

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-001179-MR

STEVEN L. SCHMIDT, INDIVIDUALLY;  
STEVEN L. SCHMIDT, AS ADMINISTRATOR  
OF THE ESTATE OF TERRY ANN SCHMIDT,  
DECEASED;  
J. BOSWELL TABLER, M.D., INDIVIDUALLY;  
AND TABLER AND ASSOCIATES, P.S.C.,  
N/K/A TABLER CLINICAL SERVICES, P.S.C.

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN P. RYAN, JUDGE  
ACTION NO. 96-CI-001974

AMERICAN PHYSICIANS ASSURANCE  
CORPORATION, SUCCESSOR TO  
KENTUCKY MEDICAL INSURANCE COMPANY

APPELLEE

OPINION  
AFFIRMING IN PART  
REVERSING IN PART  
AND REMANDING

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BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

BARBER, JUDGE: This case is an insured's appeal of a jury  
verdict in favor of his insured on a claim of bad faith. We  
reverse in part and remand for actions consistent with this  
opinion.

Appellant Steven Schmidt's decedent, Terry Schmidt, died of aplastic anemia. Decedent was the patient of Dr. J. Boswell Tabler. In the initiating complaint, Schmidt asserted that Dr. Tabler's treatment of Terry Schmidt constituted medical negligence and caused her aplastic anemia. Prior to trial, Schmidt attempted settlement negotiations with Dr. Tabler's insurer, Kentucky Medical Insurance Company or KMIC, (now Appellee American Physicians Assurance Corporation). The record shows that during these negotiations, Schmidt offered to settle the claim within the applicable policy limits. A formal written settlement demand within policy limits was also made prior to trial. Appellee refused to make a settlement on behalf of Dr. Tabler. The case went to trial, and Schmidt received a verdict of \$1,807,325.36 against Dr. Tabler, exclusive of costs and interest, which were also awarded.

At the time of trial, Dr. Tabler's insurance policy coverage was in the sum of one million dollars. After entry of the verdict and while motions for new trial and judgment notwithstanding the verdict were pending, Dr. Tabler retained separate counsel. Dr. Tabler's new attorney, prior to entry of final judgment, negotiated with counsel for Schmidt to reduce the total verdict to \$1,200,000.00, including interest and costs, a savings in excess of \$600,000.00. Dr. Tabler requested

that KMIC pay this sum, or negotiate to settle the claim for some alternate sum prior to entry of final judgment.

Despite this clear demand by its insured, KMIC refused to pay the negotiated reduced judgment or to engage in good faith negotiations to settle the case prior to entry of final judgment. Final judgment was entered against Dr. Tabler for the amounts awarded by the jury, exposing him to almost a million dollars in excess liability. After final judgment was entered, KMIC paid policy limits for a partial satisfaction of the judgment against Dr. Tabler. Contrary to KMIC's claims that Dr. Tabler "is not interested in pursuing any claims against KMIC," the record shows that Dr. Tabler assigned his claims against KMIC to Schmidt in return for a release from the excess verdict. Dr. Tabler's claims against KMIC are the subject of this appeal. Schmidt filed the underlying action on behalf of Dr. Tabler against KMIC for the excess verdict. This case deals solely with Dr. Tabler's claims against KMIC.

Before this Court, KMIC asserts that it did not act in bad faith. KMIC argues that "Dr. Tabler suffered no damages as a result of KMIC's refusal [to pay the reduced sum negotiated by Dr. Tabler]." KMIC states that this is so because "the Schmidts subsequently released Dr. Tabler personally, in exchange for **no personal money**, merely the assignment of his purported 'bad faith case.'" (Emphasis original.) This citation reveals KMIC's

basic misunderstanding of the nature of an assignment of a claim. Schmidt stood in the shoes of Dr. Tabler after the assignment and made the claims applicable to the injury suffered by Dr. Tabler. The entire amount of the excess judgment constitutes Dr. Tabler's injury as a result of KMIC's actions.

Due to the excess judgment, Dr. Tabler suffered damages in excess of \$800,000.00. On his own initiative, and without any assistance from KMIC, Dr. Tabler negotiated a reduction of the excess damages from almost a million dollars including costs and interest, down to \$200,000.00. Dr. Tabler then requested that his insurer settle the case for this reduced sum prior to entry of the final judgment. His insurer refused. Faced with a substantial excess judgment, Dr. Tabler's determination was that his best recourse was to assign his claims to Schmidt. Dr. Tabler's claims are properly the subject of this action, and he suffered damage as a result of KMIC's bad faith actions.

At the time of the partial satisfaction of judgment, KMIC had several separate excess insurance coverages available to it. KMIC was reimbursed \$500,000.00 of the million dollar partial satisfaction of judgment under "reinsurance" coverage. Schmidt retained an expert witness who stated that the "reinsurance" coverage was available to KMIC to pay the excess judgment of \$200,000.00 so that Dr. Tabler would not be exposed to an excess judgment. This witness also proposed to address

the fact that KMIC had other excess coverage available to it with which it could have satisfied the excess judgment.

The trial court barred Schmidt from referencing the excess coverage and reinsurance coverage available to KMIC at trial of this matter. The opinion of Schmidt's expert witness with regard to the insurance coverage available to KMIC was also excluded. It is uncontroverted that KMIC had unused "defense costs" available to it after payment of the policy limits. It is also uncontroverted that KMIC had a "reinsurance" policy available to it for use to pay excess verdicts or to reimburse itself, and that it accepted \$500,000.00 of reinsurance to reimburse itself for the verdict sums. Schmidt asserts that the trial court's denial of his discovery request for all such policies relevant to this action was in error. KMIC argues that the reinsurance policies were "irrelevant" in this action, and that for this reason the trial court's ruling was correct.

The trial court denied the admissibility of the reinsurance policies because insurance coverage available to a defendant has no bearing on that defendant's liability. Kentucky law bars introduction of evidence regarding a defendant's insurance coverage. White v. Piles, Ky., 589 S.W.2d 220 (1979). We affirm the trial court's ruling with regard to denial of the discovery requests regarding excess insurance coverage, and with regard to exclusion of the reinsurance

coverage. Introduction of evidence regarding a defendant's insurance is irrelevant and properly excluded.

Schmidt asserts that the trial court was in error in excluding witness testimony regarding KMIC's excess insurance coverage at trial. Schmidt proffered the testimony of a reinsurance expert from Lloyds of London. The trial court excluded this testimony, stating that the question of reinsurance coverage was irrelevant. KMIC argues based on the Kentucky Evidence Handbook, 3d Ed., Lawson (1993), that construction of insurance policies is a question of law, and that for this reason the testimony was properly excluded. The witness, a barrister with an international insurance practice, was going to testify regarding "the international practice rules" with regard to settlement of excess claims using reinsurance coverage. KMIC claims that this testimony was irrelevant to "the legal effect and construction of insurance contracts in the Commonwealth of Kentucky." We do not reach this question, but find that as evidence regarding insurance available to the defendant was not admissible, similarly the testimony of the witness regarding such coverage is inadmissible.

Schmidt claimed that KMIC acted in bad faith by exposing Dr. Tabler to a jury trial without fully apprising him of the risks of an excess judgment. KMIC claims that its

counsel informed Dr. Tabler during pendency of the action that "he might need personal counsel at some point," but did not further suggest to him that separate counsel be retained to protect his interests. KMIC asserts that when Dr. Tabler raised questions with his counsel about the risk to his assets of a judgment against him, defense counsel assured Dr. Tabler that "most of the time plaintiffs . . . were willing to take an assignment of the doctor's rights against the insurance company instead of pursuing a doctor's personal assets." Counsel for KMIC claims that the decision to try the case was made because "Dr. Tabler and his [KMIC's] lawyer thought the case ought to go to trial." Testimony from Dr. Tabler and his wife contained in the record shows that Dr. Tabler had serious concerns about his chances at trial.

Dr. Tabler denied that he had been informed of his personal liability for any excess judgment. Dr. Tabler claims that he was not apprised of his personal risk if an excess judgment was entered against him. Dr. Tabler stated that he was informed by defense counsel that the claim was "defensible." Dr. Tabler stated that if he had been advised by counsel to settle the claim against him, he would have done so. Schmidt provided by avowal a sworn statement executed by Dr. Tabler expressly stating that he did not understand that he would be personally, rather than corporately, liable for an excess

verdict. Dr. Tabler's deposition testimony shows that Tabler was unclear as to his personal liability in the event of an excess verdict. The jury was not permitted to hear Dr. Tabler's sworn statement refuting KMIC's assertions of his refusal to consent to settlement.

At trial on the bad faith claim, the jury found that Dr. Tabler had not consented to a settlement of the initial claim by KMIC. For this reason, the jury did not award Dr. Tabler any damages against KMIC. The jury did not address the other claims raised in the bad faith trial by Schmidt or Dr. Tabler. The consent clause in the policy stated that "the Company shall not compromise any claim hereunder without the consent of the named insured." The record does not show that Dr. Tabler was given fully opportunity after informed consent to determine whether to settle the claim prior to trial. The record clearly shows that KMIC refused Dr. Tabler's stated request to settle the matter after the jury verdict was rendered but before entry of final judgment. The jury's determination was made on the basis of insufficient evidence, and must be reversed for a new determination after hearing the testimony of Dr. Tabler and the attorney involved in post trial settlement negotiations.

The trial court denied Dr. Tabler's request to introduce evidence about KMIC's behavior after the jury verdict



was rendered, but before the judgment became final and appealable. Schmidt argues that the post-verdict conduct of the insurance carrier is relevant and admissible in a bad faith action. The tort of bad faith stems from intentional, reckless or willful disregard of an insured's rights by the insurer. Zurich Ins. Co. v. Mitchell, Ky., 712 S.W.2d 340, 343 (1986). Clearly, the conduct of the insurer must be reviewed in order to make such a determination.

Dr. Tabler provided evidence that he was not informed by KMIC that he and his assets would be required to satisfy any excess judgment. Dr. Tabler stated that after entry of the excess verdict against him, he requested that KMIC negotiate and settle the case. Testimony was presented by avowal showing that KMIC refused to negotiate any reduced judgment against Dr. Tabler after entry of the excess verdict, and that the KMIC officer handling the claim stated that he had a policy of "zero offers." Efforts to settle an action, or refusal to settle an action, are central to a claim of insurance bad faith. Cooper v. Auto Club Ins. Co., Ky. App., 638 S.W.2d 280, 281 (1981). All this evidence was relevant to the claims before the trial court, and should have been found admissible. We reverse the trial court's exclusion of this evidence.

Schmidt claims that the trial court was in error in excluding the testimony of witnesses regarding KMIC's conduct

after entry of the final verdict. Gary Hillerich, counsel for Dr. Tabler during post-verdict negotiations, testified by avowal regarding KMIC's refusal to negotiate or attempt settlement of the claim. Hillerich testified that in his professional opinion KMIC violated the Kentucky Unfair Claims Settlement Practices Act by failing to effectuate prompt settlement of the action when liability became reasonably clear. Hillerich also testified that KMIC violated fair dealing with its insured by refusing to settle the smaller excess verdict against Dr. Tabler before exposing him to the much larger final verdict. It is alleged that KMIC's failure to engage in settlement negotiations, despite its insured's request, resulted in a judgment some \$600,000.00 greater than the offer of settlement.

Hillerich testified by avowal based on his personal experience with the appellate process and bad faith cases. This testimony shows that the reduced amount of the excess verdict, which was \$200,000.00 instead of \$800,000.00 plus interest and costs, was less than the cost of an appeal plus interest or appellate bond. Hillerich argues that the offer of settlement was a reasonable offer which should have been accepted by KMIC in order to protect its insured.

KMIC disparages Hillerich as a "volunteer attorney" and a "free lawyer," and claims without citation to authority that Hillerich's "'opinion' is contrary to law." KMIC argues

that the trial court's exclusion of Hillerich's testimony was in accordance with law because his assertions that KMIC acted in bad faith were "false." KMIC argues that because Dr. Tabler assigned his claims to Schmidt, he suffered no damages and thus KMIC cannot be found to have acted in bad faith. KMIC argues that a trial court may exclude expert testimony where that testimony is false. Farmland Mut. Ins. Co. v. Johnson, Ky., 36 S.W.3d 368 (2000).

KMIC claims that it is not bad faith to refuse to negotiate or to refuse to settle for a sum in excess of the policy limits. KMIC cites Motorists Mut. Ins. Co. v. Glass, Ky., 996 S.W.2d 437 (1999) as supporting its premise that it has no duty to provide more than policy limit coverage. To show good faith, an insurer must make a tender of the full policy limits prior to entry of final judgment. Schlauch v. Hartford Acc. & Indem. Co., 146 Cal. App.3d 926, 936 (Cal. App. 3d Dist. 1983). Where, as here, the insurer knows that an excess judgment is pending, the insurer has a duty to attempt to settle the case prior to entry of that judgment. Pinto v. Allstate Ins. Co., 221 F.3d 394 (2<sup>nd</sup> Cir. 2000).

KMIC was fully aware that Dr. Tabler was facing a judgment in excess of \$800,000.00. KMIC had a duty to engage in good faith negotiations to reduce or eliminate that excess by settling the claims against him prior to entry of final

judgment. The failure to act in good faith prior to entry of final judgment renders KMIC potentially liable for the damages incurred by Dr. Tabler. We reverse the jury verdict rendered in absence of the evidence regarding KMIC's conduct prior to entry of the final verdict, and remand the action for hearing after admission of all such evidence.

Schmidt argues that the trial court erred in granting KMIC's motion for summary judgment on Schmidt's claims of violation of the Kentucky Consumer Protection Act, KRS 367.220. The Consumer Protection Act, by its terms, applies only to ". . . goods or services primarily for personal, family or household purposes. . . ." KRS 367.220(1). The policy at issue was purchased by Dr. Tabler to cover his professional services. For this reason, the Consumer Protection Act did not apply here. The trial court's grant of summary judgment on this issue is affirmed.

TACKETT, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT.

BRIEFS FOR APPELLANT:

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