



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**CAVALLO v. PHOENIX HEALTH PLANS, INC.
CV-21-0051-PR**

PARTIES:

Petitioners: Matthew Cavallo (“Cavallo”) and Jocelyn Cavallo (collectively, the “Cavallos”)

Respondent: Phoenix Health Plans, Inc. (“PHP”)

FACTS:

In 2005, Cavallo was diagnosed with relapsing multiple sclerosis (“MS”). In 2007, Cavallo began taking Tysabri, which is used to prevent or reduce MS symptoms. Tysabri can only be administered by infusion at facilities certified by Tysabri Outreach: Unified Commitment to Health (“TOUCH” facilities). Tysabri is generally administered to patients every four weeks to prevent relapses. One of Tysabri’s side effects is the risk of relapse if the patient does not receive another dose within 90 days.

On December 9, 2015, Cavallo, who was asymptomatic at the time, received a Tysabri dose. Shortly after, Cavallo changed health insurance providers to PHP. His new health care plan (the “Plan”) included Tysabri coverage, but required PHP’s prior authorization before it would cover Tysabri’s cost and infusion. Although the Plan generally did not provide for out-of-network benefits, it would do so if the treatment was medically necessary and not available in-network.

After Cavallo switched health insurers, Cavallo’s medical provider’s MS coordinator (the “Coordinator”) had difficulty finding an in-network TOUCH facility. In early February, the Coordinator learned that Chandler Regional Hospital (“Chandler”) was a TOUCH facility within PHP’s network. When the Coordinator called PHP to check on pre-authorization, a PHP representative incorrectly stated that Chandler was out-of-network and therefore not covered under the Plan. The representative gave the Coordinator a list of in-network facilities, but none of the listed facilities were TOUCH facilities and thus could not administer Tysabri.

The parties dispute the details of what occurred as a result of the representative’s mistaken statement that Chandler was not in-network. The parties essentially agree that, on February 22, the Coordinator told the PHP representative that she was working with Biogen, the drug manufacturer, to find an in-network infusion site and that she was looking into Biogen’s “free” drug program. The parties disagree about whether the Coordinator “cancelled” or “withdrew” the pre-authorization request during this conversation—the PHP representative documented that the Coordinator cancelled the preauthorization request, while Cavallo asserts that the Coordinator did not cancel the request.

On February 23, Biogen approved Cavallo for its “free” drug program. Under this program, Cavallo could receive one complimentary Tysabri dose subject to administration fees of approximately \$100 to \$150. Cavallo did not use the program. He later indicated that he declined the dose because he was asymptomatic at the time and because he was concerned that accepting the dose would be a “one-time fix with long-term consequences.”

Over the next several weeks, there was a series of exchanges between Cavallo, the Coordinator, and PHP representatives. Eventually, PHP determined that Chandler was in-network and a TOUCH facility. Cavallo received his Tysabri infusion at Chandler on April 1, 2016, more than 90 days after his last dose. Cavallo alleges that the delay caused him to suffer a significant MS relapse.

Cavallo and his wife sued PHP for breach of contract, insurance bad faith, misrepresentation/false advertising, and loss of consortium. After significant pre-trial litigation, only the bad faith tort claim and the loss of consortium claim remained. Those claims went to a jury trial in 2019.

As part of the bad faith claim’s jury instructions, the trial court instructed the jury on the contract defenses of waiver and mitigation of damages. These instructions were based on the Recommended Arizona Jury Instructions for breach of contract cases.

The waiver instruction stated:

A party to a contract may waive the other party’s duty to perform. “Performance” refers to what a party agreed to do as his part of the contract.

Waiver is either the express, voluntary, and intentional relinquishment of a known right, or it is conduct that is inconsistent with an intent to assert that right.

By accepting performance known to be deficient, a party has waived the right to reject the contract on the basis of that performance.

If Mr. Cavallo has waived a promised performance, then [PHP] is no longer bound to perform on that promise and Mr. Cavallo is not entitled to damages for that particular non-performance.

[PHP] has the burden of proving waiver.

The mitigation of damages instruction stated:

[PHP] claims that Mr. Cavallo did not make reasonable efforts to prevent or reduce damages. Mr. Cavallo may not recover for any damages that could have been avoided without undue risk, burden or humiliation. [PHP] must prove:

- A. Mr. Cavallo did not make reasonable efforts to prevent or reduce damages;
- B. If Mr. Cavallo had acted reasonably, Mr. Cavallo could have prevented or

reduced damages; and

C. The amount of plaintiff's damages that could have been prevented or reduced through reasonable efforts.

The jury returned a verdict in favor of PHP. The Cavallos moved for a new trial, arguing that the jury instructions regarding PHP's affirmative defenses of waiver and mitigation of damages were erroneous and prejudicial in their insurance bad faith tort claim. The trial court denied the motion.

The Court of Appeals affirmed. Regarding waiver, the court stated the issue was "whether it is proper to allow the jury to consider a contract defense such as a waiver in resolving an issue that informs, but does not decide, its determination concerning the elements of an insurance bad-faith claim." Opinion ¶ 18. Although the court held that waiver is not an absolute defense against a bad faith claim, it concluded that an insurer could raise a "*limited* defense arising from an insurer's compliance with or application of" an insurance contract. Opinion ¶ 19. It further concluded that, when an insurer asserts a contract defense to demonstrate that it acted reasonably under the circumstances, the trial court may "instruct the jury to guide its deliberations concerning whether the defense should apply." Opinion ¶ 20.

Regarding the mitigation of damages instruction, the court concluded that, even if the instruction was contrary to the law, it did not prejudice the Cavallos. The court reasoned that, because the jury returned a verdict for PHP, it never considered the mitigation of damages instruction because the instruction only applied to the jury's calculation of damages, not to any issue of liability. Opinion ¶ 26.

ISSUE (as rephrased by the Court): Were the jury instructions on contract waiver and mitigation of damages proper in this bad faith tort case?

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