RENDERED: NOVEMBER 16, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

SUPREME COURT GRANTED DISCRETIONARY REVIEW:
FEBRUARY 11, 2009
(FILE NO. 2008-SC-0127-DG)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000200-MR

OHIC INSURANCE COMPANY — APPELLANT

v.

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

GHASSAN HAJ-HAMED — APPELLEE

AND: NO. 2006-CA-000392-MR

RIVERSIDE MEDICAL CENTER;
GHASSAN HAJ-HAMED; AND HUSAM
HAMED — CROSS-APPELLANTS

v.

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

OHIC INSURANCE COMPANY CROSS-APPELLEE

OPINION
AFFIRMING IN PART, AND REVERSING
AND REMANDING IN PART ON DIRECT APPEAL;
AFFIRMING ON CROSS-APPEAL

** ** ** ** **

BEFORE: STUMBO AND VANMETER, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

VANMETER, JUDGE: OHIC Insurance Company appeals from a judgment entered by the Campbell Circuit Court after a jury found that OHIC negligently failed to comply with its duties toward Ghassan Haj-Hamed and Husam Hamed. Haj-Hamed, Hamed, and the Riverside Medical Center (cross-appellants) cross-appeal from the same judgment. For the reasons stated, on direct appeal we affirm in part, and we reverse and remand in part. We affirm on cross-appeal.

Riverside was an entity which owned multiple urgent medical care and professional medical offices in Northern Kentucky and Ohio. It was formed by Haj-Hamed while he was a physician licensed in Kentucky and Ohio. OHIC issued a professional liability insurance policy which covered "claims made" regarding the professional acts or omissions of cross-appellants and Riverside's other physician employees between June 22, 2001, and June 22, 2002. The policy included Kentucky endorsements which addressed both cancellation and nonrenewal of the policy. Specifically, cancellation could occur only upon written notice, which was required to be provided at least 14 days in advance if for nonpayment of premium, or at least 75 days in

[1] Senior Judge Daniel T. Guidugli, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

advance if for any of six stated reasons, including the "[d]iscovery of willful or reckless acts" by the insured which increased the hazardous risk.

On August 23, 2002, OHIC notified cross-appellants in writing that the policy would be canceled, effective September 6, for nonpayment of premium unless $19,461 was "received in OHIC's office" prior to that date. A payment of $16,642 was made prior to September 6. Haj-Hamed later indicated that he believed this amount was the base premium, and that some dispute existed about the additional premium charged to cover changes in the insured medical personnel.

On or about September 20, 2002, cross-appellants provided OHIC with a check for $12,898 in payment of another premium which was due on September 22. On September 24, however, the premium check was dishonored by the bank when it was presented for payment. Although cross-appellants assert that the check was dishonored because the bank accounts were frozen after Haj-Hamed's September 23 arrest for illegally prescribing controlled substances, OHIC presented evidence to show that the accounts in fact were not frozen until two days after the check was dishonored.

On September 27, based on the media coverage of Haj-Hamed's arrest and the criminal allegations against him, OHIC's underwriting department notified cross-appellants that their coverage would be canceled on December 11, 2002, due to the "[d]iscovery of willful or reckless acts" by the insured. On October 2 and again on October 7, cross-appellants' insurance agent, Joe Vonderhaar, faxed to cross-appellants the following message:

URGENT!!!!!!!!!!!!!!

> As you know by now, [OHIC] has sent a direct notice of cancellation as of December 11th, due to the recent bad publicity and exposure changes. We will need to discuss how we may cover the doctors in the future, but it will be a problem.
>
> More importantly, [OHIC] has past due bills dating back to March and they will be canceling the group's coverage on this Friday [October 4], if a check for the full amount is not overnighted immediately. At this point, we are not in a negotiating position with the carrier and if the coverage were to cancel, we would not be able to replace it in a timely fashion.
>
> Please forward the payment (per the attached invoice) immediately.

Haj-Hamed testified that he then called Vonderhaar and offered to pay the outstanding premium by credit card or some other method. According to OHIC, that offer was rejected because a credit card payment plan had not been established for the policy. On October 11, Vonderhaar advised Haj-Hamed that OHIC had canceled the coverage, effective September 6, based on nonpayment of premium and the mailing of the cancellation notice to cross-appellants on August 23. According to the parties, cross-appellants did not obtain substitute insurance coverage with another carrier until July 2003.

In January 2003 cross-appellants were sued for the wrongful death of one of Haj-Hamed's patients, who in October 2002 overdosed on drugs including the controlled substances prescribed by Husam Hamed one day earlier. As OHIC's "claims made" policy had expired and no other liability insurance policy was in place, cross-appellants purportedly settled the case for $25,000. Meanwhile, the Kentucky and Ohio Medical Boards suspended and then reinstated, under severe restrictions, Haj-Hamed's license to practice medicine.

In May 2003 cross-appellants filed the action below, raising a variety of claims. The court eventually dismissed all claims against OHIC's codefendants, as well as several claims against OHIC. A trial was conducted regarding cross-appellants' claim of negligence, as well as their claim that OHIC breached its statutory and administrative duties. The jury found that OHIC, by and through its employees, had failed to comply with its duty "to exercise ordinary care in issuing and canceling insurance policies[,]" and that such failure "was a substantial factor in causing damages" to Haj-Hamed and Hamed. The jury also found that OHIC, by and through its employees, had failed to comply with its statutory and administrative duties regarding the issuance or cancellation of an insurance policy. The jury awarded zero damages to Hamed but awarded $175,000 to Haj-Hamed, reduced to $157,500 based on a finding of 10% fault. The court denied OHIC's motion for judgment notwithstanding the verdict or for a new trial. This appeal and cross-appeal followed.

DIRECT APPEAL

On direct appeal, OHIC first asserts that the trial court erred by failing to apply Ohio substantive law rather than Kentucky law. We disagree.

OHIC relies on *Lewis v. American Family Ins. Group,* 555 S.W.2d 579 (Ky. 1977), in which Indiana plaintiffs were involved in a collision with an uninsured Kentucky resident in Kentucky. The plaintiffs sought to recover uninsured motorist benefits under their automobile liability insurance policies, which had been sold and delivered in Indiana to provide coverage of vehicles principally garaged in Indiana. In holding that Indiana law governed, the Kentucky Supreme Court stated:

> Traditionally the rule has been that the validity of a contract is to be determined by the laws of the state in which it was

> made, while the remedies to be enforced are those provided by the state in which the suit is brought. *Fry Bros. v. Theobold,* 205 Ky. 146, 265 S.W. 498 (1924). Such a mechanical approach is no longer favored. The modern test is "which state has the most significant relationship to the transaction and the parties." Restatement of Conflict of Laws 2d, sec. 188 (1971). Using this test, in most cases the law of the residence of the named insured will determine the scope of his automobile liability insurance policy. Section 193 of the Restatement of Conflict of Laws 2d, states:
>
> > "Contracts of Fire, Surety or Casualty Insurance
> >
> > The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in sec. 6 to the transaction and the parties, in which event the local law of the other state will be applied."

Id. at 581-82.

OHIC asserts on appeal that the matter before us so resembles *Lewis* that Ohio substantive law should apply. OHIC notes that

> Riverside Medical Center, the purchaser of the professional liability policy and a named insured, has offices in Cincinnati. OHIC is an Ohio company and Haj-Hamed lives in Ohio. The policy was delivered in Ohio and all bills and communications were sent to Riverside's . . . Ohio office.

However, unlike the situation in *Lewis,* in which the automobile collision provided the plaintiffs' only significant contact with Kentucky, in this case cross-appellants clearly had significant contacts with Kentucky since five of their seven office locations were in Kentucky, and numerous written communications occurred between OHIC and the Kentucky offices. Moreover, the insurance policy included a Kentucky endorsement, and

OHIC obviously intended to rely on Kentucky regulations since the charged premiums reportedly were based on Kentucky rates and the notices of cancellation reflected Kentucky statutory requirements. Given these circumstances, the trial court did not err by determining that Kentucky had the most significant relationship to the transactions and parties, and by applying Kentucky rather than Ohio substantive law.

OHIC alternatively contends, in essence, that even if the trial court properly applied Kentucky law, it erred by failing to direct a verdict in OHIC's favor as to whether cross-appellants received proper notice of the policy's cancellation. We agree in part, and disagree in part.

Pursuant to KRS 304.20-320(2)(b) and 806 KAR 20.010, as well as the policy's terms, OHIC was obligated to provide cross-appellants with written notice of any cancellation of insurance. The notice was required to be mailed or delivered

> at least fourteen (14) days prior to the effective date of the cancellation if the cancellation is for nonpayment of premium[, . . . or] at least seventy-five (75) days prior to the effective date of the cancellation if the policy has been in effect more than sixty (60) days.

KRS 304.20-320(2)(b).

Here, as noted above, OHIC provided cross-appellants with two different reasons for cancellation. The first reason, nonpayment of premium, was raised on August 23, 2002, when OHIC provided 14 days' notice that the policy would be canceled if the stated premium was not timely paid. Although cross-appellants responded with a payment of less than the stated premium, OHIC did not cancel the policy at that time but instead continued to send notices for additional premiums, including one due on

September 22. However, cross-appellants' check for the September 22 payment was dishonored.

Further, on September 27 OHIC provided cross-appellants with the second reason for cancellation, in the form of 75 days' notice that their coverage would be canceled on December 11 due to their "willful or reckless acts." Also, on October 2 and October 7, Vonderhaar noted that the coverage was being canceled as of December 11 "due to the recent bad publicity and exposure changes[,]" and he advised cross-appellants that the coverage would be canceled sooner, on October 4, if past due bills were not immediately paid. Payment was not timely made, and on October 11 Vonderhaar advised cross-appellants that the coverage was canceled, effective September 6, due to the nonpayment of premium and the 14 days' notice of cancellation provided on August 23.

Our role on appellate review of the denial of a motion for a directed verdict is limited to determining whether, after drawing all reasonable inferences in favor of the nonmovant, the jury's verdict was so palpably or flagrantly contrary to the evidence presented at trial as to indicate that the verdict was reached as a result of the jury's passion or prejudice; we may reverse only if we reach such a conclusion. *Stringer v. Wal-Mart Stores, Inc.,* 151 S.W.3d 781, 787 (Ky. 2004). *See* CR[2] 50.01.

Here, the jury was directed to determine whether OHIC breached its statutory and regulatory duty to provide 14 days' notice before canceling a policy due to the nonpayment of premium, and 75 days' notice before canceling a policy for any other reason. Although cross-appellants were advised in October that their coverage was canceled as of September 6, based on the 14 days' notice provided on August 23, an issue of fact existed as to whether the August 23 notice was sufficient in light of subsequent

[2] Kentucky Rules of Civil Procedure.

events including OHIC's acceptance of a premium payment and its issuance of additional premium notices. Thus, OHIC was not entitled to a directed verdict as to whether it provided the required 14 days' notice before canceling the policy for nonpayment of premium.

The court did, however, err by failing to direct a verdict in OHIC's favor as to whether it provided the required 75 days' notice before otherwise canceling the policy. The record is undisputed that on September 27, OHIC provided cross-appellants with 75 days' notice that their coverage would be canceled on December 11 due to their "willful or reckless acts[,]" and nothing in the record suggests that the notice subsequently was waived or otherwise amended by the parties. Even if we assume that an ambiguity existed as to whether the policy was canceled at an earlier date due to the nonpayment of premium, the policy clearly was canceled no later than December 11. Hence, even drawing all inferences in favor of cross-appellants, the jury's finding that OHIC failed to comply with the 75 days' notice requirement was palpably or flagrantly contrary to the evidence presented at trial. *Stringer,* 151 S.W.3d at 787. We therefore must conclude that the trial court erred by failing to direct a verdict as to OHIC's compliance with that requirement, and as to the resulting cancellation of the policy.

Next, OHIC asserts that the trial court erred by failing to dismiss the negligence claim against it. More specifically, OHIC argues:

> One cannot maintain an action for breach of contract and negligence. *Cincinnati, N.O. & T.P. Ry. Co. v. Jones,* [285 Ky. 588], 148 S.W.2d 725, 727 (Ky. 1941). Once the circuit court granted summary judgment to OHIC on the claim of breach of contract, [cross-appellants] simply re-tooled that claim and molded it into one for negligence. Because OHIC did not breach the contract it cannot be found liable for negligence.

We disagree.

Cincinnati, N.O. addressed a railway company's failure to deliver a passenger to the destination stated on the passenger's ticket, allegedly resulting in the aggravation of the passenger's existing injury and his receipt of new injuries. After the court required him to make an election of claims, the passenger chose to prosecute his action as one for breach of contract rather than one for negligence, amending his petition to rephrase all of his prior tort claims as stemming from the breach of contract. Kentucky's highest court rejected the claims for pain and suffering, finding that although the passenger was entitled to sue for breach of contract, and to seek recovery of the value of his lost time and resulting expenses, he was not entitled to seek damages for his alleged physical suffering "unless the contract [was] breached in such a manner as to constitute a tort, in which event, the damages recoverable are the same as in a tort action." 148 S.W.2d at 727.

Here, by contrast, the trial court dismissed the breach of contract claim since it was not alleged that OHIC failed to honor a contract to pay a claim. 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 were injured because OHIC negligently issued and canceled the policy. Accordingly, the court did not err by failing to dismiss cross-appellants' claim for negligence.

Moreover, we are not persuaded by OHIC's alternative assertion that cross-appellants' tort claim must be denied pursuant to the economic loss rule. Although Justice Keller urged the rule's adoption in his concurring opinion in *Presnell Constr.*

Managers, Inc. v. EH Constr., LLC, 134 S.W.3d 575, 583 (Ky. 2004), thus far it has not been expressly adopted in this jurisdiction. In any event, even Justice Keller specifically noted that "the quasi-fiduciary nature of an insurer-insured relationship[,]" such as that now before us, may automatically create an independent duty of care between contractually-related parties, and may therefore support an independent tort action to which the economic loss rule should not be applied. *Id.* at 590.

OHIC's final contention is that the trial court erred by concluding that the evidence supported the jury's award to Haj-Hamed of $175,000 in damages. Although the jury's damages instruction and verdict did not categorize the components of the award of damages, the parties do not dispute that the award was consistent with Haj-Hamed's plea for $175,000 in damages, described during the trial as being $60,000 for defense of the malpractice action, $85,000 for defense of the medical licensure board proceedings, and $30,000 for additional costs of purchasing other professional liability insurance after the OHIC policy was terminated.

As to the award of $60,000 for defense of the malpractice action, we again note that OHIC was entitled to a finding that the policy was canceled effective December 11, 2002. Because the policy was a "claims made" policy, it applied only to those claims which were filed by December 11, 2002. As the malpractice action was not filed until January 2003, it necessarily fell outside of the policy's term of coverage and the claim for costs associated with the defense of that action should not have been submitted to the jury. The award of $60,000 damages relating to the malpractice claim therefore must be set aside.

As to the $85,000 awarded for defense of the medical licensure board proceedings, OHIC correctly notes that any award to Haj-Hamed of more than $25,000 was excessive in light of the insurance policy's specific limitation of coverage for "Formal Charges or Disciplinary Proceedings" to "$25,000 per named individual[.]" On remand, therefore, another $60,000 of the award must be set aside.

As to the award of $30,000 as damages for the additional costs cross-appellants incurred in order to purchase replacement liability insurance after the OHIC policy was canceled, we agree with OHIC that the trial court erred by submitting the issue to the jury. Cross-appellants do not dispute Vonderhaar's testimony that their applications to other insurance companies, seeking replacement liability insurance, reflected that cross-appellants were insured by OHIC until December 11, 2002. Although cross-appellants did not obtain replacement insurance until July 2003, there is no evidence that the gap between December and July occurred because of any actionable wrongdoing by OHIC. OHIC therefore did not incur liability as a result of cross-appellants' failure to obtain replacement insurance after the policy expired, and another $30,000 of the award of damages also must be set aside on remand.

CROSS-APPEAL

Cross-appellants contend that the trial court erred by granting a directed verdict, in OHIC's favor, on their claims that OHIC acted in bad faith and violated the Unfair Claims Settlement Practices Act by failing to provide benefits coverage for an insured event. We disagree.

Cross-appellants rely on *Wittmer v. Jones,* 864 S.W.2d 885, 890 (Ky. 1993), which reaffirms that an allegation of a bad faith refusal to pay an insured's claim

must include proof of three elements, including proof that the insurer was obligated to pay the claim under the policy's terms. Here, the record is undisputed that the insurance policy was a "claims made" policy which covered only those claims made before the policy's expiration on December 11, 2002. As the alleged malpractice occurred in October 2002, but the resulting claim was not filed until January 2003, cross-appellants clearly were not entitled to coverage of the claim under the policy's terms. Absent proof of an obligation to pay the claim, the trial court properly granted a directed verdict for OHIC.

CONCLUSION

On direct appeal, for the reasons stated above, the court's judgment is affirmed in part, and it is reversed and remanded in part for amendment of the verdict and the setting aside of $150,000 of the $175,000 awarded to Haj-Hamed prior to the 10% reduction for contributory fault. The judgment is affirmed on cross-appeal.

ALL CONCUR.

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