

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 1, 2021

TERRELL BIGGS, JR. v. LIBERTY MUTUAL INSURANCE COMPANY

**Appeal from the Circuit Court for Sullivan County
No. C41023 John S. McLellan, III, Judge**

No. E2021-00138-COA-R3-CV

FILED

NOV 22 2021

Clerk of the Appellate Courts
Rec'd by _____

JUDGMENT

This appeal came on to be heard upon the record from the Circuit Court for Sullivan County and briefs filed on behalf of the respective parties. Upon consideration thereof, this Court is of the opinion that the judgment should be affirmed.

It is, therefore, ORDERED and ADJUDGED by this Court that the judgment of the trial court granting Liberty's motion for summary judgment and dismissing with prejudice Mr. Biggs's complaint is affirmed. This case is remanded to the trial court, pursuant to applicable law, for enforcement of the trial court's judgment and collection of costs assessed by the trial court. Costs on appeal are taxed to the appellant, Terrell Biggs, Jr.

PER CURIAM

Appendix A

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The plaintiff challenges the order of the Sullivan County Circuit Court (“trial court”) granting summary judgment in favor of the defendant, Liberty Insurance Corporation¹ (“Liberty”), and dismissing his complaint on the merits with prejudice. The trial court granted summary judgment to Liberty based on lack of subject matter jurisdiction and its conclusion that the plaintiff would be unable to produce sufficient evidence at trial to withstand a motion for directed verdict. Because the plaintiff’s claims are barred by the exclusive remedy provision of the Tennessee Workers’ Compensation Act, we affirm the trial court’s grant of summary judgment to Liberty, albeit for a different reason than that found by the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded**

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which W. NEAL MCBRAIER and KENNY W. ARMSTRONG, JJ., joined.

Michael C. Murphy, Morristown, Tennessee, for the appellant, Terrell Biggs, Jr.

Brian C. Neal and Alexandria A. Rhoades, Nashville, Tennessee, for the appellee, Liberty Insurance Corporation.

OPINION

I. Factual and Procedural Background

The plaintiff, Terrell Biggs, Jr., a former employee of White's Discount Foods, Inc., in Johnson City, Tennessee, suffered a spinal cord injury in May 1990 when a pallet of

¹ According to the defendant's pleadings, it was incorrectly named in the plaintiff's complaint and notice of appeal as Liberty Mutual Insurance Company.

sugar rolled down the ramp of a truck and struck Mr. Biggs while he was assisting with the set-up of a store in Boone, North Carolina. Mr. Biggs subsequently filed a workers' compensation action in the Washington County Law Court ("Washington County court"), which entered an order in June 1992, concluding that the incident had rendered Mr. Biggs permanently disabled and awarding him permanent total disability benefits and lifetime future medical benefits. Upon Mr. Biggs's request, the Washington County court entered a second order in October 1992, awarding Mr. Biggs a one-time commutation of his workers' compensation disability benefits. Mr. Biggs, however, maintained his right to future medical expenses. As the workers' compensation carrier, Liberty became responsible for paying all of Mr. Biggs's future medical expenses related to his back injury.

Mr. Biggs received medical benefits from Liberty without issue until 2014 when Liberty allegedly pressured Mr. Biggs to accept a lump-sum settlement offer in lieu of future medical benefits, forced him to receive pain management from a pain clinic rather than his physician of twenty-four years, and denied approval of and payment for prescribed pain medications. On May 5, 2015, Mr. Biggs filed a complaint in the trial court alleging that Liberty had engaged in or committed (1) outrageous conduct and intentional infliction of emotional distress, (2) fraudulent and intentional misrepresentation, and (3) a violation of the covenant of good faith and fair dealing. Mr. Biggs's three causes of actions derived from what he perceived to be Liberty's "interference and disruption" with his medical care to "extort," "harass," and pressure him to accept Liberty's settlement offer.

Specifically, Mr. Biggs averred that Liberty had sent him a letter detailing a settlement offer in May 2014, which coincided with a "pattern and practice" of denying payment for and approval of his prescribed pain medications. In addition, Mr. Biggs asserted that Liberty had fraudulently and falsely expressed to him that his long-time orthopedic physician, Dr. Galen Smith, was no longer willing to treat him for pain management. Mr. Biggs further alleged that Liberty had attempted to force him to seek pain management at an out-of-town pain clinic in Knoxville, Tennessee, a five-hour round trip from Mr. Biggs's home in Kingsport, Tennessee. Mr. Biggs also asserted that Liberty had falsely and fraudulently expressed to him that there were no local pain management doctors in Kingsport. According to Mr. Biggs, when he eventually began seeking treatment from a Kingsport pain clinic, Liberty continued to deny approval for prescribed pain medication. As a result of Liberty's alleged actions and omissions, Mr. Biggs claimed that he had suffered physical pain, mental and emotional injury, and loss of enjoyment of life.

On February 4, 2016, Liberty responded with a motion to dismiss Mr. Biggs's complaint. Therein, Liberty contended that the trial court should dismiss the complaint because (1) Mr. Biggs's claims were barred by the exclusive remedy provision in Tennessee Code Annotated § 50-6-108 of the Tennessee Workers' Compensation Act and (2) the trial court lacked subject matter jurisdiction pursuant to the prior suit pending doctrine inasmuch as Mr. Biggs's workers' compensation claim had been heard by the

Washington County court in 1992. Following a hearing, the trial court entered an order on July 5, 2016, denying Liberty's motion to dismiss.

Thereafter, Liberty filed an answer to Mr. Biggs's complaint on September 19, 2016. In its answer, Liberty denied that it had interfered with Mr. Biggs's medical care or that it had engaged in a pattern or practice of denying payment for any treatment that would have been deemed reasonable, authorized, and/or necessary under the Tennessee Workers' Compensation Act. Liberty justified any refusal on its part to approve or pay for certain medications by citing recommendations that came from "Utilization Review."² According to Liberty, following a utilization review, conducted by Dr. Paul Lafavore, Liberty denied certain treatments ordered by Dr. Smith and recommended that Mr. Biggs wean off Lortab, one of two pain medications that Dr. Smith had prescribed. Ultimately, Liberty asserted that it had complied with the provisions of the Tennessee Workers' Compensation Act.

Three years later, on October 22, 2019, Liberty filed a motion for summary judgment, a supporting memorandum of law, and a statement of undisputed material facts. Liberty again argued that the trial court lacked subject matter jurisdiction under the prior suit pending doctrine and the "doctrine of civil contempt," asserting that Mr. Biggs's claims had to be addressed in the Washington County court where the workers' compensation orders had originated. Moreover, Liberty reiterated that the three causes of action asserted by Mr. Biggs were barred by the exclusive remedy provision of Tennessee Code Annotated § 50-6-108. Lastly, Liberty contended that Mr. Biggs would be unable to prove the elements of his claims. Mr. Biggs subsequently filed several responses to Liberty's motion for summary judgment.

The trial court conducted a hearing with regard to Liberty's motion for summary judgment on January 17, 2020. During the hearing, the trial court expressed that it could not make sense of Mr. Biggs's responses to Liberty's motion for summary judgment and statement of undisputed material facts, emphasizing that Mr. Biggs had failed to properly cite to the record in his responses. In response to Liberty's argument that the trial court lacked subject matter jurisdiction, Mr. Biggs's counsel argued that the court had already dismissed Liberty's postulate when it denied its motion to dismiss in July 2016. Mr.

² Tennessee Code Annotated § 50-6-102(20) (Supp. 2021) defines utilization review, in pertinent part, as:

[E]valuation of the necessity, appropriateness, efficiency and quality of medical care services, including the prescribing of one (1) or more Schedule II, III, or IV controlled substances for pain management for a period of time exceeding ninety (90) days from the initial prescription of such controlled substances, provided to an injured or disabled employee based on medically accepted standards and an objective evaluation of those services provided.

Biggs's counsel nevertheless orally requested that the court transfer the case to the Washington County court.³

The trial court entered its order granting Liberty's motion for summary judgment on March 4, 2020, also denying Mr. Biggs's request for transfer. The trial court deemed Liberty's statement of undisputed material facts admitted due to Mr. Biggs's failure to properly respond. In the court's conclusions of law, it found that it lacked subject matter jurisdiction based on Mr. Biggs's failure to contest Liberty's argument on this point. Notwithstanding its conclusion that it lacked subject matter jurisdiction, the court also granted Liberty's motion for summary judgment on the merits and concluded that Mr. Biggs would have been unable to produce sufficient evidence at trial to withstand a motion for directed verdict. The trial court dismissed Mr. Biggs's suit against Liberty with prejudice. After filing an unsuccessful motion to alter or amend the judgment, Mr. Biggs timely appealed.

II. Issue Presented

Mr. Biggs raises one issue on appeal, which we have restated slightly as follows:

Whether the trial court erred in granting Liberty's motion for summary judgment.

III. Standard of Review

The grant or denial of a motion for summary judgment is a matter of law; therefore, our standard of review is *de novo* with no presumption of correctness. *See Rye v. Women's Care Ctr. of Memphis, PLLC*, 477 S.W.3d 235, 250 (Tenn. 2015); *Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 671 (Tenn. 2013) (citing *Kinsler v. Berkline, LLC*, 320 S.W.3d 796, 799 (Tenn. 2010)). As such, this Court must "make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *Rye*, 477 S.W.3d at 250. As our Supreme Court has explained concerning the requirements for a movant to prevail on a motion for summary judgment pursuant to Tennessee Rule of Civil Procedure 56:

[W]hen the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. We reiterate that a moving party seeking summary judgment by attacking the

³ There is no indication in the record that Mr. Biggs filed a written motion to transfer his case to the Washington County court.

nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] . . . supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set forth specific facts" *at the summary judgment stage* "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. [574,] 586, 106 S. Ct. 1348, [89 L.Ed.2d 538 (1986)]. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, after adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06. The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial.

Rye, 477 S.W.3d at 264-65. "Whether the nonmoving party is a plaintiff or a defendant—and whether or not the nonmoving party bears the burden of proof at trial on the challenged claim or defense—at the summary judgment stage, '[t]he nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.'" *TWB Architects, Inc. v. The Braxton, LLC*, 578 S.W.3d 879, 889 (Tenn. 2019) (quoting *Rye*, 477 S.W.3d at 265). Pursuant to Tennessee Rule of Civil Procedure 56.04, the trial court must "state the legal grounds upon which the court denies or grants the motion" for summary judgment, and our Supreme Court has instructed that the trial court must state these grounds "before it invites or requests the prevailing party to draft a proposed order." *See Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 316 (Tenn. 2014).

IV. Exclusive Remedy Provision of Tennessee's Workers' Compensation Act

It is undisputed that Mr. Biggs's relationship with Liberty derived from a 1992 order entered by the Washington County court, which had awarded Mr. Biggs future medical benefits and named Liberty as the workers' compensation carrier responsible for paying such benefits. Mr. Biggs alleged in his complaint two common law tort claims, intentional infliction of emotional distress and intentional misrepresentation, and a common law contract claim, violation of the covenant of good faith and fair dealing. In its motion for summary judgment and supporting memorandum, Liberty posited that the Tennessee Workers' Compensation Act ("the Act") provided the exclusive remedy for a Tennessee workers' compensation plaintiff, pursuant to Tennessee Code Annotated § 50-6-108, and that this provision excluded all other rights and remedies not provided for by the Act. Although the trial court did not address this argument in its order granting summary judgment, we agree with Liberty and conclude that this was the proper predicate for granting Liberty's motion for summary judgment and dismissing Mr. Biggs's complaint.

The Act confers benefits that are "purely statutory," and "the circumstances under which they are paid and the manner in which they are calculated depend solely upon statutory authority." *Perry v. Transamerica Ins. Grp.*, 703 S.W.2d 151, 153 (Tenn. Ct. App. 1985); *see Curtis v. G.E. Cap. Modular Space*, 155 S.W.3d 877, 882 (Tenn. 2005) ("The right to workers' compensation benefits is a unique concept in the law, derived solely from statutory provisions rather than from the common law."). This Court has previously explained that the Act "involve[s] a *quid pro quo* in that workers give up certain common law rights against their employers in return for a system providing more certain compensation, totally independent of any fault on the part of the employer." *Perry*, 703 S.W.2d at 153.

Under the Act, the relinquishment of common law rights and remedies on the part of employees is codified in Tennessee Code Annotated § 50-6-108 (2014), which provides in pertinent part:

- (a) The rights and remedies granted to an employee subject to this chapter, on account of personal injury or death by accident, including a minor whether lawfully or unlawfully employed, shall exclude all other rights and remedies of the employee, the employee's personal representative, dependents or next of kin, at common law or otherwise, on account of the injury or death.

The exclusive remedy provision of the Act is "triggered when an employee suffers an injury arising out of and in the course and scope of employment." *Clawson v. Burrow*, 250 S.W.3d 59, 62 (Tenn. Ct. App. 2007). "[T]he employee must accept the remedies of the Workers' Compensation Law, and those remedies exclude all of the employee's other rights and remedies." *Id.*

Moreover, the Act defines “employer” to include the employer’s insurer. Tenn. Code Ann. § 50-6-102(13) (Supp. 2021) provides:

“Employer” includes any individual, firm, association or corporation, the receiver or trustee of the individual, firm, association or corporation, or the legal representative of a deceased employer, using the services of not less than five (5) persons for pay, except as provided in § 50-6-902, and, in the case of an employer engaged in the mining and production of coal, one (1) employee for pay. If the employer is insured, it shall include the employer’s insurer, unless otherwise provided in this chapter[.]

(Emphasis added.) *See Perry*, 703 S.W.2d at 154 (“[U]nder our statute the insurer is equated fully and completely with the employer”).

Therefore, an action against the employer’s compensation carrier does not fall outside the scope of the Act or the exclusive remedy provision. In fact, this Court has specifically affirmed trial courts in dismissing suits pursuant to the exclusive remedy provision when workers’ compensation plaintiffs have sought “damages by virtue of an alleged mishandling of workers’ compensation claims by the employer and its insurance carrier.” *See Leatherwood v. United Parcel Serv.*, 708 S.W.2d 396, 401 (Tenn. Ct. App. 1985); *see, e.g., Davis v. Alexsis, Inc.*, 2 S.W.3d 228, 229-30 (Tenn. Ct. App. 1999); *Perry*, 703 S.W.2d at 154.

We find the facts of *Perry* to be nearly identical to the facts of the present case and therefore illustrative. In *Perry*, this Court considered whether the Act’s exclusive remedy provision “bar[red] an employee who ha[d] sustained a compensable injury covered by the act from maintaining an independent action against the workers’ compensation carrier of the employer.” *Perry*, 703 S.W.2d 151. The *Perry* plaintiff filed a complaint in the Shelby County Circuit Court against the defendant compensation carrier based on its “alleged bad faith in handling the workers’ compensation claim, negligence in regard to handling that claim, and outrageous conduct.” *Id.* Similar to Mr. Biggs’s allegations against Liberty, the *Perry* plaintiff asserted that the defendant had failed to “furnish her with a choice of physicians,” timely pay her benefits, and authorize her admission into a hospital for a scheduled surgery. *Id.* at 152. The defendant compensation carrier filed a motion to dismiss, arguing that the Act provided the exclusive remedy for the plaintiff and that the Act’s exclusive “penal provisions for bad faith failure to pay benefits was likewise an exclusive remedy.” *Id.* at 153. The circuit court accordingly granted the motion to dismiss. *Id.*

In affirming the circuit court’s order dismissing the plaintiff’s complaint, the *Perry* Court rejected the plaintiff’s argument that her damages “arose from an ‘injury’ that did

not occur in the course of her employment" and thereby rendered her suit outside the scope of the Act. *Id.* at 154. In rejecting this argument, this Court concluded:

Workers' compensation rights are purely creatures of statute, and, therefore, we must look to the particular statute with which we are dealing. It has already been pointed out that under our statute the insurer is equated fully and completely with the employer. The acts complained of were committed by a representative of the insurer. Paraphrasing the intent of the statute, the acts complained of were committed by a representative of the employer.

Id. Therefore, inasmuch as the alleged "mishandling of the workers' comp claim" was committed by a representative of the insurer and, by extension, the employer, this Court concluded that the Act governed the remedies available to the workers' compensation plaintiff and affirmed the circuit court's order dismissing the complaint, determining that the plaintiff did not have a cause of action. *Id.* at 155-56.

Although he presents no argument in his appellate brief as to why the exclusive remedy provision should not preclude his claims, Mr. Biggs argued in the trial court that intentional torts fall outside the scope of the exclusive remedy provision. Tennessee courts have indeed created an exception to the exclusive remedy provision if "the employee is able to prove the employer had an actual intent to injure the employee." *Gonzales v. Alman Constr. Co.*, 857 S.W.2d 42, 46 (Tenn. Ct. App. 1993). However, this exception has been limited to the original injury for which workers' compensation benefits were initially sought rather than to a subsequent alleged injury, such as Mr. Biggs's claim, against a compensation carrier for the mishandling of a workers' compensation claim. *See id.*

In *Leatherwood*, the plaintiff alleged, much like Mr. Biggs has, that the defendant compensation carrier had "intentionally inflicted mental and emotional anguish upon him in its handling of his workers' compensation claim," committed outrageous conduct, and conspired to defraud the plaintiff of his benefits. *Leatherwood*, 708 S.W.2d at 398. Despite the intentional nature of these allegations, this Court affirmed the trial court's order granting summary judgment based on the Act's exclusive remedy provision. *Id.* While noting that the legislature had enacted a penalty provision for insurance carriers who failed to pay compensation, this Court concluded: "The legislature did not undertake to add any further provisions concerning the actions of the employer in dealing with the employee concerning workers' compensation benefits." *Id.* at 401.

Finally, we note that the trial court granted Liberty's motion based on, *inter alia*, a lack of subject matter jurisdiction. We conclude that the trial court erred in determining that it lacked subject matter jurisdiction. According to the trial court's order, it lacked subject matter jurisdiction because Mr. Biggs had failed to respond to Liberty's arguments concerning subject matter jurisdiction. However, Mr. Biggs's failure to respond to Liberty's argument did not deny the trial court the power to hear and adjudicate his claims.

In addition, Liberty concedes on appeal that the trial court did in fact possess subject matter jurisdiction respecting Mr. Biggs's tort and contract claims because Mr. Biggs alleged that he had suffered harm in Sullivan County. *See* Tenn. Code Ann. § 16-10-101 (2021) ("The circuit court is a court of general jurisdiction, and the judge of the circuit court shall administer right and justice according to law, in all cases where the jurisdiction is not conferred upon another tribunal."); Tenn. Code Ann. § 20-4-101(a) (2021) ("In all civil actions of a transitory nature, unless venue is otherwise expressly provided for, the action may be brought in the county where the cause of action arose or in the county where the individual defendant resides."); *Five Star Express, Inc. v. Davis*, 866 S.W.2d 944, 945 n.1 (Tenn. 1993) ("Typical examples of transitory actions are actions sounding in tort and contract."). We agree with Liberty's concession on appeal and conclude that the trial court possessed subject matter jurisdiction to adjudicate Mr. Biggs's claims.

Despite the trial court's erroneous conclusion that it lacked subject matter jurisdiction over Mr. Biggs's claims, we may still affirm the overall decision of the trial court to grant Liberty's motion for summary judgment. *See In re Conservatorship for Allen*, No. E2010-01625-COA-R10-CV, 2010 WL 5549037, at *8 (Tenn. Ct. App. Dec. 29, 2010) ("We are empowered on appeal to sustain the trial court's order if it reached the correct result for the wrong reasons."). Therefore, we affirm the trial court's order granting Liberty's motion for summary judgment but on the basis that the exclusive remedy provision of the Act precluded Mr. Biggs's common law claims.

V. Conclusion

For the foregoing reasons, we affirm the trial court's order granting Liberty's motion for summary judgment and dismissing Mr. Biggs's complaint with prejudice. Accordingly, we remand this case for collection of costs below. Costs on appeal are taxed to the appellant, Terrell Biggs, Jr.

s/ Thomas R. Frierson, II
THOMAS R. FRIERSON, II, JUDGE

**IN THE COURT OF APPEALS
FOR THE STATE OF TENNESSEE
EASTERN DIVISION AT KNOXVILLE**

TERRELL BIGGS, JR.,)
v.)
Appellant,)
LIBERTY MUTUAL) Appeal No. E2021-00138-COA-R3-CV
INSURANCE COMPANY,) Sullivan County Circuit Court
Defendant,) Docket No. C41023
)
)
)
)
)

BRIEF OF APPELLANT

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Appeal pursuant to Rule 3 of Tennessee Rules of Appellate Procedure

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STATEMENT OF THE ISSUE

THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT.

STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

Plaintiff Terrell Biggs, Jr. filed a Complaint (1-3) on May 5, 2015, in Sullivan County, Tennessee, against insurance corporation Defendant Liberty Mutual Insurance Company, which answered on September 15, 2015 (24-28). Plaintiff moved to amend the complaint on May 20, 2016 (21). Defendant filed a Motion to Dismiss (4-9) the action on February 4, 2016, alleging among other things lack of subject matter jurisdiction due to workers compensation act exclusivity, which was denied on July 5, 2016 (22) by the trial court judge following an April 6, 2016, Response by Plaintiff (11-19) and a hearing. The case proceeded on its tort basis of outrageous conduct/intentional infliction of emotional distress, violation of the covenant of good faith and fair dealing, and fraudulent and intentional misrepresentation.

The Defendant filed a Motion for Summary Judgment (31-103) on October 22, 2019, some four and a half years after the case was filed, along with a Statement of Undisputed Material Facts (169-179). Plaintiff filed six responses to the Motion: Response of December 12, 2019 (180-183), Supplemental Reply of December 20, 2019 (233-239, with attachments) and his Affidavit (240), Amended Response of December 26, 2019 (241-242), Affidavit of Plaintiff on January 9, 2020 (245-246), and Affidavit as well on January 9, 2020, of Dr. Galen Smith, his decades long treating physician and spinal surgeon (247-248). The lower trial court granted Defendant's Motion for Summary Judgment by Order of March 4, 2020 (308-314) and

Plaintiff timely filed a Motion to Alter/Amend on April 1, 2020 (315). The trial court denied Plaintiff's Motion to Alter/Amend on January 6, 2021 (329-330). A Notice of Appeal was filed on February 5, 2021 (334), and this case is now before this Honorable Court for consideration.

STATEMENT OF THE FACTS

Plaintiff Terrell Biggs, Jr. is a 65 year old longtime Kingsport, Sullivan County, Tennessee, resident who suffered a 100% disabling spinal injury in 1990 (1-3, 180-183, 233-239, 240, 241-242, 245-246, 247-248). Defendant insurance corporation Liberty Mutual Insurance Company was ordered by the Honorable Judge Penny White on October 14, 1992, to provide future medical care benefits to Plaintiff (1-3, 8-10).

However, beginning around May 13, 2014, when Plaintiff was 59 years old, the Defendant began actions to attempt to force him to accept their lump sum buyout offer of future medical costs (via a Medicare Set Aside Agreement) by withholding medical care and prescription pain medicine approval (1-3, 180-183, 233-239, 240, 241-242, 245-246, 247-248). This interference and disruption of his medical care occurred simultaneously with their attempts to basically use their power to extort him through pain into accepting their buyout offer for their duty and obligation to provide future medical benefits, causing a living nightmare for Plaintiff (1-3, 180-183, 233-239, 240, 241-242, 245-246, 247-248).

Defendant Liberty Mutual from May, 2014, forward began a pattern and practice to deny and reject payment and approval of his pain medication prescribed by his treating physician and surgeon for decades, Dr. Galen Smith of Kingsport (1-3, 180-183, 233-239, 240, 241-242, 245-246, 247-248). Plaintiff suffered physical and emotional problems as a

result of Defendant's intentional actions and harassment directed toward him while they simultaneously sent him offers of future medical benefits settlement (1-3, 180-183, 233-239, 240, 241-242, 245-246, 247-248). Instead of acting in a fiduciary manner concerning Plaintiff, the Defendant tried to sabotage his physicians' medical care to harm him (1-3, 180-183, 240, 241-242, 245-246, 247-248).

In addition to rejecting approval of payment and access for his prescribed pain control Medicine the Defendant began efforts to harass and force him to be treated by an out-of-town physician that would have resulted in a five hour roundtrip (1-3, 180-183, 233-239, 240, 241-242, 245-246, 247-248). Defendant fraudulently told Plaintiff that there were no local pain management doctors, when in fact there were at least three in Kingsport (1-3, 180-183, 233-239, 240, 241-242, 245-246, 247-248). Dr. Smith stated: "I just do not understand why Liberty Mutual would be cruel to him and make him travel excessively to a pain clinic when there are several good pain clinics right here in the Tri-cities area of Northern Tennessee" (2, 235, 247). On the same day Plaintiff received a letter from Defendant Liberty Mutual (June 18, 2014) regarding being forced by them to undergo lengthy and painful travel to an out-of-town pain clinic, he also received a second letter from Defendant attempting to get him to settle and accept their offer to him (1-3, 180-183, 233-239, 240, 241-242, 245-246, 247-248). Defendant continued to interfere and refuse approval of prescribed pain medication (even by the local pain management doctor they eventually sent him to) in an effort to intentionally harm him and force him into submission (1-3, 180-183, 233-239, 240, 241-242, 245-246, 247-248).

ARGUMENT

THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT.

The lower trial court decision is reviewed *de nova* with no presumption of correctness by the appellate court as the standard of review and in the light most favorable here to appellant as well as drawing all reasonable inferences favoring the appellant herein. As indicated previously, Plaintiff filed **six responses** to the Tenn.R.Civ.P.56 motion, affirmatively showing by specific facts that there is a genuine issue for trial by jury concerning disputed material facts.

Plaintiff's December 12, 2019, Response (180-183) to Defendant's Motion addresses by number all of Defendant's asserted facts, and provides detailed explanation when necessary. On December 20, 2019, Plaintiff further filed a Supplemental Reply (233-239) concerning the genuine issues for jury trial with a collective Exhibit A containing pertinent detailed medical records of Plaintiff's two physicians, and correspondence of Defendant's efforts to force Plaintiff to accept a lump sum buyout for future medicals against his will (while leaving Plaintiff without pain management care for some five months). Plaintiff also filed an Affidavit that date (240).

Following the Christmas holiday Plaintiff's counsel on December 26, 2019, filed an Amended Response (241-242) again specifying citations to the record regarding the disputed facts. Two separate Affidavits were filed January 9, 2020, one from Plaintiff (245-246) detailing his dispute of Defendant's alleged facts, and one from Dr. Galen Smith (247-248) describing Defendant Liberty Mutual's interference in depriving his elderly, 100% disabled spinal patient from his medical care.

As indicated, the same trial Judge had previously denied (22) Defendant's claim of workers compensation act exclusivity for intentional infliction of emotional distress by employers due to T.C.A.50-6-108 (Medrano v. MCDR, Inc., 366 F. Supp. 2d 625, 631-32 (W.D. Tenn., 2005) (see also Brewer v. Monsanto Corp., 1986, 644 F. Supp. 1267). If the trial Judge erroneously changed his ruling at the Tenn.R.Civ.P.56 hearing then he should have transferred the case to Washington County Circuit Court rather than dismissing it. It is also noted that the lower Court never imposed a discovery deadline, and discovery depositions of the many adjustors of Defendant scattered over several states had not been taken.

There is no presumption of correctness attaching to decisions granting Summary Judgment by the lower court. As this Court is well aware the burden is on the Defendant Liberty Mutual Insurance Company to show that no genuine issue of material facts exist, which they did not meet taken in the light most favorable to the Plaintiff with all legitimate conclusions drawn in his favor regarding this tort case. Plaintiff demonstrated through his responses the existence of specific facts which could lead a rational trier of fact to find in favor of the nonmoving party herein.

CONCLUSION

The trial court Judge abused his discretion in granting Summary Judgment to Defendant. For the reasons herein, the Appellant requests this Honorable Court to reverse or modify the lower Court decision, or remand to a different Judge, with costs taxed to Appellees.

RESPECTFULLY SUBMITTED:

Michael C. Murphy

MICHAEL C. MURPHY
Attorney for Appellant
P.O. Box 1365
Morristown, TN 37816
(423) 581-1022
BPR No. 007183

CERTIFICATE OF SERVICE

I hereby certify that I have mailed via U.S. Mail, postage prepaid, a true and exact copy of Appellant's Brief to counsel for Appellee, Brian Neal, this 6th day of August, 2021.

Michael C. Murphy

MICHAEL C. MURPHY

MINUTES, 6 day of Jan, 2020

IN THE CIRCUIT COURT FOR SULLIVAN COUNTY, TENNESSEE
AT KINGSPORT

FILED

TERRELL BIGGS, JR.,

Plaintiff,

vs.

LIBERTY MUTUAL INSURANCE
COMPANY,

Defendant.

1-6-21 4:00 pm
Bobby L. Russell
CIRCUIT COURT CLERK
SULLIVAN COUNTY, TN.

Case No. C41023

ORDER DENYING PLAINTIFF'S MOTION TO ALTER/AMEND THE MARCH 4, 2020
ORDER GRANTING SUMMARY JUDGMENT

This cause came to be heard before the undersigned Judge on Monday, November 2, 2020, upon Plaintiff Terrell Biggs, Jr.'s ("Plaintiff") Motion to Alter/Amend filed on or about April 1, 2020. Upon review of Plaintiff's Motion, Defendant Liberty Insurance Corporation's, incorrectly named in this action as Liberty Mutual Insurance Company ("Liberty") Response in Opposition to Plaintiff's Motion to Alter/Amend filed on August 4, 2020, and upon oral argument of counsel for both Plaintiff and Liberty, the Court finds that Plaintiff's Motion to Alter/Amend should be DENIED for the following reasons:

1. Plaintiff's Motion to Alter/Amend does not meet the requirements or parameters of Tenn. R. Civ. P. 59.04, because, among other reasons, Plaintiff failed to advise the Court of any new law or previously unavailable evidence in Plaintiffs' Motion to Alter/Amend;
2. One of the primary reasons that the Court granted Liberty's Motion for Summary Judgment was due to Plaintiff's failure to present the Court with a Response to Liberty's Statement of Undisputed Facts that complied with Tenn. R. Civ. P. 56.03, which led the Court to deem such Undisputed Facts as admitted in accordance with Tenn. R. Civ. P. 56.03 and *Holland v. City of Memphis*, 125 S.W.3d 425 (Tenn. Ct. App. 2003); and

Appendix B

3. Plaintiff's counsel's reference to "transfer" for the first time during the Motion for Summary Judgment hearing on January 17, 2020, constituted an "oral motion" that the Court did not grant.

For these reasons, it is accordingly **ORDERED, ADJUDGED, AND DECREED** that Plaintiff's Motion to Alter/Amend is hereby **DENIED**.



JUDGE JOHN S. MCLELLAN, III

APPROVED FOR ENTRY:



Brian C. Neal (BPR #022532)
Alexandria A. Rhoades (BPR #037024)
BURR & FORMAN LLP
222 Second Ave. South, Suite 2000
Nashville, TN 37201
Telephone: (615) 724-3200
Facsimile: (615) 724-3290

*Attorneys for Defendant Liberty Insurance
Corporation, incorrectly named in the
Complaint as Liberty Mutual Insurance Company*

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2021, a true and correct copy of the foregoing *Order Denying Motion to Alter/Amend* has been served via U.S. mail, postage pre-paid on Michael C. Murphy, P.O. Box 1365, Morristown, TN 37816.



IN THE CIRCUIT COURT FOR SULLIVAN COUNTY, TN AT KINGSPORT

TERRELL BIGGS, Jr. ,
Plaintiff,

v.

No. C41023

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant.

MOTION TO ALTER/AMEND

Comes the Plaintiff, Terrell Biggs, Jr. by and through counsel, pursuant to T.R.Civ.P. 59.04 and moves the Court to alter/amend the March 4, 2020 Order Granting Summary Judgment to Defendant, and shows as follows:

(1) The March 4, 2020 Order does not contain the Court's ruling of denial concerning Plaintiff's verbal motion made twice at the hearing on January 17, 2020 to transfer (rather than dismiss) this case filed in Sullivan County Law Court to the adjacent Washington County Law Court given that the Judge felt that he did not have subject matter jurisdiction over the case herein that he apparently perceived as a workers comp case rather than one for outrageous conduct (an intentional tort which is allowed by statute and caselaw) regarding this elderly, totally disabled Sullivan County resident (transcript of hearing, previously filed herein, pp. 27 and 16). It is noted that neither Plaintiff's original nor amended Complaint even mention the word workers compensation.

(2) The March 4, 2020 Order states under Findings of Fact that "the Court finds that Plaintiff's Response did not respond to Liberty's arguments concerning subject matter jurisdiction" (order p. 4, T. p. 17), and under Conclusions of Law that "the Court finds that since Plaintiff's Responses did not dispute or otherwise respond to Liberty's arguments concerning subject matter jurisdiction, then the Court should grant Liberty's Motion to the extent it seeks dismissal of Plaintiff's claims due to a lack of subject matter jurisdiction" (order p. 5, T. pp. 23 and 25), as well as the Court stating "as far as I know, that's (i.e. subject matter jurisdiction) not being contested" (T.p. 17). With all due respect, those are not correct. In Plaintiff's December 20, 2019 Response to Defendant's Rule 56 Motion his counsel disputed the allegations that the Court lacked subject matter jurisdiction, stating: "This Court's previous Order of July 5, 2016 (Attachment A) dismissed Defendant's claims in that regard concerning A and B of their Brief" (i.e. Defendant's Brief A. Subject matter jurisdiction, pp. 10-12) (Plaintiff's Response p. 1, third paragraph). Those were claims made in Liberty's February 1, 2016 Motion To Dismiss, and dismissed by this Court as previously indicated.

It is also noted that Liberty admits that there is an exception to any workers compensation statute exclusivity for intentional torts(Tpp. 12).

From all of which, Plaintiff requests the Court alter/amend its Order of March 4, 2020, and for general relief, upon a hearing of this cause.

RESPECTFULLY SUBMITTED:

Michael C. Murphy
MICHAEL C. MURPHY
Attorney for Plaintiff
P.O.Box 1365
Morristown, TN 37816
No. 007183
(423)581-1022

CERTIFICATE

I hereby certify that I have served a true and exact copy of the above on Defendant's counsel at his business address via U.S. Mail, postage prepaid, this 1 day of April, 2020.

Michael C. Murphy
MICHAEL C. MURPHY

IN THE CIRCUIT COURT FOR SULLIVAN COUNTY, TN
AT KINGSPORT

FILED

12-20-1987 3:30 PM
Bobby L. Russell
CIRCUIT COURT CLERK
SULLIVAN COUNTY, TN

TERRELL BIGGS, JR.

Plaintiff,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant.

No. C41023

SUPPLEMENTAL REPLY:

PLAINTIFF'S RESPONSE TO DEFENDANT'S RULE 56 MOTION

Comes the Plaintiff, Terrell Biggs, Jr., and In Supplemental Response to the Defendant Liberty Mutual Insurance Company, a/k/a Liberty Insurance Corporation, TRCP 56 Motion filed herein some four and a half years after the Complaint of May 5, 2015, states as follows:

There are genuine issues for trial as to disputed material facts that could lead a reasonable jury to legitimately resolve the disputed material facts in favor of Plaintiff Biggs of Kingsport.

The Defendant Liberty concedes that an intentional tort is a proper case to be heard in this Court, being an exception to TCA 56-6-108. This Court's previous Order of July 5, 2016, dismissed Defendant's claims in that regard concerning A and B of their Brief. The intentional infliction of emotional distress (outrageous conduct) is a jury issue for a local jury to decide if Defendant's conduct is so outrageous that it is not to be tolerated by normal society concerning its actions against the disabled elderly long-time Kingsport citizen with spinal injuries since 1990. Defendant has tried to sabotage and interfere with physicians' care since around 2014 through the present in an intentional and purposeful effort to extort him into settling with them for their obligation of future medical care payments.

Liberty in its Brief totally ignores and offers no explanation or reason for its settlement attempts and letters occurring in direct concert and timing with their actions regarding Plaintiff Biggs. Apparently their previous "physical visits" to Biggs' home, and repeated telephone calls, since 2007 to obtain lump sum settlement did not produce the desired results, so a hardball pain extortion approach was dialed up whereby Defendant Liberty would withhold approval and payment of his prescription pain medication and try to force Biggs drive five hours roundtrip for pain clinic treatment. As his treating orthopedic physician of 24 years said in his October 13, 2014 medical notes: "I just do not understand why Liberty Mutual would be cruel to him and make him travel excessively to a pain clinic when there are several good pain clinics right here in the Tri-Cities area of Northwest Tennessee" (Dr. Galen Smith). Defendant eventually left Plaintiff without pain management care for some five months.

Concerning their blocking his access to his pain medication, Dr. Smith stated in his medical records of February 8, 2016 that "Liberty Mutual has not paid for his hydrocodone in over a year. Certainly this medicine gives him a better quality of life and is well tolerated by him. I support the hydrocodone usage in his pain management and this decision is also supported by the pain management expert doctor". Plaintiff lists around 21 rejections of payment by Defendant for pain prescriptions from the doctors in No. 19 of his response to Interrogatories of August 16, 2018. Dr. Timothy Smyth, his pain management

doctor noted on April, 2015 in his medical records (which were sent to Liberty) that he urged them "to start covering his Lortab(hydrocodone) prescription as it helps Mr. Biggs function and he uses it appropriately" (See Collective Exhibit A attached).

Pertaining to Mr. Biggs' emotional and mental injury from Defendant's actions, he has been diagnosed with Depression and anxiety by his medical care physicians, who counseled him for these conditions and prescribed the medication Duloxetine for these conditions that a reasonable person would be unable to cope with due to the mental stress engendered by the circumstances of Defendant's intentional and deliberate actions. The Duloxetine was prescribed in March 2015 and from that point forward to present. Biggs in his No. 15 interrogatory response indicated many of the above factors and their effect on him. The referral notes from the pain clinic note the diagnosis of Depression, sleep disturbance, and chronic pain syndrome.

The Affidavit attached to Defendant's Rule 56 Motion from Liberty's adjuster Rebecca Bearman is not made of personal knowledge. In fact this adjuster did not even begin to adjust Mr. Biggs' claim until April 2019, knowing nothing of him or his case in 2014 and 2015, for instance. This Affidavit is merely hearsay with one Liberty adjuster just reading the file of her fellow adjusters and thereby trying to somehow justify Defendant's actions without any personal knowledge whatsoever.

From all of which, and the entire record as a whole, Plaintiff Biggs respectfully requests the Court to deny Defendant's Rule 56 Motion.

RESPECTFULLY SUBMITTED:
TERRELL BIGGS, Jr.

BY: *Michael C. Murphy*
MICHAEL C. MURPHY
P.O. BOX 1365
Morristown, TN 37816
(423) 581-1022
BPR No. 007183

CERTIFICATE

I hereby certify that I have served a true and exact copy of the above on Defendant's attorney via U.S. Mail, postage prepaid, at his office address this 20 day of Dec. *Hand delivery*

Michael C. Murphy
MICHAEL C. MURPHY

IN THE CIRCUIT COURT FOR SULLIVAN COUNTY, TN
AT KINGSPORT

TERRELL BIGGS, Jr. ,
Plaintiff,

v.

No. C41023

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant.

AFFIDAVIT OF PLAINTIFF

STATE OF TENNESSEE)
COUNTY OF SULLIVAN)

Personally appeared before the undersigned, duly authorized to administer oaths, Terrell Biggs, Jr. of Kingsport, who states under oath of his own personal knowledge as follows:

I have indeed been medically diagnosed with a severe mental or emotional injury as a result of Defendant Liberty Mutual's conduct, and its deliberate and purposeful intent to injure, by among other things its withholding of approval and payment for my medically prescribed pain medications (Lortab and Lyrica) in order to force and pain me into accepting its settlement offers for future medical care. This conduct by the insurance company Defendant has caused significant impairment of my daily life, and I have suffered mental and emotional pain including depression (a serious mental condition), anxiety, sleep disturbance, nausea, headaches, grief, weight gain, fear, disappointment, anger, embarrassment, worry, and apprehension. I was prescribed Duloxetine, which is for treatment of depression and anxiety. I have as mentioned been unable to adequately cope with the mental stress engendered by the circumstances from Defendant's actions.

As an example, Defendant sent on May 13, 2014, a settlement letter offer to me while at the exact time denying approval of, and blocking access to, my pain medications. Further, on June 18, 2014, the insurance company Defendant sent a settlement letter offer to me while at the very same time falsely stating to me that my physician since 1990 (Dr. Galen Smith) had declined to continue to treat me for pain management, and then attempting to force me to travel long distances to one of a panel of pain clinic doctors that could have caused me extreme spinal pain, nerve pain, and spasms, all the while falsely telling me that there was no pain clinic in Kingsport (when in fact there were at least three). These falsifications were designed to force and extort me to settle with Liberty Mutual or else endure many months of pain from its cutting off any medication to control and manage the pain from my severe, totally disabling spinal injury wherein my disc imploded into my spine in 1990. The Defendant left me without a pain management doctor for five months, refusing to pay for medications Lyrica for four months, and Lortab for some three years. I constantly worried about having to pay out of my pocket for these prescribed pain medications (Lyrica alone can run \$700 a month). Its actions occurred after I refused to settle with them for future medicals, and Defendant Liberty Mutual absolutely intended to injure and harm me. My condition is unbearable and unmanageable without the pain medication which was prescribed by both Dr. Galen Smith and the Kingsport pain management clinic physicians that provide medical care for me, and the Defendant actually was going against and sabotaging their treatment plan by its intentional infliction of emotional distress toward me.

FILED
1-9-20 12:30 PM
Bobby L. Russell
CIRCUIT COURT CLERK
SULLIVAN COUNTY, TN.

It is noted that the deceit of the Defendant Liberty Mutual Insurance Company is exemplified by its leaving out of its Exhibit 9 of the Rule 56 Motion all of 2014 concerning a record of its denials of medications, including 2015 through 2017 instead. I would at times have to skip pain medication, or take half of it, to try to survive its actions and conduct herein.

Defendant's conduct is so outrageous that it is not to be tolerated by normal society, being intentional and reckless. Liberty Mutual desired to force me to settle future medicals that may include surgery and certainly will include expensive medications, and when I declined to settle (many times to do so) then the Defendant began a series of actions designed to make me do so or else. My physician of nearly 30 years stated that this atrocious conduct by Liberty Mutual was indeed cruel, and Dr. Smyth of the pain clinic urged them to cover the Lortab so I could function. The Defendant's conduct is so severe that no reasonable person should be expected to endure it, as it would be viewed by an average member of the Kingsport community as intolerable and going beyond all bounds of decency by using pain to try to force me to cave in to their settlement demands.

I adopt by reference my sworn Complaint of May 5, 2015, and the medical records and other exhibits of my Supplemental Reply to the Rule 56 Motion, of December 20, 2019, and further I amend my Affidavit of December 20, 2019, to include Plaintiff's Answers To Defendant's Request For Admissions, of September 12, 2018, as true, factual, and correct as signed, to the best of my knowledge and belief.

Further this Affiant sayeth not.

Terrell Biggs
TERRELL BIGGS, JR.

STATE OF TENNESSEE)
COUNTY OF SULLIVAN)

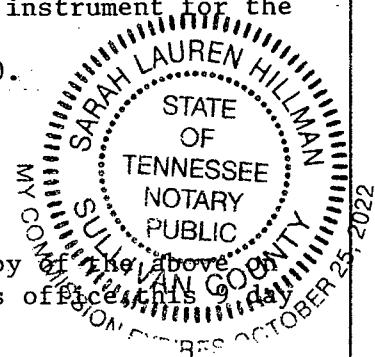
Personally appeared before me, Sarah Hillman, a Notary Public of said County and State, Terrell Biggs, Jr. with whom I am personally acquainted or proven to me, and who acknowledged that he executed this instrument for the purposes therein contained.

Witness my hand and seal this 9 day of January, 2020.
Sarah Hillman
NOTARY PUBLIC: My Commission Expires OCT. 25, 2021.

CERTIFICATE

I hereby certify that I served a true and exact copy of the above instrument to the Plaintiff, Michael C. Murphy, Attorney for Plaintiff, P.O. Box 1365, Morristown, TN 37816, (423) 581-1022, on January 9, 2020.

Michael C. Murphy
MICHAEL C. MURPHY
Attorney for Plaintiff
P.O. Box 1365
Morristown, TN 37816
(423) 581-1022



IN THE CIRCUIT COURT FOR SULLIVAN COUNTY, TN
AT KINGSPORT

TERRELL BIGGS, Jr. ,
Plaintiff,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant.

No. C41023

AFFIDAVIT

STATE OF TENNESSEE)
COUNTY OF SULLIVAN)

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1-9-20 11:23 AM
Bobby L. Russell
CIRCUIT COURT CLERK
SULLIVAN COUNTY, TN.

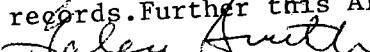
Personally appeared before the undersigned, duly authorized to administer oaths, Dr. Galen Smith of Kingsport, who states under oath of his own personal knowledge as follows:

I have treated Terrell Biggs, Jr. as my patient from around 1990 until my retirement in November, 2018, from my orthopedic practice. My surgeries on Mr. Biggs included laminectomy and discectomy at right L5/S1 followed by discectomy for recurrent disc herniation with right S1 nerve root neurolysis as a result of his May 6, 1990, disabling work injury.

Around May 2014 Liberty Mutual, his insurance carrier, began interfering with his treatment, which Mr. Biggs stated was because he would not settle with them for payment of future medicals.

On June 18, 2014, Liberty Mutual, the Defendant, attempted to force him to travel long extensive painful hours for long distances to see pain clinic doctors, when there are several in Kingsport itself. I felt this was cruel of them to him and so noted in my medical records of October 13, 2014. In addition, I had been providing pain management for my patient and would gladly have continued to do so.

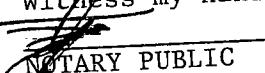
Liberty Mutual also began withholding approval and payment for Mr. Biggs' prescribed hydrocodone pain medication, which gives him a better quality of life as noted in my February 8, 2016 records. I have noticed due to the actions and conduct of Liberty Mutual as mentioned that Mr. Biggs seemed to experience depression and anxiety, for which I counseled him as part of my medical care for him. Mr. Biggs, whom I have known for nearly 30 years as a patient, is an extremely reliable and highly trustworthy individual with the highest character, and a model citizen, all noted in my medical records. Further this Affiant sayeth not.


DR. GALEN SMITH

STATE OF TENNESSEE)
COUNTY OF SULLIVAN)

Personally appeared before me, a Notary Public in said County and State, Dr. Galen Smith, with whom I am personally acquainted and who acknowledged that he executed this instrument for the purposes therein contained.

Witness my hand and seal this 8th day of January, 2020.


NOTARY PUBLIC

My commission expires: June 24th, 2020



(On Smith Affidavit)
I hereby certify that I served a true and exact copy of the above on
Defendant's attorney, via U.S. Mail, postage prepaid, at his office, this 9
day of Jan., 2010.

Michael C. Murphy
MICHAEL C. MURPHY

IN THE CIRCUIT COURT FOR SULLIVAN COUNTY, TN AT KINGSPORT

FILED

TERRELL BIGGS, Jr.,
Plaintiff,

v.

2016 JUL -5 AM 9:40

No. C41023

LIBERTY MUTUAL INSURANCE COMPANY
Defendant.

John R. Kerns D.C.
CIRCUIT COURT CLERK
SULLIVAN CO., TN

ORDER

Upon a Hearing held May 20, 2016, concerning the Motion to Dismiss filed by Defendant Liberty Mutual Insurance Company on or about February 1, 2016, the Court after careful consideration finds that the Motion to Dismiss is DENIED.

IT IS SO ORDERED THIS _____ DAY OF _____, 2016.

John R. Kerns
CIRCUIT COURT JUDGE JOHN MCLELLAN III

APPROVED FOR ENTRY:

Michael C. Murphy
MICHAEL C. MURPHY
Attorney for Plaintiff
P.O. Box 1365
Morristown, TN 37816

Mary Elizabeth Maddox
MARY ELIZABETH MADDOX
Attorney for Defendant
P.O. Box 39
Knoxville, TN 37901

APPROVED FOR ENTRY:

Michael C. Murphy *u/p remiss*  2/20/2020
Michael C. Murphy (BPR #007183)
P.O. Box 1365
Morristown, TN 37816
Telephone: (423) 581-1022

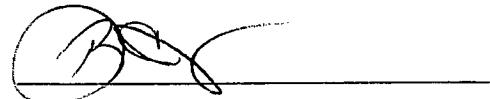
Attorney for Plaintiff Terrell Biggs, Jr.


Brian C. Neal (BPR #022532)
Alexandria A. Rhoades (BPR #037024)
BURR & FORMAN LLP
222 Second Ave. South, Suite 2000
Nashville, TN 37201
Telephone: (615) 724-3200
Facsimile: (615) 724-3290

*Attorneys for Defendant Liberty Insurance
Corporation, incorrectly named in the Complaint
as Liberty Mutual Insurance Company*

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2020, a true and correct copy of the foregoing *Order Granting Plaintiff's Motion to Amend Complaint* has been served via U.S. mail, postage pre-paid on Michael C. Murphy, P.O. Box 1365, Morristown, TN 37816.



IN THE CIRCUIT COURT FOR SULLIVAN COUNTY, TN, AT KINGSPORT

TERRELL BIGGS, Jr.,
Plaintiff,

FILED

v.

2016 MAY 20 AM 10:31

No. C41023

LIBERTY MUTUAL INSURANCE COMPANY
Defendant.

OMMY R. KERNS, D.C.
CIRCUIT COURT CLERK
SULLIVAN CO., TN

MOTION TO AMEND

Comes the Plaintiff, Terrell Biggs, Jr., and moves to amend his original Complaint herein to add as the last sentence of Paragraph 5 the following:

"Defendant's actions herein were actual and deliberate, not accidental, with the conscious intent to injure Plaintiff and cause him injury and harm."

RESPECTFULLY SUBMITTED:

TERRELL BIGGS, JR.

BY: Michael C. Murphy
MICHAEL C. MURPHY
Attorney for Plaintiff
P.O. Box 1365
Morristown, TN 37816
(423) 581-1022

CERTIFICATE

I, Michael C. Murphy, hereby certify that I have hand delivered a true and exact copy of the above to Defendant's counsel this May 18, 2016.

Michael C. Murphy
MICHAEL C. MURPHY

IN THE CIRCUIT COURT FOR SULLIVAN COUNTY, TN
AT KINGSPORT

TERRELL BIGGS, Jr. ,
Plaintiff,

Vs.

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant.

FILED

NO. C41023

2015 MAY -5 A 11:01

M

COMPLAINT

TOMMY L. WATKINS, JR.
DEPUTY CLERK
SULLIVAN COUNTY, TN

BSJ

Comes the Plaintiff herein, Terrell Biggs, Jr. , and files suit against the Defendant, Liberty Mutual Insurance Company, for, but not limited to, outrageous conduct and intentional infliction of emotional distress, fraudulent and intentional misrepresentation violation of the covenant of good faith and fair dealing, and avers as follows:

1. Plaintiff Biggs is a 59 year old disabled long-time resident of Kingsport, Tennessee, living at 220 Reese Street. Defendant Liberty Mutual is an insurance company doing business in the state of Tennessee and providing medical care benefits to Biggs. The actions alluded to occurred in Sullivan County, Tennessee.
2. Plaintiff Biggs began receiving interference and disruption of his medical care simultaneously with Defendant's attempts to force him into accepting a lump sum settlement of their duty and obligation by their offer by letter dated May 13, 2014. Defendant used its powers over providing pain medication, among other things, for Biggs to attempt to extort and harass him into accepting its offer, in a yearlong living nightmare for Biggs resulting thereby that continues to present.
3. (a) For some 22 years Biggs had no problems with Defendant providing medical care benefits under their obligation to cover future medical care from a serious disabling injury of May 6, 1990, that resulted in surgeries for laminectomy and discectomy at right L5/S1 followed by discectomy for recurrent disc herniation with right S1 nerve root neurolysis. At the same time in May 2014 that Defendant sent a letter out of the blue to Biggs attempting a lump sum settlement of medicals Liberty Mutual began a pattern and practice of denying and rejecting payment and approval of Biggs' pain medication prescribed by his surgeon and treating physician of 24 years, Dr. Galen Smith of Kingsport. Dr. Smith repeatedly informed Defendant that the Lortab pain medication was necessary in his treatment of Biggs, as well as the medication Lyrica. Biggs has suffered physical and mental pain as a direct result of Defendant's withholding approval of these medications, including spasms, nerve pain, lack of sleep, side effects from a cheaper approved substitute drug for the Lyrica (Gabapentin) that also resulted in extreme swollen lower legs and feet, nerve attacks, spasms of the muscles and nerves, as well as loss of cohesive thinking and problems speaking.

(b) The actions by Defendant were deliberately timed to force Biggs to accept their offer and settlement. In addition to blocking access to his pain medications, Defendant would approve one type medication while at the same time would reject and cherry pick another willy-nilly, knowing Biggs' vulnerability was in their complete control as if he were their toy play puppet. Defendant is not a medical expert but instead of acting in a fiduciary manner concerning Biggs it tried to sabotage his physicians' medical care of him. For instance, around May 13, 2014, Defendant denied approval of his pain medication while at the same time sending out the May 13, 2014, settlement letter offer received by Biggs on May 15, 2014.

4.(a) In addition to rejecting approval for payment and access to Lortab and Lyrica for his pain control, Defendant in its attempt to secure his settlement agreement embarked on efforts to harass and force Biggs to be treated by an out-of-town pain management physician in Knoxville (some five hours roundtrip) by falsely and fraudulently telling Biggs that there was no local Kingsport pain management doctor. Defendant as well falsely and fraudulently told Biggs that his treating physician of 24 years, Dr. Smith, had "indicated that he will no longer treat you for pain management", which was not true. In fact, Dr. Smith was not only willing to continue Biggs pain treatment but wrote in his October 13, 2014, medical report that "I just do not understand why Liberty Mutual would be cruel to him and make him travel excessively to a pain clinic when there are several good pain clinics right here in the Tri-Cities area of Northeast Tennessee". The Defendant was the one who refused to allow Dr. Smith to treat his patient and manage his pain care treatment plan. On the same day (June 18, 2014) that Biggs received a letter from Liberty Mutual concerning being forced to undergo lengthy travel to an out-of-town pain clinic, he also received on that day a second letter from Defendant trying to get him to settle and take their offer to him.

(b) It turned out that there were at least three local Kingsport pain management physicians, where Defendant had claimed there were none, and eventually Biggs was referred to Dr. Timothy Smyth. However, Defendant still refused both Dr. Smyth's as well as Dr. Smith's prescribed Lortab treatment, prompting their pain management doctor (Dr. Smyth) to urge them April 1, 2015, "to start covering his Lortab prescription as it helps Mr. Biggs function and he uses it appropriately".

5. The abusive actions by Defendant are intentionally designed to hinder and interfere with Biggs' medical care by both of his physicians, including Dr. Smith who has cared for him for 24 years since 1990 and by the pain management doctor they finally referred him to, in an effort to force him into submission. Their actions in fact go against the treatment plan of both of Biggs' doctors by an insurance company utilizing its power to cause Plaintiff pain and attempt to extort, coerce, harass, and force him into taking their offer to settle medicals.

6. The acts were done by either the Defendant or its agents, servants, and employees and liability is imputable therefore to Defendant Liberty Mutual.

7. As a result of Defendant's actions, which are of a continuous nature and violation, the Plaintiff has suffered both physical pain, mental and emotional injury, and has been caused to endure much pain and suffering and loss of enjoyment of life. The sole proximate cause has been the result of actions by Defendant.

WHEREFORE, Plaintiff demands judgment of \$72,000 against the Defendant for compensatory and punitive damages, general relief, costs, and requests a jury try this case.

Terrell X. Biggs
TERRELL BIGGS, Jr.

Michael C. Murphy
MICHAEL C. MURPHY
Attorney for Plaintiff
007183
P.O. Box 1365
Morristown, TN 37816
(423)581-1022

COST BOND

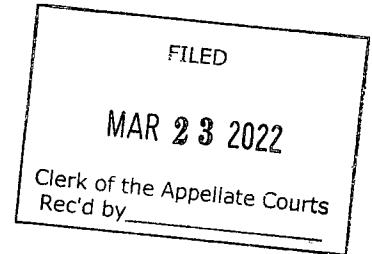
I secure the costs in this cause.
Michael C. Murphy
MICHAEL C. MURPHY

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

TERRELL BIGGS, JR. v. LIBERTY MUTUAL INSURANCE COMPANY

**Circuit Court for Sullivan County
No. C41023**

No. E2021-00138-SC-R11-CV



ORDER

Upon consideration of the application for permission to appeal of Terrell Biggs, Jr. and the record before us, the application is denied.

PER CURIAM

Appendix C

IN THE SUPREME COURT
FOR THE STATE OF TENNESSEE

TERRELL BIGGS, JR.,)
v.)
Appellant,)
LIBERTY MUTUAL) Appeal No. E2021-00138-COA-R3-CV
INSURANCE COMPANY,)) Sullivan County Circuit Court
Appellee.)) Docket No. C41023
)
)
)
)
)

APPLICATION FOR PERMISSION TO APPEAL

MICHAEL C. MURPHY
Attorney for Appellant
P.O. Box 1365
Morristown, TN 37816
(423) 581-1022
BPR No. 007183

Appeal pursuant to Rule 11 of Tennessee Rules of Appellate Procedure
From the Court of Appeals at Knoxville

IN THE SUPREME COURT FOR THE STATE OF TENNESSEE
TERRELL BIGGS, JR. v. LIBERTY MUTUAL INSURANCE COMPANY

Appeal from the Circuit Court for Sullivan County
Docket No. C41023
John S. McLellan, III

No. E2021-00138-COA-R3-CV

APPLICATION FOR PERMISSION TO APPEAL

Comes the Appellant, Terrell Biggs, Jr., and seeks permission to appeal to the Tennessee Supreme Court pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure from the Judgment and Opinion of the Court of Appeals, at Knoxville, filed November 22, 2021 (copy of Opinion appended). There was no petition for rehearing. The question for review is whether the intermediate appellate Court was correct in upholding the lower Court's dismissal of Appellant/Plaintiff's intentional infliction of emotional distress claims, due to the appellate Court's finding of alleged exclusivity of the workers compensation statute. The applicable standard of review is *de nova* with no presumption of correctness by the lower courts.

This case may actually be one of first impression in some aspects involving the intentional tort exception to workers compensation exclusivity bar under Tenn. Code Ann. 50-6-108 for intent to injure. In this instance the alleged extortion actions by Liberty Mutual Insurance Company were to force the 100% disabled elderly Biggs (1990 spinal cord injury) to

accept their Medicare Set Aside Agreement offer for a lump sum payment of 1992 Court ordered lifetime future medicals or else suffer harmful pain from their simultaneous deliberate and disruptive actions (beginning in 2014 when Plaintiff was 59 years old) of interference with his medical care to sabotage his treatment. Withholding approval of his pain medication, and fraudulently lying about the availability of nearby pain management clinics, were tactics used by Defendant Liberty Mutual Insurance Company, prompting his well respected and decades long treating physician (and surgeon) Dr. Galen Smith to note in his medical records that "I just do not understand why Liberty Mutual would be cruel to him..." (T.R. 235, 247). At one point Liberty Mutual Insurance Company abandoned Biggs without any pain management care at all for nearly a half year, all the while simultaneously writing him to attempt to force and coerce him to accept their offers of settlement of future medical care. Biggs adopts by reference herein his Brief of Appellant.

This matter therefore involves the need to secure settlement of this question of public interest and of law, secure uniformity of decision, and exercise the Supreme Court's supervisory authority.

As mentioned, the same trial Judge had previously denied (T.R.22) Defendant's same claim of worker compensation act exclusivity remedy for intentional infliction of emotional distress due to T.C.A.50-6-108. [See *Medrano v. MCDR, Inc.*, 366 F. Supp. 2d 625, 631-32 (W.D. Tenn., 2005) and also *Brewer v. Monsanto Corp.*, 1986, 644 F. Supp. 1267].

If the trial Judge had wanted to grant Defendant's dismissal on this ground he would have done so in 2016, but instead did not rule in their favor. The lower appellate Court indicated that the trial Court did not address in its order granting summary judgment (that it had directed Defendant's counsel to prepare) that Tenn. Code. Ann. 50-6-108 allegedly excluded all other rights and remedies not provided for by the act. It is also noted that the lower Court never imposed a discovery deadline, and discovery depositions of the many adjustors of Defendant scattered over several states had not been taken.

There is no presumption of correctness attaching to decisions granting Summary Judgment by the lower court. As this Court is well aware the burden is on the Defendant Liberty Mutual Insurance Company to show that no genuine issue of material facts exist, which they did not meet taken in the light most favorable to the Plaintiff with all legitimate conclusions drawn in Biggs' favor regarding this tort case. Plaintiff demonstrated through his Responses the existence of specific facts which could lead a rational trier of fact jury to find in favor of the nonmoving party herein. As previously indicated, Appellant Plaintiff filed six separate Responses to Appellee's Tenn.R.Civ.P. 56 Motion, including Affidavits and detailed medical records (T.R. 180-183, 233-239, 240, 241-242, 245-246, 247-248).

The lower appellate Court's reliance on *Perry v. Transmerica Ins. Group*, 703 S.W. 2d 151 (Tenn.CT. App. 1985) is incorrect, it is respectfully submitted. Even Defendant/Appellant's counsel agrees that there is an exception to the workers compensation exclusivity bar. In

addition, Plaintiff specifically amended his Complaint to include "intent to injure" (T.R.21).

The Biggs case, unlike the *Perry* facts, does not rest on common law negligence. It does not involve failure to handily make timely temporary benefit payments in bad faith and face a penalty, for example, nor did the actions of Defendant herein occur prior to the Court settlement as in *Perry*, but 22 years thereafter. Defendant Liberty Mutual Insurance Company's actions toward Biggs were not negligent mishandling but deliberate and intentional, with the actual goal to cause pain, to injure, and to force this 100% disabled man into accepting a Medicare Set Aside Agreement settlement of lifetime future medicals that had been ordered of them by the Court. Defendant's proffered excuses are a matter for the jury to consider.

From all of which the Appellant respectfully requests the Honorable Supreme Court of Tennessee to grant the application for permission to appeal the decision of the intermediate appellate Court.

RESPECTFULLY SUBMITTED:
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CERTIFICATE OF SERVICE

I hereby certify that I have mailed via U.S. Mail, postage prepaid, a true and exact copy of Appellant's Application For Permission To Appeal to counsel for Appellee, Brian Neal, at his business address, this 19 day of January, 2022.

Michael C. Murphy