

IN THE COURT OF APPEALS OF TENNESSEE  
WESTERN SECTION AT JACKSON

BETTY ALLEN and husband, )  
MILBURN ALLEN, )

Plaintiffs/Appellees, )

VS. )

BLUE CROSS AND BLUE SHIELD )  
OF TENNESSEE, )

Defendant/Appellant. )

Benton County Circuit No. 3543

Appeal No. 02A01-9511-CV-00253

**FILED**

March 12, 1997

Cecil Crowson, Jr.  
Appellate Court Clerk

APPEAL FROM THE CIRCUIT COURT OF BENTON COUNTY  
AT CAMDEN, TENNESSEE  
THE HONORABLE C. CREED MCGINLEY, JUDGE

**BRENDA MEASELLS DOWDLE  
LASSITER, TIDWELL & HILDEBRAND**  
Nashville, Tennessee  
Attorney for Appellant

**CHARLES L. HICKS**  
Camden, Tennessee  
Attorney for Appellees

**REVERSED AND RENDERED**

**ALAN E. HIGHERS, J.**

**CONCUR:**

**DAVID R. FARMER, J.**

**HOLLY KIRBY LILLARD, J.**

Plaintiffs/Appellees Betty Allen (hereinafter, "Mrs. Allen") and her Husband Milburn

Allen, (hereinafter, "Mr. Allen") initiated this cause of action after Defendant Blue Cross and Blue Shield of Tennessee (hereinafter, "Blue Cross") refused to pay certain medical expenses incurred by Mrs. Allen in the treatment of her colon cancer. Blue Cross refused to pay Mrs. Allen's claims based on its assessment that Mrs. Allen's cancer was a pre-existing condition which arose before the effective date of the insurance policy. The cause was tried in the Circuit Court of Benton County, Tennessee. Following the bench trial, the trial court ruled in favor of the Allens, finding that the colon cancer was not a pre-existing condition. The trial court awarded the Allens more than \$17,000 in damages plus costs. For the reasons set forth in this opinion, the Court is of the opinion that the trial court erred in finding that Mrs. Allen's colon cancer was not a pre-existing condition, and we reverse the trial court's judgment.

## I.

Mrs. Allen has been a resident of Camden, Benton County, Tennessee, for more than 30 years. Mrs. Allen's family has a history of colon cancer. Colon cancer was the cause of her mother's death, and Mrs. Allen's brother also had colon cancer. Likewise, her sister had had colon polyps. In light of the family's predisposition toward diseases of the digestive system, Mrs. Allen's physician had advised her to undergo periodic colonoscopy examinations every three to five years. Mrs. Allen had her first colonoscopy in January, 1984, and the second was performed in March, 1989. Mrs. Allen was due for another colonoscopy examination in early 1994, if she adhered to the 5 year pattern.

Mrs. Allen applied for medical insurance with Blue Cross on November 4, 1993.

The application asked in relevant part:

Have you or anyone for whom you are applying had any of the conditions or illnesses listed below?

3. Ulcer, Colitis, Diverticulitis, Hernia, Stomach, Intestines, Liver or Gallbladder?

Have you or anyone for whom you are applying been:

15. Advised to have treatment, surgery or testing that has not been done?

16. Treated for any disease, disorder, or injury not listed by this questionnaire?

Mrs. Allen answered "No" to the above questions when in fact she had had two colonoscopies and had been advised to have further colonoscopies. She had also been diagnosed with gastritis and diverticulitis. Based on the representations made in the application, Blue Cross approved coverage for Mrs. Allen on December 21, 1993. The coverage was to become effective on January 10, 1994.

Mrs. Allen testified that she began to have rectal bleeding around the first of January, 1994. Mrs. Allen called Dr. William Blackburn, her local physician, who in turn scheduled Mrs. Allen to have a colonoscopy performed by Dr. Robert Hollis, a gastroenterologist, in Jackson, Tennessee. Dr. Hollis examined Mrs. Allen on January 13, 1994, and performed the colonoscopy on January 18, 1994. Dr. Hollis diagnosed Mrs. Allen with colon cancer, and she underwent surgery that same day to eradicate the disease.

As previously noted, the insurance contract became effective on January 10, 1994. The policy contained a one year waiting period for pre-existing conditions. Pre-existing condition is defined by the policy as

an illness, injury or pregnancy or any other medical condition which existed at any time preceding the effective date of coverage under the certificate for which:

1. medical advice or treatment was recommended by or received from a provider of health care services; or

2. symptoms existed which would cause an ordinarily prudent person to seek diagnosis, care or treatment.

Blue Cross denied coverage to Mrs. Allen for treatment of her colon cancer under the terms of the policy which excluded pre-existing conditions. The Allens filed a complaint in the Benton County, Tennessee, Circuit Court on August 23, 1994. The cause was ultimately tried on June 1, 1995. At the close of the case, Blue Cross moved to amend the pleadings to conform to the proof that Mrs. Allen had misrepresented her medical history on her insurance application. Said motion was denied by the trial court. On July 27, 1995,

the trial court entered a judgment in Plaintiffs' favor for \$17,178.57 plus discretionary costs of \$700.16. Blue Cross timely filed the notice of appeal on August 15, 1995. The appeal has been perfected and is properly before the Court for consideration.

## II.

Blue Cross has raised the following issues on appeal:

1. Whether the trial court erred in holding that the Plaintiff's colon cancer was not excluded as a pre-existing illness under the insurance contract
2. Whether trial court abused its discretion in refusing to allow the defendant to amend its answer to conform to the proof that the plaintiff made material misrepresentations on her insurance application which voided her policy.
3. Whether the court erred in finding that the misrepresentations of the Plaintiff were not material, did not increase the risk of loss and did not void the insurance policy issued to the Plaintiff.

## III.

The parties' respective rights and obligations are governed by their contract of insurance whose terms are embodied in the policy. As with any other contract, our responsibility is to give effect to the expressed intention of the parties, Blaylock & Brown Constr., Inc., v. AIU Ins.. Co., 796 S.W.2d 146, 149 (Tenn. App. 1990), by construing the policy fairly and reasonably, and by giving the policy's language its common, ordinary meaning. Black v. Aetna Ins.. Co., 909 S.W.2d 1, 3 (Tenn. App. 1995); Demontbruen v. CNA Ins.. Cos., 822 S.W.2d 619, 621 (Tenn. App. 1991); Moss v. Golden Rule Life Ins.. Co., 724 S.W.2d 367, 368 (Tenn. App. 1986); Ballard v. Great North Am. Life & Cas. Co., 667 S.W.2d 79, 82 (Tenn. App. 1983). It is the duty of the courts to enforce an insurance policy as it is written, and the courts are not at liberty to rewrite policies of insurance to provide coverage where no coverage was intended. Spears v. Commercial Ins. Co. of Newark, New Jersey, 866 S.W.2d 544, 548 (Tenn. App. 1993). Likewise, we are not at liberty to rewrite an insurance policy simply because we do not favor its terms or because its provisions produce harsh results. In the absence of fraud, overreaching or unconscionability, the courts must give effect to an insurance policy if its language is clear

and its intent certain. Black v. Aetna Ins.. Co., 909 S.W.2d 1, 3 (Tenn. App. 1995); Qunitana v. Tenn. Farmers Mut. Ins.. Co., 774 S.W.2d 630, 632 (Tenn. App. 1989).

In the instant case, the trial court questioned whether Mrs. Allen's colon cancer could be characterized as a pre-existing condition on the basis that Mrs. Allen had no reason to think that she had colon cancer prior to the effective date of the policy. In all deference to the trial court, we cannot agree. The policy is unambiguous. While the circumstances of this case may produce a harsh result, courts are not at liberty to rewrite contracts to conform to their opinion of justice in a particular case. Black v. Aetna Ins.. Co., 909 S.W.2d 1, 3 (Tenn. App. 1995). In this case, the exclusion of pre-existing conditions is clear and unambiguous. It is undisputed that the effective date of the policy was January 10, 1994. The policy, by its own terms did not apply to treatment for conditions during the 12 months after the effective date of the policy for which, prior to the effective date, symptoms existed which would cause an ordinarily prudent person to seek diagnosis. The insurance contract stated in relevant part:

Pre-Existing condition: an illness, injury or pregnancy or any other medical condition which existed at any time preceding the effective date of coverage under the certificate for which:

1.medical advice or treatment was recommended by or received from a provider of health care services; or

2.symptoms existed which would cause an ordinarily prudent person to seek diagnosis, care or treatment.

Careful examination of the record on appeal reveals that both of the conditions for exclusion mentioned in the policy are present in this case. At trial, Mrs. Allen testified as follows:

Q: Okay. And you clearly had this rectal bleeding at least around the first of the year, that's what you testified?

A: Yes.

Q: When did you first call the doctor about that rectal bleeding?

A: I don't remember the date. I called Dr. Blackburn and asked him, would he make me an appointment with the doctor at Jackson.

...

Q: Okay. And you're testifying now that you don't remember. Do you recall saying that, do you know how long you had been bleeding when you called Dr. Blackburn, about how long?

A: I don't remember. One (1) or two (2) days, three (3) days. I don't remember.

Q: Alright. So, you had been bleeding a couple of days. You started bleeding, you testified, around the first of January and had been bleeding about two (2) days and you called Dr. Blackburn, is that accurate?

A: Yes.

Q: And he made an appointment for you then with Dr. Hollis?

A: Yes. I remember he made the appointment and someone called me back, I don't remember if it was that day or the next day, and the next week, then I was to go to Dr. Hollis.

Q: Okay. So, it took you at least a week to go to, to be able to get into Dr. Hollis after you had called and gotten your appointment?

A: Yeah, because, I don't remember the date. It was, it was the last of the week when he called and I went the 13th.

Q: Alright. So clearly you were bleeding at the, you were bleeding prior to the effective date of the contract on January 10th, 1994?

A: Around the first of the month.

Q: The first of January, 1994?

A: Yeah.

Mrs. Allen admitted that she noticed rectal bleeding around the first of January, 1994. The persistence of bleeding prompted Mrs. Allen to call her local physician, Dr. Blackburn, to ask him to schedule an appointment with a doctor in Jackson in order for her to have a colonoscopy. Dr. Blackburn scheduled an appointment for Mrs. Allen with the gastroenterologist in Jackson for a colonoscopy. Mrs. Allen testified that the appointment with the gastroenterologist was scheduled to take place about a week after the date she had called her local doctor in Camden. Because the appointment with the gastroenterologist took place on January 13, 1994, and because Mrs. Allen called her local physician at least a week before the appointment, it is apparent that Mrs. Allen sought medical advice before the effective date of the policy.

By the time Mrs. Allen saw the gastroenterologist, she had been experiencing rectal bleeding for approximately two weeks. Dr. Hollis testified in his deposition as follows:

Q: At that time she had a history of rectal bleeding for approximately two weeks?

A: Yes.

Q: So she would have developed her rectal bleeding right around the first of January or shortly thereafter?

A: Yes.

Q: Now, it is my understanding, Doctor, that rectal bleeding is a symptom of colon cancer?

A: That is correct.

Q: It is also more likely that rectal bleeding is a symptom of colon cancer in patients who have had a family -- who is 57 years old and has a family history of a mother who has died from colon cancer and a brother who has had colon cancer?

A: Yes, that's true.

Q: So, when you were talking about the fact that she was asymptomatic, you were not referring to the fact that she had had rectal bleeding?

A: Correct; other than the rectal bleeding, she had no other symptoms.

Q: Okay, but clearly rectal bleeding is a symptom of potential colon cancer?

A: Correct.

Q: And, a prudent person such as Mrs. Allen would seek treatment for -- to determine the cause of that rectal bleeding, such as she did -- just as she did?

A: Correct.

Q: And, particularly a woman who has had a family history of colon cancer, and had a mother die from that, if she were prudent she would seek treatment for it?

A: That's true, if she was aware that family history was involved, that's true.

The evidence in this case is clear that Mrs. Allen not only had symptoms of colon cancer but also sought advice regarding said symptoms prior to the effective date of the Blue Cross insurance policy. The trial court acknowledged this in its findings of fact made from the bench:

...[A]nd, we've got a very strange situation in this case that quite clearly at the time the policy went into effect, she did have cancer... [W]e've got a strange situation where we did have a symptom that occurred prior to the actual effective date of the policy ...

Appellees point out that rectal bleeding is not exclusively a symptom of colon cancer. The Court is aware of the fact that rectal bleeding may be an indicator of other maladies and is not confined to colon cancer. However, in this particular case, rectal bleeding was a symptom of colon cancer, and it was for the treatment of that disease that Blue Cross denied insurance coverage. Contrary to the trial court's judgment, we do not find that the plain language of the contract required Mrs. Allen to know that she had cancer prior to the effective date of the policy. Nor does it require that she have received treatment prior to the effective date of the policy. The Blue Cross policy merely required that Mrs. Allen have an illness for which treatment had been recommended or for which symptoms existed which would cause her to seek treatment or advice.

The preponderance of evidence in this case compels the Court to find that Mrs. Allen had a pre-existing illness as defined in the insurance policy. The colon cancer had manifested itself in the form of rectal bleeding of which Mrs. Allen was aware and for which she had sought medical advice before the effective date of the insurance policy. Therefore, under the terms of the insurance policy which notified the insured that she must "...wait 12 months before you can receive benefits for a pre-existing condition...", the Court finds that the trial court erred in holding that Mrs. Allen's colon cancer was not excluded as a pre-existing condition. Mrs. Allen's colon cancer meets both of the alternative exclusions for pre-existing conditions found within the insurance policy. Considering the broad exclusionary language of the insurance policy and the testimony regarding the onset of rectal bleeding prior to the effective date of the insurance policy, we are compelled to find that Mrs. Allen is not entitled to insurance coverage from Blue Cross under the policy in question for treatment of her colon cancer in 1994. Because of the Court's holding on this issue, we do not find it necessary to address the remaining issues raised by Blue Cross on appeal.



The judgment of the trial court is reversed and judgment is rendered for Blue Cross.  
Costs are adjudged against plaintiffs-appellees for which execution may issue if necessary.

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HIGHERS, J.

CONCUR:

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FARMER, J.

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LILLARD, J.