UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-7092
Summary Calendar

DONALD C. BARDOWELL, ET AL.,

Plaintiffs,

DONALD C. BARDOWELL,

Plaintiff-Appellant,

versus

MUTUAL OF OMAHA INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas
(CA-3-88-096-G)

(February 5, 1993)

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Plaintiff-appellant Donald C. Bardowell (Bardowell) sued his insurer, defendant-appellee Mutual of Omaha Insurance Company

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

(Mutual), for benefits alleged to be due under a disability policy, and for Mutual's allegedly tortious conduct in its denial of payment and handling of premium withdrawals from his bank account. Concluding that Bardowell had not shown that his disability was not within a policy exclusion, and that his tort claims were barred by the statute of limitations, the district court directed a verdict for Mutual. We affirm.

Facts and Proceedings Below

Between 1969 and 1974 Bardowell bought ten insurance policies from Mutual for himself, his wife, and his son. For all of the policies he arranged an automatic bank draft system of payment, under which Mutual made monthly deductions from his bank account to cover the premiums. The policy primarily at issue in this case is a disability policy for Bardowell. It provided benefits for illnesses that necessitated confinement, and also limited benefits for up to three months for nonconfining illnesses. When Bardowell purchased the policy in August 1969, he had suffered from diabetes for eight to ten years, and the policy excluded coverage for any disability arising from diabetes.

Viewed most favorably to Bardowell, the evidence at trial showed the following facts underlying his suit. In March 1981, Bardowell began to experience hemorrhaging in his right eye. He was diagnosed as having vitreous floaters and the beginnings of cataracts. In the spring of 1982, his vision problems rendered him unable to drive, and he was forced to close his business on May 31, 1982. On October 4, 1982, he had cataract surgery on his right eye. The surgery, performed by Dr. Stephen Chambless (Chambless),

also entailed implantation of an intra-ocular artificial lens.

Bardowell submitted a claim to Mutual on December 1, 1982, for medical and disability benefits from the surgery and associated diagnosis and treatment. On the claim form, Bardowell indicated that the first day he was unable to work because of sickness was June 5, 1982, and the first day he was again able to do any part of his work was November 8, 1982. He attached his medical bills, two of which indicated a diagnosis of diabetic retinopathy in addition to cataracts. Mutual allowed Bardowell's disability claim to the extent of forty-two days of benefits for a confining sickness (September 27 to November 8), and tendered payment before the end of December.

Bardowell continued to experience problems with his eyes, however, and within a few weeks after his surgery sought treatment from a new doctor, Dr. Bruce Taylor (Taylor). In a letter to the referring physician describing his examination of Bardowell on November 17, 1982, Taylor stated that Bardowell had "proliferative diabetic retinopathy and cystoid macular edema in his right eye as well as background diabetic retinopathy in his left eye." Bardowell received further treatment, including laser treatment, from Taylor in 1983. Mutual paid Bardowell for fourteen days of confining disability in 1983.

On August 7, 1984, Bardowell wrote to Mutual a letter in which he claimed that he had been disabled for most of the time from March 5, 1981 to July 31, 1984, and that he was therefore entitled to additional benefits under his policy. He calculated that he had been disabled for 990 days during that period (666 with a confining

illness and 324 with a nonconfining illness). On September 25, 1984, Bardowell had cataract surgery on his left eye.

Bardowell telephoned Mutual numerous times over the next several months about the status of his August 7 claim, but was not told anything other than that some of his files were being retrieved from Mutual's home office. On November 28, 1984, Lynn Robinson (Robinson) of Mutual visited Bardowell in his home and brought him a few checks covering medical expenses. Robinson also informed Bardowell, however, that Bardowell had not substantiated his disability claim. Robinson offered to pay Bardowell $1,200 as a settlement, provided Bardowell would cancel all of his policies.

At approximately the same time, Bardowell began to experience problems with Mutual's withdrawal of premium payments from his bank account. The difficulties began after he decided in September or October 1984 to change banks. In accordance with Mutual's instructions, he sent Mutual a signed authorization card and two months' premiums. Mutual continued for several months thereafter to attempt to make draws from the old bank, and the requests were not honored. Bardowell was charged four hundred dollars by his old bank as fines for overdrafts. Bardowell called Mutual several times to alert them to the problem and each time was assured that the situation would be corrected and that his policies were still in effect.

On December 4, 1984, Bardowell received a notice from Mutual saying that the withdrawals from his bank were being returned unpaid, and that he needed to take action to prevent his policies from lapsing. When he received a similar notice in February 1985,

he returned it with a note on the bottom stating that Mutual owed him four hundred dollars and should use that money to cover his premium payments.

Bardowell did not submit any medical certification of disability until February 1985. At that time, he wrote Mutual and attached a letter from Taylor indicating that Bardowell had been under his care since November 17, 1982, for "cystoid macular edema and proliferative diabetic retinopathy in the right eye," and that a cataract was also present in the left eye. Taylor's letter stated that Bardowell had been unable to work from November 17, 1982, until June 1983 and from March 1984 to September 30, 1984, and that "[n]onconfinement dates" had been July 1983 to March 1984. Based on the information in Taylor's letter, Bardowell updated his August 7 claim, requesting disability benefits for a nonconfining illness from March to June 1982 and July to March 1984, and benefits for a confining disability for an additional 727 days between March 1981 and September 1984. Bardowell's total claim was $8,439.19.

In February and March 1985, Mutual notified Bardowell on several occasions that they could not locate the bank authorization and premium check he had sent to them in October 1984, and that he would need to resubmit those items in order to continue his policies, which had been paid only to January. Bardowell did not comply with this request. A letter from Mutual dated March 15 asked whether, if Mutual did not hear from him within ten days, it could assume that he no longer desired coverage.

In late March 1985, Mike Nolan (Nolan) of Mutual visited

Bardowell and offered to settle all of the claims for $5,500 if Bardowell would return all of his policies. Bardowell declined this offer. On July 8, 1985, Nolan wrote Bardowell a letter indicating that the $5,500 offer had been made despite Mutual's belief that Bardowell had not submitted timely or adequate proof of his disability, but that the offer was withdrawn as of the date of the letter. Settlement negotiations continued for another fifteen months. Mutual offered $6,500 on May 8, 1986, and reopened this offer on August 20, 1986, after Bardowell increased his demand to $9,123.

On October 30, 1986, Nolan wrote to Bardowell indicating that despite their inability to settle the claim, Mutual wanted to pay all of the benefits that it considered to be due based on the medical information provided, *i.e.*, Taylor's letter. Noting that it had already paid disability benefits up to November 8, 1982, Mutual allowed disability benefits for a confining illness from November 8, 1982 to June 30, 1983, and from March 1 to September 30, 1984, and allowed the maximum of three months' benefits for a nonconfining illness from July 1, 1983. Nolan enclosed a check for $3,539.66.

Bardowell did not cash the check, and, along with his wife and son, filed suit against Mutual in Texas state court on December 29, 1987. The complaint alleged that Mutual had failed to pay benefits due under the policy and had negligently or willfully breached the duty of good faith and fair dealing in its settlement practices and cancellation of the ten policies. The plaintiffs sought damages for past and future mental anguish and for loss of reputation in

the community. Although the complaint also alleged damages in the form of medical expenses, Bardowell made clear at trial that the only policy under which he was claiming benefits was the disability policy.

Mutual removed to federal court based on diversity of citizenship and answered the complaint by, *inter alia*, raising the defense that Bardowell's disability resulted from diabetes and therefore fell within the policy exclusion.

The case was tried before a jury on September 3-4, 1991. At the conclusion of Bardowell's case, the district court granted Mutual's motion for a directed verdict, holding: (1) that because it was undisputed that the policies were renewable on a month-by-month basis at the option of the company, there were no damages from Mutual's alleged negligence in allowing the policies to lapse; (2) that there was no competent record evidence on which a reasonable jury could conclude that Bardowell's disability arose from any condition other than diabetes; and (3) that Bardowell's tort claims were barred by a two-year statute of limitations. Bardowell brings this appeal.

Discussion

This Court reviews the grant of a motion for directed verdict by applying the same test as the district court: the directed verdict will be upheld if, but only if, after considering all of the evidence in the light most favorable to the nonmoving party, and drawing therefrom all reasonable inferences in the nonmovant's favor, this Court believes that a reasonable jury could not arrive at a contrary decision. *White v. Walker*, 950 F.2d 972, 977 (5th

Cir. 1991) (per curiam); *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc).

We conclude that the district court was correct in directing a verdict in favor of Mutual on Bardowell's claim for nonpayment of benefits. Under Texas law, when an insurer pleads a policy exclusion as a defense, the plaintiff suing on the policy has the burden of showing that the exclusion does not apply. *Sherman v. Provident American Insurance Co.*, 421 S.W.2d 652, 654 (Tex. 1967); *American Home Assurance Co. v. Brandt*, 778 S.W.2d 141, 143 (Tex. App.--Texarkana 1989, writ denied); *Southern Insurance Co./Zale Indemnity Co. v. Progressive County Mutual Insurance Co.*, 708 S.W.2d 549, 551 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.).

Mutual specifically raised the issue of the diabetes exclusion in its original answer and in a pretrial motion for partial summary judgment, and also included it in a list of contested issues of fact in a joint pretrial order. Nevertheless, Bardowell did not present any evidence during his case in chief to negate the possibility that diabetes caused his illnesses. As discussed above, the documentation supporting his 1982 and 1983 disability claims refers to one condition that was plainly related to diabetes--proliferative diabetic retinopathy--and to two other conditions for which there was no indication whether or not they were associated with diabetes--cystoid macular edema and cataracts. Because Mutual had expressly raised the diabetes exclusion as a defense, it was incumbent upon Bardowell to offer some evidence that his cystoid macular edema and cataracts were not attributable

to his diabetes. Because there is no evidence in the trial record addressing this question in any manner, the district court correctly concluded that no rational jury could find that Bardowell had carried his burden.[1]

The district court was also correct in concluding that Bardowell's extra-contractual claims were barred by the applicable statutes of limitations. The following summary of these claims was contained in the joint pretrial order:

> "Plaintiffs have brought this action for the unfair practice of the defendant in the handling of plaintiffs' insurance claim by engaging in unreasonable and unjustified delays in paying plaintiffs' losses, by making repeated unreasonable demands for information which had already been furnished to the defendant, and by failing to use due diligence in attempting to determine the nature of Donald C. Bardowell's loss and by failing to deal in good faith with the plaintiffs regarding their insurance claims. In addition, plaintiffs have brought this action alleging that defendant engaged in an unfair act of [sic] practice in the handling of and the cancellation of plaintiffs' insurance policies, approximately ten policies, by failing to use due diligence in obtaining proper bank authorizations for the

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[1] With its motion for partial summary judgment, Mutual attached deposition testimony from Chambless and Taylor. This deposition testimony of Taylor states that cystoid macular edema can be caused by either diabetes or cataracts, that he had not made a conclusive determination in Bardowell's case, because both potential causes had been present, and that he had no opinion on whether Bardowell's cataracts were caused by his diabetes. The referenced Chambless deposition testimony states that he thought in Bardowell's case that the macular edema was more likely than not attributable to his diabetes, but noted that Taylor was in a better position to judge, and that Chambless thought the odds were very high that Bardowell's cataracts were caused by diabetes.

In his brief to this Court, Bardowell relies on this deposition testimony by Taylor to argue that a factual question existed as to whether his cystoid macular edema was caused by diabetes or simply by incomplete healing after cataract surgery. However, these depositions were never offered into evidence at trial, so they were not among the evidence to be considered by the court in passing on the motion for directed verdict.

> prompt payment of plaintiffs' premiums to the defendant and by making repeated unreasonable demands for information from the plaintiffs, and by failing to use due diligence in attempting to ascertain the reason that the premiums were not being paid."

In addition to the common-law tort of a breach of the covenant of good faith and fair dealing, Bardowell apparently alleged violations of the Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code § 17.41 *et seq.* (Vernon 1987), and article 21.21 of the Texas Insurance Code. All of these claims are subject to two-year statutes of limitations. *See* Tex. Bus. & Com. Code § 17.565 (Vernon 1987); Tex. Ins. Code Ann. art. 21.21, § 16(d) (Vernon Supp. 1992); Tex. Civ. Prac. & Rem. Code § 16.003(a) (Vernon 1986).[2]

Bardowell does not contend to this Court that Mutual's actions in attempting to settle the dispute tolled the statutes or triggered the 180-day extension statutorily authorized in Tex. Bus. & Com. Code § 17.565 and Tex. Ins. Code Ann. art. 21.21, § 16(d). Rather, his sole contention is that his cause of action accrued within two years of his filing suit on December 29, 1987.

Relying on *Alvarez v. American General Fire and Casualty Co.*, 757 S.W.2d 156 (Tex. App.--Corpus Christi 1988, no writ), he argues that his cause of action accrued when his claim was finally denied, and that a rational jury could have concluded that this occurred on October 30, 1986. However, the holding of *Alvarez*, which was a contract suit rather than a tort suit, was that the plaintiff's

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[2] Bardowell suggests in his brief to this Court that his claim may be treated as one for common-law fraud subject to a four-year limitations period. However, a theory of common-law fraud was never advanced to the court below.

cause of action accrued when the insurer denied coverage rather than at the time of the accident giving rise to the claim. *Id*. at 158. It did not involve an insurer's initial denial of a claim followed by efforts to settle the dispute, and thus offers no support for Bardowell's suggested distinction between initial and final denial.

The Texas Supreme Court, however, recently did provide guidance on this question that is adverse to Bardowell's position. In *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826 (Tex. 1990), the insurer refused on September 5, 1984, to verify coverage for Murray's medical treatment, but admitted on March 15, 1985, that its refusal had been unwarranted and reinstated coverage retroactively. In her suit against the insurer alleging a breach of the duty of good faith and fair dealing, Murray contended that because the underlying claim on the policy was not finally resolved until March 15, 1985, her tort cause of action for bad-faith handling of that policy did not accrue until that date. The Texas Supreme Court rejected that view, holding instead that the statute of limitations commences "when the wrongful act occurs resulting in some damage to the plaintiff," *i.e.*, at the moment that the insurer should pay a claim but fails to do so. *Id*. at 828. The Court grounded its holding in the basic principle that "a cause of action generally accrues at the time when facts come into existence which authorize a claimant to seek a judicial remedy." *Id*. The Court noted that although where there is no outright denial of a claim the exact date of accrual may be a difficult factual question, *id*. at 828 n.2, Murray's position was untenable because it would imply

that if the insurer never admitted coverage, the contract claim would never be "finally resolved" so as to start the running of the statute on the tort claim. *Id*. at 828. *See also Tectonic Realty Investment Co. v. CNA Lloyd's of Texas Insurance Co.*, 812 S.W.2d 647, 652-55 (Tex. App.--Dallas 1991, writ denied) (action for breach of duty of good faith and fair dealing and for violation of Tex. Ins. Code Ann. art. 21.21 accrued when policyholder received insurer's letter rejecting policyholder's proof of loss).[3]

Applying those principles to the present case, we regard it as inescapable that all of the conduct described in the above summary and forming the basis for Bardowell's extra-contractual claims was known to him well before December 1985. On November 28, 1984, Bardowell knew that Mutual was denying his disability claim unless he produced further documentation. By late March 1985, when Nolan visited Bardowell, Mutual had clearly expressed its unwillingness to pay more than $5,500 even after Bardowell submitted Taylor's letter. From that time forward, Mutual only increased its offer,

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[3] We consider the holding and reasoning of *Izaguirre v. Texas Employers' Insurance Association*, 749 S.W.2d 550, 555-56 (Tex. App.--Corpus Christi 1988, writ denied), to be inconsistent with the Texas Supreme Court's pronouncements in *Murray* and thus to no longer be persuasive authority. In *Izaguirre*, the court held that an insurer's actions in contesting a workers' compensation claim before the Industrial Accident Board constituted a "continuous injury" that prevented the tort cause of action from accruing until the insurer's bad-faith conduct ceased about twenty months after its initial denial of payment. *Id*. at 556. The *Izaguirre* court relied on the limitations analysis of *Arnold v. National County Mutual Fire Insurance Co.*, 725 S.W.2d 165 (Tex. 1987), which the Texas Supreme Court expressly modified in *Murray*. *See Murray*, 800 S.W.2d at 829; *see also Tectonic Realty*, 812 S.W.2d at 654 (noting that characterization of an insurer's persistent refusal to pay as a "continuing tort" for purposes of the statute of limitations "would conflict with *Murray*").

without any further submission of documentation by Bardowell. Whatever "unreasonable demands for information," and failures to use due diligence Mutual could have been guilty of were or should have been apparent to Bardowell no later than March 1985. Similarly, with regard to Mutual's handling of the bank authorizations, Mutual had by March 15, 1985, informed Bardowell that he would have to submit additional authorizations and premium payments to prevent the policies from lapsing as of January 1985. Insofar as the record shows, Mutual did nothing after that date other than adhere to its position of March 15. Bardowell admitted at trial that he knew on March 28, 1985, that the policies had lapsed. Therefore, the alleged wrongfulness of Mutual's actions was fully evident by the end of March 1985 at the latest--more than two and a half years before Bardowell filed suit. No reasonable jury could find under the principles of *Murray* that Bardowell's tort claims accrued on December 27, 1985, or later.

Conclusion

Because we conclude that Bardowell's challenges to the directed verdict are unavailing, the judgment of the district court is

AFFIRMED.