

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOHN DOE, a fictitious name,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,	:	
	:	
Defendant.	:	NO. 96-3951

MEMORANDUM

Reed, J.

December 24, 1997

Currently before this Court are the timely post-trial motions of both parties.

Plaintiff John Doe ("Doe")¹ has filed a motion for judgment as a matter of law or for partial new trial pursuant to Federal Rules of Civil Procedure 50(b) and 59 (Document No. 128). Defendant Provident Life and Accident Insurance Company ("Provident Life") has filed a motion to amend judgment and/or for judgment as a matter of law and/or for new trial (Document No. 130). Also pending before the Court is the motion of Doe to mold the verdict (Document No. 129).

Having reviewed the evidence on the record,² as well as the various briefs submitted by the parties, and for the following reasons, I will deny both post-trial motions and grant the motion to mold the verdict.

¹ In an Order dated June 19, 1996, this Court granted plaintiff permission to proceed under the pseudonym John Doe. On April 9, 1997, this Court modified that earlier Order by providing that plaintiff's true name be used during the jury selection and trial of Count I of this case. For all purposes other than jury selection and trial, the provisions of the Order of June 19, 1996 remain in full force and effect.

² Most of the issues raised in these motions were previously considered by the Court and the parties participated in an oral argument on these issues. Due to the straight forward nature of the issues presented, the Court will rely on the record and the briefs of the parties to resolve these motions.

I. FACTUAL AND PROCEDURAL BACKGROUND

Doe brought this breach of contract action alleging that Provident Life improperly refused to pay benefits owed to Doe under three disability policies. The first of the three disability insurance policies, policy number 06-334-700127 (the “334 policy”), contained the following two-part definition of the term “total disability”:

Total Disability means that due to Injuries or Sickness:

1. you are not able to perform the substantial and material duties of your occupation; and
2. you are under the care and attendance of a Physician.

(Pl. Ex. P-1). The two other policies, policy numbers 06-335-877787 and 06-337-6039536 (the “335 and 337 policies”), defined “total disability” as follows:

Total Disability . . . means that due to Injuries or Sickness:

1. you are not able to perform the substantial and material duties of your occupation; and
2. you are receiving care by a Physician which is appropriate for the condition causing the disability.

(Pl. Exs. P-3, P-4).

Prior to the commencement of trial, Doe sought to exclude evidence challenging the quality of care rendered to him by his treating physicians on the basis that the pertinent language in policies 335 and 337 should be interpreted as referring to an appropriate physician, rather than to the type or quality of care. As an alternative position, Doe argued that the language was ambiguous because it could mean either the physician must be appropriate for the condition or that the care rendered by the physician must be appropriate for the condition. After considering the briefing of the parties and having a hearing on this issue, this Court on April 11, 1997 entered an Order denying Doe’s motion in limine on the basis that the policy language -- “which is appropriate for the condition causing the disability”-- was unambiguous and clearly

modified the word "care" and not the word "physician." (Document No. 72). The Court consequently admitted expert testimony on behalf of Provident concerning the quality of care given to Doe by his treating physicians, in particular, Dr. Jan Doeff.

The case was tried before a jury from April 14, 1997 through May 2, 1997. At the charge conference, the parties argued the issue of whether to instruct the jury that, as a matter of law, Doe had satisfied the second prong of the definition of "total disability" in policy 334. (Tr. 5/1/97 at 46-47). The Court instructed the jury as follows:

Policy 334 says you are under the care and attendance of a physician. Under this policy all that is necessary is that the insured . . . be under the care of any doctor. *Since the evidence is uncontradicted that [plaintiff] was under the care of a physician, I instruct you as a matter of law that this paragraph of policy # 334 has been satisfied by the plaintiff.*

. . .

Let's move along to policies 335 and 337 [which] require that plaintiff be "receiving care by a physician which is appropriate for the condition causing the disability" in order to be entitled to benefits. You can see that these two policies have the added requirement that the medical care be "appropriate for the condition causing the disability." "Appropriate" means suitable under the circumstances. It does not mean perfect care, or the best possible care. Thus, in order to prove he is entitled to total disability under policies # 335 and # 337, the plaintiff must also prove that he has received appropriate care for his allegedly disabling condition.

(Jury Instructions at 29, 30) (emphasis added). The jury was asked to answer the following interrogatories contained on the verdict form:

1. Do you find that plaintiff has proven by a preponderance of the evidence that from March 1996 until the present date he was not able to perform the substantial and material duties of his occupation?
2. Do you find that plaintiff has proven by a preponderance of the evidence that from March 1996 until the present date he was receiving care by a physician which was appropriate for the condition that he claims was causing his disability under policies #335 and #337?

The jury answered "YES" to the first interrogatory and "NO" to the second

interrogatory. Thus, the jury verdict allows Doe to recover on policy #334, but not on policies #335 and #337. Policy #334 provided for benefits in the amount of \$3,250.00 per month. The benefit period decided by the jury was from March 26, 1996 to May 9, 1997, a total of 13 months and 13 days: 13 months x \$3,250.00 = **\$42,250**; 13 days corresponds to .433 of a month (13 divided by 30), so .433 x \$3,250.00 = **\$1,408.33**. Therefore, the total judgment to which Doe is entitled for policy #334 is in the amount of **\$43,658.33** as of May 9, 1997.

Thus, after a long fought battle by both parties, neither side was totally triumphant. The jury deliberated for five days, a considerable period of time for a three-week trial. The jury asked several questions during their deliberation process, and after four days of deliberations, the jury responded to the Court's request for a status report by stating that there were three identified groups of jurors whose views were disparate. The jury went on, however, to reach a verdict the next day.

Not surprisingly, neither party is content with the verdict and each has submitted post trial-motions asking this Court to revisit rulings made before the trial, during the trial, and at the charge conference, and/or to disregard the findings of the jury. Given the significant efforts of the jury during the deliberative process and based upon the applicable law and the entire record, I will do neither. While there are instances that call for a Court's active intervention post trial, this is not one of them.³

³ For a more extensive review of the underlying facts, see the Memorandum of this Court dated August 15, 1996 (Document No. 20), published at Doe v. Provident Life and Accident Ins. Co., 936 F. Supp. 302 (E.D. Pa. 1996).

II. LEGAL STANDARD

Judgment as a matter of law is appropriate only where the verdict is not supported by sufficient evidence to allow reasonable jurors to arrive at the verdict. Walter v. Holiday Inns, Inc., 985 F.2d 1232, 1238 (3d Cir. 1993). Denial of a motion for judgment as a matter of law is proper unless the record “is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief.” Griffiths v. Cigna Corp., 857 F. Supp. 399, 403 (E.D. Pa. 1994) (quoting Denneny v. Siegel, 407 F.2d 433, 439-40 (3d Cir. 1969)), aff’d, 60 F.3d 814 (3d Cir. 1995). This Court must view the evidence, together with all reasonable inferences therefrom, in the light most favorable to the verdict winner, insuring minimum interference with the jury and its deliberative process. Rotondo v. Keene Corp., 956 F.2d 436, 438 (3d Cir. 1992); Lightning Lube, Inc. v. Witco Corp., 802 F. Supp. 1180, 1185-86 (D.N.J. 1992), aff’d, 4 F.3d 1153 (3d Cir. 1993). Accordingly, this Court will not weigh the evidence or determine the credibility of witnesses, refraining from any tendency to substitute its judgment of the facts for that of the jury and will determine only whether the evidence and the justifiable inferences in favor of the prevailing party afford any rational basis for the verdict. See Griffiths, 857 F. Supp. at 404.

A motion for a new trial may be granted for various reasons: the verdict is against the clear weight of the evidence; damages are excessive; the trial was unfair; substantial errors were made in the admission or rejection of evidence or the giving or refusal of instructions. Northeast Women's Ctr., Inc. v. McMonagle, 689 F. Supp. 465, 468 (E.D. Pa. 1988), aff’d, 868 F.2d 1342 (3d Cir. 1989). A trial court should grant a motion for a new trial when, in its opinion, “the verdict is contrary to the great weight of the evidence, thus making a new trial necessary to

prevent a miscarriage of justice.” Lightning Lube, 802 F. Supp. at 1185 (quoting Roebuck v. Drexel Univ., 852 F.2d 715, 736 (3d Cir. 1988)). Although the district court is permitted to consider the credibility of witnesses and weigh the evidence, the court should not substitute its own judgment for that of the jury simply because the court might have come to a different conclusion. Id. Courts should not disturb jury verdicts “absent exigent circumstances such as a case of manifest and extreme abuse of the jury's function.” Pearsall v. Emhart Indus., Inc., 599 F. Supp. 207, 211 (E.D. Pa. 1984). “In reviewing the propriety of a jury verdict, [this Court's] obligation is to uphold the jury’s award if there exists a reasonable basis to do so.” Motter v. Everest & Jennings, Inc., 883 F.2d 1223, 1230 (3d Cir. 1989); see Brandy v. Flamboyant Inv. Co., 772 F. Supp. 1538, 1541 (D.V.I. 1991). Accordingly, I must search the record for any evidence which could have reasonably led the jury to reach its verdict, drawing all reasonable inferences in favor of the verdict winner. Blum v. Witco Chem. Corp., 829 F.2d 367, 372 (3d Cir. 1987) (citing Massarsky v. General Motors Corp., 706 F.2d 111, 117 (3d Cir.), cert. denied, 464 U.S. 937 (1983)).

III. ANALYSIS

A. Motion of Doe for Judgment as a Matter of Law or for a Partial New Trial

1. Care by a Physician which Is Appropriate for the Condition Causing the Disability

Doe argues that the Court erred by admitting evidence concerning the quality of care and by failing to instruct the jury that, as a matter of law, the care Doe received by his treating physicians was appropriate. Without waiving his objection to the Court’s decision to permit such evidence and not instruct the jury that Doe received appropriate care as a matter of law, Doe requested that the Court charge the jury that the language of the 335 and 337 policies

would be satisfied “as long as the care would satisfy the standard of a reasonable physician under the circumstances, in other words the malpractice standard.” (Tr. of 5/1/97 at 41).

Specifically, Doe argues that the policy language,--“which is appropriate for the condition causing the disability”-- is ambiguous and therefore to be construed against Provident Life. According to Doe, the policy language is satisfied if he received psychiatric care for his psychiatric condition and cardiac care for his coronary artery disease. In other words, Doe interprets the language as requiring the insured to seek medical care which appears reasonably directed to his condition, by a physician whose specialty encompasses the condition.” (Pl. Mem. at 15). Doe argues that the policy language does not impose a duty on the insured to ensure that his treating physician achieves a certain level of performance.

Doe is essentially reasserting the same arguments he made earlier in his motion in limine on this issue, which I denied. (See Order dated April 9, 1997, Document No. 72). None of the arguments now articulated by Doe persuade me that my earlier decision and reasoning were incorrect. The Court of Appeals for the Third Circuit defines “ambiguity” to mean an “[i]ntellectual uncertainty; . . . the condition of admitting of two or more meanings, of being understood in more than one way, or referring to two or more things at the same time” Mellon Bank, N.A. v. Aetna Bus.Credit, Inc., 619 F.2d 1001, 1011 (3d Cir. 1980) (quoting Webster's Third New International Dictionary (1971)). In determining whether an ambiguity exists in an insurance policy, “[t]he language of the policy may not be tortured . . . to create ambiguities where none exist.” St. Paul Fire and Marine Ins. Co. v. Lewis, 935 F.2d 1428, 1431 (3d Cir. 1991) (internal quotations omitted).

As I have ruled previously, I do not find the provision “care by a physician which

is appropriate to condition causing the disability” to be ambiguous. It is not misleading or beyond the understanding of an individual of average intelligence, *i.e.*, a reasonable policyholder. It does not demand that a policyholder perform any complex or confusing interpretation of the language. Common sense is the only requirement. Having found the language to be unambiguous, the law requires that the language be read by the jury in accordance with its plain and ordinary meaning. See Ryan Homes, Inc. v. Home Indem. Co., 647 A.2d 939, 940 (Pa. Super. 1994), appeal denied, 657 A.2d 491 (Pa. 1995). The instructions given to the jury on this provision comply with this mandate: “‘Appropriate’ means suitable under the circumstances. It does not mean perfect care, or best possible care.” (Jury Instructions at 29). This instruction mirrors the dictionary definition of the term “appropriate,”⁴ thus indicating that my instruction to the jury explained the term in accordance with common knowledge. I find that the phrases “under the circumstances” and “does not mean perfect care, or best possible” sufficiently satisfy the request of Doe made in the charge conference that the language, “reasonable physician standard under the circumstances,” be used. I additionally note that Doe’s motion in limine to exclude evidence challenging the quality of care given to Doe was denied “without prejudice to the right of plaintiff John Doe to object to particular questions on grounds other than relevancy consistent with the policy language interpretation by the Court herein.” (Order dated April 9, 1997, Document No. 72). For these reasons, I conclude that the Court did not err by admitting evidence concerning the quality of care given to Doe and by refusing to instruct the jury as a matter of law that Doe’s treatment was appropriate within the meaning of the policy.

⁴ “[A]ppropriate . . . 1: specifically suitable : fit, proper” Webster’s Third New International Dictionary at 106 (1986).

Doe further contends that Provident Life never informed Doe in their correspondences that it was terminating his benefits because the care he was receiving was not appropriate for his condition. Provident Life stated in those letters that benefits were being terminated only because Doe was no longer disabled from performing the substantial and material duties of his job. Doe cites no law that failure to fully inform him of reasons for denial of benefits bars Provident Life from asserting these defenses. This argument, while creative, is ultimately unpersuasive, especially in light of the fact that Doe was free to make this argument to the jury, which he did, in his closing argument and that Doe had the opportunity to, which he did, question Provident Life employees about the lack of reference to the inappropriate care issue in their correspondences with Doe. Thus, the jury presumably considered this argument and related testimony in their deliberations. Therefore, I will not disturb the jury verdict on the grounds that Provident Life failed to inform Doe that it was terminating his benefits because he was not receiving appropriate care.

2. No Evidence to Support Jury Verdict

Doe also argues that there was no legally sufficient evidentiary basis for a reasonable to jury to have found that he did not receive appropriate care. Provident Life presented three expert witnesses, Doctors Robert M. Toborowsky, Victor Vieweg, and Peter Badgio, which pointedly challenged the appropriateness of care rendered by Doe's treating physician, Dr. Doeff. The evidence, argues Doe, established at most that Doe did not receive "optimal" care and therefore does not meet the standard by which the Court instructed the jury.

In considering a post-trial motion like the one *sub judice*, a court must view the evidence and all reasonable inferences arising therefrom in the light most favorable to the verdict

winner. Rotondo v. Keene Corp., 956 F.2d 436, 438 (3d Cir. 1992). The court should not upset the jury verdict “unless the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief.” Id. (internal quotations omitted). Both parties cite in their briefs excerpts from the testimony given during trial to support their respective positions. Upon review of the record, I conclude that there is evidence in the record to support the finding of the jury that the care rendered by Dr. Doeff was not appropriate in that there was, among other things, a lack of a treatment plan and a lack of a vigorous effort to enable Doe to return to work.

Dr. Toborowsky testified that the care given to Doe was inappropriate because there was a six-week hiatus in the summer of 1995 where Doe was not seen by Dr. Doeff and because Doe was prematurely taken off the antipsychotic medication. (Tr. of 4/25/97 at 45, 51). He stated that Doe “was not getting the kind of treatment that one should get for the condition his doctor diagnosed.” (Tr. of 4/25/97 at 51). Dr. Toborowsky also stated that it was his opinion that Doe “was not getting optimal treatment, and that the diagnostic formulation of Dr. Doeff . . . was grossly in error” (Tr. of 4/25/97 at 54). Dr. Badgio testified that Doe was not offered the optimal range of available psychologic or psychiatric treatment, (Tr. of 4/30/97 at 98-99), and that Doe “chose not to practice law anymore. He chose to smell the roses and change his lifestyle. He told me he made that choice with Dr. Doeff about a month into their treatment and is pursuing it ever since.” (Tr. of 4/30/97 at 97). Dr. Victor Vieweg similarly criticized Dr. Doeff for stopping to treat Doe with anti-psychotics and failing to select from various treatment options. (Tr. of 4/29/97 at 90-91). This testimony goes to the heart of the defense of Provident Life, who was the prevailing party on the issue of appropriate care.

In sum, I find that the testimony of these three medical experts, separately or collectively, provide the evidence necessary to render the jury's verdict reasonable. Accordingly, I will not disturb the jury's verdict on the basis that the evidence was insufficient to support such an outcome.

4. Burden of Proof

Next, Doe argues that the Court erred when it placed the burden on Doe to establish his eligibility for disability benefits. Doe had been receiving disability benefits under these policies for over two years prior to Provident Life's ceasing of payments. According to Doe, therefore, the burden rests with Provident Life to prove that Doe no longer qualifies for the benefits. The burden of proof issue had been raised previously by Doe and carefully considered by this Court. In my earlier Memorandum opinion dated April 22, 1997 in Part I.A (Document No. 91), I held that the burden of proof, the burden of going forward, and the burden of ultimate persuasion at trial clearly lies with Doe to show that Provident Life breached the contracts at issue. In fact, many of the cases relied on by Doe in his post-trial motion were thoroughly discussed and distinguished in my earlier Memorandum. There is no reason to rehash the reasoning of that Memorandum when it remains sound, even in light Doe's post-trial motion.⁵

⁵ I will note that the disability policies at issue provide for only monthly payments based upon proof of disability submitted by an insured. The policies provide, in pertinent part:

TIME OF PAYMENT OF CLAIMS

After we receive written proof of loss, we will pay monthly all benefits then due you for disability. Benefits for any other loss covered by this policy will be paid as soon as we receive proper written proof.

(Pl. Ex. P-1 at 10); (Pl. Ex. P-3 at 10); (Pl. Ex. P-4 at 10). Thus, even accepting the position of Doe as correct and placing the burden of proof on Provident Life to show that Doe no longer qualifies for the benefits, this burden only spans for a 30-day period. To state it differently, Doe's burden to prove his disability is renewed each month. Only when payments are given and then terminated within the same month, would the burden shift to Provident Life. So, in our case, the burden of proof would rest with Provident Life only for the first month it terminated payments to

5. Testimony of Dr. Peter C. Badgio

Doe's final argument is that the Court should not have permitted the expert testimony of Dr. Badgio, a psychologist, who opined on the need to change medications and the form of psychotherapy received by Doe, because he is not a medical doctor, and thus his testimony was beyond the scope of his expertise. I found at trial that Dr. Badgio was a qualified expert under Federal Rule of Evidence 702 and I reiterate that conclusion here.⁶ The decision whether to allow a witness to testify as an expert is within the discretion of the trial court. United States v. Velasquez, 64 F.3d 844, 847-48 (3d Cir. 1995). The Court of Appeals for the Third Circuit has adopted a broad interpretation of Rule 702; close calls on the admission of expert testimony are to be resolved in favor of admissibility. Dunn v. HOVIC, 1 F.3d 1362, 1367 (3d Cir. 1993). Dr. Badgio testified that he received a master's degree and doctorate in psychology, and that he specializes in neuropsychology. (Tr. of 4/30/97 at 5). As part of his practice, Dr. Badgio performs psychological evaluations on patients in order to provide the psychiatrist with diagnostic information, and he also provides treatment, such as psychotherapy, for patients suffering from severe depression, psychosis, and traumatic reactions to tragedies in their life. (Tr. of 4/30/97 at 11, 12, 13). Dr. Badgio testified that Doe was not suffering from a psychiatric illness (Tr. of 4/30/97 at 96) and that Doe had not been receiving the appropriate treatment. (Tr.

Doe, and no longer.

⁶ Rule 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702.

of 4/30/97 at 99-100). I find that, given Dr. Badgio's practice of providing treatment and supplying diagnostic information on psychiatric illnesses, he was well within his expertise to comment on the treatment plan received by Doe.

I also note that Doe did not object to or challenge the qualifications of Dr. Badgio before or during the trial. Any shortcomings of Dr. Badgio's professional qualifications goes to the weight of his credibility and I instructed the jury to determine the proper weight to be accorded such testimony.⁷ Doe could have made known any foibles attributed to Dr. Badgio during cross-examination or during closing argument. I therefore conclude that this Court did not err by admitting the expert testimony of Dr. Badgio, and the post-trial efforts of Doe to challenge that testimony are not efficacious.

B. Motion of Provident Life to Amend Judgment, Judgment as a Matter of Law, or New Trial

The jury found (in its answer to Jury Question No. 1) that Doe had proved he was unable to perform the substantial and material duties of his occupation from March 1996 to the date of trial. Provident Life here maintains that the Court erred when it charged the jury that, as a

⁷ In relevant part, I instructed the jury:

You will recall that you heard testimony from several [expert] witnesses here, namely, . . . Dr. Peter Badgio You should consider their testimony received in evidence in this case, and give it such weight as you may think it deserves. . . .

The mere fact that the court has permitted these witnesses to testify to their opinions should not be interpreted by you to mean that I believe that these witnesses are in fact experts on the subjects about which these witnesses have testified, nor that I in some way approve of the testimony given. In permitting these witnesses to testify to their opinions, my only function is to determine whether or not the witnesses have specialized knowledge on the subject matter in question and to provide you with that knowledge in order to assist you in making a determination of an issue before you for consideration.

(Jury Instructions at 11-12).

matter of law, the second prong of policy 334 had been satisfied and did not permit the jury to evaluate whether Doe's care was appropriate to satisfy this requirement of policy 334. Provident Life timely and properly objected to this charge. (Tr. of 5/11/97 at 48).

The language of policy 334 stands in clear contrast to that of the other two policies with respect to the second prong of the "total disability" definition. Provident Life cannot escape these essential differences. Yet, it attempts to craft an argument to save itself from the lenient language set forth in policy 334.

First, Provident Life argues that the Court should have allowed the fact finder to determine whether Dr. Doeff's treatment of Doe did, in fact, constitute "care and attendance." Provident Life's position is that Doe was feigning his disability and thus by definition could not be under the care of a physician as required under the policy. Provident Life correctly states that the language "under the care and attendance of a physician" is unambiguous. Applying the plain and ordinary meaning thereof, I find that a policyholder satisfies this provision if he meets periodically with a physician and receives care. The second prong burden presented by the insurance company's language is anything but a daunting standard for a policyholder to meet. The degree, extent, and appropriateness of the care and attendance are not relevant factors in considering whether that provision has been met by the policyholder. My earlier finding that Doe satisfied, as a matter of law, this provision stands correct. Provident Life has not disputed, either in its briefs or during trial, that Doe was seen by Dr. Doeff and other physicians for his psychiatric illness and other medical related illnesses. There is ample evidence in the record that Doe met periodically with Dr. Doeff and other physicians. (See Pl. Ex. 32 (containing Attending Physician's Statements from September 1994 through March 1996, indicating that Doe met with

Dr. Doeff approximately once per month and he was being treated for his psychiatric illness during this period and containing other records that Doe met with Dr. Doeff monthly from March 1996 through September 1996)); (Tr. of 4/17/97 at 151 (Dr. Doeff stated at trial that he had seen Doe “week in and week out since March of 1994”)); (Tr. of 4/17/97 at 36-37, Testimony of DiGiacomo (meeting with Doe in March 1997)). There is no evidence that Dr. Doeff fraudulently treated or conspired with Doe to defraud the insurance company. Absent such evidence, it is clear that Doe satisfied the minimal requirement set forth in policy 334.

Second, Provident Life argues that the “care and attendance” clause in policy 334 implicitly incorporates the duty recognized under Pennsylvania law to submit to reasonable medical treatment. The cases cited by Provident Life are not instructive, however.⁸ They all involve the common law duty to mitigate damages in tort-related actions and not the duties of an insured to seek care under a total disability insurance policy. Had Provident Life wanted to protect itself against fraud and to ensure that the policyholder submit to reasonable medical treatment, it could have written germane language into policy 334 as it did in the other two policies sued upon here.

Provident Life devotes a significant portion of its brief to discuss the case of Mutual Life Insurance Company v. Ellison. In that case, the plaintiff was a rectal surgeon who developed a severe skin disease which caused substantial irritation to his hands. 223 F.2d 686, 688 (5th Cir.), cert. denied, 350 U.S. 845 (1955). The disease grew progressively worse until it became so acute that plaintiff had to discontinue his practice. Id. Plaintiff brought an action

⁸ Provident Life cites in support of this proposition, McGinley v. United States, 329 F. Supp. 62 (E.D. Pa. 1971), Lewis v. Pennsylvania R.R. Co., 100 F. Supp. 291 (E.D. Pa. 1951), and Kehoe v. Allentown & L.V. Traction Co., 41 A. 310 (Pa. 1898).

against his insurer to recover total disability benefits under two insurance policies. Id. The appellate court recited the legal principle that “it is the duty of one suffering from causes that disable him to avail himself of all reasonable means and remedies to remove his disabilities.” Id. at 691 (internal quotations omitted). Reviewing the evidence that plaintiff “talked to various doctors who were friends of his . . . and exhibited his hands to them,” id. at 688, but did not “call upon any physician trained as a skin specialist and undergo a course of treatment for the conditions of his hands,” id. at 689, the appellate court reversed on the grounds that, *inter alia*, the plaintiff made no effort to have a skin specialist treat his disease. Id. at 694. The main and uncontrovertible difference between Ellison and our case is that the plaintiff in Ellison never sought treatment from a physician, whereas here the evidentiary record is replete with instances of Doe receiving treatment from his physicians in an attempt to cure his condition. No matter how much Provident Life attacks and criticizes the quality of this treatment, it cannot erase the fact that Doe sought and received treatment, and thus satisfied the “care and attendance” requirement under of the 334 policy.

I find that this Court properly ruled as a matter of law that Doe satisfied the “care and attendance” provision under the 334 policy and, as well, properly instructed the jury accordingly. Therefore, I will deny the request of Provident Life to amend the judgment, or enter a judgment of a matter of law in its favor, or for a new trial on this issue.

IV. CONCLUSION

For the foregoing reasons, I will deny all post-trial motions of the parties. Because I will not disturb the jury verdict, I will grant the motion of Doe to mold the verdict.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOHN DOE, a fictitious name,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,	:	
	:	
Defendant.	:	NO. 96-3951

ORDER

AND NOW, on this 24th day of December, 1997, upon consideration of the motion of plaintiff John Doe (“Doe”) for judgment as a matter of law after trial pursuant to Rule 50 of the Federal Rules of Civil Procedure, and for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure (Document No. 128), and the responses of the parties thereto, and upon consideration of the motion of defendant Provident Life and Accident Insurance Company (“Provident Life”) for judgment as a matter of law after trial pursuant to Rule 50 of the Federal Rules of Civil Procedure, and for a new trial or to amend the judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure (Document No. 130), and the responses of the parties thereto, and having reviewed the evidence of record, and for the reasons stated in the foregoing memorandum, it is hereby **ORDERED** that the motion of plaintiff Doe and the motion of defendant Provident Life are **DENIED** and the jury verdict shall remain undisturbed.

IT IS FURTHER ORDERED that the motion to mold the verdict (Document No. 129) is **GRANTED** and **JUDGMENT IS ENTERED** in favor of plaintiff Doe and against defendant Provident Life for benefits owed under policy 334 up to May 9, 1997, in the amount of **\$43,658.33**, plus such interest and costs as permitted by law.

This is not a final Order due to the bifurcation of the liability and bad faith claims, of which the bad faith claim remains unresolved.

LOWELL A. REED, JR., J.