

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JOHN COOK,

Plaintiff,

v.

MEDICAL SAVINGS INSURANCE
COMPANY, an Indiana Corporation,

Defendant.

Case Number CIV-05-289-C

MEMORANDUM OPINION

Before the Court is Defendant Medical Savings Insurance Company's Motion for Judgment as a Matter of Law. Plaintiff filed a response and the matter is now at issue.

Defendant filed the present motion pursuant to Fed. R. Civ. P. 50(b), arguing it is entitled to judgment as a matter of law because the evidence presented to the jury was insufficient to demonstrate by clear and convincing evidence that Plaintiff established the elements of his fraud claim. Defendant further argues that because the fraud claim must fail, the punitive damages claim must be set aside.

Defendant argues that Plaintiff's testimony at trial did not provide a sufficient basis to support the fraud verdict. According to Defendant, there is insufficient evidence of: reliance by Plaintiff on Mr. Russell's statements; that Mr. Russell made any misstatements or omissions; and/or that there was intent to deceive by Mr. Russell. Defendant also argues that the only other communication between Plaintiff and Defendant regarding the insurance policy was the brochure, and the evidence surrounding that brochure at trial was insufficient to demonstrate fraud. According to Defendant, there was no evidence presented at trial from

which a rational jury could find Plaintiff relied on the brochure in making his decision to purchase the policy. Finally, Defendant argues there was no evidence offered at trial demonstrating the brochure contained misstatements or omissions on which Plaintiff relied. Therefore, Plaintiff cannot premise his fraud claim on his reliance on the brochure.

Plaintiff argues that Defendant has waived any ability to raise a Rule 50(b) motion based on the representations of Mr. Russell. According to Plaintiff, the only argument made during Defendant's Rule 50(a) motion regarding the reliance issue was directed solely at the brochure. Therefore, Plaintiff argues, pursuant to Unitherm Food Sys., Inc. v. Swift-Echrich, Inc., ___ U.S. ___, 126 S.Ct. 980, 984 n.1 (2006), Defendant cannot now raise arguments in its Rule 50(b) motion that were not first raised in its Rule 50(a) motion. The Court disagrees with the factual basis of Plaintiff's argument.

In making its Rule 50(a) motion, Defendant moved for a directed verdict on the fraud or deceit claims as they relate to Troy Russell. Defendant argued there was no evidence or testimony that Mr. Russell deceived anyone or intended to deceive anyone and that as a result a verdict of fraud based on anything that Mr. Russell did would be inappropriate. Thus, although Defendant's argument was somewhat less than precise, it was adequate to preserve the issue for post-trial motions. See United Int'l (Holdings) Inc. v. Wharf Holdings, Ltd., 210 F.3d 1207, 1228-29 (10th Cir. 2000) (holding that technical precision is unnecessary and that rigid application is required only if necessary to protect the right to trial by jury or to ensure that the opposing party has adequate notice of the alleged error so that that error may

be cured.) Thus, the Court finds Defendant did not waive its right to challenge the insufficiency of the misrepresentations of Mr. Russell.

The Tenth Circuit has made clear that:

judgment as a matter of law is warranted only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion. We do not weigh the evidence, pass on the credibility of the witnesses, or substitute our conclusions for that of the jury. However, we must enter judgment as a matter of law in favor of the moving party if there is no legally sufficient evidentiary basis . . . with respect to a claim or defense . . . under the controlling law.

Mason v. Oklahoma Turnpike Auth., 115 F.3d 1442, 1450 (10th Cir. 1997) (citations omitted). In his response brief, Plaintiff provides excerpts from his trial testimony wherein he testified that he relied upon Mr. Russell's representations in deciding to purchase the policy. Thus, there was evidence from which a jury could find that Defendant's agent made a material representation and that Plaintiff acted in reliance upon that representation. Plaintiff also provides excerpts of his trial testimony wherein he relayed that Mr. Russell indicated his responsibility would be \$5,000 and, after that, Defendant would pay 100% of all bills up to \$1,000,000. There was ample evidence presented at trial that Defendant would not pay 100% of all medical bills, even after Plaintiff had satisfied his deductible. Thus, there is evidence before the jury demonstrating that Defendant's representations were false.

Plaintiff points to the trial testimony of Mr. Russell, Defendant's agent, wherein Mr. Russell testified he had read the entire sales brochure and understood Defendant's method for determining the amount it would pay on claims submitted by an insured such as Plaintiff. Again, the evidence was clear that that method of payment was not 100% payment. Thus,

therein. For the reasons stated in the Court's accompanying Memorandum Opinion denying Defendant's Motion for Judgment as a Matter of Law, Defendant's request for a new trial on this issue is denied.

In its second claim, Defendant argues the jury's damage award was not supported by the evidence and the Court should grant a new trial or in the alternative a remittitur. According to Defendant, Mr. Cook's testimony regarding being upset or worried does not provide a sufficient basis on which a jury award of \$550,000 may be made.

To grant a new trial or remittitur on the issue of excessive damages, "[t]he award must be so excessive that it shocks the judicial conscience and raises 'an irresistible inference that passion, prejudice, corruption, or other improper cause invaded the trial . . .'" Vining v. Enter. Fin. Group, Inc., 148 F.3d 1206, 1216 (10th Cir. 1998) (quoting Fitzgerald v. Mountain States Tel. & Tele. Co., 68 F.3d 1257, 1961 (10th Cir. 1995).

Here, Plaintiff argues the length of the jury's deliberations, including the fact that those deliberations occurred over a two-day time period, belies any claim that the verdict was the basis of passion or prejudice. Plaintiff also argues that his testimony before the jury outlined a significant amount of mental anguish, concern, and distress over Defendant's handling of his medical expenses. Plaintiff notes this distress began with his wife's visit to Lakeside Women's Clinic where she was informed that clinic did not accept insurance issued by Defendant and continued during his medical treatment following a diagnosis of prostate cancer, when he ran into similar difficulties securing payment or coverage from Defendant. Plaintiff notes that as a result of Defendant's handling of his insurance claims,

he endured collection calls from Mercy Hospital. Plaintiff also noted his testimony regarding the worry he had over not knowing what his future medical expenses would be and whether or not Defendant would pay any portion of those expenses. In short, Plaintiff argues the evidence presented to the jury was sufficient to support the monetary amount.

After consideration of the arguments raised in the present motion and response brief, as well as the evidence presented at trial, the Court finds the jury's verdict was well-supported by the evidence and there is no inference or evidence that passion, prejudice, corruption, or other improper cause led to the verdict. The jury's verdict does not shock the judicial conscience and Defendant's request for new trial or remittitur will be denied.

Defendant next challenges the Court's decision in the summary judgment motion that Defendant's January 1, 2004, endorsement of the reimbursable charge rider was not an effective change to the group policy and individual endorsements. Defendant argues Plaintiff's presentation of evidence and testimony to the jury, that the endorsement was not lawfully secured, prejudiced it at trial. Defendant also argues the Court erred by preventing presentation of evidence that would have established Plaintiff's awareness of how his claims would be adjusted.

Defendant has failed to demonstrate any error in the Court's summary judgment ruling, that the evidence presented at trial was improper or that the Court should have permitted its proffered evidence. There was no evidence presented either before or at trial that Mr. Cook or any other of Defendant's insureds provided their written consent to the modification. Accordingly, pursuant to 36 Okla. Stat. § 1219.5 and Aetna Life Ins. Co. v.

Wilson, 1942 OK 59, ¶¶ 16 & 17, 123 P.2d 656, 658, the rider could not become a part of Plaintiff's insurance policy. Therefore, Defendant's motion will be denied on this issue.

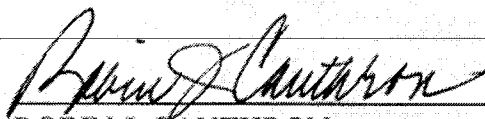
As its final claim for relief, Defendant argues the Court's allowance of evidence and argument related to the destruction of evidence and/or failure to produce evidence was improper. Defendant argues that when Plaintiff's counsel questioned Mr. Suttles regarding production of documents, an improper argument was made that those documents had been destroyed or that Medical Savings had refused to produce the documents. According to Defendant, because Plaintiff never challenged the production of these documents by way of a motion to compel it was error for counsel to raise these arguments. Defendant, citing Timberlake Constr. Co. v. USF&G Co., 71 F.3d 335, 341 (10th Cir. 1995), argues the conduct of Plaintiff's counsel brought the issue of litigation misconduct before the jury and such evidence should only in very rare circumstances be presented to a jury.

Defendant overstates the reach of Timberlake. In that case, the Tenth Circuit found error in the presentation to the jury of actions which it classified as standard and facially permissible litigation steps. Id. at 340. The Timberlake court was concerned with permitting litigation conduct to serve as evidence of bad faith as that would undermine an insurer's right to contest questionable claims. Id. at 341. That concern is not present here in relation to the cross-examination by Plaintiff's counsel. Plaintiff's questioning did not place before the jury the issue of decisions made by Defendant about the method or strategy for pursuing the litigation. Rather, on direct examination, Defendant's witness had alluded to the fact that its modification of Plaintiff's insurance contract had occurred with the permission and/or

blessing of the Oklahoma Insurance Department and in the course of that discussion the witness had noted that the document went through several drafts before being finalized. Plaintiff's cross-examination merely sought to provide for the jury copies of those drafts so that the accuracy of the witness's testimony could be measured. In this regard the destroyed documents were in fact evidence relevant to Plaintiff's bad faith claim and not evidence of actions Defendant undertook in maintaining its defense to Plaintiff's action. Consequently, Defendant's claim fails on this issue.

As set forth more fully herein, Defendant has failed to demonstrate the jury's verdict in favor of Plaintiff was clearly, decidedly, and overwhelmingly against the weight of the evidence. Likewise, Defendant has failed to demonstrate the jury's verdict was so excessive as to shock the judicial conscience. Accordingly, Defendant Medical Savings Insurance Company's Motion for a New Trial or Remittitur (Dkt. No. 153) is DENIED.

IT IS SO ORDERED this 12th day of June, 2006.



ROBIN J. CAUTHRON
United States District Judge