IN THE SUPREME COURT OF THE STATE OF NEVADA

AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS, AND AMERICAN NATIONAL INSURANCE COMPANY,
Appellants/Cross-Respondents,
vs.
JOHN F. CRIMMINS, IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF CATHY P. CRIMMINS,
Respondent/Cross-Appellant.

No. 42667

FILED

DEC 01 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal and cross-appeal from a district court judgment entered pursuant to a jury verdict in an insurance bad faith action and from an order denying a new trial. Second Judicial District Court, Washoe County; Steven P. Elliott and Brent T. Adams, Judges.

Respondent and cross-appellant John F. Crimmins and Cathy P. Crimmins[1] (collectively, the Crimminses) sued appellants and cross-respondents American National Life Insurance Company of Texas and American National Insurance Company (collectively, American National) for, among other things, breach of contract and breach of the duty of good faith and fair dealing. The Crimminses sought both compensatory and punitive damages. A jury awarded the Crimminses $983,000 in compensatory damages and $650,000 in punitive damages.

[1]Cathy is now deceased, and John has proceeded against appellants in his capacity as executor of the Estate of Cathy P. Crimmins.

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On appeal, American National argues that the district court's extensive questioning of witnesses and injection of levity into the proceedings deprived American National of a fair trial. American National also contends that there was insufficient evidence to support the jury's finding of breach of the duty of good faith and fair dealing and the jury's awards of compensatory and punitive damages.[2] We conclude that the district court's actions in the trial did not deprive American National of a fair trial with respect to the Crimminses' claim of breach of contract because substantial evidence supported these claims and the burden of proof involved the preponderance of the evidence standard.

However, we conclude that the trial judge's actions did deprive American National of a fair trial with respect to the jury's determination that American National acted in bad faith and its award of punitive damages. Because of the higher standard for attaining punitive damages, the limited evidence in this case supporting the bad faith determination and punitive damage award, and Cathy Crimmins' failure to disclose material information on the insurance application and subsequent phone interview, the judge's comments and questions could have caused the jury to find bad faith and award punitive damages as a result of passion or prejudice.

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[2]On cross appeal, the Crimminses argue that the district court erred by not calculating interest on the judgment on a compound basis. We conclude that the district court did not err and properly calculated interest in this case. See Campbell v. Lake Terrace, Inc., 111 Nev. 1329, 1333-34, 905 P.2d 163, 165 (1995), overruled on other grounds by Aviation Ventures v. Joan Morris, Inc., 121 Nev. ___, 110 P.3d 59 (2005).

The Crimminses had the burden of proving breach of contract by a preponderance of the evidence.[3] For their breach of the duty of good faith and fair dealing claim, the Crimminses had to prove by a preponderance of the evidence that American National acted (1) unreasonably, and (2) with knowledge or a reckless disregard that there was no reasonable basis for its conduct.[4] Finally, to obtain punitive damages, the Crimminses had to present clear and convincing evidence indicating that American National was guilty of oppression, fraud, or malice.[5]

An insured may not recover under a policy if he or she materially misrepresented or omitted facts on the insurance application that affected the insurer's acceptance of the risk.[6] Further, an insured

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[3]See Southwest Gas v. Vargas, 111 Nev. 1064, 1073, 901 P.2d 693, 698 (1995).

[4]See Wohlers v. Bartgis, 114 Nev. 1249, 1258, 969 P.2d 949, 956 (1999) (citing Guaranty Nat'l Ins. Co. v. Potter, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996)). The Crimminses did not specify in their complaint whether their claim for breach of the duty of good faith and fair dealing was in contract or tort. However, their relationship with American National as insured and insurer permits them to seek tort remedies on this claim, and the allegations in their complaint support both contract or tort remedies. See id. at 1258; Great American Ins. v. General Builders, 113 Nev. 346, 354-55, 934 P.2d 257, 263 (1997); K Mart Corp. v. Ponsock, 103 Nev. 39, 49, 732 P.2d 1364, 1370 (1987), abrogated on another ground by Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990). Further, in order to pursue their punitive damages claim, the Crimminses must have proceeded under a tort theory. See Great American Ins., 113 Nev. at 354-55, 934 P.2d at 263.

[5]See NRS 42.005(1).

[6]See NRS 687B.110(2).

may not recover when, in good faith, the insurer would not have issued the policy had the true facts been made known to the insurer as required by the application or otherwise.[7] A misrepresentation or omission on an insurance application need not be related to the actual cause of loss of the insured to permit an insurer to rescind the policy.[8] Nevertheless, when an insurer has knowledge of the misrepresentation or omission, yet issues the policy anyway, the insurer has waived its power to rescind the policy.[9]

The evidence in the record indicates that at the time of submitting her application for insurance, Cathy failed to answer the following question on the application: "Does any person proposed for insurance have any other injuries, abnormalities, health conditions, medical or surgical advice, hospitalization, treatments or operations or visited a doctor in the past five years?" By leaving the question unanswered, Cathy omitted mention of Dr. Zena Levine's recommendation that she undergo an endometrial biopsy and follow-up ultrasound.

As the question was left unanswered, and after review of the other questions, American National conducted a follow-up phone interview with Cathy, during which Cathy answered "no" to the unanswered question from the application. American National also requested Cathy's medical records from her primary-care physician, Dr. Steven Tilles.

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[7]See NRS 687B.110(3).

[8]Randono v. CUNA Mutual Ins. Group, 106 Nev. 371, 375, 793 P.2d 1324, 1326 (1990).

[9]See Violin v. Fireman's Fund Ins. Co., 81 Nev. 456, 461-63, 406 P.2d 287, 290 (1965).

Cathy's medical records from Dr. Tilles included reference to Cathy's meeting with Dr. Levine and reference to Dr. Levine's finding of benign fibroid tumors in Cathy's uterus and a benign ovarian cyst. However, Dr. Tilles' records did not include Dr. Levine's recommended additional tests, and American National did not request Dr. Levine's records.

American National learned of the recommended tests after Dr. Levine's records were transmitted to American National during an investigation into Cathy's claims for payment for treatment of a liposarcoma in her retroperitoneum (i.e., stomach cancer). At trial, Cathy testified that she thought all of Dr. Levine's records would have been transmitted to American National along with Dr. Tilles' records when she applied for insurance. Cathy also testified that she believed Dr. Levine's recommended tests were conditioned on whether she experienced additional vaginal bleeding, which prompted her initial visit to Dr. Levine. Because she had not experienced additional bleeding, Cathy thought specific disclosure of the recommended tests in the insurance application was unnecessary.

At the time of Cathy's application, American National knew that Cathy had seen Dr. Levine and that Cathy had fibroid tumors in her uterus and an ovarian cyst. Based on that information, American National's underwriter testified that she should have issued a waiver of liability for anything related to Cathy's reproductive system according to American National's underwriting guidelines. However, American National failed to follow its underwriting guidelines and approved Cathy for insurance without the waiver. In addition, American National failed to obtain Dr. Levine's records before issuing the policy. Testimony revealed that had American National known of Levine's recommendation of additional tests, it would not have issued the policy until the tests had been performed.

Dr. Levine's testimony revealed that the recommended tests were related to Cathy's reproductive system. Therefore, had American National issued a waiver of Cathy's reproductive system, it would not have been liable for anything resulting from the recommended tests. Other medical testimony indicated that there was a slight chance that the recommended tests could have revealed Cathy's liposarcoma. Nevertheless, based on this information, the jury could have reasonably concluded that Cathy's failure to disclose the recommended endometrial biopsy and ultrasound were not material and that the policy was issued as a result of American National's own negligence after having knowledge of Dr. Levine as a treating physician and failing to issue a waiver or obtain Dr. Levine's records. Such findings would support the Crimminses' breach of contract claim.

After Cathy submitted her claims for payment, American National's underwriter, Jayne Manning, was asked to review Cathy's initial application to determine, in retrospect, whether American National would have issued a policy to Cathy had it known of Dr. Levine's recommended tests. Manning testified that she would not have issued the insurance policy because Cathy had not taken the recommended tests. Manning admitted that American National had improperly failed to issue a waiver of Cathy's reproductive system based on the fibroids and ovarian cyst.

The record also reveals evidence that Peggy Armstrong, the employee in American National's claims department who ultimately made the decision to rescind Cathy's policy, testified that she rescinded Cathy's policy based on Manning's information regarding Cathy's failure to disclose the recommended tests on her application. However, the report from the claims department that was supposed to indicate American National's reason for rescinding Cathy's policy does not state a reason for the rescission. Further, American National's rescission log indicated that the reason for rescinding Cathy's policy was a history of a "pelvic mass," not Dr. Levine's recommended, untaken tests. Moreover, for other insureds who had a history of a "pelvic mass," American National offered them a waiver of liability for that condition rather than rescinding their policies. This evidence indicates that American National did not apply its policies uniformly, but instead altered application of its policies to suit its needs.

While presiding over the trial, Judge Adams made several humorous comments directed to making the jury feel more comfortable or explaining reasons for delay in the trial process. Additionally, Judge Adams questioned several witnesses during trial. Under NRS 50.145, a trial judge may interrogate and call witnesses. The questioning was extensive and, although many of the questions indicate that Judge Adams sought to clarify several points for the jury regarding the highly technical nature of the insurance business, many were argumentative in nature, particularly the questions asked of Manning. They leave a distinct impression that Judge Adams was skeptical or critical of her answers. Judge Adams did give standard instructions advising the jury that any interjection by him should not be taken as favoring one party over the other and that only the witnesses' testimony was relevant.

Based on the above, we conclude that substantial evidence supported the Crimminses' claims of breach of contract and the compensatory damages award, such that any improper conduct on the part of the trial judge did not deprive American National of a fair trial with respect to that claim. However, given the higher burden of proof associated with a punitive damages claim, the need to find that American National knew or acted with reckless disregard and without a reasonable basis for its actions, and the importance of witness credibility in deciding these issues, we cannot say the same regarding the jury's finding that American National acted with oppression, fraud, or malice or in bad faith by rescinding Cathy's policy.

Cathy failed to provide relevant information on the application and during the telephone interview. Absent its own failure to follow its underwriting rules, American National would have been justified in rescinding the policy and cannot be punished if it makes decisions on whether or not to rescind based upon a business analysis. Even knowing it had made a mistake, it still could have a reasonable belief that Cathy's omissions were more material to the issuance of the policy than its own failures to issue a waiver or obtain Dr. Levine's records. Thus, any finding of bad faith, oppression, fraud or malice would have to be based on a finding that American National did not believe it had a valid legal basis for disputing the claim. This required weighing the credibility of Cathy, Manning and Armstrong in the skeptical atmosphere created by the district court's actions. Therefore, we conclude that the jury's finding of bad faith and award of punitive damages may have been the result of passion or prejudice stemming from the trial judge's extensive interaction in the trial, witnessed throughout the trial by the jury. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART with regard to breach of contract and compensatory damages AND REVERSED IN PART with regard to the bad faith and punitive damages findings AND REMAND this matter, as a result of the trial judge's improper conduct, to the district court for a new trial on bad faith and punitive damages.

Douglas, J.
Douglas

Becker, J.
Becker

cc: Hon. Brent T. Adams, District Judge
Hon. Steven P. Elliott, District Judge
Allison, MacKenzie, Russell, Pavlakis, Wright & Fagan, Ltd.
Greer, Herz & Adams, LLP
Lemons Grundy & Eisenberg
Law Offices of Terry A. Friedman, Ltd.
Leverty & Associates
Matthew L. Sharp
Washoe District Court Clerk

PARRAGUIRRE, J., concurring in part and dissenting in part:

I agree with the majority that the trial judge's actions did not deprive American National of a fair trial with respect to the jury's compensatory damages award. However, I dissent from the majority's conclusion that the judge's conduct warrants a reversal of the jury's award of punitive damages and finding of bad faith.

I would affirm the jury's punitive damages award for two reasons. First, American National failed to preserve the issue of judicial misconduct for appellate review.[1] Second, American National has failed to demonstrate that the trial judge's conduct amounted to plain error.[2]

American National's Failure to Preserve the Issue of Judicial Misconduct

Appellate review "is generally precluded when the aggrieved party fails to object, assign misconduct, or request an instruction from the lower court."[3] In addition, only timely objections will suffice to preserve an issue for appeal.[4]

Timely objections serve at least two purposes. First, "objections demonstrate that the objecting party takes issue with the conduct."[5]

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[1]See Parodi v. Washoe Medical Ctr., 111 Nev. 365, 368, 892 P.2d 588, 590 (1995).

[2]See id.

[3]Id.

[4]See Ringle v. Bruton, 120 Nev. 82, 94, 86 P.3d 1032, 1040 (2004) (discussing the timeliness of objections to attorney misconduct during closing argument).

[5]Id. at 94-95, 86 P.3d at 1040.

Thus, the failure to object to allegedly prejudicial conduct at the time it occurs indicates that the party moving for a new trial did not find the conduct objectionable at that time, but is making the claim "as an afterthought."[6] Second, timely objections conserve judicial resources by providing the trial court "an opportunity to correct any potential prejudice and to avoid a retrial."[7]

In this case, American National did not enter an objection to the trial judge's conduct until after the liability and compensatory damages phase. American National now complains that the judge's conduct was excessive and prejudicial, and that the judge abandoned the appearance of impartiality by "belittling" and "berating" defense witnesses and counsel. If this conduct was as excessive and prejudicial as American National claims, it should have objected as the conduct occurred. Moreover, if American National felt that objecting in front of the jury would have proved prejudicial, it could have approached the judge at a sidebar or during a break in the proceedings. Objecting in a timely manner would have demonstrated that American National took issue with the conduct and would have allowed the judge the opportunity to correct any potential prejudice to avoid retrial. Because American National failed to object to the trial judge's allegedly excessive and prejudicial actions, I conclude that it failed to preserve the issue for appellate review.

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[6]See id. at 95, 86 P.3d at 1040.

[7]Id.

American National's Failure to Demonstrate Plain Error

When a party fails to preserve an allegation of judicial misconduct, the purportedly errant conduct may still be reviewable under the plain error doctrine.[8] Accordingly, this court has held that appellate review is appropriate where "judicial deportment is of an inappropriate but non-egregious and repetitive nature that becomes prejudicial when considered in its entirety."[9]

For example, in Parodi v. Washoe Medical Center, this court reviewed and found prejudicial a course of conduct that included leading prospective jurors in a standing ovation when counsel returned late from recess, joking about the solemn oath that jurors take, directing light-hearted comments to a prospective juror, and endorsing a prospective juror's business.[10] In Parodi, the court was particularly concerned that the aggrieved party was unable to object to the judge's light-hearted but inappropriate conduct without risking a prejudicial reaction from the judge and jury.[11] As explained by this court, the trial judge's actions were "comparatively benign. . . [and] apparently intended to tranquilize the

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[8]See Parodi, 111 Nev. at 368, 892 P.2d at 590. According to this court, "[p]lain error is error which either (1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings." Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993) (judgment vacated by Libby v. Nevada, 516 U.S. 1037).

[9]Parodi, 111 Nev. at 370, 892 P.2d at 591.

[10]Id. at 367 n.1, 892 P.2d at 589 n.1.

[11]Id. at 368-70, 892 P.2d at 590-91.

[somber wrongful death] trial atmosphere."[12] However, the conduct actually placed the aggrieved party's counsel "in the untenable position of silently accepting the judge's trivialization of the proceedings or risking the prospect of alienating the judge or the jury by interjecting a discordant and somber note to the good-spirited trial atmosphere being created by the judge."[13]

In this case, American National complains that the trial judge engaged in excessively extensive questioning of witnesses and improperly injected levity into the proceedings. As to the trial judge's questioning of witnesses, no plain error occurred. During the trial, the judge interrogated witnesses from both parties in an attempt to clarify the technical nature of the insurance business. He only took this course of conduct after it became clear that at least half of the jury did not understand the first day of testimony. In addition, the trial judge emphasized that the jury should not take any interjection by him as favoring one party or another—a sentiment he reiterated throughout the trial. Thus, unlike the misconduct in Parodi, the judge's actions here were aimed at assisting the jury in comprehending the complex nature of the action.

As to the trial judge's injection of levity or humor, American National takes most of his conduct out of context. The only questionable incident occurred when the judge elicited laughter from the jury after American National requested the Crimminses' insurance expert to cut

[12]Id. at 369, 892 P.2d at 590.

[13]Id.

construction paper to the size of Cathy Crimmins' fibroids. However, this conduct does not compare to that of the judge in Parodi. Thus, it does not rise to the level of plain error, and it did not deprive American National of a fair trial.

Because I conclude that the trial in this case was fair on all counts, I dissent from the portion of the majority's disposition that reverses the jury's award of punitive damages and finding of bad faith.

_____________________, J.
Parraguirre