

RENDERED: JANUARY 4, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001324-MR

BRENDA ALEXANDER

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 14-CI-00252

TRUSTGARD INSURANCE COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Brenda Alexander brings this appeal from a July 18, 2017, order of the Laurel Circuit Court rendering summary judgment dismissing Alexander's third-party bad faith claim against Trustgard Insurance Company. We affirm.

On April 16, 2013, Alexander was involved in a motor vehicle accident when a vehicle driven by Jessica Jackson rear-ended Alexander's

vehicle.¹ Jackson's vehicle was insured by Trustgard Insurance Company. The motor vehicle insurance policy provided bodily injury liability coverage in the amount of \$50,000. The police report indicated that the inattention of Jackson caused the accident.

Alexander secured legal representation, and Trustgard was sent a letter dated November 6, 2013, demanding the policy limits of \$50,000 be paid to Alexander for her accident-related injuries. Trustgard refused to forward said sum to Alexander and undertook an investigation into the extent of Alexander's injuries that were caused by the accident.

Consequently, Alexander filed a complaint in the Laurel Circuit Court on April 3, 2014, against Jackson asserting that her negligence caused the motor vehicle accident and an amended complaint on August 5, 2015, against Trustgard asserting a third-party bad faith claim under the common law and Kentucky Revised Statutes (KRS) 304.12-230 (Kentucky Unfair Claims Settlement Practices Act).

On September 3, 2015, Trustgard offered to settle the negligence action against Jackson for \$10,000. Eventually, Alexander and Jackson reached a mediated settlement agreement whereby Alexander received \$27,500 in settlement

¹ The circuit court erroneously stated that April 17, 2013, was the date of the accident in its July 18, 2017, order. The police report indicates that the accident occurred on April 16, 2013.

of the tort action. By order entered February 16, 2016, the circuit court dismissed Jackson as a party.

Trustgard then filed a motion for summary judgment arguing that Alexander's third-party bad faith claim should be dismissed. Particularly, Trustgard maintained that it acted in good faith when it investigated the extent of Alexander's injuries actually caused by the accident. On the other hand, Alexander claimed that material issues of fact remain, thus precluding entry of summary judgment.

By order entered July 18, 2017, the circuit court granted Trustgard's motion for summary judgment. The circuit court explained its reasoning as follows:

Alexander's medical records from both the responding emergency medical services and the emergency room indicate she was complaining of left shoulder pain immediately following the accident. On both sets of records, there was no mention of Alexander having sustained a right shoulder injury or complaining of right shoulder pain. However, approximately one month after the subject-accident, Alexander underwent a right shoulder surgery, which she contended was due to the accident.

Claims notes produced by Trustgard revealed it questioned whether Alexander's right shoulder injury was related to the subject-accident due to, initially, the discrepancy that existed between the EMS and ER records that made no mention of a right shoulder injury and the gap in time of approximately a month between the accident and when she underwent right shoulder surgery. Upon making a claim, Alexander's bodily injury counsel advised Trustgard that Alexander had never had a problem with her right shoulder before this accident, despite not making any

complaints of pain and/or injury to the right shoulder to the EMS and/or ER.

Trustgard then took appropriate and necessary actions to attempt to investigate the claim. One of the things Trustgard did in an effort to verify Alexander's contention that she had never had prior issues with her right shoulder was to request that her attorney provide it with medical records from the five years before the accident. This request was made numerous times and, as the communications from Alexander's counsel show, there was no objection to Trustgard's request for these records. Moreover, Alexander's counsel seemed to concede the need for these records as they made efforts to secure same for Trustgard. Eventually, as the record shows, after many months of attempting to obtain the records, Alexander's counsel provided Trustgard with a release as they indicated they could not obtain the requested records as the doctor in question was allegedly no longer practicing. Within the same timeframe, Alexander's bodily injury counsel then filed suit against Jackson, Trustgard's insured. At that point in time, continued efforts were made to try and secure prior medical records by Trustgard-retained counsel, Hon. Gary Crabtree. Eventually attorney Crabtree secured Alexander's pre-existing records, which, further called into question the relatability of the right shoulder injury and surgery to the accident with Jackson.

The records showed Alexander treated with Dr. Amjad Ali at Physicians Express Care, where she had complained of right shoulder pain only seventeen days before the accident. This is contrary to representations made to Trustgard that she had never had a problem with her right shoulder before the accident with Jackson. At the doctor visit seventeen days before the Jackson accident, Alexander was diagnosed with rotator cuff disease and ordered to undergo an MRI. The Jackson accident occurred before the MRI could be conducted.

Alexander was asked about these records at her June 2015 deposition. In response, Alexander claimed the information in the Physicians Care Express records, the EMS records, and the ER records were all incorrect.

....

Of importance, this Court notes that Alexander's Response to Trustgard's Motion for Summary Judgment does not dispute any of the facts related to the actions taken and/or treatment history outlined in Trustgard's Motion for Summary Judgment. Likewise, Trustgard does not dispute the timing of the settlement demands and offers made in the underlying case, that are generally set forth below:

Alexander notes in her Response that 660 days passed between her first demand for the \$50,000 policy limits on November 6, 2013, and Trustgard's first offer made on September 3, 2015. What Alexander did not note was that during that time frame, Trustgard and attorneys for Alexander continued to amicably work together to attempt to secure the necessary medical records so that the claim could be properly evaluated. Trustgard understood and acknowledged to the Court and in the claims notes that *if* the shoulder surgery was related, the claim would have merited payment of the policy limits. During the time period between Alexander's first policy limits demand and Trustgard's first offer, it obtained post-accident medical records, secured the necessary pre-accident medical records, considered attorney Crabtree's evaluation of Alexander's deposition performance as it related to the pertinent records, and had an IME performed. After doing these things, Trustgard then directed attorney Crabtree to make an offer of \$10,000, on or about September 3, 2015, as no proof was produced by Alexander or unearthed during Trustgard's own investigation that would seem to establish that the claimed right shoulder surgery was in fact due to the accident with Jackson.

Following that offer, Alexander continued to demand the \$50,000 in policy limits up until a court-ordered mediation between the parties that occurred on December 18, 2015. There, upon advice of counsel, Alexander voluntarily accepted \$27,500, i.e., approximately half of Jackson's policy limits, to settle her claims against Jackson.

....

Here, the Court finds that Plaintiffs claims for third-party bad faith fail to meet all three of the *Wittmer* [*v. Jones*, 864 S.W.2d 885 (Ky. 1993)] elements; therefore, summary judgment is appropriate.

July 18, 2017, Order at 2-7 (footnotes omitted). This appeal follows.

Alexander initially contends that summary judgment was premature as she had not completed discovery. We disagree.

A summary judgment motion should only be considered after the nonmoving party had been given a sufficient amount of time to complete discovery. *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010). The circuit court's decision that an ample amount of time has passed is reviewed on appeal for an abuse of discretion. *Id.*

The record indicates that Alexander filed the complaint against Jackson on April 3, 2014, and the third-party bad faith claim against Trustgard on August 5, 2015. The tort claim against Jackson was settled in December 2015, and Trustgard filed its motion for summary judgment on April 12, 2017. So, Alexander had some twenty months after filing the bad faith claim and some sixteen months after settlement of the tort claim to conduct discovery. On its face, this appears to be more than adequate time to conduct discovery on the bad faith issue. Accordingly, we are unable to conclude that the circuit court abused its discretion by granting Trustgard's motion for summary judgment in regards to this

issue, and we agree with the circuit court that further discovery was unlikely to reveal any genuine issue of fact. This leads to the next issue raised in this appeal.

Alexander also argues that the circuit court erred by rendering summary judgment on the merits in dismissing her third-party bad faith claim against Trustgard. Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). All facts and inferences therefrom are viewed in a light most favorable to the nonmoving party. *See id.* Because a summary judgment involves only questions of law and the existence of disputed material issues of fact, an appellate court does not defer to a trial court's decision and will review the case *de novo*. *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

Alexander specifically argues that Trustgard failed to offer her a fair and prompt settlement even though its insured's (Jackson) liability was reasonably clear. By so doing, Alexander asserts that Trustgard acted in bad faith and violated KRS 304.12-230.

KRS 304.12-230 provides in part:

It is an unfair claims settlement practice for any person to commit or perform any of the following acts or omissions:

.....

- (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
- (3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- (4) Refusing to pay claims without conducting a reasonable investigation based upon all available information;
- (5) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
- (6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
- (7) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;
- (8) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;
-
- (14) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement[.]

Under KRS 304.12-230, “an insurance company is required to deal in good faith with a claimant, whether an insured or a third-party, with respect to a claim which

the insurance company is contractually obligated to pay.” *Indiana Ins. Co. v. Demetre*, 527 S.W.3d 12, 26 (Ky. 2017) (quoting *Davidson v. Am. Freightways, Inc.*, 25 S.W.3d 94, 100 (Ky. 2000)). To prevail upon a third-party bad faith claim, it must be demonstrated that:

(1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; *and* (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed.

Hollaway v. Direct Gen. Ins. Co., 497 S.W.3d 733, 737-38 (Ky. 2016) (quoting *Wittmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993)). Additionally, the third-party carries the burden of proving bad faith; thus, to survive summary judgment, the third-party “must offer proof for all three” elements. *Hollaway*, 497 S.W.3d at 738.

Under the first element to prove a bad faith claim, the insurance company must have a contractual duty to pay the claim per the terms of its policy. Stated differently, the insurance company must be liable. *Hollaway*, 497 S.W.3d at 737-38. In assessing the insurer’s liability under a motor vehicle insurance policy, our Supreme Court has pointed out that two distinct questions are presented as to a bad faith claim: (1) “liability for the accident itself” and (2) “the extent and

severity of . . . alleged injuries from the accident.” *Hollaway*, 497 S.W.3d at 738, 739. In this case, the second question is pivotal.

The extent of Alexander’s injuries caused by the April 16, 2013, accident has been consistently and reasonably contested by Trustgard. Approximately one month after the accident, Alexander underwent surgery on her right shoulder to repair a torn rotator cuff. She claimed that her right shoulder injury was caused by the accident and demanded Trustgard pay her the policy limits of \$50,000. However, Trustgard reviewed the medical records from emergency medical services and the hospital emergency room made on the day of the accident (April 16, 2013). These records indicated that Alexander only complained with left shoulder pain; in fact, no medical record indicated that Alexander suffered a right shoulder injury on the day of the accident. So, Trustgard requested Alexander’s medical records for the previous five years in order to investigate whether the right shoulder injury preexisted the accident. After Alexander failed to provide said medical records, Trustgard obtained them. These medical records revealed that Alexander presented to a medical doctor for right shoulder pain on March 30, 2013, some seventeen days before the motor vehicle accident. At the visit, Alexander was diagnosed with rotator cuff disease, and an MRI was ordered on the right shoulder. The MRI did not take place before the accident. At Alexander’s deposition on June 16, 2015, she was questioned

concerning the office visit on March 30, 2013, and her report of right shoulder pain. Alexander denied that she had complained of right shoulder pain at that visit. Trustgard offered Alexander \$10,000 in settlement of her tort claim on September 3, 2015. Alexander rejected the offer. Eventually, the parties reached a settlement of the tort claim in December 2015 for a total of \$27,500.

Based upon these undisputed facts, it is clear that the extent of Alexander's injuries were not reasonably established and a legitimate dispute existed between Alexander and Trustgard regarding same. Trustgard reasonably contested its liability for the right shoulder injury and for this reason refused to tender the policy limits of \$50,000 to Alexander. As the extent of Alexander's right shoulder injury was reasonably and legitimately contested by Trustgard, the contractual obligation of Trustgard to pay the claim was not clearly established. *See Hollaway*, 497 S.W.3d at 739. Hence, we conclude that the first element of a third-party bad faith claim (contractual duty to pay) was not satisfied by Alexander; thus, Alexander's third-party bad faith claim must fail. *See id.*

We view any remaining contentions of error as moot or without merit.

Accordingly, we hold that the circuit court properly rendered summary judgment dismissing Alexander's third-party bad faith complaint against Trustgard.

For the foregoing reasons, the order of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
FOR APPELLANT:

Kyle R. Salyer
Paintsville, Kentucky

BRIEF FOR APPELLEE:

Melissa Thompson Richardson
Chad R. Wadlington
Michael J. LaCourse
Lexington, Kentucky

ORAL ARGUMENT FOR
APPELLEE:

Melissa Thompson Richardson
Lexington, Kentucky