

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000924-MR

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NOS. 95-CI-03001 & 95-CI-03221

ROBERT B. MUNCY, JR.

APPELLEE

AND _____ NO. 2000-CA-000969-MR

ROBERT B. MUNCY, JR.

CROSS-APPELLANT

v. CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NOS. 95-CI-03001 & 95-CI-03221

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY

CROSS-APPELLEE

OPINION
REVERSING AND REMANDING
** ** * * * * *

BEFORE: EMBERTON AND SCHRODER, JUDGES; AND MARY COREY, SPECIAL
JUDGE.¹

¹Senior Status Judge Mary Corey sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

SCHRODER, JUDGE: This appeal and cross-appeal arose out of the appellee/cross-appellant's attempts to collect on disability insurance policies he had procured from the appellant/cross-appellee insurance company. The insurance company appeals from a judgment rendered in a second trial determining the appellee/cross-appellant was disabled and from the earlier order granting the new trial. The cross-appellant appeals from a judgment dismissing his claims against the insurance company for bad faith and punitive damages. We adjudge that the trial court abused its discretion in granting the appellee/cross-appellant a new trial. Accordingly, we reverse and remand for reinstatement of the judgment entered pursuant to the jury verdict in the first trial. Hence, the cross-appeal is rendered moot.

Appellee/cross-appellant, Dr. Robert Muncy, is a 53-year-old dentist who had a solo dental practice in Lexington from 1976 to 1994. In 1987, appellant/cross-appellee, Provident Life and Accident Insurance Company ("Provident") sold Muncy a personal income replacement disability policy with an initial benefit of \$5,000 per month, with a cost of living rider. That same year, Provident also sold Muncy a business overhead policy. In 1993, Muncy obtained another disability insurance policy from Provident, with a benefit of \$1,050 per month, and another business overhead policy, with a benefit of \$5,800 a month. At this time, Dr. Muncy additionally purchased a group insurance policy for key employees of his practice, including himself.

In the fall of 1994, Muncy maintains he accidentally shot a stream of air from a high pressure air hose into his ear

while working on some dental moldings. He thereafter began to experience constant ringing in his ears, a condition known as tinnitus. Also in 1994, Muncy began to notice pain and tingling in his wrist and hand which was ultimately diagnosed as carpal tunnel syndrome. Muncy sought medical treatment for both conditions. In December of 1994, Muncy filed claims with Provident to collect on the disability policies he purchased in 1987 and 1993. Provident began paying the benefits under the two disability policies and under the two business overhead policies, while retaining a reservation of rights as to the policies. In June of 1995, Provident informed Muncy that it was revoking the 1993 disability and business overhead policies because it claimed that Muncy made material misrepresentations regarding his income in his applications for coverage. Provident then quit paying benefits under the 1993 policies, but continued to pay benefits under the 1987 policies.

On September 15, 1995, Provident filed a declaratory judgment action against Dr. Muncy seeking to revoke the 1993 insurance policies. In the petition, Provident stated that Muncy fraudulently misrepresented his income to be higher than it actually was in his application for coverage. The petition did not question Muncy's disability.

Thereafter, on October 6, 1995, Muncy filed an action against Provident alleging breach of contract, violations of the Unfair Claims Settlement Practices Act, and bad faith. He further sought punitive damages. In Provident's answer, it specifically raised as a defense that Muncy fraudulently

misrepresented his income on his application. As to the allegation in the complaint claiming that Muncy was disabled, Provident stated a general denial thereof in its answer. These two cases were then consolidated.

The first trial on the two actions was held on December 15-18, 1997. On November 11, 1997, Muncy filed a motion in limine asking that the court preclude Provident from presenting any evidence challenging Muncy's disabilities. Muncy contended that Provident should be estopped from challenging the issue of disability since it was paying under the other disability policies. Muncy also claimed that Provident did not disclose that it was challenging Muncy's disability until one month before trial. The court denied the motion, and the jury trial proceeded with both parties presenting evidence regarding Muncy's alleged disability. On the issue of fraudulent misrepresentation, the jury found in favor of Dr. Muncy. As to the disability issue, the jury returned a verdict in favor of Provident.

Subsequent to the trial, both parties tendered proposed judgments. When a judgment had yet to be entered by February 20, 1998, each party filed a motion requesting that their tendered judgment be entered. At the hearing on those motions on February 27, 1998, the court stated that it had signed a judgment but was unaware that two had been submitted. The court stated that it needed to consider both before deciding which one to properly enter. In that hearing, counsel for Muncy expressed concern over the ten days running. The judgment which had been

entered by the court on February 26, 1998 was the judgment tendered by Provident. On March 9, 1998, the court entered an order setting aside the order of February 26, 1998. That order specifically stated that the time for filing any post-judgment motions shall not begin to run until a final judgment is entered hereafter.

On April 15, 1998, the court reentered the judgment it had entered in favor of Provident on February 26, 1998. On April 27, 1998, Muncy filed a motion for a new trial. Attached to the motion was an affidavit of Muncy's trial counsel, Mark Hayden. In this affidavit, Hayden stated in part:

Up until one month before trial, I believe [sic] that Provident was not contesting Dr. Muncy's disability because:

- (a) Provident's letter in response to Dr. Muncy's claim under the subject policies denied the claim based on alleged misrepresentation of income and not disability;
- (b) Provident was making disability payments to Dr. Muncy under two older Provident policies;
- (c) Provident did not challenge disability in the petition filed against Dr. Muncy;
- (d) Provident's Director of Field Claims, Thomas Timpanaro, had testified that Provident was not rescinding the subject policies for medical reasons;
- (e) Provident had not identified any medical experts in its expert disclosure;
- (f) Provident's counsel had specifically represented to me that Provident was not challenging disability;
- (g) Provident had not requested any independent medical evaluations of Dr. Muncy; and
- (h) Provident had not scheduled the depositions of any medical experts.

After a hearing on the motion, the court entered an order granting Muncy's motion for a new trial on grounds that Muncy's

counsel was not aware that Provident was contesting liability until one month before trial.

The second trial was held on February 21-24 and 28, 2000. The retrial was in two phases. In the first phase, the disability issue was tried. The second phase was to be the trial on the issues of bad faith and punitive damages. As to the first phase, the jury returned a verdict finding that Dr. Muncy was disabled. Provident thereafter moved to dismiss the bad faith and punitive damages claim on grounds that the issue of Muncy's disability was fairly debatable. The court granted the motion dismissing these claims and the second phase of the trial was not held. From the judgment rendered pursuant to the second trial, as well as the court's earlier order granting Muncy's motion for a new trial, Provident now appeals. From the court's order dismissing the bad faith and punitive damage claims, Muncy cross-appeals.

Provident's first argument is that the trial court had no authority to enter the order on March 9, 1998 setting aside the judgment of February 26, 1998 since Muncy had not filed a motion for a new trial within ten days of the February 26 judgment. Hence, Muncy's motion for a new trial filed on April 27, 1998 was untimely and the court improperly granted the second trial. Provident maintains that because the ten-day rule for filing motions under CR 59.02, CR 59.05, and CR 50.02 is mandatory, the court could not on its own motion enter the order setting aside the judgment of February 26.

First, the court did not act on its own motion in setting aside the February 26 judgment. Unaware that the court was entering the February 26 judgment, both parties filed a motion to have their tendered judgments entered, and the court was acting on these motions when it held the hearing on February 27, 1998. In reviewing this hearing, although the court did not enter a written order until March 9, 1998, the court verbally made it clear that it had inadvertently entered the judgment of February 26 without considering both tendered judgments and needed to submit on the parties' motions before entering a final judgment in the case. Hence, both parties should have known at this time that the judgment was not yet final because the prior judgment was under reconsideration. Accordingly, while the case was under submission, the time for filing post-judgment motions was tolled until the final judgment was entered on April 15, 1998. In fact, the court specifically stated in its order of March 9 that the time for filing post-judgment motions would not begin to run until a final judgment is entered hereafter. Hence, the ten-day period did not begin to run until April 15, and Muncy's motion for a new trial filed on April 27, 1998 was timely (the 25th was a Saturday).

Provident next argues that the trial court erred in granting Muncy's motion for a new trial. Provident maintains that Muncy could not claim he was surprised by the fact that Provident was contesting disability since Provident denied that Muncy was disabled in its answer to Muncy's complaint. Provident also argues that even if Muncy was indeed unaware that Provident

was contesting disability until one month before trial, Muncy should have moved for a continuance to allow himself more time to prepare, instead of going to trial and waiting until he was unsuccessful to claim prejudice.

CR 59.01 states that a new trial may be granted for any of the following reasons:

(c) Accident or surprise which ordinary prudence could not have guarded against.

. . .

(g) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

. . .

The trial court has broad discretion in granting or refusing to grant a new trial, and only if it appears there has been an abuse of that discretion will the reviewing court interfere. Whelan v. Memory-Swift Homes, Inc., Ky., 315 S.W.2d 593 (1958). However, if a new trial is granted, there must be some basis for the exercise of the trial court's discretion. Sanders v. Drane, Ky., 432 S.W.2d 54 (1968).

As for Muncy's claim of surprise, although the disability issue was not raised in Provident's action, disability was clearly denied in Provident's answer to Muncy's complaint. Also, counsel for Muncy stated in his opening statement in the first trial that he knew about the disability defense two months prior to trial, as opposed to the one month claimed in his affidavit. As for Muncy's counsel's claim that he was misled by the testimony of Thomas Timpanaro to the effect that Provident was not rescinding the policies for medical reasons, Timpanaro was simply a witness, not a party or an attorney who could

legitimately say what defenses would or would not be raised at trial.

Muncy's counsel also maintained in his affidavit that because Provident did not identify any medical experts in its expert disclosure, did not schedule any depositions of medical experts, and did not request any independent medical evaluations of Dr. Muncy, that he had no reason to know that Provident was challenging disability or what the nature of that evidence would be. As noted in Hayden's affidavit, Provident did ultimately file notice to take the depositions of certain medical experts in September, October, and November of 1997. However, all of the medical experts deposed by Provident were either treating physicians of Muncy or were physicians who had previously evaluated Muncy for purposes of his workers' compensation claim. Hence, Muncy presumably knew or should have known what that testimony would be.

Finally, even if Muncy could legitimately claim he was unaware that Provident was challenging his disability until one month before trial, we adjudge that Muncy should have moved for a continuance to get the evidence he maintains he needed to prove his disability, instead of going to trial and waiting until he was unsuccessful to make that claim. It has been held that when a party is surprised by certain evidence adduced at trial, the party claiming surprise cannot wait until a motion for new trial to raise that issue, but must move for a continuance. Caldwell v. E.F. Spears & Sons, 186 Ky. 64, 216 S.W. 83 (1919); Kenmont Coal Co. v. Salyer, 239 Ky. 88, 38 S.W.2d 940 (1931); Sessmer v.

Commonwealth, 268 Ky. 127, 103 S.W.2d 647 (1936); Baker's Adm'r v. Frederick, Ky., 243 S.W.2d 921 (1951). In the present case, Muncy was aware of the evidence challenging disability at least one month prior to trial, so he had all the more notice of the disability defense and, thus, should have moved for a continuance. Although Muncy did raise the issue in his motion in limine, when the motion was denied and he needed more time to obtain evidence, he should have asked for it. He could not simply allow the trial to proceed and wait for an unsuccessful result before complaining that he needed more time to prepare. Accordingly, the trial court abused its discretion in granting Muncy's motion for a new trial.

Muncy contends that because it was a disability case, he had to allow the first trial to proceed because a continuance would have simply delayed justice and the benefits on which he and his family depended. On the contrary, if a continuance would have been granted, it could have prevented the second trial over two years later, hastening justice.

Relative to Muncy's claim of newly discovered evidence, it has been held that the newly discovered evidence cannot be evidence known to the moving party before trial. Walker v. Bencini, Ky., 374 S.W.2d 368 (1963). It is undisputed that the evidence contesting Muncy's disability was known to Muncy before trial.

For the reasons stated above, the judgment of the Fayette Circuit Court granting a new trial is reversed and remanded for reinstatement of the judgment rendered pursuant to

the first trial. Given our decision on appeal, the cross-appeal is rendered moot.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

Spencer D. Noe
Lexington, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Robert L. Elliott
Lexington, Kentucky