# United States Court of Appeals for the Fifth Circuit

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Fifth Circuit
**FILED**
December 10, 2021
Lyle W. Cayce
Clerk

No. 21-10028

JOHNNY PHAM; KIM VAN BUI, AS NEXT FRIEND OF SKB AND BDB, MINORS,

*Plaintiffs—Appellants*,

*versus*

TRANSAMERICA PREMIER LIFE INSURANCE COMPANY,

*Defendant—Appellee*.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CV-738

Before DENNIS, HIGGINSON, and COSTA, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

In January 2018, Bich (pronounced "Bick") Pham[1] applied for life insurance coverage of $600,000 from Transamerica. The same day, Bich gave her insurance agent a check to cover the first premium and received a "Conditional Receipt," which provided temporary coverage as of the "Effective Date," as long as Bich met all four "Conditions to Conditional

[1] Because Bich Pham shares a last name with one of the plaintiffs, for clarity, we refer to Bich by her first name throughout.

Coverage." In February, Transamerica informed Bich that she could only be insured at the lesser amount of $525,114. Bich then signed a supplemental illustration and numeric summary reflecting that lesser amount. In March, Transamerica notified Bich's insurance agent that it had approved her application for the lesser coverage amount. Tragically, Bich was killed before the Policy was delivered to her.

Bich's intended beneficiaries, her two minor children and her father, Johnny Pham (hereinafter "Plaintiffs"), filed a claim with Transamerica, which the company denied, stating that there was no coverage under the Policy or Conditional Receipt. Bich's intended beneficiaries filed suit for breach of contract and violations of the Texas Insurance Code and Texas Prompt Payment of Claims Act in Texas court. Transamerica removed the case to the United States District Court for the Northern District of Texas and eventually moved for summary judgment on all of Plaintiffs' claims. The district court granted summary judgment in favor of Transamerica, and Plaintiffs appealed.

For the reasons that follow, the district court's grant of summary judgment is REVERSED.

## I.

On January 29, 2018, Bich Pham applied for life insurance coverage of $600,000 from Transamerica. That same day, Bich gave her insurance agent, Kim Thu Tang, a check for $500 to cover the first premium. In return, Tang gave Bich a Conditional Receipt on behalf of Transamerica. The Conditional Receipt provided temporary life insurance as of the receipt's "Effective Date," if four conditions were met. The only condition relevant here required that Bich be "insurable at any rating under the Company's rules for insurance on the plan applied for and *in the amount . . . applied for*." (emphasis added). The Conditional Receipt provided that the Effective Date

was the later of: "the date of completing all parts of the application," the date of the last medical examinations required by Transamerica, or the date requested in the application.

On January 31, 2018, Transamerica acknowledged receipt of Bich's application, the $500 premium payment, and the Conditional Receipt. On February 6, 2018, Bich completed the medical examinations and tests required by Transamerica.

On February 14, 2018, Transamerica notified Tang, Bich's insurance agent, that Bich's requested coverage amount of $600,000 did not comply with Transamerica's premium-to-income underwriting guidelines. In other words, Bich's income was too low to qualify for a $600,000 policy. Shortly thereafter, Transamerica determined that coverage of $525,114 with a $333 premium would satisfy its guidelines and sent notice of this fact to Tang in the form of a "supplemental illustration" and "numeric summary." The numeric summary contained a disclaimer requiring Bich to acknowledge that she understood that "[the numeric summary] is a hypothetical illustration containing non-guaranteed elements and it is not intended to predict actual performance of the policy." On February 26, 2018, Bich signed the numeric summary. Tang then informed Transamerica that Bich would accept the policy with $525,114 in coverage. On March 8, 2018, Transamerica notified Tang that it had "approved" Bich's application for $525,114 in coverage.

The following day, March 9, 2018, Bich was killed. Prior to her death, Bich had not received the actual insurance policy (hereinafter, "the Policy"). Unaware of Bich's death, Transamerica officially issued the Policy on March 20, 2018 and sent it to Tang by mail on March 21. Attached to the Policy was an "Amendment of Application," which Bich was required to sign to acknowledge the adjusted coverage amount. The "Amendment of

Application" document states, "The undersigned agrees that these changes shall be an amendment to and form a part of the original application . . . ."

On May 1, 2018, Bich's father, Johnny Pham, one of the intended beneficiaries under the life insurance policy, submitted a claim for benefits to Transamerica.

On May 15, 2018, Transamerica denied the claim, and it later affirmed that decision after an internal appeal.

On February 25, 2019, Plaintiffs sued Transamerica in Texas court for breach of contract and violations of the Texas Insurance Code and Texas Prompt Payment of Claims Act. Transamerica removed the case to the United States District Court for the Northern District of Texas based on diversity. Transamerica eventually moved for summary judgment on all of Plaintiffs' claims.

On December 14, 2020, the district court granted summary judgment for Transamerica, ruling that: (1) there was no coverage under the Policy because it was not in effect at the time of Bich's death, (2) there was no temporary coverage under the Conditional Receipt because "Bich Pham was not insurable in the amount that she previously applied for—$600,000" on February 6, 2018, which the district court determined to be the Effective Date, and (3) Plaintiffs' statutory, extra-contractual claims failed as a matter of law because there was no contractual coverage. Plaintiffs appealed.

## II.

We review a grant of summary judgment de novo, applying the same standard as the district court. *Terrebonne Par. Sch. Bd. v. Mobil Oil Corp.*, 310 F.3d 870, 877 (5th Cir. 2002). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Where federal

jurisdiction is premised on diversity of citizenship, a federal court applies the substantive law of the forum state. *Ace Am. Ins. Co. v. Freeport Welding & Fabricating, Inc.*, 699 F.3d 832, 839 (5th Cir. 2012). The parties agree that Texas law applies in these proceedings.

Under Texas law, a conditional receipt may create a binding contract for temporary life insurance. *Nat'l Life & Acc. Ins. Co. v. Blagg*, 438 S.W.2d 905, 908 (Tex. 1969). Texas courts "construe insurance policies according to the same rules of construction that apply to contracts generally." *Don's Bldg. Supply v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008). Accordingly, courts use the standard rules of contract construction—that is, assess language, terms, and conditions—to determine whether a particular conditional receipt has created a binding contract for life insurance. *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010); *see also United Founders Life Ins. Co. v. Carey*, 363 S.W.2d 236, 241 (Tex. 1962).

III.

Because Plaintiffs concede that the Policy itself had not gone into effect, the only issue in this case is whether Bich was covered under the Conditional Receipt at the time of her death. That question turns on whether Bich was insurable "in the amount . . . applied for" on the Effective Date of the Conditional Receipt. Even more narrowly, the disagreement between the parties is whether the Effective Date was February 6, 2018 or February 26, 2018.[2] As such, in order to decide whether summary judgment was

[2] At oral argument, Plaintiffs conceded that if the Effective Date is February 6, 2018, then Bich *was not* insurable "in the amount . . . applied for," while Transamerica conceded that if the Effective Date is February 26, 2018, then the opposite is true.

appropriate, we must determine whether there is a genuine dispute of any fact that is material to determining the Effective Date.

The Conditional Receipt defined the Effective Date as *the later of*: "the date of completing all parts of the application (including medical questions), the date of the last medical examination, tests, and other screenings required by the Company, if any, or the date requested in the application." Plaintiffs contend that Bich's signing of the numeric summary constituted an amendment to and, thus, a "part[] of the application." Thus, according to Plaintiffs, Bich did not "complet[e] all parts of the application" until February 26, 2018, when she signed the numeric summary and accepted the lower coverage amount. On that date, she was insurable "in the [lower] amount . . . applied for." Meanwhile, Transamerica asserts that Bich's application was not amended. Instead, Bich "complet[ed] all parts of the application" on January 29, 2018, when she submitted her initial application. Thus, according to Transamerica, the Effective Date of the Conditional Receipt was February 6, 2018, the date that Bich completed the required medical examinations. On that date, Bich was not insurable in the coverage amount she had applied for—$600,000.

A.

The parties' arguments and the record presented to the district court at summary judgment reveal a genuine dispute as to whether Bich's application was amended.

Texas contract principles apply when determining whether the application was amended because, according to the Policy, the application is part of the parties' contract for insurance. Texas law provides that modification of a contract must include all the essential elements of a contract, including a "meeting of the minds." *Hathaway v. Gen. Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986). If the actions of the parties reflect a mutual

intent to be bound, a binding agreement may be implied in fact. *See McAllen Hospitals, L.P. v. Lopez*, 576 S.W.3d 389, 392 (Tex. 2019) (citing *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 608-09 (Tex. 1972)). Whether there was a "meeting of the minds" to form or amend a contract is usually a question of fact. *See Hallmark v. Hand*, 885 S.W.2d 471, 476 (Tex. App. 1994) ("Where the element pertaining as to whether or not there was meeting of the minds is contested, determination of the existence of a contract is a question of fact."); *Haws & Garrett Gen. Contractors*, 480 S.W.2d at 610 (explaining that because "the state of the evidence in the present record falls short of establishing as a matter of law that the parties had entered into a contract," "[t]he existence or not of . . . a contract rests upon the inferences which are drawn by the trier of fact from the surrounding facts and circumstances").

Plaintiffs refer to several pieces of evidence that the parties agreed to amend the application. First, they point to a provision in the Policy which indicates that any applications and amendments are part of a single contract for insurance. In addition, two separate notices sent to Bich—the first stating that the application did not meet the premium-to-income underwriting guidelines and the second approving the application at the lower coverage amount—referenced the same application number. Plaintiffs argue that this evidence demonstrates that there was a single application and that, because the coverage amount in the Policy was ultimately lower than that initially applied for, it necessarily follows that the application was amended.

Second, Plaintiffs argue that the Amendment of Application, which acknowledged the reduction of the coverage amount and was attached to the Policy delivered after Bich's death, evinced a previous "meeting of the minds" to amend the application.

Finally, Plaintiffs argue that Transamerica's compliance with the requirement that an insurer send an illustration to be signed and dated by an insured if a policy is to be issued other than as initially applied for, and Bich's compliance in signing the illustration, provides further evidence that the application was amended. *See* 28 Tex. Admin. Code § 21.2209(a)(2).

Other evidence in the record also supports Plaintiffs' contention. First, the Amendment of Application document, which was attached to the Policy when it was sent to Bich in late March 2018 stated, "The undersigned agrees that these changes shall be an amendment to and form a part of the original application . . . ." Second, the application itself states that "this application shall consist of Part 1, Part 2, and any required application supplement(s)/amendment(s) . . . ." Finally, it appears that decisionmakers at Transamerica believed that Bich's application had been amended by Bich's signing of the numeric summary; per one company official, as of at least March 8, Transamerica understood Bich's application to be one for $525,114 in coverage.

Plaintiffs thus point to considerable evidence that there is, at a minimum, a genuine dispute of fact as to whether there was a meeting of the minds to amend the application. Transamerica argues in response that this sequence of events, and in particular the exchange of the supplemental illustration and numeric summary, did not amend the application because the exchanges did not reference the application or the Conditional Receipt. Transamerica contends that the "Amendment of Application" was the document intended to amend the application, and, because it was not signed by Bich, the application was not amended. As support, Transamerica cites *Hunton v. Guardian Life Ins. Co*, in which a district court refused to read the terms of an illustration into an insurance policy at least in part because the application and policy did not reference the illustration, including in the

merger clause. 243 F. Supp. 2d 686, 700, 709-10 (S.D. Tex. 2001), *affirmed* 71 F. App'x 441 (5th Cir. 2003).

Transamerica also cites one Texas state court decision in support of its argument, *Stansbury v. Legal Sec. Life Ins. Co.*, 410 S.W.2d 663 (Tex. Civ. App. 1966). The court in *Stansbury* held that the parties *had* amended an application so as to establish temporary coverage. *Id.* at 667. The facts are almost identical to those in this case: an insurance policy was ultimately issued at a lower coverage amount than that applied for, and the parties disputed whether the plaintiff's earlier agreement to the lower amount constituted an amendment to his application. *Id.* at 664-67. Relying on the fact that the insurer informed the plaintiff that it was decreasing the coverage from the applied-for amount and the fact that the plaintiff agreed to that change, the *Stansbury* court held that there was a meeting of the minds to amend the application. *Id.* at 667. The decision also noted that the conditional receipt expressly allowed for amendment of the application. *Id.* Transamerica emphasizes this latter point in distinguishing *Stansbury* and arguing that here, the application could not have been amended because the Conditional Receipt did not explicitly contemplate amendment.

Ultimately, Transamerica's arguments are insufficient to conclusively show that the application was not amended. First, *Hunton* resolved very dissimilar facts where the plaintiff primarily asserted fraud and misrepresentation perceived in an illustration but explicitly contradicted in writing in the policy. 243 F. Supp. 2d at 700-01. Nowhere in the district court's opinion in *Hunton* is there disagreement with the "well-established law that instruments pertaining to the same transaction may be read together *to ascertain the parties' intent*, even if the parties executed the instruments at different times and the instruments do not expressly refer to each other." *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 840 (Tex. 2000) (emphasis added) (footnotes omitted). Thus, even if the numeric

summary here did not itself amend the application, it is evidence of the parties' intent to amend the application (which did explicitly contemplate amendment). *See Haws & Garrett Gen. Contractors*, 480 S.W.2d at 609 (acknowledging that a contract can be implied from the parties' course of action).

The same is true of the Amendment of Application. Even though Bich never signed that document, the parties' agreement to amend the application may be binding even in the absence of a signature. *Id.* Further, the fact that Transamerica sent the Amendment of Application to Bich with the Policy bolsters Plaintiffs' claim that the parties' earlier actions amounted to an amendment of the application, which Transamerica was formalizing through this written instrument.

Transamerica's discussion of *Stansbury* is similarly not determinative. Transamerica's attempt to distinguish that case based on the fact that the conditional receipt there contemplated amendment of the application is not convincing, given that the court relied on the fact that there was a meeting of the minds, which was sufficient to amend the application. *Stansbury*, 410 S.W.2d at 667. Moreover, it is unclear that the conditional receipt in *Stansbury* actually did contemplate an amendment reducing the coverage amount. *See id.* at 663-64. Though the Conditional Receipt here did not explicitly refer to amendments, the ultimate Policy did, and the Conditional Receipt did not explicitly foreclose amendments to the application.

In sum, Plaintiffs point to more than enough evidence in the record to raise a genuine dispute of fact as to whether there was a meeting of the minds to amend the application.

B.

Because we have concluded that there is a genuine dispute as to whether the application was amended, we must decide whether that fact is

material to determining the Effective Date. This is an easy task, however, because Transamerica concedes that it is.

At oral argument, Transamerica agreed that that the phrase "all parts of the application" in the Conditional Receipt's definition of the Effective Date would include an amendment to the application, if there was such an amendment. In other words, Transamerica concedes that if Bich's application was amended, then the Effective Date is February 26, 2018. Because the parties agree that an amendment to the application would alter the Effective Date—and therefore determine if Bich was covered at the time of her death—whether the application was amended is, indeed, a material fact.

## IV.

Because there is a genuine dispute of material fact that should be resolved by a factfinder, the district court's grant of summary judgment on Plaintiffs' contractual claims is REVERSED. In addition, because the district court's grant of summary judgment on Plaintiffs' statutory, extra-contractual claims was based on the conclusion that Transamerica had legitimately denied Plaintiffs' claim for benefits, the grant of summary judgment on the statutory, extra-contractual claims is similarly REVERSED. This case is REMANDED to the district court for further proceedings.