

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001292-MR

AMERICAN PHYSICIANS ASSURANCE
CORPORATION, SUCCESSOR TO KENTUCKY
MEDICAL INSURANCE CO.

CROSS-APPELLANT

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

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

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

BARBER, JUDGE: Cross Appellant American Physician's Assurance Company, successor in interest to Kentucky Medical Insurance Company (KMIC), filed a cross-appeal complaining of errors in a jury trial in which it was successful in defending against a bad

faith claim. KMIC was the insurer of Dr. Tabler. Dr. Tabler had a million dollar verdict and an \$800,000.00 excess judgment entered against him in a medical negligence action. Counsel for Dr. Tabler negotiated a substantial reduction of the excess judgment prior to entry of the final judgment and requested that KMIC pay the substantially reduced amount of coverage. KMIC refused to negotiate settlement of the verdict prior to entry of final judgment against Dr. Tabler. Dr. Tabler assigned his bad faith claim against KMIC to Cross-Appellee Schmidt, who brought an action against KMIC for bad faith. After a jury trial, a verdict was entered in favor of KMIC.

During pre-trial discovery, KMIC produced the KMIC claims file and the entire litigation file for the previous medical negligence claim. KMIC then requested production of Schmidt's entire litigation file created during prosecution of the medical negligence claim against Dr. Tabler. KMIC also requested discovery of all consultative expert opinions contained in the file. Schmidt objected to the discovery request and maintained that the file in its entirety was privileged under the work product and attorney/client privilege. Schmidt also argued that forced disclosure of consultative expert opinions is prohibited by Newsome v. Lowe, Ky. App., 699 S.W.2d 748 (1985). KMIC complains that since Kentucky law requires production of the entire insurance file in a bad faith

action, See Terrell v. Western Cas. & Sur. Co., Ky., 427 S.W.2d 825 (1968), the duty to produce should be reciprocal.

The case before us now is the bad faith claim of Dr. Tabler against his insurer. The underlying prosecution of Schmidt's successful medical negligence case against Dr. Tabler is not relevant to Dr. Tabler's claims against his insurer. KMIC makes no relevancy argument, and cites no case law permitting it to obtain the medical negligence file from the medical negligence plaintiff, who is not a party to this action. Kentucky law provides for only very limited disclosure of any attorneys file, and only where "an attorney's knowledge regarding a claim litigated in a prior action is itself an issue in subsequent litigation." Morrow v. Brown, Todd & Heyburn, Ky., 957 S.W.2d 722, 725 (1997). No such showing was made in the present case. The trial court's order sustaining the objection to KMIC's discovery request is affirmed.

KMIC next argues that it was entitled to a requested grant of summary judgment. KMIC claims that because Schmidt made no request for settlement within the policy limits prior to entry of the verdict, it had no duty to settle the action at any time. KMIC argues that even though Schmidt offered to settle the entirety of his claims within policy limits, he had no authority to settle the claims of decedent's insurer, Metlife. KMIC argues that absent an offer of settlement within policy

limits from Metlife, it had no duty to settle the action. A stipulation made part of the record is clear in showing that Metlife's subrogation claim was against Schmidt, rather than against KMIC, therefore the requested demands for settlement were made within policy limits.

The record shows that Metlife made no demand for reimbursement from KMIC. Metlife's claim for subrogation was against Schmidt, and Metlife's recovery was to come from any damages awarded to Schmidt. A portion of the claims made against KMIC by Schmidt was for reimbursement of decedent's medical expenses, which had been paid by Metlife. Clearly, KMIC was aware that the only claims against it were Schmidt's claims, and that KMIC was not liable to Metlife for any reimbursement. The trial court properly denied KMIC's request for summary judgment on this issue.

KMIC asserts that it was entitled to summary judgment because Dr. Tabler did not consent to settlement of the action prior to trial. The record shows that issues of fact exist as to whether Dr. Tabler was adequately made aware of his personal liability for an excess judgment prior to trial. Issues of fact also exist as to whether KMIC acted in good faith following the verdict and during negotiations prior to entry of a final judgment. These genuine issues of material fact properly precluded entry of summary judgment in KMIC's favor. CR 56.01.

KMIC argues that the trial court erred in not dismissing the Unfair Claims Settlement Practices Act claim brought by Dr. Tabler. KMIC argues that the entire case was "within litigation" because Schmidt filed the medical negligence action within two months of initiating settlement negotiations. KMIC argues that the UCSPA does not apply to claims in litigation and only applies to claims adjusting. This argument is without basis in fact and is clearly contradicted by the language of the law, and the relevant case law. We affirm the trial court's denial of the motion for directed verdict.

Lastly, KMIC argues that it was entitled to a directed verdict on Dr. Tabler's claim for punitive damages based on the insurer's bad faith actions. Kentucky law permits assignment of bad faith claims. See Grundy v. Manchester Insurance & Indem. Co., Ky., 425 S.W.2d 735 (1968). KMIC argues that claims for punitive damages or damages for emotional distress cannot be assigned, and that Dr. Tabler could only assign his contractual claims against his insurer. While initially bad faith claims were based solely on contractual issues, claims for bad faith now sound in tort. Manchester Ins. & Indem. Co. v. Grundy, Ky. App., 531 S.W.2d 493 (1975). All damages stemming from the bad faith actions are recoverable in an action for bad faith. Motorists Mut. Ins. Co. v. Glass, Ky., 996 S.W.2d 437, 451 (1997), citing Curry v. Fireman's Fund Ins. Co., Ky., 784 S.W.2d

176 (1989), specifically allowing recovery of punitive damages,
and FB Ins. Co. v. Jones, Ky. App., 864 S.W.2d 926 (1993).

The trial court's judgment with regard to the issues
raised by KMIC is affirmed.

ALL CONCUR.

BRIEFS FOR CROSS-APPELLANT:

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