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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

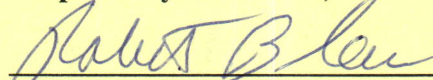
V.

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

OHIC INSURANCE COMPANY **APPELLEE**

APPELLANT'S REPLY BRIEF

Respectfully submitted,



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CERTIFICATION

This is to certify that a true and accurate copy of the foregoing Reply Brief has been served on this 26 day of August, 2009 upon Hon. Robert C. Welleford and Hon. Tonya S. Rager, 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 Tauyna Nolan Jack, 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 I further certify that the record on appeal has not been withdrawn.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

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COUNTER-STATEMENT OF FACTS

Some technical factual statements made by Appellees are not accurate. Trial Exhibits 6, 7 and 8 are the October 2, 2002 notices which threatened cancellation for nonpayment of premiums which cancellation was to occur on Friday, October 4, 2002. None of the faxes reference September 6th as the cancellation date. (page 4 of Appellee's Brief) The misstated quote is: "Also unknown to the underwriting department at OHIC, the finance department sent a final notice ...on October 2, 2002 the policy would be considered cancelled effective September 6, 2002." (VCR 11/15/05; 1:48:00-1:49/01)

The Appellee states it was Dr. Ghassan Haj-Hamed who prescribed the medication for Janice Stidham, but in reality it was Dr. Husam Hamed. (See VCR 11/15/05 3:34:05) and (Appellee's Brief, pg. 6)

ARGUMENT

I. DOES THE APPELLEES' CITATION TO THE RECORD PRESERVE THE ERROR IT ASSERTS?

The Appellee claims to have preserved error in this case by reference to VCR 11/16/05 1:14:10 - 1:22:37 in support of its position that it did not breach legally imposed duties and that the Court of Appeals did not improperly apply the standard of review for denial of a directed verdict. The preservation of error citation to the trial record is not accurate. The VCR record at 1:14:00 to 1:22:37 is Mr. Fuchs, OHIC trial counsel, objecting to the application of Kentucky law. Mr. Fuchs argues that Ohio law should apply based on *Lewis v. American Family Ins. Group*, 555 S.W.2d 579 (Ky. 1977). Judge Ward overruled Mr. Fuchs' argument on the choice of law issue at VCR 1:23:10 (11/16/05).

The Court of Appeals agreed with Judge Ward and stated on page 5 of the opinion as follows: "On direct appeal, OHIC first asserts that the trial court erred by failing to apply Ohio substantiative law rather than Kentucky law. We disagree."

II. DID OHIC OVER-RIDE THE SEPTEMBER 27, 2002 CANCELLATION AND DEEM THE POLICY CANCELLED FOR NONPAYMENT EFFECTIVE SEPTEMBER 6, 2002?

The question stated another way is; What part of Trial Exhibit 16 which states, "This cancellation will OVER-RIDE the cancellation mailed on September 27th for underwriting purposes" does the Appellee fail to understand? This Exhibit clearly shows the intent of OHIC through Mr. Vonderhaar to cancel the policy effective September 6, 2002. This is also consistent with Mr. Baldyga's correspondence, Trial Exhibit 24 dated October 29, 2002 which states "...OHIC holds...the policy cancelled 9/6/02."

The Appellee also misstates the facts. It states at pg. 10, "had Riverside/Haj-Hamed paid the full premium due then the policy would be in effect, that is not cancelled for nonpayment." (VCR 11/15/05 11:06:42-11:08:50; 11:43:53-11:44:20)

The fact is the check in the amount of $16,642.00 which OHIC cashed on September 3, 2002 was payment in full of the quarterly premium due. The payment made was the first installment on the "02" policy which covered the period from June 22, 2002 to June 22, 2003. What was not paid were endorsement charges which no one could figure out.

The confusion is proven in Plaintiff's Trial Exhibit 18. Barb Hersman an OHIC employee e-mailed Nanette Parsons with USI on October 15, 2002 and stated: "Total is $19,461.00. They paid the first installment (rec. on 9/3) which was $16,642.00. They did not pay the two endorsements." There was obviously, as demonstrated by Appellant's Trial Exhibits,

a lot of confusion and careless record keeping by the OHIC finance department.

An e-mail from Nanette Parsons to Barb Hersman further proved the carelessness. Everyone including Dr. Ghassan Haj-Hamed was trying to do the math to figure out how the payment of $19,461.00 was arrived at, but no one could figure it out. As Nanette Parsons states in Trial Exhibit 18:

> **"...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. Was the first installment paid by Riverside Medical? The amount of this invoice was $16,642.00. These do not add up to the $19,461.00."**

This communication occurred on October 15, 2002 several days after the OVER-RIDE letter of October 11, 2002. This evidence further demonstrated to the jury the negligent business practice of OHIC in the cancellation process and verified the violation of the Kentucky Statutes and Administrative Regulations.

The Appellee claims OHIC's VP of underwriting, James Baldyga, testimony supports their position. However, his testimony and Trial Exhibit 24 do not support this position. He states in his e-mail to OHIC's attorney Mr. Berliner as follows:

> "OHIC holds that since the insured failed to pay the $19,461.00 by 9/6/02 as specified in the first cancellation notice coverage was cancelled as of that date."

This letter was used to prove that the underwriting department and finance department had no clue what the other was doing. It demonstrates there were no procedures in place when payment of premiums were made as to whether to accept the premium or reject the premium based on policy due dates and premium amounts due. (Trial Exhibit 24).

The Appellee also asserts Dr. Ghassan Haj-Hamed has changed his position regarding the cancellation date of ths policy. (See Appellee Brief pg. 12). This could not be further from the

truth.

The Appellant, Dr. Ghassan Haj-Hamed, proved at trial "OHIC through its employees had a duty to exercise ordinary care in issuing and cancelling insurance policies" which duty OHIC breached. Further, as the jury determined, the Appellant, Dr. Ghassan Haj-Hamed, was and is entitled to all of the damages that were the direct and proximate result of that breach of duty.

The fact is the dates of September 6, 2002 and/or December 11, 2002 are contractual dates. This is not a contract case, but a negligence case. Therefore, the dates are immaterial.

The Appellee also claims the Appellants reliance on *Home Ins. Co. of New York v. Caudill*, 366 S.W.2d 167, 170, 171 (Ky. 1963) is misplaced. *Homes Ins. Co. of New York* held as follows:

> "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. 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.'"

In this case, OHIC received and cashed the $16,642.00 first base premium check. It is clear from the record, questions existed about how the $19,461.00 claimed due was arrived at.

The Appellant at trial also relied upon and quoted *Ray v. Commonwealth Life Ins. Co.*, 211 S.W. 736, 737 (1919) in support of the Appellant's position that acceptance of the premium

on September 3, 2002 kept the policy in full force. The *Ray* case states:

> **"If the company elects to treat the policy as a subsisting obligation it cannot, when subsequent events make it to its interest to do so, withdraw the election it then made and say the policy was forfeited." (*String* citation omitted)**
>
> The *Ray* case also states: "Not only does the endeavor to collect the note after the company might have lapsed the policy indicate a waiver of its right but the sending of the notice of the second premium must be taken as an acknowledgment by the insurer that it considered the policy still in force. If the policy lapsed November 27, 1915, as alleged in the answer, why would the company be sending notices in May, 1916, of the second premium, calling attention to the fact that unless said premium was paid the policy would become forfeited and void? The mailing of the two notices on May 22, 1916, was a flat contradiction of the claim that the policy had been cancelled. There could be no accruing premium on a lapsed policy. There is no claim that the notices were sent by mistake, and, had the insured tendered this second premium, there is nothing in the evidence to indicate it would not have been accepted, and he had 30 days after May 15, 1916, within which to make the tender."

The Appellee relies on *Troutman v. Nationwide Mut. Ins. Co.*, 400 S.W.2d 215, 216-217 (Ky. 1966). An extensive quote from this case is supplied by Appellee. The case states "The company did nothing before the accident to lead Mrs. Findley to believe that the policy would continue in force beyond December 21."

First, Mrs. Findley had "**no accident.**" Second, Mrs. Findley sent the premium payment after her accident. In contrast Dr. Ghassan Haj-Hamed had no claims pending, no malpractice suits, and no disciplinary proceedings pending when his premium check was mailed and cashed by Appellee. Thus, the factual analogy is not applicable.

Furthermore, between August 23, 2002 and October 11, 2002 everyone involved, Joe Vonderhaar, Nanette Parson, Barb Hersman, Joe Baldyga and Dr. Ghassan Haj-Hamed and his twelve doctors all believed they were insured. It was only when Joe Baldyga on October 7, 2002 discovered the finance department notice of August 23, 2002 cancelling the "01" policy which

covered the policy period June 22, 2001 to June, 2002 did the **over-ride** occur. Dr. Ghassan Haj-Hamed received an August 23, 2002 notice cancelling the "01" policy. The second notice dated September 27, 2002 was cancelling the "02" policy effective December 11, 2002. He also received multiple notices, e.g. A fax dated October 2nd cancelling October 4th; the re-fax of the October 2nd notice dated October 7th with no change in effective date from USI. A fax from OHIC dated 10/2/02 cancelling Friday, 10/4/02 for nonpayment and the October 11, 2002 certified mail from USI, Joe Vonderhaar cancelling retroactive to September 6, 2002 for nonpayment of premium. These notices caused great confusion. The questions presented to the jury were; was there an intent to expose all these doctors and the public who were being treated by them to uninsured claims? Did OHIC intend and carelessly expose the doctors' personal assets to liability to satisfy malpractice claims? Did acceptance of the $16,641.00 base premium for the "02" policy keep the policy in full force? Did the October 2nd fax notice and other faxes violate the 14 day notice required by statute? Should a new 14 day notice have been sent after accepting the payment on September 3, 2002? Should OHIC have provided the endorsements it was claiming were due to total the $19,461.00 before cancelling the policy? Should OHIC be allowed to cancel in anticipation of claims it knew were coming? What damages was Dr. Ghassan Haj-Hamed entitled to as a result of the negligent and careless business practices of OHIC and its employees?

The answers to these questions were provided by the jury with the verdict. Perhaps, the jury agreed with the opinion in *Troutman* relied on by Appellee which is exactly what OHIC was "...inept and less than brilliant." This though does not excuse a company for careless business practices that caused damages. Though, once again, the Appellant must point out a legal

distinction. *Troutman* was a suit for coverage pursuant to the contract. The case before this Court is a suit based on the negligence, i.e., the ineptness and less than brilliant breach of duties owed Ghassan Haj-Hamed by OHIC.

Last it cannot be disputed that the Plaintiff's Trial Exhibit 6 fax from USI violated KRS 304.20-320(2)(b) and 806 KAR 20:010; the 14 day notice required by law to cancel for nonpayment. The notice was faxed (not mailed) on October 2nd with a notice of cancellation effective Friday, October 4, 2002.

III. WAS THE DENIAL OF A DIRECTED VERDICT BY THE TRIAL COURT PALPABLY AND FLAGRANTLY CONTRARY TO THE EVIDENCE?

Each element of damage suffered by Ghassan Haj-Hamed was a direct result of OHIC's careless actions. OHIC knew by going retroactive to September 6, 2002 with cancellation of the policy for nonpayment they would avoid the known and admitted exposure of disciplinary proceedings which were certain to follow. (See Baldyga VCR 1:13:20 11/15/05) The Appellee also knew because of underwriting guidelines, a GAP in coverage and no tail coverage disregard make obtaining insurance, if not impossible, very difficult and very expensive. (See Vonderhaar VCR 9:55:00 to 10:54:00 11/15/05)

It is acknowledged that trial counsel, Mr. Fuch, on behalf of OHIC in his motion for directed verdict at VCR 11/16/05 10:44:49 questioned the validity of the damages of an increased premium charged by Red Mountain, a non standard insurer, on the ground that they were improper damages but on the ground that the premium was not paid personally by Ghassan Haj-Hamed. The Trial Judge at VCR 11:30:12 11/16/05 overruled the OHIC motion for a directed verdict on this specific issue by referencing Dr. Ghassan Haj-Hamed's testimony stating

that although Tri State paid the bill, Dr. Ghassan Haj-Hamed testified he took less compensation to pay for the increased premium. Dr. Ghassan Haj-Hamed's trial testimony on damages is at VCR 11/15/05 3:37:00 to 3:30:00 and 3:37:50 to 3:45:00.

The Court of Appeals in its opinion recognized the validity of the negligence claim and that an issue of fact existed as whether the 14 day notice was properly given pursuant to KRS 304.20-320(2)(b).

The Court of Appeals also stated in their opinion the jury instruction "did not categorize the component of the award of damages," but the Court of Appeals chose to address the damages proven by category. (Opinion pg. 12) The Court of Appeals then mistakenly applied contract law to the negligence claim.

The Court of Appeals took away the $60,959.69 rounded to $60,000.00 argued for defense of the malpractice claim, took away $31,457 rounded to $30,000.00 for the increased premium cost, and reduced the $85,914.16 rounded to $85,000.00 for defense of the medical insurance proceeding to the $25,000.00 contract policy limits. (Opinion pgs. 11 and 12) Application of contract law to reduce uncategorized damages is contrary to the law.

This ruling was clearly contrary to *Stringer v. Wal Mart Stores, Inc.*, 151 S.W.3d 781, 787 (Ky. 2004) and CR 50.01. The proof was not palpably and flagrantly against the evidence.

Dr. Haj-Hamed testified he paid all the money for the settlement, the attorney fees and the cost. (VCR 11/15/05 3:33:49-3:35:05) He testified all the money going to Tri State was his money from Riverside and that of his $150,000.00 salary almost a third was used to pay the Red Mountain premium of $39,797.00. (VCR 11/16/05 3:49:00 to 3:58:37) There was no proof contrary to this proof. The Appellee raises this issue at page 18 of their brief. The Appellee

claims the policy of insurance "expired under any scenario in December 2002..." pg.18. Once again this claim is contract law not negligence law. Had OHIC accepted the cashier's check offer or credit card offer of payment of $12,898.00 when the second premium was returned "refer to maker" to keep the policy in effect these damages would not have been incurred. There would be no GAP for nonpayment nor refusal by Pro Assurance or GE Medical to provide insurance for underwriting reasons. There also would have been tail coverage or ERP placed because the contract would have required it. OHIC negligently and carelessly undertook these risks for damages proven at the trial when it elected to seize on opportunity to over-ride the September 27, 2002 notice.

The law on damages in a negligence claim has been long established. In *Deutsch v. Shein*, 597 S.W.2d 141, 145 (1980) the law on damages as stated by W. Prosser Torts Sec. 43 1971 "... it is as if a magic circle were drawn about the person, and one who breaks it, even by so much as a cut on the finger, becomes liable for all resulting harm to the person, although it may be death."

The Appellant relies on the century old law *Kentucky Heating Co. v. Hood*, 133 Ky. 383, 118 S.W. 337, 338 (1909), which in relevant part states:

> **"...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 profits as are the direct or proximate result of the tort complained of, if such consequential damages are capable of reasonable ascertainment...**"

The fact is if Appellee did not believe Dr. Ghassan Haj-Hamed paid the $25,000.00 settlement, the trial counsel could have called the attorney for the Estate in rebuttal, or the Estate representative or Dr. Husam Hamed, or a representative of Riverside or Tri State. The fact is

trial counsel had no reason to dispute this payment once the handwritten settlement agreement was shared with him. Trial counsel could have argued to the jury it was not paid by Dr. Haj-Hamed, but he did not do this. He could have objected in Appellant's closing arguments, but did not. The reason he did not is because payment by Dr. Ghassan Haj-Hamed was the unrefuted testimony.

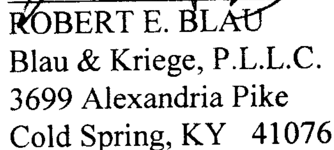
The Appellee at page 19 states what Dr. Ghassan Haj-Hamed testimony was. (VCR 11/15/05 3:49:00 and 3:50:57). He paid personally.

The facts usually are in dispute at trial. The jury was not reviewing a single fact, but all the facts including all the testimony on damages. The jury accepted that all the damages were the direct result of OHIC's careless business practice. The Appellee wants to avoid blame based on the arrest of Appellant, but the jury heard all the bad incriminating evidence, received the entire disciplinary file, and awarded damages anyway.

Is the Appellant entitled to a trial on exemplary damages? The Appellant believes it is based on the *Hood* case *supra*.

CONCLUSION

Wherefore, the Appellant respectfully requests the Court to accept the century old law as valid negligence law and determine that the denial of a directed verdict for OHIC on damages was supported by the evidence. The Appellant requests based on the law and facts that the verdict of the jury be upheld and for a trial on exemplary damages.



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