RENDERED: JULY 21, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000826-MR

DEBORAH LEMASTER,
AS ADMINISTRATRIX
OF THE ESTATE OF
TRAVIS LEMASTER, DECEASED — APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 14-CI-00032

MEDICAL PROTECTIVE INSURANCE
SERVICES, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS, AND D. LAMBERT, JUDGES.

COMBS, JUDGE: This appeal involves a third-party bad-faith claim against an insurer arising out of a medical malpractice suit brought against its insured. Deborah Lemaster, Administratrix of the estate of Travis Lemaster, appeals the

summary judgment of the Johnson Circuit Court dismissing her complaint against Medical Protective Insurance (MedPro). In her complaint, Lemaster alleged that MedPro had breached its duty to deal in good faith with the estate as a third-party beneficiary under the insurance policy issued by MedPro to Dr. Anthony DeGuzman. Having carefully reviewed the issues and the relevant authority, we affirm.

The relevant facts are not in dispute. Travis Lemaster, a 26-year-old construction worker, saw Dr. DeGuzman, a primary care physician, on April 25, 2013. Dr. DeGuzman's medical history and physical examination indicated that Lemaster was suffering with low back pain. Lemaster's disc desiccation was documented by an MRI. Dr. DeGuzman diagnosed Lemaster with a herniated disc and lumbar radiculopathy. He prescribed Oxycodone, Percocet, Soma, Xanax, and Neurontin for thirty days.

Lemaster returned to see Dr. DeGuzman on May 23, 2013. All medications were continued with a thirty-day supply.

Lemaster returned to see Dr. DeGuzman again on June 25, 2013. His condition was reportedly unchanged, and medications were again continued for thirty days. Every deponent denied that Lemaster appeared impaired by prescription medication or any other substance over the course of his treatment with Dr. DeGuzman.

Lemaster overslept and did not report to work on the morning of June 26, 2013. Between 12:30 and 1:00 a.m., the following morning of June 27, Lemaster

reported to his girlfriend by cellphone that he had just been involved in a single-car accident. He indicated that he had hit his head and lost consciousness for an unknown period of time. However, he refused to seek medical attention.

Shortly after 4:00 a.m. on June 27, Lemaster's mother, Deborah Lemaster, went to Travis's bedroom in her home to wake him for work. Travis was unresponsive and gray. He had a shallow pulse and was barely breathing. Deborah then went into the bathroom and from the bathroom screamed for her husband's assistance. She telephoned her brother for help. At 4:25 a.m., she called 911.

Deborah Lemaster indicated in deposition testimony that in the minutes before emergency medical services arrived at 4:35 a.m., she found several pill bottles in a box in Travis's room. Two days after they had been prescribed, the entire thirty-day supply of Xanax, Soma, and Percocet; nearly all of the Oxycodone; and about two-thirds of the thirty-day supply of Neurontin were gone. These were the prescriptions that had been written by Dr. DeGuzman.

Travis Lemaster was pronounced dead on arrival at the emergency room of Paul B. Hall Regional Medical Center in Paintsville. Presented with the pill bottles, the attending emergency medicine physician concluded that Travis Lemaster had died of a drug overdose. An autopsy confirmed that he had died of acute and chronic mixed drug intoxication that included -- but was not limited to -- the ingestion of Xanax, Oxycodone, and Soma. Some of the medications that Lemaster had ingested had not been prescribed to him by Dr. DeGuzman.

On January 28, 2014, in anticipation of a wrongful death action, Deborah Lemaster filed a petition to depose Dr. DeGuzman. MedPro, Dr. DeGuzman's professional liability carrier, began providing a defense. After Dr. DeGuzman agreed to produce Travis Lemaster's patient chart, the petition to depose was dismissed voluntarily.

Dr. DeGuzman's counsel requested all of Lemaster's medical records, the autopsy report, the death certificate, and documentation of any special damages in order to expedite a review of the potential claim. Without providing Lemaster's medical records or other relevant information, Lemaster demanded a settlement of the claim for Dr. DeGuzman's policy limits. By letter dated February 28, 2014, defense counsel rejected the demand, explaining that an investigation and evaluation of the claim would be undertaken before the insurer could pay any claim. Counsel again requested all of Lemaster's medical records.

On June 11, 2014, Lemaster filed a medical malpractice action against Dr. DeGuzman in Johnson Circuit Court. Lemaster alleged that Dr. DeGuzman had breached his duty of care by "negligently render[ing] treatment to Travis Lemaster by dispensing medication resulting" in his death. Dr. DeGuzman vigorously denied liability for Lemaster's death. He indicated to counsel that he was prepared to defend his treatment decisions through trial.

By June 30, 2014, Dr. DeGuzman's counsel secured the expert opinion of Dr. Timothy Saxe, who concluded that Dr. DeGuzman's treatment had met the standard of care and that Dr. DeGuzman had established appropriate safeguards to

restrict patient usage of the prescriptions. In August 2014, counsel advised MedPro: that Dr. DeGuzman's liability was not reasonably clear under the circumstances; that the estate's economic expert could not justify his projections for future lost wages; and that further discovery was essential to a thorough analysis of the claim. MedPro's claims manager set a "precautionary" case reserve of $350,000.00. The Johnson Circuit Court set the matter for trial in June 2015.

In October and November 2014, Dr. DeGuzman indicated to defense counsel that he continued to agree with a litigation strategy aimed at aggressively defending the claim. He explained that when negotiation became ripe for discussion, he would be willing to consent to a settlement of the matter for an amount within his insurance limits. (The requirement that a doctor consent to any proposed settlement is standard in medical malpractice insurance liability policies.) Defense counsel advised MedPro that any consideration of settlement was still premature, however, and discovery continued. Ultimately, the parties agreed to mediate the dispute.

On October 29, 2014, Lemaster filed a motion to amend her complaint to add a claim against MedPro. Lemaster alleged that MedPro had violated provisions of Kentucky's Unfair Claims Settlement Practices Act by failing to conduct a good faith and reasonable investigation of the claim and by failing to pay it "promptly and in full."

To support her allegations against MedPro, Lemaster relied upon an agreed order that had been entered by the Kentucky Board of Medical Licensure on

November 12, 2013 -- just months following Lemaster's death. The order provided that the parties had agreed -- without the benefit of an evidentiary hearing -- to a restriction upon Dr. DeGuzman's medical license for an indefinite period. This restriction prohibited Dr. DeGuzman from prescribing controlled substances to his patients. The investigation undertaken by the Board of Medical Licensure included a review of patient charts (presumably including Lemaster's) by the Board's non-physician consultant. The non-physician consultant concluded that Dr. DeGuzman had failed to conform to acceptable medical practices by "prescribing high potency narcotics and sedatives, in large quantities, and without proper justification or documentation." By agreement of the parties, the bad faith claim was stayed pending resolution of the underlying medical malpractice action.

At a deposition scheduled by Lemaster, Dr. DeGuzman invoked his 5th Amendment right and refused to testify. In November 2014, MedPro notified Dr. DeGuzman that his unwillingness to testify in the medical malpractice action was a breach of the policy conditions and that his refusal placed his liability insurance coverage in jeopardy. Nevertheless, MedPro continued to provide a defense and to collect information to assist in its evaluation of the claim against Dr. DeGuzman.

On August 10, 2015, during a mediation session scheduled by the parties, Dr. DeGuzman provided MedPro with written consent to settle the medical malpractice claim. Having observed Dr. DeGuzman's demeanor over the course of the day, MedPro decided to make a settlement offer of $500,000.00. Lemaster accepted the offer. This was the first time that Lemaster had indicated a

willingness to settle for an amount less than the $1 million policy limits. It was also a sum which substantially exceeded MedPro's indemnity reserve for the dispute. The settlement came fourteen months after the medical malpractice action had been filed.

On March 30, 2016, MedPro filed a motion for summary judgment with respect to the claim asserted against it. MedPro contended that it was entitled to judgment as a matter of law because the facts of the case could never support a recovery for bad faith under Kentucky's rigorous standards for these actions. MedPro argued first that it was not authorized under the terms of the liability policy to settle the claim before Dr. DeGuzman had provided his written consent. MedPro emphasized that a settlement was negotiated **on the very day** that Dr. DeGuzman gave his written consent. Next, MedPro contended that Lemaster never showed -- even as the claim was being settled -- that Dr. DeGuzman's liability for Lemaster's death was clear "beyond dispute." MedPro contended that under those circumstances, it would have been well within its rights to have made no offer at all and to have insisted instead on going to trial. Finally, MedPro argued that nothing about its conduct and/or the alleged "delay" in reaching a compromise with respect to the claim rose to the level of outrageous conduct. Although Lemaster resisted the motion, the trial court granted summary judgment in an order entered May 12, 2016. Lemaster's motion to alter, amend, or vacate the summary judgment was denied. This appeal followed.

On appeal, Lemaster contends that the trial court erred by granting summary judgment for three reasons. First, Lemaster contends that the entry of summary judgment was premature because she did not depose a single witness. Next, she argues that the trial court engaged in improper fact-finding as a basis for its judgment. Finally, she argues that there was ample evidence of record to conclude that MedPro had acted in bad faith. We disagree with each of these contentions. We address them in reverse order.

In order to prevail on a third-party bad-faith claim under provisions of Kentucky's Unfair Claims Settlement Practices Act (UCSPA - KRS[1] 304.12-230), a plaintiff must prove not only the insurer's unreasonable failure to respond to a legitimate claim to recover policy proceeds, but he must also produce evidence that the insurer was recklessly indifferent to the plaintiff's right to recover. Lemaster failed to provide sufficient evidence to show that she could possibly meet this high standard in order to succeed at trial. Thus, the entry of summary judgment was proper.

On appeal from summary judgment, we determine whether "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[2] 56.03. All factual ambiguities must be viewed in a light most favorable

[1] Kentucky Revised Statutes.

[2] Kentucky Rules of Civil Procedure.

to the nonmoving party. *See Hammons v. Hammons*, 327 S.W.3d 444 (Ky. 2010). Because we review all legal issues *de novo*, the circuit court's conclusions are entitled to no deference.

UCSPA sets forth what it deems to be misleading insurance investigative practices and prohibits insurers from engaging in specific activities in the course of settling claims. Among these prohibited activities are "[f]ailing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies[,]" and "refusing to pay claims without conducting a reasonable investigation based upon all available information[.]" KRS 304.12-230(3), 304.12-230(4). Most relevant to this case, UCSPA bars insurers from failing to attempt "in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear[.]" KRS 304.12-230(6).

In order to succeed on her bad-faith claim, Lemaster was required to show that: (1) the insurer was obligated under the terms of the policy to pay the claim; (2) the insurer lacked a reasonable basis either in law or in fact for denying the claim; and (3) the insurer either knew there was no reasonable basis for denying the claim or acted with a reckless disregard for whether such a basis existed. *Wittmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993). Proof of the third element requires evidence that the insurer's conduct was outrageous or came as a result of its reckless indifference to the rights of others. *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 452 (Ky. 1997).

Lemaster argues that the delay in settlement of the claim was patently unreasonable since Dr. DeGuzman's liability was beyond dispute. In support of her position, Lemaster refers to the agreed order entered by the Kentucky Board of Medical Licensure and the factual stipulations included within it. She asserts that the doctor's signature on the agreed order amounts to his admission that his care of Lemaster failed to conform to acceptable and prevailing medical practices. However, this assertion is incorrect. While the Board's non-physician consultant concluded that Dr. DeGuzman's conduct in prescribing narcotics constituted malpractice, Dr. DeGuzman's decision to enter into the agreement restricting his authority to prescribe narcotics did not include an admission that his treatment of any former patients had failed to conform to acceptable practices. Nor was such an admission required under the terms of the agreed order.

Lemaster also relies upon Dr. DeGuzman's willingness (as early as October and November 2014) to settle the claim as proof of his liability. She asks us to consider why he would be worried about his personal exposure and why he would be willing to settle if he did not believe that he was responsible for his patient's death. Dr. DeGuzman's concerns and willingness to settle are not utterly irrelevant. Nevertheless, they arguably could just as likely be explained by a variety of other circumstances (such as a desire to rid himself of the ongoing pressure of litigation). He agreed to mediation in order to terminate the litigation.

A review of the insured's internal case summary report prepared by its claims manager reflects its timely and continuing attention to and consideration of

the claim. The basis of its decision to settle the claim for an amount that exceeded its reserve is well documented. It came, in part, as a result of the claims manager's reevaluation of Dr. DeGuzman himself, who appeared at the mediation to be discomfited by his personal circumstances as well as the pending litigation.

Even if we were to accept Lemaster's unsupported theory that Dr. DeGuzman and MedPro believed that DeGuzman's malpractice resulted in the death of his patient, we cannot agree that Dr. DeGuzman ever conceded liability. The record indicates that the question of whether Dr. DeGuzman was responsible for the decedent's overdose was initially fairly debatable and remained so throughout the proceedings.

Our review of the record indicates that the issue of the value of the claim was also fairly debatable as to the amount of damages recoverable as a result of Lemaster's death. Counsel for MedPro challenged early and often the projection of Lemaster's expert as to the decedent's lost wage potential -- and presented a valid basis upon which to do so.

Under the circumstances, Lemaster could not clearly establish that MedPro had a clear or an absolute duty to pay her claim. Consequently, the circuit court did not err by dismissing her bad-faith action upon this basis.

Next, Lemaster argues that the circuit court engaged in improper fact-finding in concluding that MedPro had a reasonable basis in fact for initially denying the claim. She contends that the "reasonableness" of the insurer's actions is a question of fact reserved for a jury's determination. We disagree.

Under case law interpreting provisions of UCSPA, courts must determine whether a plaintiff presented sufficient evidence from which reasonable jurors could conclude that in the investigation, evaluation, and processing of a claim, the insurer acted unreasonably and either knew or was conscious of the fact that its conduct was unreasonable. *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368 (Ky. 2000). Furthermore, in order to survive a motion for summary judgment, the evidence presented by a plaintiff must be so egregious as to justify the imposition of punitive damages against the insurer. *Motorists Mut. v. Glass*, *supra*. To justify punitive damages, there must be proof sufficient for a jury to conclude that the conduct was outrageous or that it indicated a reckless indifference to the rights of others. *Wittmer v. Jones*, *supra*.

Lemaster did not present proof sufficient to support her claim against MedPro. She did not present evidence -- either direct or circumstantial -- from which a jury could reasonably conclude that the delay in settling her claim came as a result of the insurer's outrageous conduct or reckless indifference. Instead, the evidence showed that MedPro had a reasonable basis upon which to continue its investigation and evaluation of the claim against Dr. DeGuzman. MedPro participated in extensive discovery aimed at uncovering the circumstances surrounding the decedent's overdose; his medical history; and his earning potential. It also conducted an investigation into whether Dr. DeGuzman breached the standard of care and caused or contributed to Lemaster's death. In summary, Lemaster failed to meet the threshold requirements established by our courts and

legislature to establish a colorable claim of bad faith. Consequently, the trial court did not err by granting summary judgment.

Finally, we address Lemaster's contention that summary judgment was at least premature since she was not given an adequate opportunity to conduct discovery. In October 2015, before any formal discovery was exchanged in the bad-faith action, MedPro waived any potentially applicable privileges to its complete file created for Lemaster's medical malpractice claim. It produced the entire 1,691-page claim file to Lemaster's counsel. Subsequently, MedPro produced 1,000 pages of manuals, guidelines, performance evaluations, compensation information, and financial information about the company.

Lemaster has not asserted that she requested any information that was not provided. Instead, she notes that depositions were not taken concerning the bad-faith allegations. However, there was no attempt to take such depositions or to conduct any further discovery. Lemaster did not identify to the trial court any discovery that she needed but was denied in order to respond to MedPro's summary judgment motion. Lemaster was provided a voluminous amount of information relevant to MedPro's evaluation of her claim. Her unsupported allegation that she was deprived of an opportunity to develop the necessary facts is insufficient under the circumstances.

Therefore, we affirm the summary judgment of the Johnson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Phillip D. Blair
Paintsville, Kentucky

BRIEF FOR APPELLEE:

Mindy G. Barfield
Lexington, Kentucky