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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001544-MR

L. MICHAEL LAVENDER, M.D.,
OB/GYN SPECIALISTS OF NORTHERN
KENTUCKY, INC.; AND
LINDA AND MATTHEW JUSTICE — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 01-CI-01352

AMERICAN PHYSICIANS ASSURANCE
CORPORATION — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: DYCHE AND McANULTY, JUDGES; EMBERTON, SENIOR JUDGE.[1]

McANULTY, JUDGE:

SUMMARY

On May 24, 1997, L. Michael Lavender, M.D., delivered Linda Justice's son by crash cesarean section. Once Dr. Lavender opened Linda Justice in the operating room, he

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

discovered that her uterus had ruptured. Secondary to the uterine rupture, Linda Justice's baby, Joseph, suffered a severe brain injury, and Linda Justice had to have a hysterectomy. At the time of the delivery, Dr. Lavender and his practice group, OB/GYN Specialists of Northern Kentucky, Inc. (OB/GYN), were insured by the P.I.E. Mutual Insurance Company (P.I.E.). But P.I.E. went out of business in the fall of 1997, and the doctors in the practice were left to find another insurance carrier. When completing his insurance application to the predecessor in interest of American Physicians Assurance Corporation (APAC), Dr. Lavender answered "No" to the following question: "Have any incidents occurred in your practice (treatment results less than anticipated, complications that prolonged treatment/ hospitalization, patient expressions of dissatisfaction, fee disputes, etc.), that, from your knowledge of the patient's situation, have any realistic potential of developing into a formal claim against you?" After being notified that Linda Justice filed a medical negligence action against Dr. Lavender, APAC filed a declaratory judgment action in which it contended that Dr. Lavender's answer to this question was a misrepresentation entitling it to rescind coverage. The trial court agreed with APAC and granted its motion for summary judgment. At issue in this appeal is whether genuine issues of

material fact precluded summary judgment. Because we believe that they do, we vacate and remand for a jury trial.

LINDA JUSTICE'S LABOR AND DELIVERY

Linda Justice is the mother of three children. Her first two children were born by cesarean section. But she desired to have her third child, Joseph (Joey), by vaginal delivery. There are certain risks involved in having a vaginal birth after cesarean section (VBAC), one of which is a uterine rupture.

Linda Justice's due date with Joseph was in late-May of 1997. She sought prenatal medical care at OB/GYN. After discussing the risks of a VBAC with her, the doctors at OB/GYN eventually agreed to let her be a VBAC candidate.

Dr. Lavender was the group physician on call when Linda Justice went into labor on May 24, 1997. He allowed Linda Justice to proceed with the trial of labor, as she desired to do. But when Linda Justice complained of break-through abdominal pain after having been administered an epidural and fetal monitoring indicated the baby was in severe distress, Dr. Lavender attempted a vaginal delivery using forceps. But he could not deliver the baby that way, so he performed a crash cesarean section.

When Dr. Lavender opened Linda Justice in the operating room, he discovered that her uterus had ruptured. She had to have a hysterectomy and required blood transfusions.

Joey was blue and limp. His APGAR scores -- an indication of a baby's condition immediately after birth, a score of 7-10 considered normal and a score of 3 and below requiring advanced medical care and emergency measures -– were 1 at one minute, 3 at five minutes and 5 at 10 minutes. Joey's prognosis for months after his birth was "guarded."

In the early hours after Joey's birth, Linda Justice's sister, who used to work as a nurse in obstetrics and gynecology, asked Dr. Lavender if he used an internal uterine pressure catheter (IUPC) on Linda during her labor. The IUPC is an internal device that is most valuable if external monitors are not picking up contractions. Dr. Lavender replied that he did not insert an IUPC.

The day after Joey's birth, Linda Justice remained in the intensive care unit. Dr. Lavender went to check on her. According to Dr. Lavender, Linda Justice acknowledged to Dr. Lavender that one of the other doctors in the practice, Dr. Burchell, had carefully explained the serious problems that could develop in a VBAC with both the baby and the mother. In spite of the risks, she wanted to attempt a vaginal delivery, and she did not feel coerced by any doctor at OB/GYN to VBAC.

About a week and a half after Joey's birth, Dr. Lavender called Linda Justice at home to see how she and Joey were doing. At this point, Joey was still in the hospital. Dr. Lavender asked Linda if she had any questions for him, and she said "No." And she told Dr. Lavender that she did not blame him or the other doctors at OB/GYN for what happened. After this phone call, Dr. Lavender did not speak with Linda or any member of her family again.

Dr. Lavender had never had a patient rupture under these circumstances. He had some concerns about the way in which the nurses had read the fetal monitoring strips that night. So shortly after Joey's birth, Dr. Lavender took the fetal monitoring strips to another doctor, Dr. Kim Brady, for review. After examining the strips, Dr. Brady advised Dr. Lavender that everything he had done was appropriate.

Although not known by Dr. Lavender until about six months after Joey's birth, St. Elizabeth Medical Center, the hospital where Linda had Joey, performed a peer review of the birth. The peer review process resulted in a finding of no fault in Dr. Lavender's care of Linda.

On August 1, 1997, the Lawrence Firm, a law firm in the Cincinnati area that specializes in medical malpractice, sent a letter to Dr. Lavender's office at OB/GYN requesting Linda Justice's medical records. This letter was addressed

incorrectly, however, and was not received by OB/GYN or Dr. Lavender.

OB/GYN'S MALPRACTICE INSURANCE COVERAGE

At the time of Linda Justice's delivery, May 24, 1997, Dr. Lavender and OB/GYN had a claims-made medical malpractice insurance policy with P.I.E. P.I.E. went out of business in late 1997, leaving OB/GYN to obtain insurance coverage with another carrier. In December 1997, the doctors at OB/GYN submitted insurance applications to Kentucky Medical Insurance Company (KMIC) through KMIC's agent, KMA. At the time, there were six doctors in the group, and each doctor, including Dr. Lavender, submitted his own application. Angie Ball, OB/GYN's office manager at the time, submitted Dr. Lavender's application in early December of 1997.

The application had the following question (Question 22):

> 22. Have any incidents occurred in your practice (treatment results less than anticipated, complications that prolonged treatment/hospitalization, patient expressions of dissatisfaction, fee disputes, etc.) that, from your knowledge of the patient situation, have any realistic potential of developing into a formal claim against you?

Dr. Lavender answered "No" to this question.

A few weeks after Dr. Lavender submitted his application to KMIC's agent, the Lawrence Firm faxed the letter

originally dated August 1, 1997, to Dr. Lavender's office. In the letter, the Lawrence Firm stated that it represented Linda Justice and requested a complete copy of her medical records and bills. On the authorization for release of the records signed by Linda Justice, the Lawrence Firm specified that it was requesting the following: "any and all monitoring strips, including but not limited to fetal monitoring strips." Dr. Lavender did not see the faxed request, but he did authorize the release of the records when Angie Ball asked him if he had any objection to copying Linda Justice's chart. A member of OB/GYN's office staff sent the records to the Lawrence Firm on January 7, 1998.

KMA finally gave all of OB/GYN's completed applications to KMIC's underwriter on January 20, 1998. After receiving the applications, the underwriter instructed KMA to obtain a "no known loss letter" from OB/GYN. A "no known loss letter" is a recitation that the prospective insured has not had any claims or incidents since the proposed retroactive date of the policy (November 14, 1997) up to the date of the signing of the letter.

The representative of KMA recalled that KMIC's underwriter asked him to get a "no claim letter" from OB/GYN. A "no claim letter" is slightly different than a "no known loss letter." It is a letter from the prospective insured stating

that there have been no claims filed from the proposed effective date through the date of the signing of the letter. OB/GYN wrote a letter on January 20, 1998, signed by all six physicians stating that "[f]rom November 15, 1997, none of our six physicians . . . have had any new malpractice claims brought against them."

KMIC issued coverage to Dr. Lavender and OB/GYN in the amount of $3,000,000 on January 28, 1998. The policy written had a retroactive effective date of November 14, 1997 to November 14, 1998.

On May 22, 1998, Linda and Matthew Justice, individually and on Joey's behalf, filed a medical negligence lawsuit against Dr. Lavender, OB/GYN and St. Elizabeth Medical Center. In response to the lawsuit and under the terms of the insurance policy, KMIC provided a defense to OB/GYN and Dr. Lavender.

At some point after the Justice's filed their lawsuit, APAC bought out KMIC. So APAC became KMIC's successor in interest. After acquiring KMIC, on June 29, 2001, APAC filed the underlying action in this case –- a complaint for declaratory judgment that the insurance coverage was void because Dr. Lavender misrepresented Linda Justice's catastrophic delivery on the insurance application to KMIC. The Justice

family was permitted to intervene in the declaratory judgment action.

Discovery ensued and APAC eventually filed a motion for summary judgment, which the trial court granted, precipitating this appeal. In its order granting summary judgment, the trial court held that APAC's motion was "well taken" and found as a matter of law that "Question #22 is not vague, not ambiguous, and is enforceable as a matter of law."

Appellants, Dr. Lavender, OB/GYN and the Justice Family (Dr. Lavender), raise three arguments on appeal. First, Dr. Lavender argues that there are genuine issues of material fact that preclude summary judgment. Second, Dr. Lavender argues that APAC's failure to obtain a "no known loss" letter before deciding to issue coverage precludes it from denying coverage for the Justice lawsuit. Third, Dr. Lavender argues that the trial court erred in finding as a matter of law that Question 22 was not vague and ambiguous and was enforceable as a matter of law.

SUMMARY JUDGMENT WAS INAPPROPRIATE IN THIS CASE

The standard of review of a trial court's granting of summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

We review the record in a light most favorable to Dr. Lavender and resolve all doubts in his favor. See Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

Dr. Lavender contends that summary judgment was inappropriate in this case because there are genuine issues of material fact that his answer to Question 22 was a misrepresentation. In support, Dr. Lavender argues that Question 22 sought his subjective opinion based solely on his knowledge of Linda Justice's delivery. He does not deny that a brain-injured baby and an unanticipated hysterectomy are bad outcomes; and he does not deny that Linda Justice and her baby had prolonged hospitalizations. But he asserts that he considered the fact that Linda Justice acknowledged that she was advised of the risks of a VBAC and wanted to proceed anyway. She told Dr. Lavender she did not blame him for what happened. And another physician reviewed the fetal monitoring strips and felt his care was appropriate. Finally, a request for medical records is simply that -- a request for medical records. The request did not render his initial negative response to Question 22 a misrepresentation.

APAC contends that Dr. Lavender's admissions belie any assertion today that he answered Question 22 truthfully when he completed his application. He has admitted to the catastrophic outcome of Linda Justice's delivery. And he has admitted that

his internal office procedures called for his insurance carrier to be notified under the circumstances of this case. Based on the undisputed facts, Dr. Lavender should have answered "Yes" to Question 22. If Dr. Lavender had answered "Yes," KMIC would not have issued the coverage as requested. Under KRS 304.14-110, a misrepresentation, omission or incorrect statement on an application for insurance prevents recovery under an insurance policy if it is (1) material to the risk, or (2) the insurer in good faith would either not have issued the policy or would not have provided coverage with respect to the hazard resulting in the loss. Because it is undisputed that Dr. Lavender's misrepresentation meets both of these criteria, the policy was void from the beginning.

And APAC argues that even assuming that Dr. Lavender answered Question 22 truthfully when he completed his application, he failed to supplement his application to change his negative response to "Yes" after receiving the letter from the Lawrence Firm. Dr. Lavender admits in a sworn statement given as part of the claims investigation that he should have changed his response but did not do so.

APAC contends that Dr. Lavender should have notified the insurer of the receipt of the Lawrence Firm Letter for two reasons. First, he had a good faith duty to give true information. Second, the United States Supreme Court has spoken

on the issue of an applicant's duty to supplement the initial application if, while the insurer is deliberating, facts come to light that make portions of the application no longer true. See Stipcich v. Metropolitan Life Ins. Co., 277 U.S. 311, 317, 48 S. Ct. 512, 72 L. Ed. 895 (1928) (cited with approval in MacKenzie v. Prudential Ins. Co. of America, 411 F.2d 781, 783 (6th Cir. 1969), which predicts that Kentucky courts would adopt this rule if faced with the issue). Simply, the applicant must inform the insurer of those facts, and if he does not and the insurer decides to write a policy, the insurer has a valid defense to a claim on the policy. See id.

We begin our analysis by considering the wording of Question 22. It is subjective. It is subjective because it seeks to probe Dr. Lavender's state of mind in contrast to objective questions calling for information within his knowledge. See Liebling v. Garden State Indemnity, 337 N.J.Super. 447, 767 A.2d 515, 518 (2001) (addressing subjective question on attorney's application for professional liability insurance and holding that even viewing the evidence in the light most favorable to the attorney, his answer to the subjective question did not reflect an opinion he truthfully held). Since Question 22 was subjective the answer is to be judged on Dr. Lavender's state of mind. See id. at 522. "If he honestly believed that a malpractice claim was unlikely, his

negative answer to the question posed in this case is not a misrepresentation." Id.

Contrary to APAC'S assertions, Dr. Lavender has not admitted that he honestly believed that a medical malpractice claim arising from his treatment of Linda Justice was likely. His acknowledgment that she had treatment results less than anticipated or prolonged hospitalization is only one part of the subjective question he was asked on the insurance application. He was then asked to consider his knowledge of her situation. She never said she intended to sue him. In fact, she expressed that she did not blame him for what happened to her. And she knew the risks and made her choice to proceed with a VBAC in spite of the risks.

As for the request for medical records and his duty to supplement the insurance application, viewing the facts in the light most favorable to Dr. Lavender, he does not recall reading the actual letter faxed December 30, 1997, from the Lawrence Firm. He recalls that his office staff informed him that the office had received a faxed request from a law firm for Linda Justice's medical records. The staff asked if the chart was complete for them to send the records out. He said it was, and they sent the records within a week of the request.

The question on the application asked "[h]ave any incidents occurred in your practice . . . that, from your

knowledge of the patient situation, have any realistic potential of developing into a formal claim against you?" The questions asked by APAC's attorney in the sworn statement pertaining to the issue of medical records spoke in hypothetical terms and pinned Dr. Lavender down to phrases like his awareness of a *possibility* or *a heightened likelihood* of a medical malpractice claim. This is not an admission establishing that he misrepresented his belief in Question 22 about what would occur in Linda Justice's case. It is unfair to presume to know that a doctor is untruthful when he maintains that a case with a bad outcome and in which a lawyer gets involved does not necessarily mean that he would be sued.

It is the insurance company's responsibility to ask the questions on the application to which it wants answers. See Waxse v. Reserve Life Ins. Co., 248 Kan. 582, 809 P.2d 533, 537 (1991). If it wanted to know if a patient whose treatment results were less than anticipated had requested her medical records or if Dr. Lavender had delivered any brain-injured babies or babies with poor APGARs, it could have asked those questions, but it did not do so.

It is clear that Dr. Lavender's credibility will be the crucial factor in the ultimate factual determination made in this case. See Ogden v. Employers Fire Ins. Co., Ky., 503 S.W.2d 727, 729 (1973). "In such a situation summary judgment

is an inappropriate tool and trial is indispensable." Id. It is for this reason –- the determination of Dr. Lavender's credibility -- that the testimony of the officer manager, Angie Ball, pertaining to inter-office handling of patient matters with bad outcomes is important. But her testimony is not dispositive of whether Dr. Lavender's answer on his application for insurance was truthful. That question is for the jury.

WHY KMIC'S FAILURE TO OBTAIN A "NO KNOWN LOSS" LETTER DOES NOT PRECLUDE IT FROM RESCINDING COVERAGE

We move to Dr. Lavender's second argument that KMIC's failure to obtain a "no known loss" letter before writing a policy precludes it from rescinding coverage for the Justice lawsuit. We note that Dr. Lavender cites no judicial authority directly in support of this argument. Kentucky case law is clearly against Dr. Lavender on this point. See State Farm Mut. Auto. Ins. Co. v. Crouch, Ky. App., 706 S.W.2d 203, 206 (1986) (rejecting similar argument that insurer was estopped from raising issue of material misrepresentation based on insurer's alleged negligent failure to investigate). "[T]he rule is that as between the applicant and the insurance company it is the applicant's responsibility to see that the application is correctly filled out." Paxton v. Lincoln Income Life Ins. Co., Ky., 433 S.W.2d 636, 638 (1968). It is fundamental that "an

insurer must have clear notice and full cognizance of the true facts to be bound by its policy." Crouch, 706 S.W.2d at 206.

DISPOSITION

We hold that Question 22 is subjective and this case will turn on whether Dr. Lavender honestly believed that a medical malpractice claim was unlikely. The facts of this case do not allow for only one conclusion respecting Dr. Lavender's true state of mind. Thus, summary judgment was prematurely granted. We need not decide whether Question 22 was vague and ambiguous as a matter of law. We vacate the trial court's order granting APAC'S motion for summary judgment and remand this case for trial.

EMBERTON, SENIOR JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

DYCHE, JUDGE, DISSENTING: I must respectfully dissent, as there is no final judgment in this declaratory judgment action. The Order from which the appeal is prosecuted "finds that said [summary judgment] motion is well taken and summary judgment is granted in favor of Plaintiff American Physicians Assurance Corporation." It declares no rights, it adjudicates nothing. A judgment should say, on its face, what it adjudicates or what it decides. The judgment, standing alone, should inform a reader of its nature and the result of

its entry. We have none of that here, and therefore no final and appealable judgment.

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