
IN THE
**United States Court of Appeals
for the Third Circuit**

No. 05-3433

KAKKADASAN SAMPATHACHAR, M.D.,

Appellee,

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(Honorable Juan R. Sanchez, District Judge)

REPLY BRIEF OF FEDERAL KEMPER LIFE ASSURANCE COMPANY

Bryan D. Bolton
Michael P. Cunningham
M. David Maloney
Funk & Bolton, P.A.
36 South Charles Street, 12th Floor
Baltimore, Maryland 21201-3111
410.659.7700 (telephone)
410.659.7773 (facsimile)

Attorneys for Appellant,
Federal Kemper Life Assurance
Company

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INTRODUCTION

In an attempt to plunge this Court into a Serbonian bog,¹ Plaintiff misstates the issues on appeal, mischaracterizes the arguments advanced by Federal Kemper, and asserts unfounded factual and legal positions. Notwithstanding Plaintiff's efforts, what remains clear is that the District Court erred in four significant respects.

First, the District Court erred by not submitting the dispute concerning the identity of the body pulled from the Ganges River on November 6, 2001, to the jury. Second, the District Court erred by precluding cross-examination for impeachment purposes into areas opened on direct examination by Plaintiff. Third, the District Court failed to fulfill its duty to determine and apply Indian law and failed to exclude the "death certificate," which was not recorded, issued, or certified in accordance with Indian law. Fourth, and finally, the District Court erred by not fulfilling its gate-keeper function, and by permitting Plaintiff's forensic dentist to testify on matters outside her area of expertise and express opinions without a reasonable degree of scientific certainty.

For the reasons stated above and more fully expressed below, as well as the reasons previously stated in Federal Kemper's Opening Brief, the judgment against

¹ *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 499 (1934) (Cardozo, J.) (dissenting).

Federal Kemper should be vacated and the matter remanded for a new trial on Plaintiff's breach of contract claim.

ARGUMENT

I. The District Court Erred By Not Requiring The Jury To Resolve The Factual Dispute As To Whether The Body Found In The Ganges River On November 6, 2001, Was Mrs. Sampathachar's

Plaintiff does not dispute that the jury did **not** determine that the body pulled from the Ganges River on November 6, 2001, was Mrs. Sampathachar's. Plaintiff also does not dispute that Federal Kemper contested the identity of the body pulled from the Ganges River on November 6, 2001. Instead, Plaintiff argues the "only material fact" the jury had to determine was whether Mrs. Sampathachar was "probably dead." (Appellee's Br. at 18.) This is legally incorrect; a special verdict sheet must resolve all material issues of fact. *See* Fed. R. Civ. P. 49(a); *Martinez v. Union Pac. R.R.*, 714 F.2d 1028, 1032 (10th Cir. 1983) (interrogatories must cover all material factual issues); *Simien v. S.S. Kresge Co.*, 566 F.2d 551, 555 (5th Cir. 1978) (judge must submit all material issues raised by the pleadings and the evidence); *Kornicki v. Calmar S.S. Corp.*, 460 F.2d 1134, 1139 (3d Cir. 1972) (questions asked in special verdict must be adequate to determine factual issues essential to judgment). Since Federal Kemper disputed the identification of the body at trial, the factual dispute of whether the body was Mrs. Sampathachar's had to be submitted to the jury. *See Mut. Life Ins. Co. v. Sayre*, 79 F.2d 937, 938 (3d

Cir. 1935) (holding jury verdict against life insurance company could be sustained only if there was sufficient evidence that torso pulled from river was the body of the insured).

Plaintiff cannot sustain the District Court's jury submission based on a generalized finding that Mrs. Sampathachar died. Indeed, no Pennsylvania authority supports the proposition that recovery is permitted on a life insurance policy based on a general finding of "probable death" unless one of the two following circumstances are proven and found by the jury: (i) more than seven years have elapsed since an unexplained disappearance of the insured; or (ii) the claimant proves a specific peril of death. *See* 20 Pa. Cons. Stat. § 5701(b), (c) (2005); *In re Kerstetter*, 582 A.2d 1122, 1123-24 (Pa. Super. Ct. 1990).² Plaintiff, however, could not wait seven years for a finding of probable death, as permitted by Pennsylvania law, because he could not afford to pay the premiums on the \$10.5 million in life insurance.

² The presumption of life applies in life insurance contract actions. Indeed, in every case where the body of an alleged decedent is not recovered, there is a presumption of continued life for seven years that is only overcome by proving a "specific peril" of death. *See, e.g., Continental Life Ins. Co. v. Searing*, 240 F. 653, 657 (3d Cir. 1917); *Herold v. Washington Nat'l Ins. Co.*, 194 A. 687, 689 (Pa. Super. 1937); *Silverstein Estate*, 64 Pa. D. & C. 174, 175-76 (1948).

Moreover, the issue of “specific peril of death” was not pled in the complaint or submitted to the jury for consideration.³ Indeed, the District Court failed to instruct the jury on specific peril of death and failed to submit a special verdict slip requiring the jury to consider the issue of specific peril of death. The judgment cannot be sustained based on a legal theory (i) not pled in the complaint; (ii) not provided to the jury in the court’s instructions as a basis for finding for the Plaintiff; and (iii) not included on the special verdict slip for the jury’s consideration. *See McCormick v. United States*, 500 U.S. 257, 269-71 (1991) (reversing Court of Appeals decision affirming conviction based on theory not presented to jury even though facts in record may have supported alternate theory); *Chiarella v. United States*, 445 U.S. 222, 236-37 (1980) (refusing to affirm conviction on basis of theory on which jury was not instructed); *Putnam Res. v. Pateman*, 958 F.2d 448, 469 (1st Cir. 1992) (“We do not think that a verdict returned under an erroneous theory of liability can be left intact on a different, uncharged theory unless the jury’s fact finding necessarily embodied each of the elements required to support a verdict under the uncharged theory.”). As the Court is well aware, on appeal, this Court cannot usurp the jury’s fact-finding function by deciding whether the evidence was sufficient to prove a specific peril of death. *See*

³ Specific peril of death means evidence that brings “the person within the range of a particular and an immediate danger.” *Burr v. Sim*, 4 Whart. 150, 171 (Pa. 1839); *see also In re Holst*, 17 Pa. D. & C. 4th 645, 651-53 (1992); *Meadville Prod. Credit Ass’n v. Haskell*, 40 Pa. D. & C. 145, 151 (1939).

McCormick, 500 U.S. at 270 n.8 (“This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury.”).

Since the burden of proof on peril of death would have rested with Plaintiff, he would have had the burden of requesting a jury instruction concerning peril of death. *See Kerstetter*, 582 A.2d at 1124 (observing petitioner had burden of proving specific peril of death). If Plaintiff had, in fact, been the proponent of the peril of death issue, then it would have been incumbent upon him to ask the court to submit that issue to the jury through the special verdict form or otherwise. *See McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 306 (5th Cir. 1993) (“A party has the burden to request the submission of its issues to the jury and to request instruction on each such issue.”). Since Plaintiff failed to request any of the foregoing from the District Court, Plaintiff cannot now argue that the judgment may be sustained based on an issue never submitted to the jury.

Although Plaintiff purports to cite authority in support of his position, careful inspection reveals they are not authorities at all. Plaintiff’s reliance on *Ondo v. Greek Catholic Union of Russian Brotherhoods*, 38 A.2d 370 (Pa. Super. Ct. 1944), is misplaced because the only issue in that case was whether a member of a fraternal society was “in good standing” at the time of his death. *See id.* at 371. The language in *Ondo* quoted by Plaintiff was the appellate court’s

observation of the proceedings below, not a statement on the elements of a breach of contract claim. *See id.* (“At the trial, plaintiff established a *prima facie* case by proving that a certificate of insurance had been issued to her decedent, the by-laws, the death, and that proofs of death had been furnished the Union.”).⁴ Notably, in *Ondo*, there was no question about identification of the body.

Plaintiff’s reliance on *Fidelity Mutual Life Association v. Mettler*, 185 U.S. 308 (1902), and *Occidental Life Insurance Company v. Thomas*, 107 F.2d 876 (9th Cir. 1939), is equally misplaced because the issue in those cases was whether there was sufficient evidence to overcome the presumption of life in the case of a missing person. *Mettler* and *Occidental Life* are inapplicable because the Court cannot sustain the verdict based on a legal and factual theory never submitted to the jury.

Moreover, neither *Mettler* nor *Occidental Life* applied Pennsylvania law. In fact, *Occidental Life* affirmed a judgment without deciding whether the presumption of life was overcome by a “specific peril.” *See Occidental Life*, 107 F.2d at 878 (“[T]he fact of death within the [seven-year] period has been thought to be sufficiently established without a showing that the absentee encountered a specific peril.”).

⁴ Federal Kemper objected to the jury instructions and verdict slip proposed by Plaintiff and based on the *dicta* in *Ondo*. (JA 1935-36.)

Similarly, Plaintiff's citation to *Couch on Insurance* (Appellee's Br. at 23) is misleading because it omits, without indication, the following sentence: "An inference that a missing person died short of seven years' unexplained absence may be justified where it appears that the missing person was *exposed to some general peril* that might reasonably be expected to destroy life." 9A Lee R. Russ, *Couch on Ins.* § 138:10 (3d ed. 1995) (emphasis added). This sentence appeared between the two sentences quoted by Plaintiff and indicates that the complete passage contradicts Pennsylvania law. *See Burr*, 4 Whart. at 171 (holding general peril will not overcome presumption of life).

Plaintiff further confuses matters by claiming Federal Kemper argued that the presumption of life "can only be overcome by a specific finding of the timing and manner of death, for which circumstantial evidence may not be admitted." (Appellee's Br. at 19-20.) Notably, this argument does not appear anywhere in Federal Kemper's brief, and Plaintiff provides no citation for the Court.

At trial, Plaintiff offered proof, both circumstantially and directly, to support his contention that Mrs. Sampathachar's body was pulled from the Ganges River on November 6, 2001. (*See, e.g.*, JA 2136-39, 2140-41.) Federal Kemper's appeal is not premised on any distinction between "circumstantial" and "direct" evidence; rather, Federal Kemper appealed the District Court's failure to instruct the jury to resolve the dispute about whether the body was Mrs. Sampathachar's.

Plaintiff further attempts to confuse matters by claiming the jury should not have been instructed to determine whether the body pulled from the river was Mrs. Sampathachar's because that would impose an additional burden of proving the "cause and manner" of death. (Appellee's Br. at 16.) This argument is disingenuous, at best, because finding that the body was Mrs. Sampathachar's imposes no requirement upon the jury to determine either the cause or manner of death. Indeed, the jury instruction and verdict slip requested by Federal Kemper did not inquire about the cause or manner of death. (JA 1578, 1556-57.)

Similarly, Plaintiff seeks to mislead the Court by claiming the District Court would have erred by giving Federal Kemper's proposed jury instructions and verdict slip because the "time and manner of death" is immaterial to his contract claim. (Appellee's Br. at 19.) Again, Federal Kemper did not propose instructions or a verdict slip concerning the "manner" of death. The time of death, on the other hand, was material to Plaintiff's contract claim. In every life insurance claim, the beneficiary must prove the death of a specific person at a specific time. *See Sayre*, 79 F.2d at 938-39 (requiring proof that insured died while policy was in effect in order to sustain verdict). Although it was undisputed that Mrs. Sampathachar's policy was in force in November 2001, the Policy lapsed shortly thereafter.

Plaintiff attempts to mislead the Court by claiming Federal Kemper "insinuates that the jury could only have found that Jaya was dead by disregarding

all the evidence it introduced at the trial indicating (in its view) that the body was not Jaya's." (Appellee's Br. at 23 (emphasis in original).) Notably, Plaintiff provides no citation for this alleged "insinuation." Although the jury could, of course, have found that Mrs. Sampathachar died while her policy was in force, based on either circumstantial or direct evidence, this would be true only if the jury actually found that the body pulled from the river on November 6, 2001, was her body, which the jury was not called upon to decide. The crux of the legal deficiency, therefore, is the jury's failure to resolve the dispute over the identity of the body, not the type of evidence relied upon if the jury had made such a finding.

Plaintiff asserts that Federal Kemper "assumes that the evidence of the teeth count on the post-mortem report was so compelling as to eliminate any other reasonable conclusion by the jury." (Appellee's Br. at 26.) Once again, Plaintiff provides no citation for this proposition. The problem is not the tooth count, but that the jury made no finding concerning whether the body was Mrs. Sampathachar's. Thus, Plaintiff's hypothetical "reasonable jury" is irrelevant because the real jury never made any finding about the identity of the body. The judgment cannot stand on such a verdict.

II. The District Court Erred By Precluding Cross-Examination Of Plaintiff Concerning Financial Condition, Prior False Statements Under Oath, And Prior Misrepresentations

A. Plaintiff Opened The Door To Cross-Examination Into The Prior Bankruptcy, Outstanding Tax Liabilities, And Other Life Insurance Policies

Plaintiff essentially concedes Federal Kemper's primary argument that the District Court's decision to prohibit cross-examination on matters that the Plaintiff affirmatively placed at issue "conferred on [P]laintiff the unparalleled right to give testimony on direct examination with immunity from inquiry on cross-examination." *See Gladden v. P. Henderson & Co.*, 385 F.2d 480, 483-84 (3d Cir. 1967). The District Court, therefore, committed reversible error by precluding cross-examination on matters raised by Plaintiff on direct examination that would have impeached his credibility before the jury. *See Fed. R. Evid. 611(b); Glass v. Phila. Elec. Co.*, 34 F.3d 188, 194-95 (3d Cir. 1994) (finding preclusion of cross-examination concerning matters raised on direct deprived parties of full hearing); *United States v. Segal*, 534 F.2d 578, 582 (3d Cir. 1976) ("[I]f a matter has been raised on direct examination, generally cross-examination must be permitted."); *Gladden*, 385 F.2d at 483-84 (allowing cross-examination on otherwise impermissible topics because plaintiff opened door by raising them on direct examination).

Plaintiff, for example, does not dispute that his testimony about a letter he sent to one insurance company was intended to bolster his credibility and show his candor during the insurance investigation. (Appellee's Br. at 35-36.) By testifying about his alleged truthful statements in the letter, Plaintiff opened the door for Federal Kemper to show that other statements in that letter were false and misleading. In this regard, the letter states Plaintiff filed for bankruptcy individually in 1996; in fact, the bankruptcy petition reveals that Plaintiff and Mrs. Sampathachar jointly filed for bankruptcy, and it was a year later, 1997, when they filed. (*Compare* JA 4506 *with* JA 1833-34.) Moreover, Plaintiff's letter falsely claims that the "bank authority appropriated the entire properties we purchased." (JA 4506.) In fact, Plaintiff and his wife owned far more properties at the time of the bankruptcy than were listed on their sworn bankruptcy schedules. (*Compare* JA 2437-38 (Trial Tr.) *with* JA 1841-43 (bankruptcy schedule).) Plaintiff, of course, would not have wanted to reveal to the insurance companies during their claims investigation that he and his wife (the alleged deceased) had lied on their bankruptcy schedules and as a result of those lies had retained properties that they should have lost in the bankruptcy. Moreover, the lies by Plaintiff and his wife in the bankruptcy schedules were inconsistent with Plaintiff's attempt to portray his wife as a holy person.

To further enhance his credibility, Plaintiff repeatedly sought to show he had no financial motive for making a false insurance claim. (JA 2015, 2057, 2064, 2083.) Plaintiff testified he did not need money and could have paid his outstanding tax liabilities at any time, which opened the door for evidence regarding (1) the extent of Plaintiff's substantial, unpaid tax liabilities (JA 2078-79); (2) Plaintiff's letters to the IRS in 2000 claiming he could not pay his 1997 and 1998 taxes (JA 1792, 1812);⁵ and (3) the bankruptcy filing shortly before his wife tripled the amount of her life insurance (JA 1832-1925 (bankruptcy papers)).

Similarly, Plaintiff's mantra concerning the charitable, pious character of Mrs. Sampathachar and her desire to fund charitable trusts with the life insurance proceeds was intended to show her good character. (JA 2052-53, 2056-57, 2063, 2072, 2074-75, 2083.) This direct testimony opened the door to evidence tending to impeach his claim about his wife's alleged pious character. *See* Fed. R. Evid. 608(b), 806. This impeachment evidence included Mrs. Sampathachar's misrepresentations on her life insurance applications, her joint misrepresentations in the sworn bankruptcy papers, and the life insurance policies designating

⁵ Plaintiff's claim that "Dr. Sampathachar did not make any false statements in any tax returns" misses the point. (Appellee's Br. at 36 n.14.) Plaintiff testified that he could have paid a \$400,000 tax liability at the time it was incurred during 2000 and 2001. (JA 2078-79.) In 2000, however, he twice wrote to the IRS claiming that he could not afford to pay his taxes. (JA 1792, 1812 (letters written in 2000).) That contradiction undermines his credibility regardless of which statement was false.

Plaintiff, not any charitable trust, as the beneficiary of every single policy. (JA 1614, 1668, 1687, 1711, 1715, 5737, 5748 (policy applications).)

Plaintiff misrepresents that Federal Kemper was permitted to introduce “any evidence” of the Sampathachars’ financial condition for “the two-year period prior to Jaya’s [alleged] death.” (Appellee’s Br. at 27, 41.) In fact, Federal Kemper was denied the opportunity to cross-examine Plaintiff about the two letters he sent to the IRS in 2000 claiming he could not afford to pay his taxes. (JA 1792, 1812.) Furthermore, Federal Kemper was not permitted to follow up or make any inquiry with respect to Plaintiff’s failure to pay his \$400,000 tax liability for the years 2000 and 2001. (JA 2525-28.)

Plaintiff further suggests that Federal Kemper was properly prevented from cross-examining him on issues raised during direct examination because it had the opportunity to impeach him on other matters. (Appellee’s Br. at 27-29.) This is legally incorrect. Impeachment on different points cannot cure the District Court’s failure to permit impeachment on the central tenets of Plaintiff’s case. Moreover, the suggestion that Plaintiff can introduce evidence with immunity from cross-examination violates both the Federal Rules of Evidence and fundamental principles of due process. *See Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse

witnesses.”); *Morgan v. United States*, 304 U.S. 1, 18 (1938); *N. Am. Coal Co. v. Miller*, 870 F.2d 948, 951 (3d Cir. 1989).

B. The Prior Bankruptcy Proceedings, Misstatements In The Life Insurance Applications, And The Significant Tax Liabilities Were Probative Evidence Of A Motive And Plan To Defraud

Through cross-examination of Plaintiff, Federal Kemper sought to show that

- (1) Plaintiff and his wife lost significant assets due to their 1997 bankruptcy;
- (2) they continued to claim financial difficulties after their bankruptcy; and
- (3) following the bankruptcy, the Insured became grossly over-insured by lying about her financial condition on multiple applications for life insurance. (JA 1597-1927 (Documents Proffered in Support of Defendant’s Offer of Proof).) This evidence was proffered to show a motive and plan to feign the death of the Insured shortly after the policies became incontestable.⁶ This evidence was admissible for the proper purpose of “show[ing] this larger goal rather than to show defendant’s propensity to commit crimes.” 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure* § 5244, 500 (1978); *see also Becker v. ARCO Chem. Co.*, 207 F.3d 176, 195-97 (3d Cir. 2000).

⁶ Contrary to Plaintiff’s assertion that the record contains no evidence of a scheme to feign the death of the Insured (Appellee’s Br. at 28), Federal Kemper offered objective medical evidence tending to show that Plaintiff and his family misidentified the body retrieved from the Ganges River. (JA 3140-64 (Sekula-Perlman); 3208-18, 3226-27 (Askin); 3949-51, 3953 (Saklani); 5506-08 (Postmortem Report).)

Plaintiff further suggests that misrepresentations on insurance applications would only show a propensity for the Insured to feign her death, and that the failure to disclose assets on a sworn bankruptcy petition would only show a propensity to commit claim fraud. (Appellee's Br. at 32.) The illogic of Plaintiff's chains of inference undercuts his argument. Moreover, Plaintiff seems not to understand that evidence may be admissible for one purpose, but not another. *See* Fed. R. Evid. 404(b); *United States v. Abel*, 469 U.S. 45, 56 (1984) (“[T]here is no rule of evidence that provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case.”).

Plaintiff's argument that the incontestability clause in an insurance policy renders the misrepresentations in the applications inadmissible for all purposes reveals a fundamental misunderstanding of the purpose of an incontestability clause. (Appellee's Br. at 30-32.) An incontestability clause precludes the insurer from disputing the validity of the insurance contract. *See Perilstein v. Prudential Ins. Co.*, 29 A.2d 487, 488-89 (Pa. 1943). Federal Kemper did not dispute the validity of the Policy. The evidence of misrepresentations in the insurance applications was offered to demonstrate the genesis of a well-planned fraudulent scheme to fake Mrs. Sampathachar's death. Moreover, the most recent policies issued to Mrs. Sampathachar, including the most valuable ones, became

incontestable only months before Mrs. Sampathachar allegedly disappeared. (JA 1674, 1700, 1714-17 (Policy Issue Dates).)⁷

Plaintiff cites no authority to support his argument that evidence of misrepresentations should have been excluded because the insurance policy was incontestable. To the contrary, the Tenth Circuit affirmed admission of false statements by an insured in an application, even though the policy was incontestable, because they were relevant to show a plan by the insured to defraud the insurance company. *See Zwerin v. Maccabees Mut. Life Ins. Co.*, No. 96-8002, 1997 U.S. App. LEXIS 7916, at *19-21 (10th Cir. Apr. 21, 1997) (“[A]dmission of Zwerin’s representations in his applications is governed by the rules of evidence rather than the principles of contract.”). The mere fact that a policy is “incontestable” has no bearing on whether misrepresentations in the policy application are admissible to prove a motive or plan under Rule 404(b).

C. Plaintiff’s Rule 403 Analysis Is Flawed

Plaintiff’s argument that evidence of the bankruptcy should have been excluded under Rule 403 is based on a false premise. Plaintiff relies on decisions of the Ninth and Eleventh Circuits to show that the fact of a bankruptcy, without more, is inadmissible to show a financial motive for wrongdoing because it would

⁷ The jury, of course, was unaware of this apparently amazing coincidence of timing because the other insurance policies were excluded from evidence. (JA 27, 3395-3400.)

be unfairly prejudicial. See *United States v. Bensimon*, 172 F.3d 1121, 1129-30 (9th Cir. 1999); *United States v. Reed*, 700 F.2d 638, 642-43 (11th Cir. 1983).

Plaintiff's argument fails because Federal Kemper sought to introduce evidence of the bankruptcy proceedings for purposes of cross-examination and impeachment. If the claim of inability to pay taxes in the letters sent to the IRS in the year 2000 is true (JA 1792, 1812), then those letters show that Plaintiff was suffering financial stress after his bankruptcy, despite his testimony about his good financial health. (JA 2057, 2064, 2078-79, 2083.) Thus, the observation in *Bensimon* and *Reed* that bankruptcy would relieve stress that might otherwise compel a bad act would not apply here. See *Bensimon*, 172 F.3d at 1129; *Reed*, 700 F.2d at 642-43. Moreover, Federal Kemper sought to show the untruthfulness of sworn statements contained in Plaintiff's bankruptcy papers for the purpose of impeachment. "Nothing could be more probative of a witness's character for truthfulness than evidence that the witness has previously lied under oath." *United States v. Whitmore*, 359 F.3d 609, 619 (D.C. Cir. 2004). It is difficult to imagine what unfair prejudice might outweigh this most important evidence of untruthfulness.

III. The District Court Erred By Admitting A Death Certificate That Failed To Comport With Indian Law

A. Mr. Guru's Testimony Proves The Death Certificate Was Not Properly Issued Or Certified In Accordance With Indian Law

The death certificate admitted at trial is not what it purports to be, namely, a genuine Indian death certificate certified by the “Executive Officer, Panchayat Dev Prayag (Tihri Gradhwal).” (JA 5629-30.)⁸ The death certificate in this case was stamped and issued by Madhav Mewar Guru (“Mr. Guru”). (JA 3789, 3794.) Mr. Guru was not the Registrar or executive officer and was not authorized to execute the death certificate. (JA 1479 (§ 17(2), Indian Reg. Births & Deaths Act); JA 3788-89 (Guru).) Thus, Mr. Guru’s own testimony proves the death certificate was not executed by the executive officer and, therefore, not issued in accordance with Indian law.⁹

Plaintiff does not dispute the requirements of Indian law, but claims that Mr. Guru was “authorized to issue death certificates.” (Appellee’s Br. at 44.) This

⁸ Plaintiff asserts that Federal Kemper’s investigation “confirmed” the Insured’s death was “duly recorded” in the Executive Offices at Devaprayag. (Appellee’s Br. at 42.) Plaintiff fails to provide a citation for this assertion because it is not true. Although the investigator acknowledged that the name “P. Jayalakshmi Sampathachar” appeared in what he was told was the death register, the investigator expressed no opinion and was not qualified to form an opinion about whether the alleged death was “duly recorded.” (JA 4992 (Investigator’s Report).)

⁹ As the proponent of the evidence, Plaintiff bears the burden of proving its admissibility. See *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987); *United States v. Caldwell*, 776 F.2d 989, 1002 n.16 (11th Cir. 1985) (noting impropriety of shifting burden of proving authenticity to opponent of evidence).

assertion is unsupported by the record. Mr. Guru's testimony that he was "officiating" when the executive officer "was not there" says nothing of his authority under the law to execute death certificates and sign the executive officer's name to the certificate. (JA 3789.) Indeed, Mr. Guru testified that only the executive officer was authorized to issue death certificates. (JA 3788-89.)

This might be an entirely different matter, of course, if the executive officer had been deposed and testified that he had authorized Mr. Guru to act in his absence. Mr. Guru, however, cannot empower himself based upon his own testimony that he was "officiating." (JA 3789.) Indeed, permitting such self-authorizing testimony might permit mischievous and potentially fraudulent overseas death claims on a very large scale.

Plaintiff's further contention that Federal Kemper confuses "the difference between admissibility of evidence and its weight" is unfounded. (Appellee's Br. at 52.)¹⁰ Federal Kemper objected to the death certificate because it was not recorded, issued, or certified in accordance with Indian law. These objections went to the competence of the evidence; not its weight. Plaintiff's argument that the

¹⁰ Similarly, Plaintiff's reliance on *Allahabi v. N.Y. Life Ins. Co.*, No. 98 Civ. 4334, 2000 U.S. Dist. LEXIS 3928 (S.D.N.Y. Mar. 30, 2000), in support of this argument is misplaced. First, the defendant in *Allahabi* did not raise the hearsay objections that Federal Kemper has raised. Second, the defendant challenged only the accuracy and credibility of the suspect death certificates. The thrust of Federal Kemper's objection is that the death certificate was not recorded, issued, or certified in accordance with Indian law. No such challenge was made to the competence of the evidence in *Allahabi*.

jury was properly permitted to consider the weight of the evidence is based on a false premise. The jury was not instructed on the requirements of Indian law and, therefore, could not have fully considered the evidence. In fact, the District Court refused to give Federal Kemper's proposed instruction concerning Indian law as it pertains to the issuance and certification of death certificates. (JA 1559 (proposed instruction); JA 28 (order denying instruction).)

Even if the jury was instructed on Indian law, "the jury is not the appropriate body to determine issues of foreign law." Fed. R. Civ. P. 44.1 advisory committee's note. *See also Pittway Corp. v. United States*, 88 F.3d 501, 504 (7th Cir. 1996); *United States v. McClain*, 593 F.2d 658, 669-70 (5th Cir. 1979) ("[T]he proper procedure is for the judge rather than the jury to determine questions of foreign law."). The District Court erred by submitting the death certificate to the jury without first resolving the issue of foreign law. *See* Fed. R. Evid. 104(a).

B. Plaintiff Misrepresents The Rule Regarding Self-Authenticating Documents

Plaintiff further asserts that, even without extrinsic evidence, the death certificate is "self-authenticating." (Appellee's Br. at 51-52.) This is completely untrue. First, Mr. Guru is not "a person authorized by the laws of [India] to make the execution or attestation" of the death certificate as required by Rule 902(3). Thus, the "death certificate" cannot be self-authenticating under any circumstances. Second, there is no dispute that Plaintiff failed to present a final

certification from an authorized United States government official as to the genuineness of Mr. Guru's signature and his official position. *See* Fed. R. Evid. 902(3). Having failed to satisfy either requirement of Rule 902(3), the purported death certificate is not self-authenticating.

Plaintiff further contends the death certificate was admissible absent a final certification pursuant to the following exception: "If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification." (Appellee's Br. at 49 n.17 (citing cases interpreting Fed. R. Evid. 902(3).) This exception is inapplicable because Plaintiff never presented the District Court with any reason for the lack of final certification. *See, e.g., United States v. Perlmutter*, 693 F.2d 1290, 1293 n.2 (9th Cir. 1982) (holding foreign record inadmissible without final certification or showing of good cause for lack of final certification); *United States v. Yousef*, 175 F.R.D. 192, 193-94 (S.D.N.Y. 1997) (excluding foreign documents that lacked final certification where proponent of documents failed to show "good cause" for failing to obtain certification).

C. Copies Of Papers From The Civil Death Registry Were Unauthenticated And Inadmissible

Plaintiff does not dispute that the papers marked as “Guru 1” (JA 5634-38) were not certified in accordance with Rule 1005.¹¹ Although Rule 1005 may be satisfied by presenting testimony of a witness who has compared a copy of a public record with the original, Mr. Guru never compared the trial exhibit marked as “Guru 1” with the notebook that he brought to his deposition. Thus, there is no evidence in the record from any witness confirming that “Guru 1” is a true and accurate copy of the original record. The District Court, therefore, erred by admitting “Guru 1” in violation of Rule 1005. *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1227 (E.D. Pa. 1980).

IV. The District Court Erred By Admitting The Unfounded And Speculative Testimony Of Dr. Himmelberger

A. Dr. Himmelberger Testified Outside Her Field of Expertise When She Criticized A Medical Doctor’s Postmortem Report

Dr. Himmelberger was qualified as an expert in forensic odontology. (JA 3366.) She is not a medical doctor, has never performed a postmortem examination, and has never been trained to perform postmortem examinations.

¹¹ Plaintiff’s contention that the attendance of Robert Burke at the deposition of Mr. Guru somehow cures the Rule 1005 violation is unavailing. (Appellee’s Br. at 43 n.15.) Mr. Burke did not agree to copy excerpts of the loose-leaf notebook that Mr. Guru said was the official death record and he did not certify the copies. (JA 2353-54 (Robert Burke Testimony).)

(JA 3385.) Plaintiff does not dispute that Dr. Himmelberger did not have any training, qualifications, background, or experience in performing medical postmortem examinations.

Instead, Plaintiff insists that Dr. Saklani performed a “dental exam.” (Appellee’s Br. at 53-54, 57, 61-62.) Plaintiff seeks to create this false premise in an effort to establish that Dr. Himmelberger testified “squarely within her field of expertise.” (Appellee’s Br. at 54.)¹² Dr. Himmelberger, however, acknowledged in her deposition that Dr. Saklani did not conduct a “forensic pathological dental examination.” (JA 671.) He simply counted the teeth and recorded the number in his postmortem report. (JA 3949-51, 5507.) Moreover, Dr. Saklani never testified that he conducted such an examination.

Although Dr. Himmelberger may have been qualified as an expert forensic dentist, she had no special background or expertise in medicine that would qualify her to render an opinion concerning the training and ability of a medical doctor to count teeth in the course of a postmortem examination. *See Calhoun v. Yamaha Motor Corp.*, 350 F.3d 316, 322 (3d Cir. 2003) (“An expert may be generally qualified but may lack qualifications to testify outside his area of expertise.”); *Lexington Ins. Co. v. Rounds*, 349 F. Supp. 2d 861, 870 (D. Vt. 2004). The fact that Dr. Himmelberger was not qualified to opine on a medical doctor’s training

¹² This same false premise was used by Dr. Himmelberger to point out the various deficiencies in Dr. Saklani’s “examination” of the teeth. *See infra* Part IV.C.

and ability to count teeth is, standing alone, a sufficient reason to exclude her testimony. *See Smelser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 301, 305 (6th Cir. 1997) (holding that non-medical doctor was not qualified to testify about cause of injuries).

B. Dr. Himmelberger Did Not Reach Any Conclusion With
The Necessary Degree of Certainty

Plaintiff argues that the degree of certainty held by an expert does not matter so long as the expert relies on her professional experience and reliable methodology and stays within the bounds of her expertise. (Appellee's Br. at 59-61.) In support of this argument, Plaintiff relies on this Court's opinion in *Schulz v. Celotex Corp.*, 942 F.2d 204 (3d Cir. 1991), which held that use of a particular phrase such as "reasonable degree of medical certainty" in an expert's testimony was not dispositive of its admissibility. *See id.* at 209. *Schulz*, however, also stated that "the intent of the law is that if a physician cannot form an opinion with sufficient certainty so as to make a medical judgment, neither can a jury use that information to reach a decision." *Id.*; *see also Mayhew v. Bell S.S. Co.*, 917 F.2d 961, 963-64 (6th Cir. 1990) (affirming exclusion of an expert who "did not testify with *any* degree of certainty"). *Schulz* stands for the proposition that an expert must have a sufficient degree of certainty in her opinion but need not use a particular phrase to express that opinion. *See Schulz*, 942 F.2d at 209; *accord Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997).

The issue here is not whether Dr. Himmelberger used the correct phrase to express her opinion; Dr. Himmelberger admitted she could not state to a reasonable degree of scientific certainty that Dr. Saklani's tooth count was wrong. (JA 3389-90.) Once this point was conceded, the District Court should have recognized the testimony of Dr. Himmelberger for what it was – an opinion that, to a reasonable degree of certainty, Dr. Saklani's tooth count “might” have been wrong. The opinion that Dr. Saklani's tooth count “might” be wrong was not permissible expert testimony. *See Mayhew*, 917 F.2d at 963 (affirming exclusion of testimony where expert was “suspicious” of what “could have been”); *Grant v. Farnsworth*, 869 F.2d 1149, 1151-52 (8th Cir. 1989) (affirming exclusion of expert who “could only guess” about cause of injuries).

The District Court further erred by allowing Dr. Himmelberger to speculate about similarities between the teeth of the Insured and those of the body. (JA 3380-81.) She testified she was unsure if she could see gold in the mouth, but pointed to a “suggestion” of gold. (JA 3377.) Despite the suggestion of “similarities,” Dr. Himmelberger testified she could not state to a reasonable degree of scientific certainty that the body was the Insured's. (JA 3381, 3388.)

This testimony was particularly prejudicial because it improperly suggested to the jury that the body found in the Ganges River was the body of the Insured. It was improper to allow Dr. Himmelberger to indirectly suggest a conclusion that

she was unable to reach. “A doctor’s testimony that a certain thing is possible is no evidence at all. [Her] opinion as to what is possible is no more valid than the jury’s own speculation as to what is or is not possible.” *Kirschner v. Broadhead*, 671 F.2d 1034, 1039 (7th Cir. 1982).

C. Dr. Himmelberger’s Opinions Were Based On Factual Assumptions

Plaintiff argues that Dr. Himmelberger’s opinions were based on facts in the record. (Appellee’s Br. at 56-57.) The purported “facts” relied upon by Dr. Himmelberger are nothing more than her assumptions based on the absence of facts in the record. “It is an abuse of discretion to admit expert testimony which is based on assumptions lacking any factual foundation in the record.” *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 414 (3d Cir. 2002).

Plaintiff states that Dr. Saklani had “no dental training,” and cites to Dr. Saklani’s testimony that he had no “forensic medical training” and Dr. Himmelberger’s testimony that “to the best of [her] knowledge” he had no dental training. (See Appellee’s Br. at 56; see also JA 3373, 3961-62.) There is no evidence that Dr. Saklani had “no dental training” because Plaintiff’s counsel never asked Dr. Saklani about his dental training. Dr. Himmelberger assumed Dr. Saklani had no dental training based on the absence of evidence in the record. The failure of Plaintiff to develop the record is not a proper ground for an expert’s assumption.

Plaintiff further contends that the oral cavity was not “clean and free of debris,” and there was “not sufficient lighting” for Dr. Saklani to conduct a “thorough dental exam.” (Appellee’s Br. at 57.) First, Dr. Saklani did not purport to perform a dental exam; he simply counted the teeth. (JA 3949-51, 5507.) Second, there is no evidence in the record concerning the condition of the mouth at the time Dr. Saklani counted the teeth. Third, there is, as Dr. Himmelberger agreed, nothing to indicate that Dr. Saklani failed to clean the oral cavity before counting the teeth, failed to move the tongue out of the way to view the teeth, or failed to use a bright light to see the teeth. (JA 3386-87.) Plaintiff does not dispute these points. Instead, Plaintiff attempts to use the absence of evidence in the record as the factual foundation for his expert’s opinions.

Similarly, Plaintiff’s reliance on a photograph of the mortuary taken by Plaintiff before the postmortem examination is irrelevant because the photograph does not show the lighting conditions at the time Dr. Saklani counted the teeth. Again, Dr. Himmelberger made an assumption about the lighting conditions without having any evidence about the light used at the time Dr. Saklani counted the teeth. (JA 3382, 3386.)

Dr. Himmelberger’s observation that Dr. Saklani did not note malposed, rotated teeth or the spacing between teeth in his report is a red herring. (Appellee’s Br. at 57.) Dr. Saklani did not purport to make such findings. Indeed, Dr. Saklani

did not conduct a forensic dental examination. (JA 671 (Himmelberger).) The failure to note something in connection with an examination Dr. Saklani never performed cannot be the basis for a factual assumption that he erred in some way. Similarly, Plaintiff's comment on the methods by which Dr. Saklani would identify a body, if asked to do so, has nothing to do with his ability to count teeth or the accuracy of his tooth count. (Appellee's Br. at 57.)

Based on these factual assumptions, Dr. Himmelberger opined that Dr. Saklani's tooth count was "unreliable" even though she never identified a single error that Dr. Saklani made. (JA 697, 3386-87.) In essence, it was her personal belief that Dr. Saklani might possibly have made errors based on the circumstances in which the post-mortem was performed, which she did not know about, and Dr. Saklani's lack of dental training, which he was never asked about.

No case cited by Plaintiff can salvage Dr. Himmelberger's testimony. In every case Plaintiff cites, expert testimony was allowed where it was based on facts in the record and excluded where it relied on unsupported speculation. *See Stecyk*, 295 F.3d at 413-15 (finding expert testimony on cause of fire supported by physical evidence in record); *Walker v. Gordon*, 46 Fed. Appx. 691, 695 (3d Cir. 2002) (allowing medical opinion based on review of medical records and physical examination); *Kannankeril*, 128 F.3d at 809-10 (admitting expert testimony that "had a factual basis and supporting scientific theory"); *DePaepe v. Gen. Motors*

Corp., 141 F.3d 715, 720 (7th Cir. 1998) (“[T]he whole point of *Daubert* is that experts can’t ‘speculate.’”); *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 786 (3d Cir. 1996) (stating testimony that radiation could not be excluded as a cause of cancer would not have been enough to prove that radiation was the cause).

Dr. Himmelberger’s testimony was nothing more than unsupported speculation by an expert testifying outside her field of expertise and reaching conclusions with no degree of certainty. The District Court, therefore, abused its discretion in permitting Dr. Himmelberger to testify.

CONCLUSION

For the reasons stated above, as well as the reasons stated in the Opening Brief filed by Federal Kemper, the Court should vacate the judgment and direct a new trial on Plaintiff’s claim for breach of contract.

Respectfully submitted,

/s/ Bryan D. Bolton

Bryan D. Bolton

Michael P. Cunningham

M. David Maloney

Funk & Bolton, P.A.

Twelfth Floor

36 South Charles Street

Baltimore, Maryland 21201

410.659.7700 (telephone)

410.659.7773 (facsimile)

Dated: January 12, 2006

CERTIFICATE OF SERVICE

I hereby certify that, on January 12, 2006, two copies of the Reply Brief of Appellant, Federal Kemper Life Assurance Company, were mailed, first class, postage prepaid, to:

Daniel J. Dugan, Esquire
Spector Gadon & Rosen
1635 Market Street, 7th Floor
Philadelphia, Pennsylvania 19103

Attorneys for Kakkadasan Sampathachar, M.D.

On the same date, an electronic copy of the Reply Brief of Appellant was electronically transmitted to the Clerk of the United States Court of Appeals for the Third Circuit and simultaneously to Daniel J. Dugan, Esquire.

An additional ten copies of the Reply Brief of Appellant were mailed, first class, postage prepaid, to:

Office of the Clerk
United States Court of Appeals
for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

/s/ Michael P. Cunningham
Michael P. Cunningham

CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32 AND 3D CIR. LAR 32.1(c)

M. DAVID MALONEY certifies as follows:

1. This reply brief complies with the page limitation of Fed. R. App. P. 32(a)(7)(B) because this reply brief contains 6,972 words, excluding the parts of the reply brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This reply brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this reply brief has been prepared in proportionally-spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.
3. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Date: January 12, 2006

/s/ M. David Maloney
M. David Maloney

CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS

M. DAVID MALONEY certifies as follows:

1. The text of the electronic and hard copy forms of this reply brief are identical.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Date: January 12, 2006

/s/ M. David Maloney
M. David Maloney

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CERTIFICATE OF VIRUS CHECK

M. DAVID MALONEY certifies as follows:

1. I caused the electronic version of this reply brief to be checked for computer viruses using McAfee VirusScan 8. No computer virus was found.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Date: January 12, 2006

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M. David Maloney

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