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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hal H. Boyd, Appellant.

v.

Liberty Life Insurance Company and SelectQuote Insurance Services, Respondents.

Appellate Case No. 2010-166866

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

APPELANT'S PETITION FOR REHEARING & REHEARING *EN BANC*

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I. INTRODUCTION

This Court holding is penalizing Appellant for Liberty Mutual's failure to cash the payment made by Appellant in the manner required by the insurer in its application. As this court has repeatedly held, a check does not constitute a payment unless it produces cash and the burden rests on the insured to see that the check is honored when presented, but, "Payment by check suspends the underlying obligation until the check is paid or dishonored, but the obligation is discharged only by the payment of the check" 44 Am. Jur. 2d Insurance § 862 (2012)

It is undisputed that Liberty Life accepted Mr. Boyd's payment made in the form of a voided check and authorization to withdraw funds as required by Liberty Life. It is also undisputed that Boyd maintained sufficient funds in his account at all times to cover the payment agreed upon.

Liberty Life should not be permitted to claim that its failure to withdraw the funds from Boyd's account, even after its records indicate that it accepted the payment, made by its own preferred method, and issued policy number 0010071484 (ROA 79).

II. STATEMENT OF THE CASE

The present case was filed by Appellant Hal Boyd, seeking enforcement of contract of life insurance policy formed when Defendant Liberty Life, through Select Quote, an insurance broker who was authorized by Defendant Liberty Life to solicit insurance on its behalf, approved his application and agreed to issue a policy and provided Boyd with a policy number. Both SelectQuote and Liberty Life denied that a contract was formed because of lack of consideration.

The parties filed cross motions for summary judgment. A hearing was held on June 3, 2010. Following the hearing, the Honorable Kristie Lea Harrington, sitting in Charleston, South Carolina issued an order granting Defendants' Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment on June 26, 2010 and filed his notice of appeal on July 15, 2010.

This Court affirmed the lower court's grant of summary judgment on June 15, 2012.

III. ARGUMENT

A. An insurer cannot refuse to deliver the policy because it failed to withdraw the payment from insured's account

An insurer should not be permitted to deny the existence of a contract when it accepted the application, specified the method of payment and insured complied, and ultimately issued a policy.

This court upheld the lower court's finding that there is not sufficient Consideration to form a contract of insurance because Liberty Life never withdrew the funds from Boyd's account. While it is true that "as a general rule, in the absence of an express or implied agreement to the contrary, a check does not constitute payment unless it produces payment in cash" *Burns v. Prudence Life Ins. Co.*, 243 S.C. 515, 520, 134 S.E.2d 769, 771 (1964), it is also true as this court noted in its opinion, that:

> The effect of this rule is that if the check is paid when presented, the payment generally relates back to the time when the check was delivered to the payee, thereby benefitting the drawer, by preventing the payee (here the insurer) from being able to hold the check without depositing or cashing it for an unreasonable time-beyond the due date for the payment of the premium, for instance-and then asserting that the payment was late and that, therefore, the policy lapsed.

16 Williston on Contracts § 49:76 (4th ed. 2010).

The case is precisely the situation contemplated by the rule where an insurer holds the check for an unreasonable amount of time and then tries to claim that payment was not timely made or not made at all.

Furthermore, as this court found, Liberty Life approved Boyd's insurance application. Nevertheless, despite its approval of the application, the court held that the approval of the application does not constitute an agreement to accept the tender of the voided check because the check did not produce a payment in cash. In reaching its conclusion, this court relied on *Burns*, which is clearly distinguishable. In *Burns* the life policy lapsed prior to death of insured who had given check for premium and the check was dishonored twice, but the insurer retained possession of the dishonored check. The insurer approved reinstatement of the policy and accepted the check that was dishonored once. The check was again dishonored and the records show that at no time after issuing the check for reinstatement, did the insured have sufficient funds in the account the check was drawn on. The court applied the general rule that "in the absence of an express or implied agreement to the contrary, a check does not constitute payment unless it produces payment in cash, the presumption being that the check is accepted on condition that it be paid." *Id.* at 520. The issue in *Burns* was not whether retaining the check constituted unconditional acceptance of the check, but whether a receipt issued by the insurer upon taking a check, subsequently dishonored, in payment of a premium operates as an unconditional receipt. The court found that this was a question of fact and it depends on the intent of the parties.

In the case at bar, Liberty Life accepted the voided check and authorization to pay, but never presented it to the bank for payment. This issue is different from the one in *Burns* and was addressed by the Supreme Court in *Surety Indem. Co. v. Estes,* 243 S.C. 593, 599, 135 S.E.2d 226, 229 (S.C.1964), where the court held that since the company retained the check in its possession after it was dishonored, instead of returning it to the insured , a duty to present the check a second time arises. "The claim that this check was worthless is simply contrary to the facts, as has been seen. Since the company retained the check in its possession, instead of returning it to the insured, no question of a duty to present a second time arises. The check was in the possession of the insurance company before the expiration of the grace period and was retained by it. It was an authorized medium of payment and met the condition that it would have been paid if presented. There was no requirement that cash be realized within the grace period. Tender of a check at any moment before its expiration would suffice to prevent forfeiture. The facts which have been stated were equivalent to a timely tender and kept the contract in force." *Id.* at 229.

Moreover, whether the acceptance of a check is absolute or conditional is a question of fact. In the case at bar, there is no evidence that Liberty Life presented a conditional receipt or that its application contained any provisions making the acceptance of the voided check and authorization conditional. In fact, Liberty Life did not make its application part of this record. Clearly here, there is a question of fact as to the nature of the acceptance of Boyd's payment. "The determination whether the acceptance of a check is absolute or conditional is a question of fact, depending on the circumstances of the transaction and the parties' conduct" 44 Am. Jur. 2d Insurance § 862 (2012).

This court relies on *Going v. Mutual Benefit Life Ins. Co.*, 58 S.C. 201, 209, 36 S.E. 556, 558 (1900) in finding that payment of the first premium was never made because no amount was specified. In *Going*, the court found that tender of a check for the first premium constituted compliance with the requirement that first premium be paid during the life of the insured, despite the fact that agent refused to accept the check. "Now, in the case before the court the only act remaining to be done by the assured after it was executed, so far as the contract on its face shows, was for the assured to pay the first premium, which was, in effect, done during the lifetime of the assured, by the tender of the amount of such premium, which, it is conceded, and properly conceded, was equivalent to payment; and so that condition was complied with, and the contract was completed". *Going v. Mutual Ben. Life Ins. Co.,* 36 S.E. 556, 558 (S.C. 1900). In *Goings,* the court was not concerned with the amount of the payment, because the tender was made by delivery of a check, which clearly contained the amount payable.

The present is a case created by the simple advancement of technology and the need for the law to catch up with the new technology. Boyd delivered a voided check as required by the contract and an authorization to draft the payment from his account. While it is true that the voided check contained no amount, this should not be dispositive of the case as in this date and age, this method of payment is very common and tender of a voided check coupled with authorization to withdraw funds is the same as tendering a check. Boyd authorization at the time of delivery was for an amount of $406.17. On January 11, 2008, Boyd was informed that the premium was increased to $417.73 due to record of high blood pressure and he authorized Liberty Life, through its agent

SelectQuote, to withdraw the new premium, therefore accepting the offer to enter into the contract at the newly quoted premium.

> MS. GRISSOM: Well, the next step is if you're going to accept that offer, I'll put it through and you should be getting the policy in the mail very shortly, within the next week or so.
> MR. BOYD: Yes. Go right ahead.
> ....
> MS. GRISOM: ... We'll get you issued and we'll get you issued today, so you're looking at just mail time. ROA 125

The record clearly showed that Boyd gave authorization for a specific amount and the defendant agreed to issue the policy. In fact, in its letter dated January 15, 2008, SelectQuote assures Boyd that his application has been approved and provides him with a policy number. This clearly creates a genuine question of material fact and a jury could infer that a contract was issued since Liberty Life performed on the contract by issuing the policy.

B. <u>The issue of agency is a question of fact for the jury</u>

This Court erroneously found in footnote 4 that Liberty Life was not bound by SelectQuote's misquote because SelectQuote did not act as an agent for Liberty Life when communicating the premium. The court's ruling was based on S.C. Code Ann. § 38-43-10(5) (Supp. 2011) (defining an insurance agent as a person who "receives, collects, or transmits any premium of insurance"). Nevertheless, in South Carolina "Agency is a question of fact for the jury, and if there is any competent evidence of agency the trial court is correct to submit the question to the jury. This is so despite a contract term providing that the parties shall not be agent and principal. Once competent evidence of agency has been shown, the question of agency is for the jury, regardless of the weight of rebuttal evidence." 23 S.C. Jur. Agency § 14. The court cannot ignore the

plethora of evidence in the record, showing that SelectQuote acted as an agent for Liberty Life, including statements implying that SelectQuote together with Liberty Life will issue the policy, ROA 67.

CONCLUSION

As Liberty Life accepted Boyd's payment for the first monthly premium and issued the policy, this court should reverse the grant of summary judgment and remand this case to the lower court for further proceedings.

Respectfully submitted,

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Charleston, South Carolina
On this 29 day of June 2012

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PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing & Rehearing *En Banc* by delivering a copy of same to their attorney of records, Robert F. Goings, Esquire, Goings Law Firm, P.O. Box 436, Columbia, SC 29202, via regular U.S. Mail, properly addressed, with sufficient postage affixed thereto on June 29, 2012.

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