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Supreme Court of Texas.
MINNESOTA LIFE INSURANCE COMPANY, Petitioner,
v.
Elia L. VASQUEZ, Respondent.
No. 04-0477.

April 13, 2005

Appearances:
Stephen D. Howen, (argued), Figari & Davenport, L.L.P., Dallas, TX, for Petitioner.
Alan Clifton Gordon, (argued), Huseman & Pletcher, Corpus Christi, TX, for Respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice H arriet O'Neill, Justice David Medina, Justice Paul W. Green, Justice N athan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson, Justice Scott A. Brister.

CONTENTS
ORAL ARGUMENT OF STEPHEN D. HOWEN ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF ALAN CLIFTON GORDON ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF STEPHEN D. HOWEN ON BEHALF OF THE PETITIONER

CHIEF JUSTICE JEFFERSON: Be seated. The Court is ready to hear argument in 04-0477, Minnesota Life Insurance Company v. Elia L. Vasquez.
SPEAKER: May it please the Court. Mr. Steven Howen will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF STEPHEN D. HOWEN ON BEHALF OF THE PETITIONER

MR. HOWEN: May it please the Court. Minnesota Life is here today asking for the Court to do one of two things. First, to eliminate the damages awarded as a result of the alleged knowing violations of the Texas Insurance Code as the record contains no evidence that the insurance code was either violated or did that violation would have been in a knowing fashion. Alternatively, Minnesota Life ask the Court to limit the amount of all recovery awarded exclusive of interest at cost to $75,000 that the trial court abuses discretion and allowing Ms. Vasquez to amend her petition post verdict and that's delayed no damage limitation clause. But either --
JUSTICE BRISTER: If we agree with you on the first, we don't reach the second?

MR. HOWEN: I believe so, yes, Justice Brister. Each of these issues independently called back to concurrences and issues raised in concurrences by Justice Hecht from an earlier decision. The first, the insurance code violation issue refers back to the Giles decision and the -- an assurance written there and the pleading amendment issue refers back to the Greenhalgh issue and the Greenhalgh amendment and the pleading issue raised the concurrence there. I'll address the insurance issue and the insurance code first. This was an accidental death mortgage insurance policy. It's very clear that the policy definition excludes payment if the death results directly or indirectly from bodily or mentally infirmity, illness, or disease.

Referring to use of Texas Case Law, the Fifth Circuit in Sekel v. -- in a Sekel case faced an almost dead-endpoint similar situation in which a heart condition caused somebody to fall, suffered blunt force trauma to the head and died as a result of that blunt force trauma. In this situation, the facts are undisputed in this respect. Mr. Vasquez, the insurer, had serious -- serious illness, both seizure diseases that induced a coma that lasted up to 12 days and renal failure. We don't know exactly what happened to Mr. Vasquez because he was in a separate room unwatched when he fell and hit his head and died. If under Sekel, the -- either the renal failure or the seizure disorder caused him to fall and die, it is clear that this would not have been a covered claim under the policy. There would be no case to deal.

JUSTICE BRISTER: But you're saying the record -- under the record that we, as we now know it, it is impossible to tell?

MR. HOWEN: I think it is. It is impossible to tell. There was no decision ever made and that ultimately resulted in payment for this reason. That unlike Sekel, as I understood the policy as it is explained there, in this instance that he was an exclusion for mental infirmity, bodily illness, or disease. If the medical records had demonstrated in fact that the renal disease or the seizure had been the cause of the fall then there would have been proof for the insurer carrier its burden on the exclusion. Because there was no proof, however, they could let you know one way or another. It was a very close call. It would be fairly debatable, I believe, in the words that other jurisdictions use. I think this is a case that could have been litigated on payment without fear of bad faith liability for denial because it was that close.

JUSTICE BRISTER: Burden was on the insurer to prove the exclusion.

MR. HOWEN: But the burden is on the insurer to prove the exclusion.

JUSTICE BRISTER: And if it's impossible, it turns out it -- as it turns out it is impossible prove you will allow this to?

MR. HOWEN: Well, I think there was circumstantial evidence that would have allowed us to meet that burden. But on the same hand, there would have been circumstantial evidence that it was a fall or blunt force trauma, it would have been up to a jury. That's why I think it would've been bad faith, but I think I had very close call. Actually either would have been a supportable jury verdict but my recommendation [inaudible] --

JUSTICE BRISTER: What is -- was the circumstantial evidence meager circumstantial evidence where the jury would have to guess whether he fell because of the encephalopathy here or whatever?

MR. HOWEN: No, I don' think -- I would say I think it would've --

JUSTICE BRISTER: What was the circumstantial evidence that was greater than meager, suggesting your client would have won?

MR. HOWEN: Well, that the -- with respect to -- and again this is

all in hindsight after we got the medical record --

JUSTICE BRISTER: I understand.

MR. HOWEN: But there was a bite that was consistent with a new seizure sort or a new seizure occurring. There was a bite on the tongue that is referenced in the medical records. There was the renal failure which could have resulted in weakness and falls of the type that was suggested, but we just don't know. There could have been water on the floor too that is consistent with --

CHIEF JUSTICE JEFFERSON: In determining whether a liability is reasonably clear or not, should we -- I mean does the court look at the statements of Minnesota Life itself, its doctors, those who are saying it looks like this is an insured loss. We need -- we would like to further confirm but at this time it does look reasonably clear that the cause of this was an accident?

MR. HOWEN: Two points, your Honor. One factual and one legal in response to your question. The first is factually, the doctor when he originally looked at the situation as opposed to the medical records did not suggest it was an insured loss or an uninsured loss. He suggested that it was consistent with what had been described and that was a very close question at the point. I think the doctor's deposition testimony in the record is clear that he doesn't decide whether it's an insured loss or not. He's there to talk about the medical facts and allow the claims examiners to decide whether those medical facts fit the policy.

Two, your Honor, is a legal point that is exactly what recalls Justice Hecht's concerns in the Universal Life-Giles case as to whether you have to look at evidence that is supportive of a reasonable basis for denial when in fact you are engaging at a no-evidence review. I don't see that there's any other way you can judge whether there is a reasonable basis without looking at evidence that is supportive of the decision. If there is no evidence of that, obviously there is no reasonable basis.

JUSTICE BRISTER: According to your brief, it was almost five months between when you first asked -- when you received the claim and when you were told, we're not giving it to you without a signed authorization. Your client surely knew they were gonna need to sign authorization to get these records.

MR. HOWEN: Well, no, in fact -- and this goes to the knowing conduct The record is clear with respect to what we tried to accomplish and the way we did it was we hired a service to obtain these records. The very first phone -- and there's a record of what the services told us about each communications with the hospital. And the very first -- I'll get the records cite on my brief -- but the service had conversation with the hospital in which the hospital said no authorization will be needed. And that what was reported to Minnesota Life. So whether that was right or wrong, that is the state of our knowledge. The court may recall there was a -- that evidence was submitted for a limited purpose because it wasn't proved that being in service --

JUSTICE: But at that point, you knew it was going to be eight weeks or there's some estimate of six to eight weeks or something like that?

MR. HOWEN: Exactly, your Honor.

JUSTICE: Wouldn't you have known that you can expedite this by simply getting a release than having those records in your hand within days?

MR. HOWEN: No, your Honor. I think that that misstates what our

understanding was. There was going to be six to eight weeks without the release, that the release would not expedite in any manner the release of the records. That instead what was happening -- and this was the testimony put into the record by deposition from the hospital workers. It was just taking that long to produce copies of the records. And four to eight weeks, it seems like a long time to me. But at some point, I think the court has to recognize, there are commercial restraints on what an insurer can accomplish.

JUSTICE: Well, at least, it seems like -- don't you -- do you have some obligation to call your insurer, you've gotten a statute out there. It appears if you got a reasonable time to deny or pay or say you've got a reservation of rights, why didn't you pick up the phone and call your insurer, the response say, we're having trouble getting the records, can you help expedite? I mean there was no communication?

MR. HOWEN: Your Honor, factually, there was communication. We sent several letters and there was --

JUSTICE O'NEILL: To wrong address?

MR. HOWEN: Pardon?

JUSTICE O'NEILL: To wrong address?

MR. HOWEN: Well, to the address that she had as insured with us and in fact I think she got those letters. It's still full house that they were being sent to. And there were telephone conversations with her family. She didn't speak English so we didn't have a way to communicate that directly with her, but there was communications. And I don't think there was any dispute that she knew the reason for the delay was the ability to get the medical records. She testified that she went to the hospital to attempt to get the medical records and she couldn't do it either. That's in the record.

So, to the extent that we have an obligation to notify them what is going on. I think that one, we did and two, whether we did it in an effective manner is proven by the fact that she understood that she needed to get the medical records. And as I was saying, I think there is just commercial restraints that are placed on an insurance company that prevent being perfect every time. And the problem here is, I agree that this was not a perfect claim standpoint. I believe that won out by the testimony of the company employee who said this is the longest that has ever taken us. But just because it is unusual doesn't mean that we knowingly violated a provision of the insurance code. And as the brief points out, regardless of whether we should have had the medical records earlier, why it really could not be reasonably clear until we saw those medical records. So that prong of the medical -- of the insurance code could not have been violated because we've obtained within days after receiving the medical records. The other prong as I've suggested, there is simply no evidence that we failed to affirm or denied coverage as that language means in the insurance code.

MR. HOWEN: Moving to the pleading amendment issue, I just have to say that this is violative and perhaps didn't say it well enough in the brief, the thing that's violates most is Texas Rule Civil Procedure 1 for a fair procedure to be gone through here. All Texas Rules of Civil Procedure need to be interpreted in light of that rule and this is --

JUSTICE BRISTER: There would have been nothing wrong with what the trial court did but for the removal.

MR. HOWEN: No, your Honor. I believe that the -- we have two complaints about it. One is the removal. The second is that the $75,000 limitation induced us to do several things. One is not try the case with more witnesses brought to trial. We didn't videotape and present deposition witnesses by trial, that's all in my affidavit and our

starwitness wasn't at trial because she was ill. We had a reason for a continuance and this relates to the removal, but we didn't ask for the continuance because that will push this over the year time period. And would have in fact put us in a position where they could freely amend. And we would rather take a risk on the $75,000 than unliquidated damages.

CHIEF JUSTICE JEFFERSON: And all those arguments have been made in the Greenhalgh case really?

MR. HOWEN: In Greenhalgh?

JUSTICE: Yes.

MR. HOWEN: Well --

JUSTICE: All those. I mean the character of the case was different. We didn't know we're going to subject to so many -- you know, so much money and exemplary damages. We would've hired more experts. We would put on more witnesses --

MR. HOWEN: Well --

JUSTICE: -- yet we, you know, submitted that late [inaudible] --

MR. HOWEN: The witness -- the arguments that I just raised were raised but the Greenhalgh said there wasn't any evidence of them so I think one distinction is there was evidence. The second distinction here is the loss of the federal forum which was not raised in Greenhalgh.

JUSTICE O'NEILL: Would that have worked both ways? In other words, if the federal court have retained the case and the jury came back with the verdict, beneath the jurisdictional requirement, could there be reciprocal argument then be made that you know is improper?

MR. HOWEN: No. Because under the federal system what is required for the removal is there be a controversy that amounts to $75,000 with -- and it could more or it could be less. And I believe that all the time in diversity cases, federal courts enforce judgments for less than $75,000. The controversy arises because there is a potential for claim for more than $75,000. So if you have evaluation issue on a property dispute between citizens of different states and one side it says it's worth 15 and another side that says --

JUSTICE BRISTER: Oh, pardon, if you claim a million dollars and get nothing.

MR. HOWEN: Right, and so --

JUSTICE O'NEILL: But I -- what -- why should we work both ways? That's what -- I don't understand why -- you know, the amount you plead is sort of an art in the science. You don't know what a jury is gonna do and if you end up wrong in that estimate, why should it work differently?

MR. HOWEN: I see my red light is on. But in response to the Justice, first of all, it's that way because that's the way the federal system and the legislature of the courts in that system have decided it should work. And what we're asking is for this Court in an exercise of comity give deference to that. The second thing is that the difficulty with prediction is exactly what the Justice referred to. You don't know before a case. In this instance, the difference is, there is a difficulty in prediction because it turns out to be only mental anguish damages. That's really hard to predict how you're going to value mental anguish damages. What this plaintiff did is that regardless of what they are, I'm not taking more than $75,000 so I can maintain my preferred form. That's her option to do it but I don't see -- it's fundamentally unfair to allow her to pick her form in that manner and then say, but the reason beneath it no longer exist so I'm not going to stand by it anymore.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Clifton Gordon will present argument for the respondent.

ORAL ARGUMENT OF ALAN CLIFTON GORDON ON BEHALF OF THE RESPONDENT

MR. GORDON: May it please the Court. The jury heard evidence in this case that Minnesota Life knowingly delayed payment of the claim, and in doing so knowingly violated two provisions with the Texas Insurance Code. I'll start with the reasonably clear presumption --

JUSTICE WAINWRIGHT: Counsel, let's move forward and talk about the damages on the patient provision in your pleadings. The court of appeals talked about unclear surprise but doesn't give any substantial significant reasoning for not requiring a party that defeats federal jurisdiction based on its representation to a federal court, to not be bound by that same representation on damages. Why should we agree with your position on that? I mean you represented to a federal district court that limitation and that was the basis of the judge's remand, Judge Jack, in his opinion. Why should that not be binding?

MR. GORDON: Well, I would disagree that that was the basis. Whenever a defendant is trying to establish diversity jurisdiction and remove the case, this is diversity removal jurisdiction which is narrower than original jurisdiction. Law is clear that the plaintiff's choice of forum is preferred over the defendant's choice of removal. It's the defendant's burden regardless whether the pleading is silent as to the amount claimed or in state like Texas where federal courts recognize that trial amendments are allowed on damages as in Greenhalgh. That those pleading limitations are not binding and therefore all that a defendant has to do is prove by a preponderance of the evidence that the amount of controversy is met.

JUSTICE WAINWRIGHT: Well, the federal judge's opinion re-permits as plaintiff's state court petition expressly averse that the amount of controversy is less than $75,000. The only evidence Minnesota Life presented was a precept demand for $110,000 when the federal judge cites case law where that's not sufficient to defeat jurisdiction. And the court finds there's a failure to establish subject matter jurisdiction that the federal court demanded. Basis of this opinion was your damages limitation provision in your petition. There were other arguments asserted and perhaps some other evidence but clearly the basis was your damages limitation.

MR. GORDON: Again, I would disagree. It's the same burden of proof for the defendant regardless and that's with both of the Aguilar cases say one and two from the Fifth Circuit cited in our brief. When there is no amount of damages specified, the defendant has to prove by preponderance of the evidence the amount of controversy exceeds $75,000 and the same is true if there's an amount for less.

JUSTICE WAINWRIGHT: Well, let's assume that you're correct. That that was not the basis for the federal judge's opinion. The fact that that representation was made and argued in federal court could be part of the reason for the remand. You don't think you should be bound by that position in that representation?

MR. GORDON: Mrs. Vasquez never appeared in federal court. This was a sua sponte remand which is also unappealable. We had no input

whatsoever. I did remember Judge Jack where the first thing that she asked the plaintiff is, are you gonna forever limit your damages to less than $75,000?

JUSTICE BRISTER: She had incurred all of her mental anguish if -- I've been right.

MR. GORDON: Yes. That's why --

JUSTICE BRISTER: They paid off the mortgage before she filed a suit?

MR. GORDON: I believe --

JUSTICE BRISTER: Or two days within two days?

MR. GORDON: -- I believe that the service of the petition was on its way at the time did they pay.

JUSTICE BRISTER: Her mental anguish was solely caused -- took six or eight months to six or seven months to get the mortgage paid.

MR. GORDON: I don't believe there's -- I don't believe the record showed that she was continuing to suffer much beyond and I don't think --

JUSTICE BRISTER: So -- so --

MR. GORDON: -- it was awarded mental anguish and --

JUSTICE BRISTER: -- so this is not a case where by the time of trial in the state court her damages had continued to accrue from the time when she said her damages were less than $75,000?

MR. GORDON: Actually, she did testify it into eight before she learned that the mortgage had been paid, that she still had concerns and was upset that she still has an [inaudible] encouraged to have this changed --

JUSTICE BRISTER: Well, but it was -- the remand was in May. So at the time when the federal court remanded cost of controversy was less than $75,000, she didn't have any damages accrued thereafter?

MR. GORDON: I don't believe so. Also at the time that we filed the suit surrounded by this mortgage life policy and early on we don't know exactly how the insurance company handled the claim. We hadn't learned yet that we're gonna find out that they don't know about Texas Law. We haven't got their internal notes yet that like Chief Justice Jefferson intimated, it sure seemed like the insurance company was taking the position when they got it that, this is like an accident and --

CHIEF JUSTICE JEFFERSON: In terms of our review of this case, are we to -- do you think the standard of review requires us to ignore the fact that they consulted with a doctor. They got the death certificate and autopsy report, asked Dr. Lee to review them, and ask a third party company PMSI to obtaining the records and ultimately when there's continuing problem giving the records hired a lawyer to facilitate that process. Is all that irrelevant and can we just not consider that in terms of deciding whether their conduct agrees upon the circumstances?

MR. GORDON: I think to standard of review and I don't think there's a disagreement in the briefs over this. It's that the court reviews the evidence, only the evidence supporting the verdict depends --

CHIEF JUSTICE JEFFERSON: All of this is undisputed though. These -- the things that I've just mentioned, you're not disputing that they took this action, you said they should have taken the earlier action or additional action but you're not disputing that they did all of these in trying to obtain the records during this five-month period.

MR. GORDON: Well, there is conflicting evidence on exactly what PMSI was doing --

CHIEF JUSTICE JEFFERSON: But not that -- not that Minnesota Life hired them for the purpose of obtaining the records or am I wrong about

that?

MR. GORDON: No, no. We agree with that.

CHIEF JUSTICE JEFFERSON: So I mean, do -- so are you saying that we -- say we're writing an opinion on this case, we just ignore that all of that happened and look at the delay and understand and that they could have done more than what they did and that would be the basis of the opinion affirmed?

MR. GORDON: I'm not sure you can take the evidence out of context but to the extent that there is some evidence from which the jury could've found knowing violations, that's the end of the review.

CHIEF JUSTICE JEFFERSON: But can we look at that evidence that I've just mentioned and say there is no way a jury with these undisputed facts could determine that and/or as a matter of law, we hold under those circumstances there was -- the plaintiff did not prove the insurance for violations?

MR. GORDON: Well, the way I understand the no-evidence point -- I mean if the contrary proposition was established as a matter of law, obviously there wouldn't be any evidence supporting the verdict -- supporting the judgment. I don't think we're suggesting that -- I don't see how undisputed if there's -- I don't understand how undisputed facts could preclude an insurance company from knowingly violated the insurance code as long as there's some evidence that that's what they did. And in this case, I don't believe that there are undisputed facts even if the court would have take that position. That would defeat on no- evidence grounds or any grounds, the judgment on the unknowing violations. And getting back to the damage, these have [inaudible] --

JUSTICE BRISTER: How come -- how soon did they have to hire an attorney to avoid a bad faith claim? How long can you wait to get him from the hospital before you have to hire an attorney and sue?

MR. GORDON: In the abstract, it's hard to say. In this case, Minnesota Life had the so called ten-day rule, the only rule that they didn't get to having and they didn't even, you know, make a decision to get additional records within ten days. I mean, if you readied any attempt to meet your ten- day rule for paying the claims --

JUSTICE BRISTER: So -- so if any --

MR. GORDON: -- you ought to be able to decide whether you need more information of --

JUSTICE BRISTER: If an insurer has a goal to always do things super fast, faster than any other insurance company does it, if they don't meet their own internal goal then that's bad faith?

MR. GORDON: It's --

JUSTICE BRISTER: -- the effect to that is, it's sure as you're not gonna have any internal goals, right?

MR. GORDON: But this still is possible one. I understand that but when that's the only goal that they have and they also admit that they know the delay is as bad as denial, they admit that they know that it's wrong to delay payment to the claim due to delays in their investigation. They were willing to wait indefinitely on this claim --

JUSTICE BRISTER: But if -- but if you're right, I mean there are plenty of hospitals that you're not gonna get to the records within ten days after -- they're gonna have -- we're gonna have a lot more lawsuits by Minnesota Life 'cause they're gonna have to sue 'em all.

MR. GORDON: But I think if we were using the ten-day guideline as a strict liability statute -- strict liability standard, we might have that concern. But it is just -- it's one of the factors in this -- specific to this case that provides the evidence that they knew what they were doing was unfair.

CHIEF JUSTICE JEFFERSON: On what date did liability become reasonably clear?

MR. GORDON: It was on the date that they've received the death certificate and autopsy report and certainly no later than their doctor initially said that he believed that the autopsy report and death certificate were consistent.

CHIEF JUSTICE JEFFERSON: Did -- I mean, but -- did -- the death certificate and autopsy report provide -- demonstrate a linkage or non-linkage between his medical condition and the fall?

MR. GORDON: It reasonably clearly showed that there was an accidental death.

CHIEF JUSTICE JEFFERSON: And it was -- it says accidental death but the next question is did he fall accidentally or not because of seizure related to, you know, his -- the readings in the hospital or some other medical condition?

JUSTICE BRISTER: I mean both of them say seizure disorder with encephalopathy followed by blunt force trauma to the head. That sounds like A caused B.

MR. GORDON: Well, in the Sekel case, the autopsy report or death certificate actually said that the heart attack was the probable cause, and in here you just have a notation he has seizure disorder, later on he has this accidental fall, he slips and hits his head. The medical examiner had the option to choose natural cause as a manner of death and she is anxious. And of course --

JUSTICE O'NEILL: That's not what governs the policy. The policy says if the accident is caused by some other disease which is not inconsistent with what the autopsy is having.

MR. GORDON: But Minnesota Life certainly didn't view it that way. I mean in this case, talking to their claim -- group claims examiner, Jeff Halbur, the supervisor on this claim, he said he recognized that at least parts of the death certificate indicated coverage. He had the authority to pay the fine at that time upon receiving the proof of loss, the death certificate, and the autopsy report, and that had he paid it then and he was supposedly looking for reason to pay it. Had he paid it then he wouldn't have been subjected to any criticism from within the company.

You know, ultimately, I think Mr. Howen was trying to say that maybe this was a business decision but now they determined that this was -- I think there is four different ways: it was payable, it was covered, it was due, and it was owed. And the only thing that supposed to have changed was the existence or non- existence of eyewitnesses. And that's not the investigation that they did. And this Court in Simmons faulted the insurance company.

JUSTICE BRISTER: Well, on a $43,000 claim, you don't have to take many depositions for that's doubled, right?

MR. GORDON: True.

JUSTICE BRISTER: So we don't want a rule that says no matter what size the claim, you gotta start taking depositions. And the cheapest -- the cheapest way to investigate a claim like this is to get the hospital records.

MR. GORDON: Well, they could've gotten the medical examiner's records and when asked, would you want the medical or the records that the medical examiner had in her possession a letter to conclude that this was an accidental death, don't you think you're far less important? Halbur said one would think so.

MR. GORDON: But in this case, what we have is a delayed oriented investigation. I mean, when I was -- if the --

CHIEF JUSTICE JEFFERSON: What's the motive for that? I mean, it's delayed but [inaudible] the question, it's not exactly delayed. I mean from an early point after the claim arrived, Minnesota Life is taking action. You don't think it's fast enough, the jury obviously didn't think it's fast enough? But it was being done so -- I mean was there any evidence that explain from your point of view why they were so slow? Was it intentional? Was it just see if she go away?

MR. GORDON: Well, the evidence was they need to use this records company because they had -- their people would be overwhelmed. The company just didn't have enough staff to handle all these claims themselves. I think Mr. Howen started his opening with that. And I'm not sure what motivation you need for employees of a large company to keep money in the company's pocket. I mean these people were just hoping that these would -- I mean the jury can't believe that they were just hoping that they would give this lady the runaround but then the insurer -- then the attorney shows up and Mr. Howen says it's in the record. Can you, you know, can you say that -- can you tell us, Mr. Howen, that this claim would've been -- might not have been paid? And Mrs. Vasquez has not retained a lawyer? Her lie might have been enough was his answer.

JUSTICE: Well, you know [inaudible] trying to turn around this as I think I don't quite understand why they would select this case, this slow pay. That doesn't seem to me an explanation that the use of PMSI, I mean [inaudible] the company exists for the purpose of obtaining records. Just simply using them rather than their own staff would seem to have any effect --

MR. GORDON: Well, you know, motive isn't an element here knowing the statute --

JUSTICE: Well, no issue --

MR. GORDON: -- but I think it were for the evidence of why, why they don't really pay these claims that --

JUSTICE: But everything's to be settled. If they're knowingly doing this, there must be a reason for it.

MR. GORDON: I mean, they just don't care about a lady like Mrs. Vasquez. You know, this is a large company. They get these claims in, process thousands others, they treat them how they want to. That was ten-day rule out the window.

JUSTICE: And what's your evidence to that?

MR. GORDON: What --

JUSTICE BRISTER: What is the evidence that they didn't care about Mrs. Vasquez?

MR. GORDON: Well, as I started talking, I mentioned it just a little bit earlier. I just, however, said he supposedly was looking for a way to pay this client and he wouldn't be criticized if he paid this client. He recognizes the proof of loss indicated the coverage, yet he decided to delay the claim.

JUSTICE: What was the delay of communication with Ms. Vasquez and what was that about? There was a correspondence sent to her and perhaps she didn't understand English and wasn't happy to respond to the communication?

MR. GORDON: Well, it was my understanding that the problem was as the result of the letters going to the wrong address. I mean she didn't -- she testified that she didn't speak on the phone to Minnesota Life 'cause she was getting at a loose end and obviously wasn't comfortable with her English, with her English.

JUSTICE: Did Minnesota Life have any problem communicating to her that her premiums were due?

MR. GORDON: I believe on this type of policy, the premiums are automatically deducted as a part of the mortgage payment. So, Minnesota Life testified they knew that, you know, each month that they took to investigate this claim and view whatever records they were deciding to fish for because it certainly looked like their doctor felt pretty confident that this -- that accidental means of death was consistent with the autopsy report and death certificate and that further investigation would just be needed to further confirm. And then the subsequent note at that time back in October of 2000, they're talking about, well, we might want to look at the circumstances of the hospitalization for and this is kinda fishing for information. I mean they never specified that there's a particular issue that they're looking at.

JUSTICE: Did you do any discovery to find out there's a pattern of this company doing that?

MR. GORDON: We didn't. I don't believe that we did.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF STEPHEN D. HOWEN ON BEHALF OF THE PETITIONER

MR. HOWEN: A couple of brief points. First of all, with respect to our earlier discussion, the references to the communications with PMCS can be found in the record at volume 6, defendant's exhibit 1 and 31 through 33 on the page numbers. They clearly show an entry for November 15, 2000, PMCS telling Minnesota Life that no authorization would be needed to be taken or gotten from the insurer; and therefore if there is a violation it couldn't have been a knowing violation based on that. I want to go back to Dr. Lee's supposed agreement that this was gonna be a covered claim. First of all, he doesn't decide whether it's a covered claim but in the appendage to our brief, it's Appendix Tab E and I took the trouble to have it transcribed because he's a doctor and he writes like a doctor. But it is the farthest from it. What he said is the fact of level of famotidine, which is a drug used for the renal treatment, was low therapeutic would also be consistent with the seizure occurring with subsequent head trauma and encephalopathy. It's exactly what Justice Brister was referring to. It's exactly what is on the death certificate. There are potentially two scenarios here and this is consistent with the scenario that would have been in Sekel, which is the disease caused the fall.

Now, what Mr. Halbur testified to at various times is that this also raises the possibility that the other scenario was there and we don't deny that. All of this goes back to the Giles problem that Justice Hecht announced in his concurrence and to what they argued today, which is you have to ignore this scenario where leads to a reasonable basis for denial as well as payment. We admit there was a potential basis for payment just as well as for potential basis for denial. But if the court is going to do the application of the no evidence rule ignore the possibility, the very real possibility that this should have been a denied payment at the time we were looking for the medical records then there is just no way that we can get an appellate review of these type situations from a denied or a delayed claim.

JUSTICE: What about the suggestion that you could have or should

have gotten medical examiner's records and you should have contacted eyewitness or attempted to?

MR. HOWEN: First of all, the eyewitnesses there could -- there weren't any eyewitnesses.

JUSTICE: But you didn't know that, I mean, unless you tried to find out --

MR. HOWEN: Well, if the --

JUSTICE: -- at what point did you try to find out whether there were eyewitnesses?

MR. HOWEN: Well, there -- there could be no causation was gonna be my point with respect to eyewitnesses because it was agreed at the trial that just was added. So that wouldn't have led anywhere and I don't think you could get a causation analysis there. With respect to the medical records from the medical examiner, they were the same medical records. What they are suggesting is a different task to get the same medical records. Well, Minnesota Life tried several tasks. They've hired a commercially reasonable firm, and again this goes back to the evidence that is undisputed, but supporting us has to be considered because I'll again refer to what I referred to in the brief. Their own expert said, I wouldn't pay this claim in October. Their own expert said that at the trial, he said I don't get the medical records.

JUSTICE: But doctors obviously don't determine; the claims manager makes the decision on whether to pay or not. But Mr. Halbur, when he was a claims manager, he made a determination the claim should be paid. From that date, how long would it take for the claim to have actually been paid?

MR. HOWEN: Actually, Mr. Halbur didn't make the decision to make the claims payment. Ms. Brinkman did. Mr. Halbur did in turn -- I'll finish my response. Mr. Halbur left the company before the medical records came in. Ms. Brinkman was the person we wanted to bring to trial but couldn't because of the illness and so he didn't eventually make the claims payment. The point I was referring to, however, was not the doctor or a doctor expert on their side, they hired an insurance claims expert or somebody with experience in the field, and he basically agreed exactly with what Mr. Halbur's decisions were in October of 2004 -- excuse me October of 2000. And then when the medical records came in, the payment was made within days. I believe within 48 hours because it was obviously on an expedited basis at that point. So the point is, this isn't a case about the decision that was made by Mr. Halbur. Their own expert agreed with what he did. The dispute is over the method through which we attempted to get the medical records. That's really the only real dispute here and I suggest that given the commercially reasonable methods we've attempted to get it through, the service and hiring attorneys and paying those people to do that, it cannot be unreasonable as a matter of law.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. That concludes the argument and all arguments for this morning and the marshall now will adjourn the Court.

SPEAKER: All rise. Oyez, oyez, oyez. The Honorable, the Supreme Court of Texas is now being adjourned.

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