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Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-000836-MR

CHARLES EHLSCHIDE AND
PATRICIA EHLSCHIDE — APPELLANTS

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., SPECIAL JUDGE
ACTION NO. 98-CI-00146

COLONIAL LIFE & ACCIDENT
INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

KNOPF, JUDGE: Charles and Patricia Ehlschide appeal from orders of the Muhlenberg Circuit Court, entered January 20, and March 22, 2004, dismissing their bad-faith-insurance-settlement claim against Colonial Life & Accident Insurance Company. The trial court erred, they maintain, by not submitting the case to a jury. Finding no error, we affirm.

For the most part the facts are not in dispute. Colonial issued a cancer insurance policy to Charles Ehlschide and his family in 1991. In 1997, Charles's wife, Patricia, was diagnosed with colon cancer, and in July of that year, the Ehlschides made a claim under their policy. By November, disputes had arisen regarding the scope and amount of coverage for Patricia's chemotherapy expenses.

With respect to the amount, at some point the company determined that it was not liable for the full amount actually charged for chemotherapy, but rather for an amount based on "the reasonable and customary charges" for such treatment in the Ehlschides' geographical area. Charles protested that limitation, and upon reconsideration the company agreed that the "reasonable and customary" formula did not apply to the Ehlschides' policy. It thereafter based its benefit payments on the amounts actually charged and sought to make up the difference for treatments already accounted for at the lower rate. One of the prior payments was not corrected, however, leaving a discrepancy of about $2,500.00 between the amounts charged and the benefits provided. Soon after Charles filed suit, the company acknowledged the discrepancy and paid the outstanding amount plus interest. The company characterizes its delay in providing this portion of the Ehlschides' benefits as a mere oversight, which was corrected as soon as it was

discovered. The Ehlschides' see it, rather, as an attempt to deprive them of their benefits and as evidence of the company's bad faith.

The dispute with respect to the scope of the Ehlschides' coverage was not so easily resolved and provides the principal basis for their suit. Patricia was treated with the chemotherapy drug 5-Flurоucil (5-FU) and in conjunction with that drug she received Leucovorin, which apparently is a form of folic acid, a vitamin. Leucovorin is not itself a cancer destroying agent, but it prolongs the cancercidal effect of 5-FU. It is, as the company acknowledged, a common component of 5-FU therapy. Nevertheless, the company maintained that because Leucovorin is not a cancercide, it was not covered by the Ehlschides' policy. It thus refused to reimburse the Ehlschides' for the nearly $9,000.00 Leucovorin expense. The Ehlschides insisted that their policy did cover this expense, and in March 1998 brought suit claiming that the company had breached the insurance contract by denying coverage and further that it had done so in bad faith in violation of the Unfair Claims Settlement Practices Act (UCSPA),[1] the Consumer Protection Act,[2] and its common law duty to deal with its insureds in good

[1] KRS 304.12-230.
[2] KRS 367.170.

faith.[3] The trial court decided the contract issue--whether the policy covered the Leucovorin expense--in favor of the Ehlschides. The company does not challenge that ruling, and apparently it has tendered the full amount of that expense plus interest. The trial court dismissed the Ehlschides' bad-faith claims, however, and it is from that ruling that the Ehlschides have appealed.

To maintain a bad faith action against an insurer, whether premised upon common law theory or a statutory violation, the insured must prove three elements:

> (1) The insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a claim existed.[4]

If the claim is fairly debatable, as to either the law or the facts, the insurer may debate it.[5] And in particular it may litigate genuine, i.e. non-frivolous, first-impression

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[3] Curry v. Fireman's Fund Insurance Company, 784 S.W.2d 176 (Ky. 1989).

[4] Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993) (citation and internal quotation marks omitted); Davidson v. American Freightways, Inc., 25 S.W.3d 94 (Ky. 2000).

[5] Wittmer v. Jones, *supra.*

coverage issues.[6] The Ehlschides contend that the contract so clearly covered Leucovorin as to render the company's denial of coverage frivolous and fraudulent, particularly in conjunction with what they regard as the company's suspect delay in correcting the "full and customary charges" mistake. We disagree.

At the beginning of the section titled "Cancer Benefits," the Ehlschides' contract includes an introductory paragraph providing in part that "We [the company] will pay benefits for the treatment of cancer if: . . . it [the treatment] is not excluded by name or specific description in this policy." There follows a series a paragraphs describing particular benefits ("Initial Diagnosis," "Hospital Confinement," "Experimental Treatment," . . .) including a paragraph headed "Radiation/Chemotherapy." That paragraph provides in pertinent part that

> [w]e will pay this benefit if you receive radioactive or chemical treatments prescribed by a doctor for the destruction of abnormal tissue during the treatment of cancer. These treatments must be approved for the treatment of cancer by the Food and Drug Administration. We will pay the amount you are charged but not more than the reasonable and customary charges for: . . . cancercidal chemical substances and their administration.

[6] Empire Fire & Marine Insurance Company v. Simpsonville Wrecker Service, Inc., 880 S.W.2d 886 (Ky.App. 1994).

Focusing on the line, “We will pay the amount you are charged . . . for cancercidal chemical substances and their administration.” the company argued that by specifying cancercidal substances the contract excluded non-cancercidal substances such as Leucovorin. Although the trial court ultimately rejected this reading, we agree with it that this is not a frivolous, interpretation. The Ehlschides, on the other hand, emphasize the introductory line, “We will pay . . . if [the treatment] is not excluded by name or specific description,” and argue that because Leucovorin is nowhere in the contract excluded by name or description it must be deemed covered. Leucovorin, however, is not a “treatment,” having no independent cancercidal effect, and so is not implicated by the introductory language. Certainly it is not so clearly implicated as to make the company’s position untenable.

Nor is it obvious that Leucovorin should be deemed part of 5-FU’s administration. “Administration” is not defined in the contract, and the company could reasonably argue that it referred only to the equipment and personnel involved in delivering the 5-FU. We agree with the trial court, therefore, that the company’s denying coverage and forcing litigation of the first-impression coverage issue did not breach its duty of good faith.

The company's delay in fully correcting its mistake with respect to the "reasonable and customary charges" question does not change this result. A finding of bad faith is not appropriate unless the insurer's conduct is so outrageous as to justify an award of punitive damages. Neither technical violations of the UCSPA nor mere negligence or delay in satisfying a claim is enough. There must be evidence of the insurer's "evil motive, or [its] reckless indifference to the rights of others."[7] There is no such evidence in this case.

Although arguably the company was negligent in overlooking one of the payments it had agreed to correct, it responded reasonably promptly to all of the Ehlschides' concerns and gave those concerns meaningful consideration, in most cases ultimately agreeing with the Ehlschides. When its error with respect to the overlooked payment finally came to light, it promptly made the payment with interest. We agree with the trial court that this is simply not evidence of evil motive or reckless indifference. Summary judgment, therefore, was appropriate.[8]

Finally, the Ehlschides contend that the trial court erred when it overruled their motion to compel responses to

[7] Motorists Mutual Insurance Company v. Glass, 996 S.W.2d 437, 452 (Ky. 1997).

[8] Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991).

certain interrogatories. Although their brief gives this issue only cursory treatment, they appear to assert that answers should have been compelled to interrogatories seeking (1) matter relating to negotiations or offers of settlement and (2) the company's total revenues and profits for the year of the Ehlschides' claim and for some number of preceding years. With respect to the settlement information, the Ehlschides have failed to specify what information they seek and to explain why it is potentially relevant or apt to lead to relevant information. Without that specificity there can be no basis for saying that the trial court erred.

The financial information was potentially relevant, they contend, to an assessment of punitive damages. Our determination that the Ehlschides have failed to establish a claim for punitive damages renders this contention moot.

In sum, the trial court correctly held that there was a reasonable basis under the contract for Colonial's denial of the Ehlschides' Leucovorin claim and that otherwise the company's settlement of the Ehlschides' claims, although imperfect, could not be found to have been in bad faith. Accordingly, we affirm the January 20, 2004, order of the Muhlenberg Circuit Court.

ALL CONCUR.

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