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SUPREME COURT OF KENTUCKY
2008-SC-00127-DG

DR. GHASSAN HAJ-HAMED **APPELLANT**

APPEAL FROM COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
2006-CA-000200-MR AND 2006-CA-000392-MR

V.

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APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
CASE NO. 03-CI-00653

OHIC INSURANCE COMPANY **APPELLEE**

BRIEF OF APPELLANT

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CERTIFICATION

This is to certify that a true and accurate copy of the foregoing Brief has been served on this 13 day of April, 2009 upon Robert C. Welleford, Court Square Building, Suite 100, 269 West Main Street Lexington, Kentucky 40507; Judge Julie Ward, Campbell County Courthouse, Fourth & York Streets, Newport, Kentucky 41071; and Thomas Calme, Clerk, Campbell Circuit Clerk, Fourth & York Streets, Newport, Kentucky 41071; and the original to the Clerk, Supreme Court of Kentucky, State Capitol Building, Room 209, 700 Capitol Avenue, Frankfort, Kentucky 40601. I further certify that the record on appeal has not been withdrawn.

ROBERT E. BLAU

INTRODUCTION

Thank you for agreeing to review this case. The issues presented in this appeal apply to any person or entity who has purchased an insurance policy of any kind. The question is, Did OHIC Insurance Company, through its agents and employees negligently and intentionally cancel a policy of insurance issued to Riverside Medical Center, Dr. Ghassan Haj-Hamed and 11 other physicians? The answer is clearly yes. In accordance with century old case law the Appellant is entitled to all tort damages awarded by the jury and is entitled to a trial on the issue of exemplary damages.

ORAL ARGUMENT

The Appellant would like oral argument. Appellant has learned that confusion may occur due to the intertwining of contract law with tort law.

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STATEMENT OF THE CASE

The Appellant, Dr. Ghassan Haj-Hamed, was forced to sue his medical malpractice insurance provider, OHIC Insurance Company, and his insurance agent, USI Midwest, for negligently, wrongfully and illegally cancelling his personal and group malpractice insurance coverage. Riverside Medical Center, Dr. Ghassan Haj-Hamed and Dr. Husam Hamed filed a Complaint in the Campbell Circuit Court on May 22, 2003. Following discovery Appellee, OHIC, moved for Summary Judgment on the allegations of breach of contract, warranty, and fraud. The Motion was granted on these issues. (CR 813-814) However, the Court allowed Appellant's claim to go to trial on negligence, breach of statutory duties, administrative duties, and bad faith against both OHIC and USI Midwest.

The trial proceeded, and following the conclusion of Appellant's proof, all parties moved for directed verdict. The Court granted OHIC's Motion for directed verdict on bad faith determining there was no breach of contract and therefore no underlying bad faith claim. (11/16/05 VCR 10:36:20; 11:28:27 to 11:22:00) The Court also granted USI Midwest's Motion and dismissed them. The Court also dismissed the claims of Riverside Medical Center.

The Appellee, OHIC, then presented their defense to the claims and rested. Once again Motions for directed verdict were made by both parties but overruled.

The case was then argued to the jury which resulted in a verdict of $175,000.00 in favor of Dr. Ghassan Haj-Hamed. The jury found in favor of Dr. Husam Hamed, but did not award any damages. The jury found that OHIC was 90% at fault for violating its duty of ordinary care owed to Dr. Ghassan Haj-Hamed and attributed 10% fault for breach of the duty of care owed by Dr. Ghassan Haj-Hamed. Judgment was entered on November 21, 2005 in the amount of

$157,500.00 in favor of Dr. Ghassan Haj-Hamed. (CR 1306-1315)

The Appellee, OHIC's counsel, did not object to the jury instruction or the measure of damages provided therein. In fact, the Judgment entered by the Court specifically states "....The Defendant, OHIC Insurance Company, did not object to the Court's instructions....." (CR 1307 p. 2 of the Judgment) Furthermore, on the record in response to the Court providing copies of the proposed instructions to counsel, trial counsel for Respondent, Mr. Fuchs states, "I think we can live with that." (11/16/05 VCR 1:24:40)

The facts and exhibits introduced at trial support the jury's verdict finding that OHIC negligently cancelled its policy issued for the benefit of Dr. Ghassan Haj-Hamed. The exhibits also provide proof sufficient for a jury to conclude that OHIC violated Kentucky statutes and Administrative Regulations regarding issuance and cancellation of insurance policies.

The relevant facts, testimony, and exhibits presented at trial all clearly prove Appellee breached the standard of care required of the insurance company in cancelling a policy of insurance and violated KRS 304.20-320(2)(b) and KRS 304.20-33(3).

Dr. Ghassan Haj-Hamed at trial testified that he obtained his medical degree in Demascus, Syria, attended a two year post graduate training, and then moved to Flint, Michigan in July of 1993. (11/15/05 VCR 2:20:28) He trained in Michigan for about one year and then transferred to Good Samaritan Hospital in Cincinnati, Ohio. He completed a three year residency program in Internal Medicine while at Good Samaritan. During his residency at Good Samaritan, he was elected by his fellow residents and teaching physicians to be the Chief Resident. He tested to become board certified in Internal Medicine in 1997. (11/15/05 VCR 2:20:00 to 2:21:00) Upon being Board Certified, he purchased a retiring physician's general practice office

located in Bellevue, Kentucky and also opened an office in the rural community of Falmouth, Kentucky. Dr. Hamed also in September of 1999 opened the first Urgent Care Center in Northern Kentucky. (11/15/05 VCR 2:24:00) In May of 2000, he purchased another doctor's practice in Forest Park, Ohio and a practice in Cold Spring, Kentucky. In 2001, he opened another Urgent Care in Florence, Kentucky. (11/15/05 VCR 2:24:58)

Thus, at the time he applied for insurance with OHIC Insurance Company, he had (5) five different office locations and employed approximately (12) twelve physicians. (11/15/05 VCR 2:26:03 and Plaintiff's Trial Exhibit 1)[1]

Unfortunately, on September 25, 2002 all of Dr. Hamed's hard work and efforts began to crumble. He was criminally charged with prescribing medication without a lawful purpose. The charges arose from his Falmouth, Kentucky office where he operated a general practice and pain management clinic. (11/15/05 VCR 2:40:18)

OHIC Insurance Company Executive Vice President, James Baldyga, saw the TV news coverage of Dr. Hamed's arrest and immediately set out to cancel the OHIC policy issued for all of Dr. Hamed's office locations and for all of the doctors insured by the policy. (11/15/05 VCR 1:13-2:02) Mr. Baldyga admitted that the cancellation notice he sent was because of the "bad publicity." (11/15/05 VCR 1:13-2:02) He also acknowledged that claims could be anticipated against the doctor, that disciplinary action would likely be brought against Dr. Ghassan Haj-Hamed and that was in part, the reason for canceling the policy. (11/15/05 VCR 1:13-2:02) At the time Mr. Baldyga set out to cancel the policies, he was unaware the finance department of

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[1]All Trial Exhibits referenced are attached in Appendix II and are in chronological order and will be referred to in this brief by the Trial Exhibit number. All the Exhibits are referenced in the Circuit Court record as brown folder M.

OHIC had sent out a notice of cancellation to Dr. Hamed, a/k/a Riverside Medical Practice, due to non-payment of premium. This Notice was sent on August 23, 2002 and stated the policy would be cancelled effective September 6, 2002. (See Plaintiff's Trial Exhibit 4) This notice was intended to comply with the 14 day notice required by KRS 304.20-320(2)(b).

The Plaintiff's Trial Exhibit 4 was the first "Notice of Cancellation" sent by OHIC. This Notice referenced cancellation of policy number "01"-9999-6404 and referred to Ohio. The Notice also said "If payment of $19,461.00 is received in OHIC's office prior to the effective date of cancellation then coverage will remain in effect."

Dr. Hamed's office mailed OHIC the full base premium amount due on the "02"-9999-6404 policy which was in the amount of $16,642.00. The check was received by OHIC in their lockbox and cashed on September 3, 2002; this being three days before the policy was to be cancelled. (See Plaintiff's Trial Exhibit 26) The reference to the "01" policy in the notice of cancellation dated August 23, 2002 was more proof Appellee was sloppy, negligent and careless in the administration of its business.

As previously stated, Mr. Baldyga, as Executive Vice President sent a Notice of Cancellation on September 27, 2002, two (2) days after Dr. Hamed was arrested. (See Plaintiff's Trial Exhibit 5). This Notice provided the 75 days notice, which would make the cancellation effective December 11, 2002. (See KRS 304.20-320(2)(b) and KRS 304.20-330(3). The reason stated in the Notice was "discovery of willful or reckless acts or omissions on the part of the named insured." The Notice of Cancellation is Trial Exhibit 5 and was for policy "02"-9999-6404.

It was following this Notice that a flurry of e-mails, faxes and phone calls took place between OHIC, USI Midwest, and Riverside Medical Center, Dr. Ghassan Haj-Hamed, and Riverside's attorney. It was this flurry of correspondence, email and phone calls on which Appellant based his tort claims and his breach of the standard of care claims.

Trial Exhibit 6 came from Appellant's insuring agent, USI Midwest, and was dated 10/02/02. This fax referenced Mr. Baldyga's Notice of Cancellation which was to be effective December 11, 2002. It states:

> "As you know by now, the Ohio Hospital Insurance Company has sent a direct notice of **cancellation as of December 11th** due to the **recent bad publicity and exposure changes**...."

The second paragraph states:

> "More importantly, the Company has past due bills dating back to March and they will be cancelling the group coverage on this Friday..."

This Notice of Cancellation by USI Midwest was clearly in violation of the 14 day notice requirement. The same fax was re-sent on 10/07/02 to the Kentucky business office of Riverside Medical Center at 859/442-8389. (Plaintiff's Trial Exhibit 7)

The Plaintiff's Trial Exhibit 8 was a OHIC memo to USI dated 10/02/02 which states:

> "Please contact the insured and request payment...overnight payment to our street address by Friday, 10/04/02 to avoid cancellation of the policy." Inv.#74705-$1,299.00; Inv. #75858 - $238.00; Inv. #76468 - $69.00; Inv. #75921 - $2,073.00; Inv. #76469 - $2,931.00; Inv. #75886 - $1,445.00, this totals $8,055.00."

The Plaintiff's Trial Exhibit 9, entitled "Activity Log" references a check for $12,898.00, dated 09/20/02. This check was the base premium payment to OHIC for the 2nd quarter on the "02"-9999-6404 policy. (See Plaintiff's Trial Exhibit 27) This check was processed seven (7) days after it was received, 09/27/02, and was returned "refer to marker" due to the Federal attachment

of all of the doctor's personal and business bank accounts. The memo goes on to state the check was being returned to the insured and also advised the policy was **cancelled** as of **10/07/02**. The Plaintiff's Trial Exhibit 10 contradicts Trial Exhibit 9 stating the policy was **cancelled** for non-payment of premiums effective **09/06/02**.

Dr. Hamed, his office manager, Thoraya, and counsel for Appellant all tried to get OHIC to accept a credit card payment to maintain coverage. The request for payment by credit card was denied allegedly due to the account not originally having been established as an automatic credit card payment account. (See Joe Vonderhaar testimony, 11/15/02 VCR 10:43) This was argued at trial to be a ruse to avoid having to maintain coverage for the doctors.

The Doctor, after discovering OHIC had no intention of maintaining insurance for himself and the group, requested USI Midwest to obtain alternative coverage through a different insurance company. USI, through Joe Vonderhaar, informed the doctors that they did not have an alternative market. (See Plaintiff's Trial Exhibit 11) The request for insurance from Pro Assurance and GE Medical Practitioners were denied. (See Plaintiff's Trial Exhibit 13) To add insult to injury, the doctors request for OHIC to provide "Extended Reporting Practitioner Coverage" (ERP) also known as ("tail coverage") was denied.

The Defendant OHIC knew this would cause a hardship on all of the doctors, not just Dr. Ghassan Haj-Hamed. In Trial Exhibit 15, there are two statements of significance. This Exhibit is a memo from Joe Vonderhaar dated 10/10/02. It states: "**My concern ... with a gap in coverage exceeding 30 days it will be very difficult for them to obtain prior acts coverage.**" The memo also states: "I spoke with Melissa and she reviewed this account with Jim Baldyga (VP of Underwriting) who said because the policy cancelled for **non-payment, we do not have**

to provide ERP offers."

This memorandum prompted Joe Vonderhaar to send a letter by certified mail to Dr. Hamed and was dated October 11, 2002. (See Plaintiff's Trial Exhibit 16) The letter states as follows:

"Dear Dr. Hamed,

The Ohio Hospital Insurance Company has cancelled your professional liability coverage, due to 'non payment' of premium. The company mailed this cancellation notice on August 23rd (see attached copy). This cancellation will over-ride the cancellation mailed on September 27th for underwriting purposes.

Since the coverage was cancelled for 'non-payment' the Ohio Hospital Insurance Company will not be in a position to offer an 'extending reporting form' (Tail coverage) and they have officially closed their files back to September 6, 2002 (see policy form #OPRO003).

We have officially closed our file and no coverage has been replaced. If the group would like to meet with us to discuss the next step, please call our office to arrange a meeting.

Thank you for your past business.

Sincerely,

Joe Vonderhaar
Vice President"

However, despite sending out this "Final Cancellation" which "over-rides" the September 27th notice and makes this cancellation retroactive to September 6, 2002 no one at USI or OHIC could figure out how the premium claimed due in the amount of $19,461.00 was determined. It certainly did not match Trial Exhibit 8, ($8,055.00).

This was confirmed in Trial Exhibit 17 dated 10/14/02 which states "**e-mailed Barb Hernsmen (OHIC) requesting that she send over the documentation supporting the $19,461.00 cancellation**. The invoices originally sent do not add up to $19,461.00." The Plaintiff introduced Trial Exhibit 18 dated 10/15/02 which references a call from the insured wanting to know how OHIC came up with the $19,461.00 figure. The memo notes says "**...when you add this amount together, the amount due OHIC is $8,055.00. This is not close to the $19,461.00 that was stated on the cancellation**."

Also introduced to prove negligence, and breach of statute and bad faith was Trial Exhibit 19. This Exhibit is a series of e-mail memorandums between OHIC, USI employees and Joe Vonderhaar. It is evident from these e-mails that USI was trying to document their file. One memo states, "**I never figured out how to equal the $19K. I came up with 20K. We may want to document this and make sure we agree, based on the bills we had**."

It is quite evident from review of these faxes, e-mails and intra-agency memorandums and invoices that the right hand had no idea what the left hand was doing. However, they united together when they discovered each other's notices and in violation of Kentucky Statutes KRS 304.20-320, 806 Ky. ADC 20:010 and in bad faith wrongfully, negligently, and intentionally cancelled Riverside Medical Center's, Dr. Ghassan Haj-Hamed's and all his physicians' malpractice insurance retroactive to September 6, 2002.

It is also evident from the facts that both policies of insurance, "01"-9999-6404 and "02"-9999-6404, were Kentucky insurance policies. The policies, as Judge Ward correctly ruled, and the Court of Appeals concurred, insured the Riverside Medical practices located in Bellevue, Cold Spring and Falmouth, Kentucky as well as the Cold Spring Urgent Care located in Cold

Spring, Kentucky and the 12 to 14 physicians employed. The policies had Kentucky endorsements. The Kentucky endorsement language mirrors the Kentucky Statutes. The policy clearly insured 5 different business locations all in Kentucky. Furthermore, the notices sent were clearly an attempt to comply with KRS 304.20-320 the 75 day notice and 14 day notice requirements. Finally, the premiums charged were based on Kentucky rates. Specifically, Plaintiff's Trial Exhibit 20 verifies this fact as did the testimony of Joe Vonderhaar. (11/14/05 VCR 3:20 and 11/15/05 VCR 9:55) Also, in response to a question from Judge Ward, OHIC's counsel admitted the policies themselves do not say which state law should apply. (See Judge Ward's ruling on Motion of OHIC at VCR 1:23:11)

The Appellee, OHIC, after the jury verdict and judgment was entered, filed a Motion for Judgment notwithstanding the verdict or in the alternative, for a new trial and remittitur. The Circuit Court overruled the Motion finding the evidence at trial supported the jury verdict and the doctrine of remittitur did not apply.

OHIC appealed to the Court of Appeals and Dr. Ghassan Haj-Hamed cross appealed on the issue of whether the bad faith claim should have been submitted to the jury.

The Court of Appeals on November 16, 2007 rendered an Opinion affirming in part, and reversing and remanding in part on the direct appeal; affirming on cross-appeal.

The Court of Appeals affirmed Judge Ward's determination that Kentucky substantive law was to be applied because the evidence established that Kentucky had the most significant relationship to the transaction and parties. There was no further appeal of this issue.

The Court of Appeals though, reversed and remanded on the damages awarded Appellant and reduced the verdict to $25,000.00 provided in the policy for defense of medical licensure

board proceeding and reduced that by the 10% negligence attributed by Dr. Ghassan Haj-Hamed. The Court, to render its opinion, must have determined that the verdict was palpably and flagrantly contrary to the evidence presented at trial.

The Appellate Court though, affirmed the Circuit Court allowing the case to go to the jury on the negligence claim. The Appellate Court also denied Appellant's Cross Appeal on the issue of whether Appellant proved a bad faith claim and was therefore entitled to exemplary damages.

The Appellant petitioned the Court of Appeals for Rehearing which was denied on January 23, 2008.

A Motion for Discretionary Review was filed with this Court and by Order entered February 11, 2009 this Court granted review.

DID THE COURT OF APPEALS SUBSTITUTE ITS FINDINGS OF FACT CONTRARY TO THE LAW WHICH REQUIRES AN APPELLATE COURT TO REVIEW THE DENIAL OF A DIRECTED VERDICT BY DRAWING ALL REASONABLE INFERENCES IN FAVOR OF NON-MOVANT?

The first issue that was requested to be reviewed is the claimed error in the Court of Appeals factual conclusions. A review of the testimony from the trial establishes the Court of Appeals did not draw all reference in favor of Non-Movant Appellant herein.

The Court of Appeals' Opinion p. 10 held:

> "The record is undisputed that on September 27th, OHIC provided cross-appellant with a 75 day notice that their coverage would be cancelled on December 11th due to their *willful or reckless acts*[,] **and nothing in the records suggests that the notice was waived or otherwise amended by the parties.**" (Emphasis added)

This finding is clearly erroneous and totally without support from any testimony or exhibits introduced at the trial. On the other hand, the record is replete with testimony that OHIC

had no intent to rely on the September 27th letter.

At the trial on November 15, 2005, Joe Vonderhaar, the USI agent for OHIC, testified in reference to Trial Exhibit 16 as follows.

> "Q. This is the letter that says the cancellation will override cancellation notice September 27th, for underwriting purposes, correct?
> A. This is correct.
> Q. What do you mean for underwriting purposes?
> A. The purpose that was put on the cancellation notices from OHIC to the client, to Riverside, which were discovery of willful and reckless acts or omissions on the part of the named insured.
> Q. **So they were withdrawing their, or at the least represented to you, to inform the client they were withdrawing their claim for cancellation for wrongful acts and instead going retroactive to their August notice, correct?**
> A. They were cancelling for nonpayment of premium verses having to cancel for the uh the uh other underwriting concerns." (11/15/05, VCR 10:07:50 to 10:08:48)(Emphasis added)

This letter and testimony was not the only proof that OHIC had no intention to rely on the September 27th letter used by the Court of Appeals as the factual conclusion to support the decision limiting Appellant's damages to the $25,000.00 of coverage provided in the policy for defense of medical licensure proceedings. Plaintiff's Trial Exhibit 9 states: "**Per Barb Hersman at OHIC, the policy was cancelled for nonpayment of premium on September 6, 2002...**" Trial Exhibit 10 includes the same statement. Trial Exhibit 12 states, "**...OHIC has cancelled your policy for nonpayment of premium...**" Trial Exhibit 15 states, "**I spoke with Melissa and she reviewed their account with Jim Baldyga (VP Underwriting) cancelled for nonpayment...**" Trial Exhibit 23 dated February 10, 2003 states, "**Good morning Dr. Hamed policy cancelled for nonpayment September 6, 2002...request for tail coverage prior to becoming an insured of Red Mountain cannot be met...**" Trial Exhibit 24 is Mr. Baldyga's

email to OHIC in-house counsel Mr. Berliner "**...this is the confusion we spoke of insured received two notices of cancellation one for nonpayment, one for material change.**"

The law in Kentucky has been long established to require an insurance company providing notice of intent to cancel a policy to strictly comply with the notice requirements. The case of *Goodin v. General Accident Fire and Life Assurance Corporation, Ltd.* 450 S.W.2d 252, 255 (Ky. 1970) states:

> "Where cancellation is authorized by the insurance contract, there can be a cancellation only upon strict compliance with the provisions of the contract; this appears to be the settled law in this jurisdiction. *General Accident, Fire & Life Assur. Corporation v. Lee*, 165 Ky. 710, 178 S.W. 1025; *Carden v. Liberty Mut. Ins. Co.*, 278 Ky. 117, 128 S.W.2d 169."

The case of *Osborne v. Unigard Indem. Co.* 719 S.W.2d 737, 740 (Ky. App.1986) reaffirmed this long standing principle of law. The *Osborne* Court at p. 740 states:

> "Thus, the questions involved turn upon cancellation of the renewed policy and not expiration of the initial policy. When examining the issue of cancellation, we adhere to the long standing rule that cancellation may be had only upon **strict compliance** with the provisions of the contract. *Goodin v. General Accident Fire and Life Ass. Corp.*, Ky., 450 S.W.2d 252, 255 (1970)." (Emphasis Added)

It is clear from the proof and testimony at trial that OHIC did not strictly comply with their attempt at cancellation of the policy. If they had, the Judge would not have submitted the issue to the jury and the jury, would not have concluded KRS 304.20-320(2)(b) and KRS 304.20-330(3) were violated.

It was because of the intent by OHIC to avoid paying any claims which they knew were coming that they intentionally attempted to terminate coverage prior to the September 25th arrest date. All individuals who testified for OHIC and USI Representative, Joe Vonderhaar, testified there was no intent to cancel the policy with an effective date of December 11, 2002. The sole

intended cancellation date was based on the August 23, 2002 letter to be effective September 6, 2002 for non-payment of premium. There is no evidence or testimony to contradict this fact. There is no evidence in the record to support the statement in the Court of Appeals' Opinion which concludes that there is **"...nothing in the records suggest that the notice was waived or otherwise amended by the parties**." (Opinion, p. 10) Furthermore, the multiple cancellation notices being sent by fax, email and letter spread over a one and half month period (8/23/02, 9/27/02, 10/2/02, 10/4/02, 10/11/02) were introduced into evidence and, (Plaintiff's Exhibits 1 through 24) all clearly provide the evidentiary support for the jury verdict.

The October 2, 2002, October 4, 2002 and October 11, 2002 requests for payment at the very least extended the 75 day time period or cancelled the September 26, 2002 notice all together. Furthermore, the acceptance by OHIC of the $16,642.00 premium payment which was cashed on September 3, 2002 extended the policy as a matter of law.

The law in Kentucky on this issue is clear. In *Home Ins. Co. Of New York v. Caudill*, 366 S.W.2d 167, 170, 171 (Ky. 1963):

> "It is well settled that an insurance company cannot treat the contract as valid for the purpose of collecting the premium and invalid for the purpose of paying the indemnity. *Kentucky Live Stock Ins. Co. v. Stout*, 175 Ky. 343, 194 S.W. 318; *Inter-Southern Life Ins. Co. v. Omer*, 238 Ky. 790, 38 S.W.2d 931; *Cheek v. Commonwealth Life Ins. Co.*, 277 Ky. 677, 126 S.W.2d 1084.
>
> It is said in 29A Am.Jur., Insurance §1089: 'As a general rule, the acceptance by an insurance company of the payment of a premium note after the maturity of the note is a waiver of a forfeiture of a policy caused by the prior default in the payment of the note, even though such payment is received after a loss covered by the policy and the policy provides for a suspension of liability during default in the payment of premium notes.' "

Clearly, accepting the premium proved the intent of OHIC to keep the policy in effect at that time and after the August 26, 2002 notice of cancellation for non-payment. (See Trial Exhibit 26) This evidence and the trial exhibits proved to the satisfaction of the jury that OHIC breached their duty of care owed to Dr. Ghassan Haj-Hamed and that all the damages he testified to were a direct result of the negligence of OHIC, its employees, and agents.

The reversal of Judge Ward by the Court of Appeals of her denial of a directed verdict is certainly not drawing all reasonable inferences in favor of Appellant. The legislature in adopting the notice statutes never intended to allow an insurance company to send multiple notices and then choose the one that fits. Nor did the legislature expect the Courts to chose the one that fits. The decision lies with the insurance company as to when a notice is to be sent and the effective date of cancellation and by all the testimony presented it is clear OHIC chose the August 23rd letter with a cancellation date of September 6, 2002.

The damages were testified to and proven by the testimony of Dr. Ghassan Haj-Hamed. The Appellant was sued for malpractice in a case known as: "Brenda Smith as Administratrix of the Estate of Janice Stidham v. Riverside Medical Center, Dr. Ghassan Haj-Hamed, Dr. Husam Hamed and Dr. Juan Elija, Campbell Circuit Court, Case No. 03-CI-00156. The damages claimed by Appellant were not fully cognizable until this case was settled on September 27, 2005 and the invoices for legal services billed to Appellant. The Appellee knew the Appellant was claiming these expenses as damages in this case and claiming Appellee wrongfully refused to defend the practice and its physicians. The Circuit Court knew this to be an element of proof. Thus, the Stidham case was scheduled for trial before Riverside, et al. v. OHIC, et al. was tried. (See 11/14/05 VCR 8:10) Judge Ward specifically stated this on the record when denying the

Appellee's Motion for directed verdict. Furthermore, counsel for Appellant referenced answers to Interrogatories in response to OHIC's Pre-Trial Motion in Limine which specifically itemized these damages. The total damages for this element of the claim was $60,959.69. There was a payment of $25,000.00 to settle the Estate damages claim. (11/15/05 VCR 3:34:50-3:35:05 and 3:43:00-3:44:10) There was also a payment of attorney fees in the amount of $24,518.50 to Hon. Frank Benton and Hon. Robert Blau, plus $11,441.19 in Court cost, expert fees, etc. (11/15/05 VCR 3:43:00 to 3:57:12)

The Appellants also claimed damages for Appellee failing to represent Appellant in the State of Kentucky and State of Ohio Medical Licensure Board proceedings. The claim for attorney fees for defending the disciplinary actions were known to exist and even admitted to by James Baldyga of OHIC at the trial. (See 11/15/05 VCR 1:13-2:02) In cross examination by Appellant's counsel, Mr. Baldyga was asked a question to the effect, whether in his experience, when a physician is charged with a felony, are disciplinary proceedings sure to follow? He testified yes to this question. (See 11/15/05 VCR 1:13-2:00) The fees paid to defend the Medical Licensure proceedings were $60,062.43 for the Kentucky case and $25,857.73 for Ohio.

Dr. Haj-Hamed also testified that as a result of the gap in coverage in his malpractice insurance and as a result of OHIC failing to provide ERP or tail coverage, he suffered a significant, nearly four times in cost, increase of his premium. The increased premium charge was directly as a result of OHIC's failure to provide "tail coverage" and due to a "gap in" coverage. The premium charged was $39,799.00 for Dr. Ghassan Haj-Hamed. OHIC's premium for Dr. Ghassan Haj-Hamed was approximately $9,000.00. (03/15/05 VCR 3:43:00 to 3:57:12)

The testimony of Joe Baldyga, VP of Underwriting, in direct examination by Mr. Fuchs, the OHIC trial attorney, also made clear what the Respondents intended cancellation date was. Mr. Fuchs at VCR 11/16/05; 2:05:50 asked Mr. Baldyga of OHIC this question.

> **"Q. Were you at all confused as to the termination date?**
> **A. No, as I testified, I believe September 6th was the termination date."**

The Court of Appeals clearly disregarded this testimony and elected to use the 75 day cancellation date. The finding is result orientated, not factually accurate and disregard of this Court's previous holdings. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 787 (Ky. 2004); CR 50.01; *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992); *Davis v. Gravill*, 672 S.W.2d 928 (Ky. 1984) and CR 50.01.

The rule of law for the "Appellate review of a Trial Court's denial of a Motion for a directed verdict is limited to whether the jury's verdict was palpably or flagrantly contrary to the evidence presented at trial." *Stringer*, p. 787.[2]

When reviewing the quoted testimony and Trial Exhibits it is clear the jury's verdict was based on the evidence and certainly not palpably or flagrantly contrary to the evidence.

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[2]Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing part must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to [grant] the motion for directed verdict. Otherwise, the judgment must be affirmed. *Stringer*, p. 787 and *Lewis v. Bledsoe Surface Min. Co.*, 798 S.W.2d 459, 461 (1990)

DID THE COURT OF APPEALS ERR IN ITS APPLICATION OF NEGLIGENCE LAW TO MOVANT'S DAMAGES WHEN THE COURT REDUCED THE DAMAGES AWARDED BY THE JURY FROM $167,500.00 TO $22,500.00?

Confusion easily occurs when applying negligence law to an insurance company's employees and agents actions and to persons injured where a contract for carriage is broken or injury to property resulting in lost rent, and repair cost is caused by negligence in performing a contract.

The Court of Appeals in its opinion did accept the law and existing stare decisis on negligence in contract and held at p. 10 of its Opinion as follows:

> **"the negligence claim was separate and distinct from the allegations that cross appellant were injured because OHIC negligently issued and cancelled the policy. Accordingly, the court did not err by failing to dismiss cross appellant's claim for negligence."**

This finding comes from law a century old. In *Kentucky Heating Co. v. Hood*, 133 Ky. 383, 118 S.W 337, 338 (1909) the Court held:

> **" A person cannot either negligently or wantonly injure the property of another, thereby causing the other to suffer loss in business or profits, or in the denial of the ordinary and reasonable comforts he enjoyed, and then assert that all the injured party is entitled to recover is the cost of replacing the injured property. Waiving, for the moment, the question of exemplary damages, we may lay it down that, whenever a person is injured in his person or property by the wrongful act of another, he is entitled to recover such a sum as will fairly compensate him, not only for the actual loss sustained, but for such consequential damages as may spring from the deprivation of business or profits as are the direct or proximate result of the tort complained of, if such consequential damages are capable of reasonable ascertainment, and in addition thereto, the facts justifying it, compensation for personal inconvenience and discomfort. In the case before us the loss sustained by appellee, aside from personal inconvenience and discomfort, was not only the sum she paid out for having the fixtures replaced, but the loss she suffered in being deprived of the profit she had the right to expect would be received from the renters. This profit was not uncertain or**

speculative. It was as reasonably sure as any kind of business profit can be that depends upon the development or happening of the future; and, furthermore, it was capable of reasonable ascertainment by a jury."

This rule of law was adopted in the case of *Louisville & N.R. Co. v. Wells*, 219 Ky. 718, 294 S.W.143 (1927); and the case of *Louisville v. N.Ry. & Lightening Co. v. Comley*, 169 Ky. 11, 183 S.W. 207 (1916).

The facts in *Hood* which the Court relied on in determining *Hood* was entitled to tort damages are relevant to an understanding of the theory of the case presented to the jury by Appellant and to the jury instructions submitted for the jury's consideration.

Mrs. Hood rented a piece of property and then she sublet several of the rooms and the first floor to a restaurant. The tenant who operated the restaurant desired to attach a gas stove for use in her restaurant. The home had gas supply services from two gas companies, Louisville Gas Company and Kentucky Heating Company. Kentucky Heating Company came to hook up the stove and an employee, without reason, disconnected the Louisville Gas Company's line, took off the meter and threw it away. As a direct result, there was no heat for the tenants so they all moved out. Mrs. Hood also had to pay to have the gas line repaired. She sued in tort the Kentucky Heating Company for her lost rent, cost of repairs and exemplary damages. The jury awarded her $500.00. The Court upheld the verdict which included exemplary damages. The Court held "all persons are imperatively required to foresee what will be the natural consequences of their acts and omissions, according to the usual course of nature and the general experience."[3]

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[3]See also, note to *Wallace v. Pennsylvania R.Co.,* 195 Pa. 127 45 Atl. 685, 52 L.R.A. 33; *Wyant v. Crouse*, 127 Mich. 158 86 N.W. 527, 53 L.R.A. 626; 13 Cyc. pp 28, 29, 49; *Gregory v. Slaughter*, 124 Ky, 345, 99 S.W. 247, 8 L.R.A. (N.S.) 1228

The holding in *Wells, supra.* is also on point in this case as is the holding in *Comley, supra.* The *Comley* Court at p. 210 held "The conduct of the carrier amounted to more than a mere breach of its contract of carriage. Under the circumstances shown, it committed a wrong growing out of its contract relation, and its liability therefore is that of a wrongdoer;" and then quotes the rule of law established in *Hood, supra.*

However, despite the fact the Appellate Court recognized Appellant's claim to be valid according to the established case law, albeit over 100 years old, the Court applied the contract terms (75 days) to take away the damages suffered by Appellant. The jury clearly accepted the evidence as demonstrated by its verdict. The damages are not limited by a December 11, 2002 date or a September 6, 2002 date. The damages recoverable are recoverable if they are the **"direct or proximate result of the tort complained."** *Hood, supra.* This is the distinction the law makes. The contract is no longer applicable to damages because the damages are **not** contract damages. The damages recoverable are tort damages capable of reasonable ascertainment. The jury only had to believe, that OHIC violated its duties owed to Appellant and violated the standard of care, for all of the damages to be validly awarded to Appellant. The jury did this and also found the notice required by statute and administrative regulations to be violated as well.

The Appellant is entitled to all damages which were the probable "consequences of his (OHIC'S) conduct, ... because the result proximately follows his wrongful act or inaction." *Hood, supra.* The testimony and exhibits all prove the damages awarded by the jury. The improper and illegal cancellation of the contract was motivated solely by news coverage. (11/15/05 VCR 1:13-2:02) Then when the Appellee saw an opportunity to go back in time to

September 6th for cancellation of the policy they seized it but did so wrongfully, intentionally, maliciously and negligently all to the direct damage and detriment of Appellant. There was direct testimony from Mr. Baldyga acknowledging medical licensure action would be taken against Appellant and other claims brought based on the allegations of Appellant's arrest. (11/15/05 VCR 1:13-2:02) Thus, the refusal by OHIC Insurance Company to provide counsel necessitated Appellant to pay out of his own pocket the defense of the medical licensure proceedings and defense and settlement of the malpractice case. In addition, as a direct consequence of refusing payment by credit card of premiums to maintain coverage, the Appellant suffered a gap in his malpractice coverage and was also refused Extended Reporting Practitioner coverage (ERP, a/k/a tail coverage). This resulted in a direct increase in his insurance premium by more than $30,000.00. The Exhibits testified to by Joe Vonderhaar of USI Midwest Insurance Agency confirm these damages and the known fact they would be incurred by Appellant when seeking malpractice coverage. (11/15/02, Joe Vonderhaar, VCR 9:55 to 10:54) The Trial Exhibit 15 as previously stated says "my concern ... with a 'gap' in coverage exceeding 30 days it will be very difficult for them to obtain coverage ... I spoke with Melissa and she reviewed this account with Jim Baldyga (VP of Underwriting) who said because the policy cancelled for nonpayment, we do not have to provide ERP offers." It was Trial Exhibit 15 that caused Joe Vonderhaar to write the letter dated October 11, 2002 (Trial Exhibit 16) in summary stating the policy was cancelled pursuant to the August 23rd cancellation notice and the cancellation will override the September 27th notice relying on underwriting purpose, i.e. bad acts, no tail coverage will be provided and their file has been officially closed.

Joe Vonderhaar testified the policy "tailed out." (Trial tape 11/15/05 VCR 3:36:46) Mr. Vonderhaar also testified OHIC cancelled for nonpayment and there is no alternative market available. (Trial tape 11/15/05 VCR 4:41:54) Furthermore, the record shows Dr. Hamed requested a certificate of insurance for extended reporting. (11/15/05 VCR 4:43:38) He was told there is no available carrier and no alternative market. This all preceded December 11, 2002. (11/15/05 VCR 4:43:00 to 4:45:00) Mr. Vonderhaar was asked what does a "GAP" in coverage do? (11/15/05 VCR 10:49:49) He states "it is a flag." Cancellation with a "GAP" causes an increase in premium. This is confirmed in Plaintiff's Trial Exhibits 13, 14 and 15. The effect of no tail coverage and a "GAP" removes the possibility of coverage in the standard market. (11/15/05 VCR 10:05:02)

Thus, if OHIC negligently cancelled the policy as the jury believed by failing to give the proper 14 day notice, then logically the "GAP" and termination effective September 6, 2002 were directly and causally related to the wrongful cancellation and damages incurred; the natural and predictable result of the negligence.

Had OHIC kept coverage to December 11, 2002 and not asserted cancellation effective September 6, 2002 for non-payment, the doctors could have applied for new coverage while coverage was still in force. There would have been no "GAP." The clear proof in the case is the Appellant believed it could cancel retroactive to September 6th and it did.

The jury also found the statutory violation thus OHIC was negligent as a matter of law. The Court of Appeals should not have applied contract terms to reduce Movant's damages award.

The Circuit Court and Court of Appeals both recognized that Appellant had a valid negligence claim. The Appellate Court held at pg. 11:

> "Unlike the situation in Cincinnati, N.O., where the alleged tort stemmed from the manner in which the breach of contract occurred. Here the negligence claim was separate and distinct from the allegation that cross-appellants (Movant) were injured because OHIC negligently issued and cancelled the policy. Accordingly, the Court did not err by failing to dismiss cross-appellant's claim for negligence."

The Court of Appeals went in recognition of the law on this and held that the "quasi fiduciary nature of an insurer-insured relationship[,'] such as that established "by OHIC (Appellee) and Dr. Ghassan Haj-Hamed (Appellant) may automatically create an independent duty of care between contractually related parties, and may therefore support an independent tort action..."

The jury verdict of $175,000.00 was reduced by 10% to $167,500.00 for the negligence attributed to Dr. Haj-Hamed. There was no breakdown of the verdict by the jury nor was there any objection to the jury instruction providing for a single judgment amount. It is admitted the damages resulting from the negligence of Respondent were rounded as follows:

> **$60,000.00 for attorney fees and settlement of a malpractice claim Respondent refused to defend; $85,000.00 in attorney fees to defending the Kentucky and Ohio Medical Licensure Board proceedings; and $30,000.00 increased premiums incurred by Dr. Haj-Hamed in procuring medical malpractice insurance which were incurred as a direct result of the gap in insurance created by the cancellation and refusal by OHIC (Respondent) to sell to Dr. Haj-Hamed gap insurance or a/k/a tail coverage. See Closing Argument (03/16/05 VCR 3:30 to 4:30)**

The Court of Appeals, despite the verdict being for a single amount, struck down the $60,000.00 award. The Appellate Court held a directed verdict should have been issued since the insurance policy issued by OHIC was a claims made policy and because the claim occurred after

the policy cancellation date. (contract law) The Court of Appeals also struck $30,000.00 increased premium cost from the verdict. The Court of Appeals on this issue substituted evaluation of the evidence for the jury, holding there was no evidence that the gap between December 11, 2002 and July 2003, (the issue date for new policy of insurance) occurred because of any actionable wrongdoing by OHIC. Clearly, refusing the credit card payment created the gap in coverage. Refusing to provide tail coverage also caused the increase in premium. The $85,000.00 claim for wrongful refusal to defend the doctor in his Medical Licensure proceeding was also reduced by the Appellate court from $85,000.00 to $25,000.00, the policy limit for defense cost in this type of claim. (contract law) The entire verdict was thereby reduced to $25,000.00 less the 10% negligence attributed to Dr. Haj-Hamed by the jury. (negligence law).

The jury verdict form submitted to the jury without objection by Appellee OHIC was as follows:

VERDICT:

> If you find for Plaintiff, Dr. Haj-Hamed, you will determine from the evidence and award him a sum of money that will fairly and reasonably compensate him for his damages.
>
> Award: $175,000.00

A comparative fault instruction was also given with findings as follows:

> You will determine from the evidence and indicate in the following blank spaces what percentage of the total fault was attributable to each of the parties you find to have been at fault as follows:
>
> Dr. Haj-Hamed 10 %
>
> OHIC 90 %
>
> Total 100 %

The jury understood the case, understood the total amount of damages suffered by Appellant and rendered a verdict in favor of Appellant and apportioned fault accordingly. The full verdict and apportionment should be upheld based on the case law testimony and exhibits.

IF THE COURT OF APPEALS' FINDINGS ARE CORRECT, THE APPELLANT IS ENTITLED TO ALL $85,000.00 FOR DEFENSE OF THE MEDICAL LICENSURE PROCEEDINGS AND A TRIAL ON BAD FAITH SINCE OHIC BREACHED ITS DUTY TO DEFEND.

The Court of Appeals' Opinion clearly determined that OHIC had a "**duty to defend**" the Appellant in the Medical Licensure Board proceeding, but reduced the amount of damages awarded from $85,000.00 to the policy limit of $25,000.00. This is contrary to the law of tort and *Hood, supra.* The decision is also contrary to insurance law in this state. If the Court chooses to not follow the law on tort damages then it should follow the case law established in *Aetna Casualty & Surety Company v. Commonwealth of Kentucky, et al.*, 179 S.W.3d 830 (2005). *Aetna* holds at p. 840:

> "Regarding offset of the defense costs, the Court of Appeals reasoned absent a finding of **bad faith** on the part of an insurer, a breach of its obligation to defend ***841** the insureds does not provide for a rewriting of the policy contract to award the insured more coverage than it purchased. We **disagree** with the Court of Appeal's reading of the contract.
>
> It is the opinion of this Court that all of the cross-appellant's Maxey Flats **defense costs are now damages** to be paid by cross-appellees, ANI; not payments made directly by ANI *in discharge of their obligations under this policy or for* ***expenses incurred in connection with such obligations...*** We are not disposed to expand the meaning of ***payments made in discharge of their obligations under the policy, or expenses incurred in connection with such obligations*** to include payment of damages under compulsion. Anyway one reads the contested policy language, it requires voluntary payments by the companies in furtherance of the contractual obligations under the policy; not *litigated* damages for failure to honor the policy terms."

The *Aetna* Court at p. 840 states:

> "As argued by cross appellants and supported by Kentucky law, an insurer has a **duty to defend** if there is any allegations which potentially, possibly or might come within the coverage term of the insurance policy." (citation omitted)

The *Aetna* Court then states at p. 841:

> "In line with the reasoning of *Erkridge* and *Grimes*, we find the **defense cost** expended by cross appellants in the CERCLA action, for which ANI owed a duty to defend **are damages to be paid them**." (Emphasis supplied)

Plain and simple, it would be unjust for Appellee to have it both ways. The Appellant is entitled to one or the other.

There is no question based on the Court of Appeal's Opinion that OHIC had a duty to defend. Mr. Baldyga even admitted that when he sent the September 27, 2002 cancellation letter, he knew the Medical Board Licensure proceedings were likely. Thus, intent and bad faith existed. The Movant should therefore be entitled to a trial consistent with the holding in *Witmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993).

It is important to also point out in *Kentucky Heating Co. v. Hood*, 133 Ky. 383, 390, 391; 118 S.W. 337, 342 (Ky. App., 1909), the Court upheld the jury award of exemplary damages. In *Hood*, the Defendant's employees intentionally disconnected the gas line, threw away the meter and refused to come back and fix what they broke. Mrs. Hood had to contact a different gas company to fix what Kentucky Heating Company broke. The Court held as follows:

> "It is a general rule that exemplary damages in cases of this character are not allowable unless the wrong complained of is committed in a malicious, aggravating, or insulting manner, or with reckless disregard of the rights of the injured person. *Major v. Pulliam*, 3 Dana, 582; *Parker v. Jenkins*, 3 Bush, 587; *Jennings v. Maddox*, 8 B. Mon., 430; *Andrews v. Singer Mfg. Co.* (Ky.) 48 S.W. 976, 20 R. 1089; *Reynolds v. Braithwaite*, 131 Pa. 416, 18 Atl. 1110; 4 *Sutherland* on Damages, Secs. 1031, 1092-5. Measured by this rule, we have little difficulty

> in reaching the conclusion that the conduct of the servants of appellant in cutting the pipes and throwing the meter in an ash barrel was, to say the least of it, a highhanded, aggravating piece of business, done in utter and reckless disregard of the rights of appellee. The employees of the appellant company do not give any reasonable or satisfactory excuse for their conduct, but they make plain the fact that it was not the result of ignorance or mistake or accident. It was not necessary, in order to connect the mains of the heating company with Mrs. McDonald's stove, that they should either cut the pipes of the Louisville Gas Company or tear down its meter, although they testify that it was more convenient and less expensive to do it in this way than it would have been to make the necessary connections, as might have been done, without disturbing the fixtures of the other company. Looking at the matter from any reasonable standpoint, it is inconceivable why these men should have acted in this manner, unless they did it with the malicious intention of interfering with, and injuring, the property. Nor did appellant company treat appellee in a proper, becoming, or reasonable manner, after she notified it that he fixtures had been disconnected by its reckless, if not malicious, employees. Although appellant was notified of the trouble on the day following the commission of the wrong, it did not repair the injury or make any reasonable effort to do so."

This reasoning could easily be applied to Appellant's facts. The Appellee, its agents and employees intentionally cancelled the policy violating Kentucky law, refused to accept payment of premiums thereby causing a gap in coverage, refused to provide tail coverage and refused to defend Appellant knowing claims would be made. Appellant should have a remedy for this malicious, reckless and insulting behavior.

CONCLUSION

The Appellant respectfully request this Court to reinstate the full damages awarded to Appellant by the jury. It is clear from the record in this case, Appellee had no intent to rely on the September 27th correspondence cancelling the OHIC policy on December 11, 2002. Based on the case law long established, Appellant is entitled to all damages suffered as a result of the breach of the standard of care by OHIC. The Appellant is also entitled to a trial on exemplary damages. The jury could, based on the testimony, determine the acts of OHIC, its agents and

employees in breaching its duty of care and statutory duties were intentionally made with malice and therefore could have awarded damages for this conduct as well.

Respectfully submitted,

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