, 1978.

Beneficiary brought suit to recover \$6,000 value of credit-life insurance policy

plus statutory penalty. The Chancery Court, Sumner County, Edward M. Turner, Chancellor, entered judgment awarding beneficiary \$6,000 but denying penalty, and both parties appealed. The Court of Appeals, Todd, J., held that: (1) where bank was agent of credit life insurer, bank, as part of loan insurance agreement, agreed with insured that he would be insured for 91 days, the bank and insurance agency accepted insured's money in payment of 91 days of insurance and allowed the insured to believe he was insured for 91 days, the insurer was bound to provide coverage for 91 days, even though the certificate of insurance, when issued, stated the term of insurance as "three months" rather than "91 days"; (2) refusal of life insurer to pay claim in timely fashion was not shown not to be in good faith where the insured died on the ninety-first day of coverage, and thus the insurer was not liable for statutory penalty for failure to make timely payment, and (3) beneficiary, who obtained judgment on insurance policy was entitled to interest at 6% upon amount recovered from date of accrual of her right to sue until date of judgment, and at 8% from date of judgment until date paid.

Modified and rendered.

#### 1. Time ⇐5

Term of months ends on same day of terminal month as day of initial month on which term began, unless day in question does not occur in terminal month, as, for example, February 30, in which event the term ends on last day of terminal month.

#### 2. Insurance ⇐73.1

Bank making loan to insured, who was insured under credit-life policy obtained in connection with such loan and with assistance of the bank, was agent of life insurer. T.C.A. § 56-705, Pub.Acts 1907, c. 442; § 56-801, subd. A, Pub.Acts 1951, c. 83.

#### 3. Insurance ⇐178.1

Where bank was agent of credit-life insurer, bank, as part of loan insurance agreement, agreed with insured that he would be insured for 91 days, the bank and

insurance agency accepted insured's money in payment of 91 days of insurance and allowed the insured to believe he was insured for 91 days, the insurer was bound to provide coverage for 91 days, even though the certificate of insurance, when issued, stated the term of insurance as "three months" rather than "91 days."

#### 4. Insurance ⇐178.1

Expression "three months" in certificate of insurance issued by credit life insurer to bank-agent of life insurer, when interpreted in light of dealings between insured and the agents of the insurer with respect to loan term, application term and premium term, meant the insured was provided with 91 days of life insurance coverage.

See publication Words and Phrases for other judicial constructions and definitions.

#### 5. Insurance ⇐602.5

Refusal of life insurer to pay claim in timely fashion was not shown not to be in good faith where insurer was bound to provide credit-life coverage for 91 days, certificate of insurance erroneously stated that term of insurance as three months, and the insured died on the ninety-first day of coverage, and thus the insurer was not liable for statutory penalty for failure to make timely payment. T.C.A. § 56-1105, subd. A.

#### 6. Interest ⇐31

Beneficiary who obtained judgment on credit-life insurance policy was entitled to interest at 6% upon amount recovered from date of accrual of her right to sue until date of judgment, and at 8% from date of judgment until date paid. T.C.A. §§ 47-14-101, 47-14-104, 47-14-107.

Arthur E. McClellan, Gallatin, for plaintiff-appellee.

David J. White, Nashville, for defendant-appellant.

#### ABRIDGED OPINION

TODD, Judge.

*With the concurrence of participating judges, the original opinion has been abridged for publication.*

This is a suit to recover the \$6,000.00 value of a credit life insurance policy plus statutory penalty. The Chancellor awarded judgment for \$6,000.00 but denied penalty. Both parties appealed.

The material facts are uncontroverted.

On February 10, 1976, at 3:30 p. m., William Vaughn applied to Commerce Union Bank for a loan for 91 days to be due on May 11, 1976. Simultaneously, Vaughn made application to the defendant for a \$6,000.00 credit life insurance policy upon his own life for a period of 91 days and paid an advance premium computed on a daily rate for 91 days.

The loan was granted as requested; and the insurance application and premium were accepted; but the certificate of insurance, when issued, stated the term of insurance as three months, rather than 91 days as requested.

William Vaughn died on May 11, 1976, at 1:15 a. m.

The appeal of the defendant is based upon the theory that the contract of insurance expired by its terms prior to the death of the insured.

Since the year 1976 was a "leap year" wherein there were 29 days in the month of February, a period of 91 days extends from 3:30 p. m. on February 10, 1976, to 3:30 p. m. on May 11, 1976. By such measurement, the policy was in force at the time of death, 1:15 a. m., May 11.

Nevertheless, defendant insists that the term of the policy was measured in months, rather than days so that the three month term of insurance began on February 10 and ended three calendar months later on May 10, before the death of deceased.

[1] The authorities generally hold that a term of months ends on the same day of the terminal month as the day of the initial month on which the term began, unless the day in question does not occur in the terminal month (as, for example, February 30) in which event the term ends on the last day of the terminal month. *Needham v. Moore*, 200 Tenn. 445, 292 S.W.2d 720 (1956); 86 C.J.S. Time § 13(9), pp. 862, 863, note 43.

If the loan in connection with which this insurance was procured had been for a term of three months, then its due date would have been the day in May corresponding to the date of the loan, that is, May 10. A three month insurance policy issued on February 10 would terminate at midnight on May 10. However, the preceding abstractions should not apply to the present case because of its peculiar facts.

At the trial of the case there were only two witnesses, the plaintiff and W. L. Simpkins, Jr., both of whom testified at the instance of the plaintiff.

Plaintiff testified that she joined her husband in executing a 91 day note for purchase of a home; that credit insurance was obtained; and that all of the note had been paid except \$6,000.00, the amount involved in this suit.

Mr. Simpkins testified that he owned and operated the Rebel Insurance Agency which specialized in credit life insurance; that Commerce Union Bank was a sub-agent for the purpose of selling credit life insurance and received a percentage of the premium paid on all policies sold by the bank; that, in the present case, the bank sent to the Rebel Agency a "requisition form" dated February 10, 1976, ordering that deceased be insured for 91 days; that Rebel Agency received \$37.68, the correct premium for 91 days; that Rebel Agency issued a certificate of insurance for three months and sent same to Commerce Union Bank.

Under the foregoing testimony, which is uncontradicted, the plaintiff is entitled to recover.

[2] Commerce Union Bank was clearly the agent of defendant. T.C.A. §§ 56-705, 56-801 A.

[3] The circumstances produce a compelling inference that the bank agreed with deceased that he would be insured for 91 days, the term of the loan, and that the bank, using the funds of deceased (from the loan), paid the Rebel Agency for 91 days of insurance. There is no evidence that the three months certificate of insurance was

ever delivered to or seen by deceased. The presumption would be that the certificate was retained by the bank, which was the primary beneficiary of the insurance.

The agents of the defendant (the bank and the Rebel Agency) accepted deceased's money in payment of 91 days insurance and allowed deceased to believe he was insured for 91 days. So far as deceased knew he was insured for 91 days. The undisclosed preparation of a three months policy by one agent (Rebel) and delivery of same to another agent (the bank) can have no effect upon the original understanding between the bank and deceased.

[4] As an alternative means of reaching the same result, the three months provision of the policy should be viewed in the light of the dealings between the parties (loan term, application term, premium term). The parties beyond peradventure of a doubt intended that the policy provision of three months should mean 91 days. The expression, "three months", in the policy should be interpreted to mean 91 days, or the policy should be reformed to state the true intention of the parties. In either event, the result is the same: plaintiff is entitled to recover the amount of the policy.

The assignments of error of defendant-appellant are respectfully overruled.

[5] The plaintiff-appellant complains of the failure of the Chancellor to award penalty as provided in T.C.A. § 56-1105 A, which reads as follows:

"56-1105. Additional liability upon insurers for failure to pay promptly insurance losses when refusal is not in good faith.—A. The insurance companies of this state, and foreign insurance companies and other persons doing an insurance business in this state, in all cases when a loss occurs and they refuse to pay the same within sixty (60) days after a demand shall have been made by the holder of the policy on which said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss and interest thereon, a sum not exceeding twenty-five per cent (25%) on the liability for said

loss; provided, that it shall be made to appear to the court or jury trying the case that *the refusal to pay said loss was not in good faith*, and that such failure to pay inflicted additional expense, loss, or injury upon the holder of said policy; and, provided, further, that such additional liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss, and injury thus entailed." (Emphasis supplied)

Even though the present suit was probably the result of the inexact handling of the insurance by the agents of defendant, this Court cannot say that the refusal to pay was not in good faith.

Moreover, the only damage or additional expense shown by the evidence or relied upon in brief is the additional interest accrued upon the loan due the Commerce Union Bank. The rate of such interest is not shown, but the aggregate of same will largely be reimbursed to plaintiff by allowance of interest upon the policy from due date to date of judgment and of statutory interest upon the judgment from its date of rendition to date of payment.

[6] Plaintiff is entitled to interest at 6% upon the recovery from the date of accrual of her right to sue until the date of judgment, T.C.A. §§ 47-14-104, 47-14-107, and at 8% from the date of judgment until paid, T.C.A. § 47-14-101.

It appears that demand was first made on August 31, 1976, and that payment was due within 60 days thereafter. Accordingly, plaintiff is entitled to interest at 6% on \$6,000.00 from November 1, 1976, to July 22, 1977, the date of the Chancellor's decree.

The decree of the Chancellor is therefore modified to award judgment for \$6,000.00, plus interest at \$258.00, or a total of \$6,258.00. As modified, the decree of the Chancellor is affirmed by this Court, resulting in a judgment in this Court in favor of plaintiff and against defendant for \$6,258.00, plus 8% interest from July 22, 1977, to the date of the entry of judgment in this Court.

As provided in the decree of the Chancellor, the judgment may be paid to the Commerce Union Bank to the extent of its prior interest in the policy.

Modified and rendered.

SHRIVER, P. J., and LEWIS, J., concur.



STATE of Tennessee ex rel. Eddie SHAW,  
Commissioner, Department of Transportation, Plaintiff-Appellee,

v.

Ida Lou Carter SHOFNER, City of Fayetteville, Tennessee, Edison Burton d/b/a Three Point Gulf, Defendants,

J. C. Moores, d/b/a Moores Oil Co.,  
Defendant-Appellant.

Court of Appeals of Tennessee,  
Middle Section.

July 28, 1978.

An eminent domain proceeding was brought to assess compensation to owner, lessee and sublessee of filling station for taking a part of filling station and restricting access to property by erection of curbs and sidewalks. The Circuit Court, Lincoln County, Robert J. Parkes, J., entered judgment upon jury award of \$10,000 incidental damages to lessor and \$2,000 damages to lessee and lessee appealed. The Court of Appeals, Todd, J., held that: (1) jury is not required to accept or reject in toto theory of either party to eminent domain proceeding, but may arrive at its own concept of truth and justice from evidence; (2) Court of Appeals' dissatisfaction with \$2,000 award to lessee of filling station did not rise to standard of "shocked conscience" or "gross inadequacy" or obvious prejudice or caprice of jury, thus award would not be reversed

on those grounds, and (3) new trial would not be granted since \$12,000 aggregate award for incidental damages was not so grossly inadequate as to shock conscience of Court of Appeals.

Affirmed.

#### 1. Eminent Domain ⇌221

In affixing just compensation for partial taking of property which diminished usefulness of property as filling station, jurors were competent to make sound judgment upon convenience or inconvenience of filling station and probability that public would patronize it, without benefit of competent expert testimony.

#### 2. Eminent Domain ⇌131

Measure of damages for taking is fair value of property (or interest therein) taking into consideration all of its usefulness for all purposes.

#### 3. Eminent Domain ⇌221

Jury is not required to accept or reject in toto theory of either party in eminent domain proceeding, but may arrive at its own concept of truth and justice from evidence.

#### 4. Eminent Domain ⇌262(4)

Even if Court of Appeals is not satisfied with amount of verdict in eminent domain proceeding, it has no authority to reverse for new trial, nor to suggest an additur to correct failure of trial judge to do so. T.C.A. § 20-1330.

#### 5. Eminent Domain ⇌149(7)

In eminent domain proceeding, Court of Appeals' dissatisfaction with \$2,000 award to lessee filling station by reason of restricted access did not rise to standard of "shocked conscience" or "gross inadequacy" or obvious prejudice or caprice of jury, thus award would not be reversed on those grounds.

#### 6. Eminent Domain ⇌157

"Unitary rule," which is applicable in eminent domain proceeding, is that compensation for condemnation cannot exceed fair market value of property taken, and total