

GINTER v. NORTHWESTERN MUTUAL LIFE INSURANCE CO.  
576 P. Supp. 627 (E.D. Ky. 1984)

BERTELSMAN, DISTRICT JUDGE. This matter is before the court on a motion for a pretrial evidentiary ruling on the question of whether character evidence is admissible in a civil case under F. R. Ev. 404(a).

#### Facts

This is an action by the beneficiary of a life insurance policy against the insurance company which issued the policy. There is no dispute that the plaintiff's deceased husband took out a policy on his life with the defendant insurance company and that the premiums were properly paid. However, the insurance company defends on the ground that there were material omissions from the application. More particularly, the insurance company contends that the insured decedent failed to disclose that he was under treatment by a psychiatrist for depression. Plaintiff responds that the application was completely answered and that any inaccuracies were not a material consideration in the issuance of the policy.

The plaintiff in the pending motion has requested a ruling from the court that evidence is admissible from witnesses who would testify that the deceased insured was a man of good character who would be unlikely to submit a fraudulent or erroneous application.

#### Analysis

It may be noted that the text [of Rule 404(a)] does not specifically state that evidence of a relevant character trait is not admissible in civil cases. Nevertheless, this result seems to be implicit by the use of the terms "accused," "prosecution," "victim," and "crime."

Plaintiff argues that certain recent decisions militate against the conclusion that the rule of exclusion of character trait evidence from civil cases is absolute.

Most particularly, plaintiff cites *Crumpton v. Confederation Life Insurance Company*, 672 F.2d 1248 (5th Cir. 1982). This was a case somewhat similar to the case at bar. In *Crumpton*, the appellate court affirmed the admission of evidence of a peaceable character of an insured who had been shot to death. Whether or not the death was "accidental" within the meaning of the policy depended on whether the insured had approached the woman who shot him with the intent to molest her:

The court advanced several grounds for admitting the evidence, one of which was that it felt that the decedent's character was at issue. The court also stated, however, that it felt that "the unusual circumstances here placed the case very close to one of a criminal nature."

The court cited, as does the plaintiff in the case at bar, the decision of the Tenth Circuit in *Hackbart v. Cincinnati Bengali, Inc.*, 601 P.2d 516 (10th Cir.1979). The Crumpton court read *Hackbart* as implicitly approving the admissibility of evidence of a character trait in civil suits which are "akin to a criminal case." The Crumpton court stated:

"Thus by implication, when evidence would be admissible under Rule 404(a) in a criminal case, we think that it should also be admissible in a civil suit where the focus is on essentially criminal aspects, and the evidence is relevant, probative, and not unduly prejudicial."

With respect, this court must disagree with the Crumpton decision. It seems beyond peradventure of doubt that the drafters of F. R. Evi. 404(a) explicitly intended that all character evidence, except where "character is at issue" was to be excluded. After an extensive review of the various points of view on this issue, the Advisory Committee expressly stated, "(i)t is believed that those espousing change (from the view of excluding character evidence in civil cases) have not met the burden of persuasion. " This language leads to the inevitable conclusion that the use in Rule 404(a) of the terms applicable only to criminal cases was not accidental.

This court believes that the language of the rule, as originally drafted by the Advisory Committee and ultimately approved by Congress, has the effect of a statute in excluding the proffered evidence here, even though the case may be considered as analogous to a criminal prosecution. (Here some of the elements of mail fraud or larceny by trick are arguably present). The court regards itself as not having any discretion in this matter by reason of the explicit language of the rule,[\*] since it is clear that this case is not one where character is at issue.

Therefore, the preliminary motion seeking admissibility of the evidence must be denied. The proffered evidence will be excluded at trial.

Order accordingly.

11 So that there may be no misunderstanding, the court will state that this option has no applicability to P. R. Ev. 404(b), which does apply to civil cases.