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COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO 2008-SC-000127-DG

DR. GHASSAN HAJ-HAMED

APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HON. JULIE WARD, JUDGE
CIVIL ACTION NO. 03-CI-00653
COURT OF APPEALS CASE NOS. 2006-CA-00200 &
CASE NO. 2006-CA-00392

OHIC INSURANCE COMPANY

APPELLEE

*** **

APPELLEE'S BRIEF

*** **

I hereby certify that a true and accurate copy of the appellee's brief was served by first class U.S. mail, postage prepaid, on this the 11th day of August 2009 to the following: Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Julie Reinhardt Ward, Judge, Campbell Circuit Court, Courthouse, 330 York Street, Newport, Kentucky 41071; Clerk, Campbell Circuit Court, 8 Courthouse, 330 York Street, Newport, Kentucky 41071; and Robert E. Blau, Jolly, Blau & Kriege, PLLC, 3699 Alexandria Pike, P.O. Box 249, Cold Spring, Kentucky 41076. I further certify that the record was not removed from the custody of the clerk by the appellee.

Respectfully submitted,

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Should the Court set an oral argument Appellee will be pleased to participate.

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COUNTERSTATEMENT OF THE CASE

OHIC Insurance Company (OHIC) does not accept appellant's statement of the case and sets forth the following matters that are necessary and essential to present a fair and adequate statement of the facts and circumstances in this case:

On May 22, 2003, Riverside Medical Center, PLLC, Ghassan Haj-Hamed, and Husam Hamed filed a complaint against OHIC Insurance Company, USI Midwest, and Joe Vonderhaar. (Record on Appeal (hereinafter ROA) p. 4).¹ The disagreement among the various parties to this suit arose when OHIC cancelled the medical liability insurance policy issued to Riverside Medical Center, PLLC in 2002. In the original complaint, the named plaintiffs, including Ghassan Haj-Hamed (Haj-Hamed), alleged causes of action for: (1) breach of contract; (2) breach of statutory duty; (3) wrongful failure to defend; (4) breach of administrative regulations; (5) breach of express warranties; (6) breach of implied warranties; (7) fraud and misrepresentation; (8) breach of agency and agent duties; and, (9) respondeat superior. (ROA pp. 4-11).

These complaints arose out of the following factual scenario: Riverside Medical Center, PLLC (Riverside) was an entity formed by Haj-Hamed, at the time a licensed physician in Kentucky and Ohio. In 2001 OHIC issued a professional liability policy that covered professional acts or omissions by the Riverside and Riverside's employees (approximately 10 doctors including Haj-Hamed) from June 22, 2001 to June 22, 2002. (ROA pp.4-11 & pp. 23-32).² Riverside owned multiple professional offices and urgent care centers in Northern Kentucky and Ohio. (VCR 11/15/05; 2:23:36-2:27:20).

The policy was up for renewal in June 2002. Riverside had chosen to receive

¹ Only Dr. Ghassan Haj-Hamed is now a party to this case for appellants.

² Policy 01-9999-6404 covered June 22, 2001 to June 22, 2002. Policy 02-9999-6404 was the renewal of Policy 01.

billings for its professional liability coverage on a periodic basis. On August 23, 2002 it received a notice of cancellation/termination from OHIC. Essentially, this gave notice to Riverside that a certain amount (\$19,461.00) had to be paid on or before a certain date (September 6, 2002) or coverage would be cancelled for nonpayment. (VCR 11/15/05; 2:53:46-2:54:50). Instead of paying this amount, Haj-Hamed determined that he would pay \$16,642.00. He states this is because the "base premium" for the policy was the amount he paid and he was confused over the extra \$2,819.00. (VCR 11/15/05; 2:46:34-2:48:07).

Although Haj-Hamed states he was confused over this extra amount, he never called his agent, Joe Vonderhaar, employed by USI Midwest, to receive an explanation of the difference until October 2002. (VCR 11/15/05; 11:15:08-11:15:40). In addition, Haj-Hamed acknowledged that he knew this difference had something to do with previous requested endorsements adding and dropping doctors and with the retroactive date to when their coverage would apply. (VCR 11/15/05; 2:46:34-2:48:07).

The nature of the various medical practices run by Riverside through Haj-Hamed lend itself to part-time physicians and to a higher than normal turnover. Joe Vonderhaar, the agent who procured the professional liability coverage for Riverside from OHIC, was able to get OHIC to offer what is called "FTE" slots. This stands for "full time equivalent." What this means is that Riverside could hire, for example, 3 part-time doctors who together worked a 40-hour week, and only get charged for one "full-time" doctor. This made the rates OHIC offered lower. Because of turnover, though, there were frequently doctors being added and deleted from the policy and also requests to OHIC to provide coverage back to a certain date. (VCR 11/15/05; 2:33:20-2:33:54).

These additions, deletions, and requests to change retroactive dates changed the premium amount due. Accordingly, an endorsement would issue and Riverside would be billed, or credited, for any differences. The August 23, 2002 bill for \$19,461.00 included such endorsements that had never been paid. Some of the endorsements not paid dated back to 2001.

On September 20, 2002, Riverside, through Haj-Hamed, sent another payment of premium that was due on September 22, 2002. The check issued was for \$12,898.00. It was sent to OHIC's lock box and presented to OHIC's bank for payment on September 24, 2002. (VCR 11/15/05; 4:01:59-4:04:18). The check was not honored by Riverside's (Haj-Hamed's) bank and was returned to Riverside by OHIC.

On September 23, 2002, Haj-Hamed was arrested by the Pendleton County Sheriff for prescribing controlled substances without legitimate reason. (VCR 11/15/05; 2:40:02-2:41:13; 4:05:00-4:05:28). Around this same time the federal government froze all of Haj-Hamed's accounts and assets. Although Haj-Hamed has repeatedly stated that this check for \$12,898.00 was not honored because the account was frozen and not because insufficient funds existed, the evidence at trial was that the account was frozen on September 26, 2002, two days after the check was presented for payment. (VCR 11/15/05; 2:48:34-2:49:05).

On September 27, 2002, OHIC, through its underwriting department, sent a notice of cancellation of coverage to Riverside for wrongful or reckless acts in contravention of its policy. (VCR 11/15/05; 1:18:40-1:20:02; 1:42:56-1:43:40; 1:45:20-1:46:30). This was as a result of seeing news coverage of Haj-Hamed's arrest, the DEA and FBI raid on Haj-Hamed's practice, and the allegations that Haj-Hamed had written controlled substance

prescriptions for no legitimate reason. (VCR 11/15/05; 1:18:40-1:20:02; 1:54:00-1:55:06; 2:11:00-2:14:09). This notice stated that Riverside's coverage under the policy would terminate 75 days from September 27, 2002. At the time the underwriting department sent this notice of cancellation through Jim Baldyga (Vice-President of Underwriting and a witness at the trial) it had no knowledge that the finance department had sent a notice of cancellation on August 23, 2002 for nonpayment of premium. (VCR 11/15/05; 1:14:30-1:14:40; 1:20:18-1:21:20; 1:32:25-1:33:09; 1:42:56-1:43:40).

Also unknown to the underwriting department at OHIC, the finance department sent a final notice, through Joe Vonderhaar, to Riverside on October 2, 2002 notifying it that if full payment for the outstanding premiums due on the policy was not received by October 4, 2002 then the policy would be considered cancelled effective September 6, 2002. (VCR 11/15/05; 1:48:00-1:49:01). Joe Vonderhaar's October 2, 2002 notice/facsimile also mentioned OHIC's September 27, 2002 reason for cancellation – bad publicity and exposure changes. (VCR 11/14/05; 4:23:33-4:25:00). Haj-Hamed testified that when he received this October 2, 2002 notice from Joe Vonderhaar he called Vonderhaar and stated that he had paid the premium. The payment Haj-Hamed was referring to was the \$12,898.00 check not honored by his bank when presented for payment. At this point Haj-Hamed testified that he offered to pay OHIC by some alternative means such as a credit card. (VCR 11/15/05; 2:49:05-2:50:20). However, the undisputed testimony at trial is that OHIC does not accept alternative means of payment such as credit card unless the policy was set up that way in the first instance and Riverside's policy was not issued on those terms. (VCR 11/15/05; 10:43:37-10:43:50; 4:22:16-4:22:42).

By October 7, 2002 Riverside and Haj-Hamed engaged Joe Vonderhaar's (and employees with his office) assistance in trying to obtain coverage with another carrier. Their attempts to obtain coverage were unsuccessful. (VCR 11/14/05; 4:46:17-4:49:36). Joe Vonderhaar testified that are a number of reasons obtaining professional liability coverage may prove a problem. A gap in coverage can cause a problem. Vonderhaar testified that an increase in premium as a result in a gap in coverage might or might not occur and is dependent, in part, on the carrier and the length of the gap. (VCR 11/14/05; 4:47:45-4:50:20).

Joe Vonderhaar also testified that these attempts to secure alternative professional liability policy coverage for Riverside and Haj-Hamed occurred in October 2002 and the information that was sent to these other carriers were loss runs (claims against the insureds) and the policy issued by OHIC. (VCR 11/14/05; 4:54:27-4:59:00). These applications to obtain other coverage for Riverside and Haj-Hamed also showed **December 2002** as the date coverage with OHIC ended. (VCR 11/14/05; 4:58:00-4:59:00; VCR 11/15/05; 10:57:54-10:59:50). Joe Vonderhaar acknowledged that such facts as being arrested for prescribing controlled substances illegally, medical licensure board proceedings and investigations, and restrictions on one's medical license would all be strikes against obtaining professional liability insurance. (VCR 11/15/05; 11:51:07-11:53:00).

Haj-Hamed testified that following his arrest in September 2002 the Kentucky and Ohio Medical Boards suspended his license and then reinstated his license under severe restrictions. (VCR 11/15/05; 2:41:13-2:44:02). At the time of this trial Haj-Hamed was not licensed in Ohio and his Kentucky license was conditioned on him not writing

controlled substances and having supervision. (VCR 11/15/05; 3:59:00-4:00:10).

Sometime in late 2002 Riverside and Haj-Hamed were offered professional liability coverage that was the same as the coverage OHIC had offered through a nonstandard market insurer. The amount of premium for this coverage was \$235,000.00. Riverside declined to purchase this coverage. (VCR 11/15/05; 3:06:02-3:06:39). On July 11, 2003 Riverside and Haj-Hamed obtained coverage through Red Mountain for approximately \$35,000.00 to \$39,000.00 per year for each doctor. (VCR 11/15/05; 3:28:02-3:29:13). Haj-Hamed testified that coverage for him was obtained from Red Mountain for \$39,797.00 and for his brother, Husam Hamed at \$35,115.00 per year. (VCR 11/15/05; 3:56:35-3:57:12).

In January 2003 appellant was sued for wrongful death of a patient who had obtained a controlled substance prescription from him in October 2002 and overdosed on it along with other medications. (VCR 11/15/05; 3:33:49-3:35:05). No malpractice insurance was in effect to provide coverage for this claim. OHIC's policy expired by its own terms in December 2002 and it was a claims-made policy. Thus, no coverage or duty to defend could have been required of OHIC in any event. Haj-Hamed testified that he settled the case for \$25,000.00. (VCR 11/15/05; 3:34:50-3:35:05; 3:43:00-3:44:10).

Prior to the trial in this action OHIC and USI Midwest and Joe Vonderhaar moved for summary judgment on all of plaintiffs' claims. (ROA pp. 391-439 & pp. 440-457). On July 20, 2004 the Court granted in part and denied in part USI Midwest and Joe Vonderhaar's motion for summary judgment. (ROA pp. 813-814). On November 23, 2004 the Court granted OHIC's motion for summary judgment on plaintiffs' claims of: (1) breach of contract; (2) wrongful failure to defend; (3) breach of warranties; and, (4)

fraud and misrepresentation. It denied the motion as it related to plaintiffs' claims for: (1) negligence; (2) breach of statutory or administrative duties; and, (3) bad faith. (ROA p. 924).

At the close of the plaintiffs' case the Court granted USI Midwest and Joe Vonderhaar's motion for a directed verdict as to all claims against them. (VCR 11/16/05; 11:25:17-11:28:17). The Court granted OHIC's motion for a directed verdict with respect to any claims of bad faith. (VCR 11/16/05; 11:28:27-11:29:03). It also dismissed Riverside Medical Center, PLLC as a party because no evidence had been introduced that could support a conclusion that it had been damaged in any way. (VCR 11/16/05; 11:29:03-11:29:37). The Court allowed Ghassan Haj-Hamed and Husam Hamed's claims of negligence and breach of statutory or administrative duties to go forward. (VCR 11/16/05; 11:28:17-11:30:07).

At the trial Haj-Hamed and Husam Hamed claimed the following damages:

1. Defense of the malpractice case filed in 2003:
 - \$25,000.00 for settlement
 - \$24,518.50 in attorney fees
 - \$11,441.19 in costs
2. Medical Licensure Board Proceedings in Kentucky and Ohio in reference to Haj-Hamed:
 - \$60,062.43 for Kentucky
 - \$25,851.73 for Ohio
3. Professional Liability Coverage from Red Mountain:
 - \$39,797.00 for Ghassan Haj-Hamed
 - \$35,115.00 for Husam Hamed

(VCR 11/15/05; 3:43:00-3:57:12). The amounts of professional liability coverage asked for from the jury were reduced by counsel for appellant to \$30,000.00 for Haj-Hamed

only. (VCR 11/16/05; 3:49:20-4:30:00). This is presumably because of the difference between the premium paid under the OHIC policy for Haj-Hamed, \$8,340.00 versus \$39,797.00 for the Red Mountain policy. (VCR 11/15/05; 3:58:02-3:58:30). And because Husam Hamed's testimony established conclusively that he did not pay any increase in premium, rather, Tri-State Urgent Care, LLC paid the premium. (VCR 11/16/05; 12:05:20-12:14:50).

The jury was instructed to determine whether OHIC had been negligent and to determine whether it had violated any statutory or administrative duties. It answered those questions in the affirmative and returned a verdict that awarded Husam Hamed \$0.00 and Ghassan Haj-Hamed \$175,000.00 reduced by 10% comparative fault to \$157,500.00. The Court entered judgment consistent with the jury's recommendation. (ROA pp. 1306-1315).

OHIC filed a Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for New Trial and Remittitur. (ROA pp. 1330-1343 & pp. 1425-1443). The Court denied the motion. (ROA pp. 1444-1445). OHIC filed its notice of appeal as it pertained only to the verdict and judgment in favor of Ghassan Haj-Hamed. (ROA pp. 1446-1448). Appellant (along with Husam Hamed and Riverside) filed their cross-appeal contesting the directed verdict awarded to OHIC solely on their claims of bad faith and violation of the Unfair Claims Settlement Practices Act. (ROA pp. 1472-1473).

The Court of Appeals considered all of the facts and circumstances and the various arguments made by OHIC for reversal of the judgment as well as the cross-appeal as to the issues of bad faith and violation of the Unfair Claims Settlement Practices Act. In its opinion the Court of Appeals held that the trial court erred in not directing a verdict

for OHIC on the issue of whether it had complied with Kentucky law requiring an insurer to provide 75 days notice of cancellation when it cancels an insurance policy for any reason other than nonpayment of premiums. (Slip Opinion at 9-10, attached hereto as Exhibit 1). Further, the Court of Appeals agreed, in part, that the damages awarded in the case are not connected to any negligence on the part of OHIC in cancelling the medical malpractice insurance coverage of Riverside and its physicians. Therefore it reduced the damages to those representing the amount that OHIC would have been responsible for defense of the medical board actions (\$25,000.00) per its contract, less 10% comparative fault assessed to Haj-Hamed and directed the trial court to enter an amended judgment reflecting this. (Exhibit 1 at 12-13). Finally, the Court agreed that no cause of action for bad faith or violation of the Unfair Claims Settlement Practice Act could be maintained. (Exhibit 1 at 13-14).

Haj-Hamed then filed for discretionary review with this Court and the motion was granted.

ARGUMENT

I. OHIC DID NOT BREACH ANY LEGALLY IMPOSED DUTIES AND THE COURT OF APPEALS DID NOT IMPROPERLY APPLY THE STANDARD OF REVIEW FOR DENIAL OF A DIRECTED VERDICT

OHIC has preserved its position on this issue through objections to certain jury instructions (VCR 11/16/05; 1:14:10-1:22:37), its Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for New Trial and Remittitur (ROA pp. 1330-1343 & pp. 1425-1443), its brief to the Court of Appeals, its response to the Petition for Rehearing in the Court of Appeals, and in its response to the Petition for Discretionary Review.

In his brief to this Court, as in his petition for rehearing to the Court of Appeals, Haj-Hamed suggests that the testimony of Joe Vonderhaar establishes that OHIC withdrew its reliance on the second notice of cancellation, sent September 27, 2002 and predicated on willful or reckless acts and/or omissions in violation of the policy. Further, he contends that OHIC never relied on this stated reason for cancellation of the policy, and, therefore, has not preserved any error. An examination of the testimony and evidence at trial shows that Haj-Hamed's assertions are incorrect.

Vonderhaar, an agent employed by USI Midwest, is not associated with OHIC other than being the agent through whom policies are issued and purchased. The contract between USI Midwest and OHIC specifically states that USI Midwest and its employees/associates are not agents of OHIC, but, rather, independent contractors. Moreover, he did not testify that OHIC withdrew its reliance on the September 27, 2002 notice. His testimony, viewed as a whole, makes clear that he understood OHIC to communicate to him that Riverside/Haj-Hamed's policy would be cancelled period. The only question was from what date OHIC considered it to be cancelled. (VCR 11/14/05; 3:20:45-4:59:00 and VCR 11/15/05; 9:54:23-11:53:00 – Testimony of Joe Vondehaar).

Vonderhaar admitted that when he sent the October 2, 2002 facsimile to Riverside/Haj-Hamed discussing the two cancellation notices, he believed the policy to still be in effect and did not rely on the August 23, 2002 cancellation notice; 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; 11:06:42-11:08:56 and 11:43:53-11:44:20).

Similarly, Jim Baldyga, Vice President of Underwriting for OHIC and OHIC's

representative at trial, testified that there were two reasons for cancelling Riverside/Haj-Hamed's policy; one for nonpayment of premium and one for willful or reckless acts in violation of the policy. (VCR 11/15/05; 1:32:25-1:33:09).

OHIC has maintained from the inception of this case that its notices of cancellation were effective. OHIC's theory in the trial court was that the August 23, 2002 notice, giving 14 days notice before cancelling for nonpayment of premium as of September 6, 2002, was effective. Haj-Hamed has taken the opposite position. Regardless, OHIC has always maintained that, no matter the view one takes of the effectiveness of the August 23, 2002 notice, the policy was clearly cancelled no later than December 11, 2002 based on the September 27, 2002 notice of cancellation for willful or reckless acts or omissions in violation of the policy. See OHIC's objections to certain jury instructions (VCR 11/16/05; 1:14:10-1:22:37), its Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for New Trial and Remittitur (ROA pp. 1330-1343 & pp. 1425-1443), and its brief to the Court of Appeals, pages 10-11.

In its Opinion, the Court of Appeals recognized the argument OHIC has made throughout this case – that there were two reasons given by OHIC for cancelling the policy. (Exhibit 1 at p. 10). One, for nonpayment of premiums based on the August 23, 2002 notice, the other, based on willful or reckless acts or omission in violation of the policy, i.e., any other reason than nonpayment of premiums, issued on September 27, 2002.

KRS 304.20-320(2)(b) and 806 KAR 20:010 provide that if an insurer cancels a policy for nonpayment of premium it must send notice to the insured at least 14 days prior to the effective date of the cancellation. They also provide that if an insurer cancels

a policy for any reason other than nonpayment of premium it must send notice to the insured at least 75 days prior to the effective date of cancellation. In this case, the August 23, 2002 notice of cancellation was based on nonpayment of premium and gave an effective date of cancellation of September 6, 2002 – this is 14 days. The cancellation notice sent on September 27, 2002 was for reasons other than nonpayment and it gave 75 days notice (December 11, 2002) as was required.

In the Court of Appeals, OHIC argued that either of these notices complied with Kentucky law and so were effective. The Court of Appeals held that there was a reasonable question as to the effectiveness of the August 23, 2002 notice, based on the evidence at trial, such that the issue was properly submitted to the jury. However, again, based on the evidence at trial, there is no dispute that the policy issued to Riverside by OHIC was cancelled effective December 11, 2002 through the September 27, 2002 notice of cancellation. The evidence established that OHIC never withdrew its reliance on that notice and all parties knew that the policy would be terminated no later than December 11, 2002. Not until Haj-Hamed filed a petition for rehearing in the Court of Appeals, was it ever questioned or argued otherwise that any professional liability policy issued by OHIC would have expired on December 11, 2002 at the very latest. He should not now be allowed to change his theory of the case.

Haj-Hamed's contention that the payment made September 3, 2002 of \$16,642 extended the termination date of the coverage based on Home Ins. Co. of New York v. Caudill, 366 S.W.2d 167 (Ky. 1963) is misplaced. Home Ins. Co. of New York is based on a factual situation that is distinguishable from the circumstances presented by this case. Appellant contends that the facts in this case show that Riverside's premiums were

paid and OHIC accepted them. He maintains that Home Ins. Co. of New York requires the conclusion that acceptance of a premium necessarily means that an insurance policy remains in full force and effect.

This representation is more simplistic than reality and is not supported by case law that is on point with the facts of this case. Here, it is undisputed that OHIC sent a notice of cancellation on August 23, 2002 stating that if the premium of \$19,461 was not paid on or before September 6, 2002 the policy would be cancelled. Riverside did not pay the full premium by that date. It paid \$16,642. Its next payment of \$12,898 was not honored.

On September 27, 2002 OHIC's underwriting department also sent a notice of cancellation for reckless or willful acts or omissions in violation of the policy. This notice identified an effective date of cancellation of December 11, 2002.

Both the notice sent on August 23, 2002 and the one sent on September 27, 2002 clearly stated the reason for cancellation as is required by Kentucky law. Haj-Hamed has argued throughout that OHIC's actions on these two separate dates created confusion. OHIC has maintained that either notice was effective; however, even if the August 23, 2002 notice is considered to be invalid, the September 27, 2002 notice is certainly not invalid. No premiums were accepted after this notice and the check for \$12,898 that was presented to the bank for payment on September 24, 2002 and not honored was sent back to Riverside. Following this date is when OHIC sent the second notice of cancellation based on reasons other than nonpayment of premiums. At most this factual scenario is more on point with the circumstances discussed in Troutman v. Nationwide Mut. Ins. Co., 400 S.W.2d 215, 216-217 (Ky. 1966). In that case, the Court noted:

The company did nothing before the accident to lead Mrs. Findley to believe that the policy would continue in force beyond December 21. The mailing of the premium by Mrs. Findley on January 15 was not prompted by anything done by the company to indicate that such late payment might be effective; on the contrary it was done in the face of a statement by the agent that the policy was dead. The cashing of a check by the company and its delay in notifying Mrs. Findley of the termination of the policy and in refunding the amount of the check did not cause Mrs. Findley to change her position to her detriment or in any way create any equities in her favor. We find none of the elements of an estoppel in the facts of this case.

The most that can be said against the company is that it was inept and somewhat less than brilliant in cashing Mrs. Findley's check after it had received notice from its agent of the accident on January 11. But the mere cashing of the check is not a basis for imposing a contractual liability on the company. See Carden v. Liberty Mutual Insurance Company, 278 Ky. 117, 128 S.W.2d 169.

Because OHIC clearly complied with the law embodied in KRS 304.20-320(2)(b) and its corollary administrative regulation 806 KAR 20:010 with respect to the September 27, 2002 notice of cancellation, the jury's verdict finding that it did not is palpably or flagrantly against the evidence, as was stated by the Court of Appeals. Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 787 (Ky. 2004). Thus, the Court of Appeals did not improperly substitute its judgment for that of the jury/trial court. It appropriately applied the standard set forth in Stringer to the evidence.³

II. THE COURT OF APPEALS OPINION REMITTING CERTAIN DAMAGES WAS NOT IN ERROR.

Throughout this case OHIC has argued that the damages awarded by the circuit court's judgment were incorrectly assessed. When this case was originally filed (as noted in the counterstatement above) claims against OHIC were made for both breach of contract and negligence among other claims. The trial court granted OHIC's motion for summary judgment prior to trial and dismissed the claims based on breach of contract.

³ Haj-Hamed's contentions with respect to items of damages are addressed in OHIC's arguments below.

Following that, Riverside, Haj-Hamed, and Husam Hamed simply retooled their claim of breach of contract and presented it as a negligence claim. OHIC has objected throughout (including at the Court of Appeals) that it cannot be held negligent in an action that is one for breach of contract. Cincinnati N.O. & T.P. Ry. Co. v. Jones, 148 S.W.2d 725, 727 (Ky. 1941). See arguments at VCR 11/16/05; 1:13:11-1:13:26, OHIC's Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for New Trial and Remittitur, ROA pp. 1330-1343 & pp. 1425-1443, and OHIC's brief to the Court of Appeals pp. 11-12.

Further, OHIC argued that the economic loss rule precludes any recovery for appellant in tort. Presnell Const. Mgrs., Inc. v. EH Const., 134 S.W.3d 575, 583 (Ky. 2004) (Keller, J., concurring). The economic loss rule is a "judicially created doctrine that marks the fundamental boundary between contract law, which protects expectancy interests created through agreement between the parties, and tort law, which protects individuals and their property from physical harm by imposing a duty of reasonable care." Id. (footnotes omitted).

Appellant sought and recovered only economic damages. Economic damages must be based on those damages that logically and consequentially flow from a breach of contract. The damages requested here are strictly of that nature. The circuit court ruled that no breach of contract occurred and that decision was not appealed.

Accordingly, a judgment against OHIC based on negligence cannot be supported. More particularly, the damages awarded by the jury are purely economic in nature and are not supported by a finding of negligence.

OHIC also maintained throughout that the damages are not supported by the

evidence. These arguments were preserved for review through OHIC's Motion in Limine (ROA pp. 1250-1254); OHIC's Motion for Directed Verdict (VCR 11/16/01; 10:44:44-10:47:24); OHIC's Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for New Trial and Remittitur (ROA pp. 1330-1343 & pp. 1425-1443); through various objections made during the trial; and, OHIC's filings in the Court of Appeals.

Haj-Hamed now contends that the Court of Appeals: (1) improperly used the terms of the contract of insurance to limit that damages awarded to him by the jury; (2) that the damages allowed for the medical licensure board should be \$85,000.00; and, (3) that the additional \$30,000.00 claimed for increased cost of insurance was properly submitted to the jury and should be restored. An examination of the facts and law applicable to the case demonstrate that this is incorrect.

As stated above, Haj-Hamed testified at trial that he and his brother suffered the following damages:

1. Defense of the malpractice case filed in 2003:

\$25,000.00 for settlement
\$24,518.50 in attorney fees
\$11,441.19 in costs

2. Medical Licensure Board Proceedings in Kentucky and Ohio:

\$60,062.43 for Kentucky
\$25,851.73 for Ohio

3. Professional Liability Coverage from Red Mountain:

\$39,797.00 for Ghassan Haj-Hamed
\$35,115.00 for Husam Hamed

(VCR 11/15/05; 3:43:00-3:57:12). During closing argument counsel for Haj-Hamed

rounded these figures to \$60,000.00 for defense of the malpractice case filed in 2003, \$85,000.00 for defense of medical board proceedings in Kentucky and Ohio, and \$30,000.00 for professional liability coverage increase for Haj-Hamed (dropping any claim for Husam Hamed). This equals \$175,000.00 which matches the verdict of the jury. There are numerous problems with the damages awarded as recognized by the Court of Appeals.⁴

Malpractice Case Filed in 2003:

With respect to the damages claimed for defense of the malpractice case filed in 2003 the jury should not have been permitted to consider this evidence. First, at the time of the trial, there is no indication that the settlement had been consummated or had been paid by Haj-Hamed as he represented in his testimony that he had "paid" \$25,000.00 to settle the case. (VCR 11/15/05; 3:34:50-3:36:36). A person's claim for damages is not ripe until the damages are fixed and non-speculative. Meade County Bank v. Wheatley, 910 S.W.2d 233, 234 (Ky. 1995).

Further, counsel for Haj-Hamed produced, on the day of trial, a handwritten settlement agreement for the case filed in 2003. (See Handwritten Settlement Agreement attached hereto in the appendix as Exhibit 2).

That handwritten settlement agreement shows that Husam Hamed, not Haj-Hamed agreed to pay \$25,000.00 to settle the malpractice case. Husam Hamed signed the agreement. The jury awarded no damages on Husam Hamed's claims against OHIC. Haj-Hamed was not a party to the settlement agreement and did not bind himself to pay that amount, therefore, any damages awarded to Haj-Hamed for this item would be improper.

⁴ OHIC also disagrees with the Court of Appeals awarding of \$25,000 for the medical licensure board proceedings but for different reasons. OHIC believes that none of the damages should stand and the Court of Appeals should have remitted the entire amount.

Further, the \$60,000.00 requested for defense of the malpractice claim cannot be maintained as flowing naturally from any wrongful cancellation of the policy. The undisputed evidence at trial established that the policy of insurance expired no later than December 2002. In January 2003 Haj-Hamed was sued for wrongful death of a patient of his who had obtained a controlled substance prescription from him in October 2002 and overdosed on it along with other medications. (VCR 11/15/05; 3:33:49-3:35:05). No malpractice insurance was in effect to provide coverage for this claim. OHIC's policy was a claims-made policy. A claims made policy covers only those claims that are presented during the time when the policy is in effect. (VCR 11/14/05; 3:36:30-3:37:58). Because the policy expired under any scenario in December 2002, prior to the malpractice claim, no coverage or duty to defend could have been required of OHIC.

Medical Licensure Board Proceedings:

The award of damages for defense of medical licensure board proceedings in Kentucky and Ohio was \$85,000.00. This is clearly error because, even if it is believed that OHIC bears some responsibility for the costs incurred by Haj-Hamed, the policy that OHIC issued to Riverside Medical allowed only \$25,000.00 per insured for licensure proceedings. Both Haj-Hamed and counsel for Haj-Hamed acknowledged that OHIC would have only been liable for \$25,000.00 in medical board proceedings. (VCR 11/15/05; 3:37:49-3:39:30; VCR 11/16/05; 3:49:20-3:49:16).

OHIC also believes that no damages should have been awarded for this category for the reasons addressed in Argument 3 below. Essentially, no demand was ever made to OHIC by Haj-Hamed (or anyone else) to defend the actions, thus, a prerequisite for any obligation to pay per the terms of the policy was not met and the cancellation of the

policy of coverage by OHIC is not causally connected to Haj-Hamed's incurring these fees.

Professional Liability Coverage from Red Mountain:

The documents produced by Haj-Hamed and the other plaintiffs (on the eve of trial) and attached hereto in the appendix (see Supplemental Answers to Request for Production of Documents attached hereto in the appendix as Exhibit 3), show that virtually all payments for all damages claimed by Haj-Hamed were actually paid by Tri-State Urgent Care, LLC. Tri-State is a Limited Liability Company that was formed by a Dr. Qureshi after the various legal proceedings instituted against Haj-Hamed. Haj-Hamed and Husam Hamed had no ownership interest in Tri-State. (VCR 11/15/05; 4:08:25-4:08:56; 4:13:20-4:15:00).

Haj-Hamed testified at the trial that he worked for Tri-State following its formation. He also testified that the increased premiums for professional liability insurance paid by Tri-State for him were taken out of the pay he received as compensation from Tri-State. (VCR 11/15/05; 3:49:10-3:50:57). Haj-Hamed offered this explanation for the first time at trial and then only after OHIC pointed out that the damages being claimed were properly the damages of Tri-State, a non-party to this lawsuit. Further, Haj-Hamed stated that he had checks showing that he paid these amounts but he did not produce any such evidence. (VCR 11/15/05; 3:49:10-3:50:57).

Further, the claimed increase in medical malpractice insurance premiums is not related to any cancellation of the OHIC policy for nonpayment of premiums. Joe Vonderhaar testified he attempted to secure alternative professional liability policy coverage for Riverside and Haj-Hamed in October 2002 and the information that was

sent to these other carriers were loss runs (claims against the insureds) and the policy issued by OHIC. (VCR 11/14/05; 4:54:27-4:59:00). The undisputed proof at trial is that the information sent to other carriers by Joe Vonderhaar in an attempt to obtain coverage showed **December 2002** as the date coverage with OHIC ended. (VCR 11/14/05; 4:58:00-4:59:00; VCR 11/15/05; 10:57:54-10:59:50). Furthermore, the exhibits attached to appellant's brief (identified as trial exhibit 13 located under tab 13 to appellant's brief) show only that these two other insurers declined to offer coverage based on a failure to meet underwriting guidelines. Therefore, the inability of Haj-Hamed to obtain other malpractice liability insurance could not have been predicated on a cancellation of his policy in September 2002 with OHIC for nonpayment of premiums.

All Damages:

Although Haj-Hamed testified affirmatively that the increased premium (\$30,000.00) for professional liability coverage for him was taken out of his compensation paid by Tri-State, he offered no evidence that the other damages claimed, such as the attorney fees for the 2003 malpractice case and the medical board proceedings were paid by anyone other than Tri-State. He stated that he "paid" these amounts but the checks that are attached to the Supplemental Answers to Request for Production of Documents (not all attorney fee charges have a corresponding check showing payment) show that these fees were paid partially by Riverside Medical Center, but mostly by Tri-State. (See Exhibit 3) Riverside was dismissed as a party and no appeal was taken from that judgment and Tri-State has never been a party.

Haj-Hamed's theory to support all of the damages awarded in this case has, from the beginning, been predicated on the idea that OHIC's cancellation of their professional

liability policy effective September 6, 2002 caused a gap in coverage. The reason for the gap they have offered is non-payment of premium. They allege that once other potential insurers learned of this reason for cancelling their policy, they could not obtain professional liability coverage.

The evidence presented does not support that theory. Haj-Hamed presented no testimony or other proof of a denial of coverage for a gap caused by non-payment of premium. The only evidence presented regarding other insurance came from Joe Vonderhaar. He stated that applications sent in October 2002 to obtain professional liability coverage for Haj-Hamed and the former parties to this case stated **December 2002** as the date when coverage with OHIC terminated. Thus, there would have been no gap in coverage. These insurers still declined to provide coverage. (VCR 11/14/05; 4:54:27-4:59:00; VCR 11/15/05; 10:57:54-10:59:50; 11:51:07-11:53:00).

As noted by the circuit court, the theory of Haj-Hamed was that the gap in coverage is what resulted in the premium increase and the failure to have coverage for the malpractice case filed in 2003. The trial court ruled, rightly so, that OHIC was entitled to show that the failure to have coverage was not related to a gap in coverage caused by OHIC, but, rather, due to other reasons, i.e., Haj-Hamed's arrest, medical board proceedings and investigation, etc. (VCR 11/14/05; 9:02:18-9:04:00).

The gap in coverage was, in fact, conclusively shown not to be due to OHIC but rather due to Haj-Hamed's arrest, the medical board proceedings and investigations, publicity showing the DEA and FBI raids on Riverside and Haj-Hamed's office, and other related matters. This is a necessary conclusion from the testimony of Joe Vonderhaar that other potential insurers were told that OHIC's coverage existed until

December 2002 as outlined above.

Conclusion as to Damages:

The Court of Appeals did not apply an incorrect measure of damages. It expressly noted that “the negligence claim [against OHIC] was separate and distinct from the allegation that [Haj-Hamed was] injured because OHIC negligently issued and canceled the policy.” (Exhibit 1 at p. 11).

Perhaps it goes without saying that in any negligence action, whether it be for medical malpractice, an auto accident, or the negligent breach of a contract, the burden is on the plaintiff (Haj-Hamed) to demonstrate a duty, a breach, and a causal connection between the alleged breach resulting in harm. Pathways, Inc. v. Hammons, 113 S.W.3d 85, 88-89 (Ky. 2003).

The negligence alleged by Haj-Hamed was in cancelling the policy effective September 6, 2002 for nonpayment of premiums. The jury believed, and the Court of Appeals upheld the judgment, that OHIC breached its duty by negligently cancelling the policy issued to Riverside for nonpayment of premiums. The evidence showed that a breach of duty could not be predicated on the cancellation sent September 27, 2002 for the variety of reasons argued above.

Accordingly, Haj-Hamed must show that the cancellation of the policy by OHIC effective September 6, 2002 for nonpayment of premiums resulted in the harm he has claimed (defense of the medical malpractice case, medical licensure board proceedings, and additional premiums for medical malpractice coverage). Haj-Hamed cannot show that any of these claimed damages are causally connected to the alleged breach. Therefore, the Court of Appeals correctly remitted the damages as a matter of law. While

the Court of Appeals did not remit all of the damages, frankly, OHIC made an economic decision to not pursue the case further. An appellate court is well within its powers to remit damages improperly awarded and to direct the trial court to enter a judgment reflecting an amended outcome. See, Ingram v. Galliher, 309 S.W.2d 763, 767 (Ky. 1958) (emphasis added), stating:

The construction of this rule [CR 50.02] has been that where the Court of Appeals concludes that the judgment must be reversed, it may in its discretion direct the entry of a new judgment without remanding the case for a retrial. [citations omitted]. This has been done by directing a pro tanto reduction in the judgment to the extent of the amount of any item the plaintiff did not prove a right to recover.

This Court has recently reaffirmed the long-standing principle cited above in Morgan v. Scott, ___ S.W.3d ___, 2009 WL 1438905, *4-5 (Ky. 2009) (attached hereto as Exhibit 4).

If this Court is inclined to adjust the opinion issued by the Court of Appeals at all, it should enter an opinion remitting all of the damages awarded to Haj-Hamed as none are supported, not only for the reasons related to each particular category, but, for all of the damages because there is no legal causation connecting them to the alleged negligence. Pathways, supra 113 S.W.3d at 89.

III. THE CIRCUIT COURT PROPERLY GRANTED OHIC'S MOTION ON THE ISSUE OF BAD FAITH AND THE COURT OF APPEALS CORRECTLY UPHELD THIS RULING.

OHIC does not believe this issue is preserved for review as explained below. Moreover, the substance of the appellant's contentions do not have merit.

In his brief to this Court Haj-Hamed asserts that the Court of Appeals determined that OHIC had a duty to defend him in the medical licensure board proceedings in

Kentucky and Ohio but improperly used the contract terms to reduce the amount awarded from \$85,000 to \$25,000. On this basis, he argues that he should be entitled to the full \$85,000 and a trial on the issue of bad faith. This view of the opinion of the Court of Appeals is simply wrong. Additionally, the contentions made by Haj-Hamed are not based on the evidence in the case or a proper interpretation of the law related to bad faith in Kentucky.

First, and foremost, the Court of Appeals nowhere in its opinion stated that OHIC had a duty to defend Haj-Hamed in the medical licensure board proceedings in Kentucky and Ohio.

Secondly, it cannot be said that OHIC had a duty to defend medical board proceedings. This provision of the insurance policy is an indemnity provision. That is, OHIC will reimburse up to \$25,000 expended in defense of such proceedings, unlike proceedings such as a claim for medical malpractice, made within the policy period, for which there would be a duty to defend.

There has never been any dispute that any professional liability policy issued by OHIC would have expired on December 11, 2002 at the very latest. There is also no dispute that the policy issued by OHIC was a "claims made" policy meaning that claims within the provisions of the policy were covered regardless of when the claim actually occurred provided that the demand for coverage is received within the policy's effective period.

From this case's inception, appellant has claimed that OHIC is liable under the Unfair Claims Settlement Practices Act (UCSPA) for bad faith for refusing to defend a lawsuit filed January 29, 2003 for the wrongful death of a patient of Haj-Hamed's who

allegedly overdosed on pain killers prescribed by Haj-Hamed. See Complaint (ROA p. 4). On October 6, 2003 Haj-Hamed served answers to OHIC's interrogatories. In response to a question asking the basis for the allegation in the complaint concerning bad faith, Haj-Hamed identified the "event" for which OHIC should have provided a defense as the death of the patient Janice Stidham. See Answers to Interrogatories ROA pp. 58-157, Interrogatory Number 10. In Haj-Hamed's response to OHIC's motion for summary judgment on the issue of bad faith, he identified the underlying basis for the allegation of bad faith to be OHIC's refusal to defend the wrongful death suit filed on behalf of Janice Stidham. See Response to Motion for Summary Judgment ROA pp. 815-862. At trial this was also the theory relied upon by Haj-Hamed.

There is no dispute that Haj-Hamed did not notify OHIC of the wrongful death suit until February 2003, well after the policy had expired.

Haj-Hamed contended for the first time in his brief to the Court of Appeals that the basis for the bad faith claim should be considered to be the failure to defend Haj-Hamed for proceedings before the Kentucky Board of Medical Licensure and the Ohio Board of Medical Licensure.

This is plainly improper. The scope of appellate review is limited to those theory or theories upon which the case is practiced and tried. Florman v. Mebco Ltd. Partnership, 207 S.W.3d 593, 607 (Ky.App. 2006). An issue not timely raised in the trial court for it to consider cannot be considered for the first time on appeal. Id. See also, Fischer v. Fischer, 197 S.W.3d 98, 103 (Ky. 2006); Abuzant v. Shelter Ins. Co., 977 S.W.2d 259 (Ky.App. 1998).

Haj-Hamed should not be allowed to advance this argument for the first time on

appeal. For this reason the Court should not consider this issue.

Even if the Court were to set aside the fact that the issue is not properly preserved it is clear that: (1) the circuit court correctly dismissed the claim of bad faith based on the medical malpractice case filed in January 2003; and, (2) the medical board proceedings do not supply a basis to support a claim for bad faith.

Bad faith requires (1) that the insurer is obligated to pay the claim under the policy; (2) there is no reasonable basis in law or fact for denying the claim; and, (3) that the insurer knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether there was a reasonable basis. Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993). Mere negligence is not sufficient. Haj-Hamed must show that there exists some intentional wrongful conduct. Big Yank Corp. v. Liberty Mut. Fire Ins. Co., 125 F.3d 308, 312 (6th Cir. 1997); Blue Cross and Blue Shield of Ky., Inc. v. Whitaker, 687 S.W.2d 557, 559 (Ky.App. 1985).

In this case, the bad faith claim fails on the first element with respect to the 2003 malpractice claim. This is the finding and ruling by the circuit court that no contract existed upon which a bad faith claim could be maintained. In other words, the wrongful death action was filed in January 2003, notice was given to OHIC and a demand for a defense made in February 2003. Because the policy was a claims made policy that expired in December 2002, no coverage existed and there was no obligation on the part of OHIC to provide a defense. Therefore, there could be no obligation for OHIC to pay the claim under the policy.

Although appellant has raised the contention of bad faith with respect to medical board proceedings for the first time on appeal and the policy issued by OHIC was one of

indemnity for medical board proceedings, the same basic rationale is applicable to that scenario as well. There is no evidence of record that OHIC was ever requested to defend Haj-Hamed in any medical board proceeding. Timely notice is a prerequisite to coverage under the policy. Further, the complaint against Haj-Hamed's license by the Kentucky Medical Board was not issued until February 7, 2003, well after the expiration of the policy. Finally, the policy had an exclusion for acts based upon criminal violations of the law. There is no question that the complaint against Haj-Hamed's license was based on violations of the criminal law.

Haj-Hamed continues to put forth that Aetna Casualty & Surety Co. v. Commonwealth, 179 S.W.3d 830 (Ky. 2005), somehow changes this conclusion. Aetna is inapplicable and distinguishable for a number of reasons.

First, the rule being applied in Aetna is set forth by the Court as follows:

If the insurer believes there is no coverage, it has several options. One is to defend the claim anyway, while preserving by a reservation of rights letter its right to challenge the coverage at a later date. Another is to elect not to defend. However, should coverage be found, the insurer will be liable for "all damages naturally flowing from" the failure to provide a defense. (citation omitted). This includes "damages" for reimbursement of defense costs and expenses if the insured hires his own lawyer, and in some instances, the amount of a default judgment, if he does not. (citation omitted).

Aetna, 179 S.W.3d at 841.

All authorities, including Aetna recognize that there is a distinct difference between the "duty to defend" and the "duty to indemnify" under malpractice insurance policies. Aetna, 179 S.W.3d at 841. See also, American Physicians Assur. Corp. v. Schmidt, 187 S.W.3d 313, 319 (Ky. 2006); James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273, 279-80 (Ky. 1991); Cincinnati Ins. Co. v.

Vance, 730 S.W.2d 521, 522-23 (Ky. 1987).

In the case before this Court, Aetna and the other cited authorities, are simply inapplicable. There is no evidence that Haj-Hamed ever gave OHIC notification of the medical licensure board proceedings or requested, in any manner, for OHIC to provide a defense for those proceedings.⁵ Before a duty to defend can be imposed, the insurer must be put on notice and receive a request for coverage under the policy. There is no evidence of record in this case that this action was taken. Therefore, it cannot be shown that OHIC wrongfully refused to provide a defense, thus, any damages beyond the limits of the policy is not supported; Aetna only applies if there has been an improper failure to provide a defense.

CONCLUSION


It is undisputed that the policy issued to Riverside that covered appellant by OHIC expired December 11, 2002 and that OHIC gave 75 days notice of the termination of the policy in accordance with Kentucky law. Thus, the Court of Appeals' correctly held that the jury's verdict finding to the contrary could not stand. Even if it is assumed that OHIC negligently cancelled the policy for nonpayment of premiums effective September 6, 2002, there is absolutely no evidence from which a jury could conclude that the damages claimed by Haj-Hamed were related to that breach. In fact, all of the evidence leads to the inescapable conclusion that none of the damages claimed in this case are related in any way to an act or omission by OHIC. Under no circumstances should OHIC be forced to defend an action for bad faith; the undisputed evidence is that Haj-Hamed put forth a totally different theory at the trial court (failure to defend the

⁵ Both Haj-Hamed and counsel for Haj-Hamed acknowledged that OHIC would have only been liable for \$25,000.00 under the policy in medical board proceedings. (VCR 11/15/05; 3:37:49-3:39:30; VCR 11/16/05; 3:49:20-3:49:16).

medical malpractice case filed in 2003), and, because there is no question that bad faith does not fit this theory, he has now changed his position to say that the failure to defend the medical licensure board actions should be the basis for a bad faith action. Clearly, OHIC's policy was an indemnity policy as noted above. Further, even if this provision of the policy were viewed as conferring a duty to defend, no demand for a defense was ever made – a prerequisite to maintaining an action for bad faith.

The Court of Appeals' correctly held that Haj-Hamed did not support his claims. OHIC submits also that the only adjustment that should be made to the Court of Appeals' opinion, if any, is to hold that Haj-Hamed is not entitled to any of the damages claimed. Even if this Court would use different reasoning, the decision of the Court of Appeals should be affirmed if the correct result was reached. Vega v. Kosair Charities Committee, Inc., 832 S.W.2d 895, 897 (Ky.App. 1992).

Respectfully submitted,


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