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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000262-MR

THE MEDICAL PROTECTIVE COMPANY — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 01-CI-00992

AURELIA WILES AND
DONALD WILES — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; SHAKE,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Before this Court is an appeal from a multi-million dollar judgment of the Kenton Circuit Court in a third-party insurance bad faith case

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

brought pursuant to Kentucky's Unfair Claims Settlement Practices Act (UCSPA). The bad faith claim arose from the handling of a medical malpractice claim. On appeal, the Medical Protective Company (Medical Protective) contends that the $2.2 million punitive damages award should be set aside based upon erroneous jury instructions and insufficient evidence, and that the trial court erred in awarding statutory interest, attorney fees, and prejudgment interest pursuant to KRS 304.12-235 based upon an argument that the statute is not applicable to third-party claims. Having carefully considered the record, the parties' arguments, both in their briefs and at oral argument, and the applicable case law, we reverse the trial court's award of statutory interest and attorney fees, but affirm in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying medical malpractice suit arose on July 3, 2000, when Aurelia Wiles (Mrs. Wiles) suffered an injury to her inner ear during a routine procedure performed by her primary care physician, Dr. Del Burchell, at his physicians' group office, Internal Medicine Associates of Northern Kentucky (IMANK). Both Dr. Burchell and IMANK are insured by Medical Protective. Dr. Burchell was performing a lavage procedure to remove wax from Mrs. Wiles's ear when an inadequately secured needle from a pressurized syringe shot into her ear. As a result of this injury, Mrs. Wiles claimed to have suffered permanent injuries to her hearing and balance.

Following her injury, Mrs. Wiles retained attorney Terrence Moore to represent her. In mid-August 2000, Moore sent a letter to Dr. Burchell in connection with Mrs. Wiles's injury and asked that his insurance representative contact him. Thereafter, Moore sent several letters to Gary Duechle, the Branch Manager for Medical Protective's Louisville office, regarding Mrs. Wiles's medical and financial conditions. By letter dated January 12, 2001, Moore demanded the policy limits of $2 million to resolve the claim. He attached several medical reports and test results to support this demand.

Duechle responded by letter dated February 2, 2001, in which he stated that the damages resulting from the injury were complex and that he was not yet in a position to make a final conclusion on the permanent result. Duechle indicated that he was having the matter reviewed by a neurologist and might obtain an independent medical review. He also addressed questions concerning Mrs. Wiles's earnings from her business. By letter dated February 27, 2001, Moore stated that he had not yet received copies of the policies and proof that the syringe had been retained, as he had requested. He stated that he was preparing a lawsuit that he would be filing by the end of March, in which he would be demanding compensatory and punitive damages. In response to that letter, Duechle suggested that future communications be made through attorney Mark Arnzen, who had been retained to represent Dr. Burchell. Correspondence continued between Moore and Arnzen regarding Mrs. Wiles's case.

On May 14, 2001, Mrs. Wiles and her husband, Donald Wiles, (the Wileses) filed suit against Dr. Burchell, IMANK, and Medical Protective seeking damages for negligence as well as punitive damages for an allegation of bad faith on the part of Medical Protective. Mr. Wiles also sought damages for loss of consortium. The malpractice and bad faith claims were bifurcated, with the malpractice claims to be decided first. Medical Protective made its first offer of settlement in October 2002 in the amount of $500,000.00; the Wileses rejected this offer and never backed down from their original demand of $2 million. Although the matter had been set for trial, the parties eventually agreed to binding arbitration, which was tried before a three-judge panel in April 2003. Prior to arbitration, the parties agreed to a high-low range of $1.1 million to $2 million. The arbitration panel ultimately awarded the Wileses $1.65 million, which Medical Protective paid on June 10, 2003.

Once the medical malpractice claims were settled, the matter returned to the trial court's active docket for resolution of the bad faith claim. The parties entered into extensive discovery, and the record is replete with disputes concerning discovery, including numerous motions *in limine* regarding the designation of witnesses as experts and to what witnesses would testify in general. In an amended complaint, the Wileses requested statutory prejudgment interest and attorney fees on the underlying $1.65 million award. The parties also filed motions for summary judgment or partial summary judgment; the Wileses moved for partial summary

judgment on the issue of statutory interest, while Medical Protective's motion addressed the sufficiency of evidence to support a claim for punitive damages.

The trial of this matter was held over a six-day period from May 12 through May 20, 2009. At the conclusion of the trial, the jury found that Medical Protective did not lack a reasonable basis to deny or delay payment of the plaintiffs' claims, but that it failed to acknowledge and act reasonably promptly upon communications about their claims or to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies. Specifically regarding the plaintiffs' claims, the jury found that Medical Protective refused to pay their claims without conducting a reasonable investigation; did not make a good faith attempt to effectuate a prompt, fair, and equitable settlement once liability had become reasonably clear; and did not promptly provide a reasonable explanation for the denial of the claims or for the offer of a compromise settlement. Based on these findings, the jury awarded the Wileses $350,000.00 in compensatory damages for emotional pain and suffering, stress, worry, and inconvenience. The jury then awarded $2.2 million in punitive damages.

On May 29, 2009, the trial court granted judgment in accordance with the jury's verdict, and awarded costs as well as 12% post-judgment interest. The court ordered the parties to brief the issues concerning prejudgment interest and attorney fees.

In their motion addressing the above issues, the Wileses contended that they were entitled to 12% statutory interest pursuant to KRS 304.12-235(2)

from February 11, 2001, (thirty days from the date Moore provided the documentation to support Mrs. Wiles's claims) through June 10, 2003, (the date the arbitration award was paid) on the $1.65 million awarded in the malpractice action. That amount equaled $501,416.28. The Wileses also requested an award of the attorney fees pursuant to KRS 304.12-235(3) and costs related to the underlying claim. Attorney fees totaled $550,000.00, or a one-third contingency fee, and costs totaled $33,429.02. Finally, the Wileses requested 8% prejudgment interest pursuant to KRS 360.010 on the amounts of interest and attorney fees reflected above, which they claim became liquidated upon the payment of the $1.65 million award.

In response, Medical Protective argued that the Wileses lacked standing to pursue their claims for 12% statutory interest and attorney fees because the provisions permitting those items of recovery were limited to first-party claims. Furthermore, the jury specifically found that Medical Protective did not lack a reasonable basis to deny or delay payment of Mrs. Wiles's claim, and the attorney fees and interest were unliquidated.

By order entered August 17, 2009, the trial court determined that KRS 304.12-235(2), addressing statutory interest, applied to third-party claimants and awarded the Wileses 12% statutory interest on the $1.65 million arbitration award. The court found that the period during which this interest was due began to run thirty days after November 27, 2002, the date that Medical Protective's expert testified by deposition that Mrs. Wiles had trauma-induced Meniere's syndrome.

The trial court declined to assess 8% interest on the interest awarded, determining that the amount was not settled and, thus, was unliquidated. The court also determined that the Wileses were entitled to attorney fees pursuant to KRS 304.12-235(3) for the same reason they were entitled to statutory interest, with the appropriate amount to be determined following a later hearing. Finally, the court awarded 12% post-judgment interest to run from the date of the entry of the judgment until paid, as well as taxable costs.

The Wileses moved to reconsider the above order, arguing that the starting date for statutory interest was much earlier than November 27, 2002. Rather, the January 12, 2001, letter with the demand for policy limits should represent the starting date for the thirty-day period. Regarding attorney fees, the Wileses stated those should be the attorney fees paid in the underlying claim. They also argued that the amount of interest and attorney fees became fixed, and therefore liquidated, on June 10, 2003. They argued that a defense to the claim would not make the amounts unliquidated. By order entered September 9, 2009, the trial court clarified that the claim for attorney fees was for the fee received in the underlying case.

In a supplemental response regarding attorney fees filed September 11, 2009, Medical Protective continued to argue that the statute did not apply to third-party claims and that the amount was unreasonable and excessive. Medical Protective then filed a separate response to the motion to reconsider on October 9, 2009.

On November 13, 2009, the trial court entered its final and appealable judgment and order ruling on the Wileses' motion to reconsider. It first determined that the date from which statutory interest should accrue was earlier than it initially ruled. The court found that the April 4, 2001, letter from Medical Protective's counsel stated that based upon their expert, Dr. Smith's, opinion, the insurer had sufficient information so that it could no longer fairly dispute the claim. Therefore, the period of interest began to run thirty days later, on May 4, 2001. The court then determined that the statutory interest was liquidated and that the imposition of 8% interest was warranted from the payment of the underlying claim, as well as 12% post-judgment interest from the August 17, 2009, judgment. Finally, the court found that the fees and costs from the underlying claim were reasonable, and awarded those amounts as well as the associated 8% prejudgment interest and 12% post-judgment interest.

Medical Protective moved the trial court to alter, amend, or vacate the final judgment pursuant to Kentucky Rules of Civil Procedure (CR) 59.05. In this motion, it argued that the trial court should have lowered the interest rate of post-judgment interest from 12% to 8%; that a portion of the costs awarded were erroneous; that the punitive damages award should be set aside because the instructions did not include language that the finding must be supported by clear and convincing evidence; that the judgment should be clarified to show that it was not entered against Dr. Burchell or IMANK; and that post-judgment interest should have run from the final judgment entered November 13, 2009, rather than from the

non-final judgment entered in August. The Wileses filed a response on December 16, 2009, disputing Medical Protective's arguments (other than the portion requesting clarification). In an order entered January 8, 2010, the trial court granted the request for clarification, but denied Medical Protective's motion in all other respects. This appeal follows.

ANALYSIS

1. Jury Instructions for Punitive Damages

For its first argument, Medical Protective contends that the trial court improperly instructed the jury by permitting it to find punitive damages without deciding whether the award had been proven by clear and convincing evidence. "An alleged error in a jury instruction is considered a question of law and is reviewed on appeal under a *de novo* standard of review." *Mountain Water Dist. v. Smith*, 314 S.W.3d 312, 315 (Ky. App. 2010).

KRS 411.184 provides the statutory basis for an award of punitive damages. The statute provides, in pertinent part:

> (1) As used in this section and KRS 411.186, unless the context requires otherwise:
>
> . . . .
>
> (f) "Punitive damages" includes exemplary damages and means damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future.

> (2) A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.
>
> . . . .
>
> (5) This statute is applicable to all cases in which punitive damages are sought and supersedes any and all existing statutory or judicial law insofar as such law is inconsistent with the provisions of this statute.

Medical Protective contends that pursuant to the clear language of the statute, the trial court should have instructed the jury that it could award punitive damages only after it found such damages were appropriate by clear and convincing evidence. In support of this argument, Medical Protective cites to the Supreme Court of Kentucky's statement of the law in *Hardin v. Savageau*, 906 S.W.2d 356, 357 (Ky. 1995): "While a proper verdict in most civil actions requires only that the jury 'believe' or be 'satisfied' from the evidence, the substantive law of some civil actions requires a heightened degree of proof such as 'clear and convincing evidence.'" The *Hardin* Court went on to state:

> If the elevated evidentiary standard is to have meaning and effect, the jury must be informed of the standard and directed to apply it to the evidence. Without instructing on the heightened standard, only the judge will have given it any consideration and the jury will make its determination using an erroneous standard, less than the law requires. When the law requires a particular evidentiary standard, both the judge and the jury must consider the evidence in that light. The nature of the inquiry is substantially different when the jury must say whether it "is satisfied from the evidence" or whether it "believes by clear and convincing evidence."

Id. at 358.

In response, the Wileses cite to *Farmland Mutual Insurance Co. v. Johnson*, 36 S.W.3d 368 (Ky. 2000), a bad faith case in which the Supreme Court of Kentucky addressed precisely this issue. Farmland argued that the instructions did not properly "mirror" the language of KRS 411.184(2), but the Court upheld the instructions: "KRS 411.184(5) . . . does not mandate that the instruction be an exact replica of the language of KRS 411.184(2), but states only that KRS 411.184(2) takes precedence over any existing *inconsistent* law." *Farmland*, 36 S.W.3d at 381 (emphasis in original). In so holding, the Court recognized that

> KRS 411.184 became effective July 15, 1988, before this Court's decision in *Curry* adopting the three-part test for a bad faith claim from the dissent in *Federal Kemper*. This Court has continued to recognize the validity of this standard. The bad faith instructions given here were entirely consistent with *Wittmer v. Jones* and *Curry v. Fireman's Fund* and were presented by means of special interrogatories.
>
> The findings of fact which emerge from the court's interrogatories reveal the jury's belief that Farmland knowingly or recklessly failed in its duty to investigate, knowingly or recklessly failed to attempt a good faith settlement, and knowingly or recklessly compelled the Johnsons to initiate litigation to recover amounts due them under the policy.

Farmland, 36 S.W.3d at 381-82 (footnotes omitted).

As stated in *Farmland*, in *Curry v. Fireman's Fund Insurance Co.*, 784 S.W.2d 176 (Ky. 1989), the Supreme Court overruled its prior decision in *Federal Kemper Insurance Co. v. Hornback*, 711 S.W.2d 844 (Ky. 1986), but in

doing so adopted the views expressed by Justice Leibson in his dissent in that case. *See Curry*, 784 S.W.2d at 178. Justice Leibson described the three-part test to determine whether a bad faith claim has been established:

> [A]n insured must prove three elements in order to prevail against an insurance company for alleged refusal in bad faith to pay the insured's claim: (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.

Federal Kemper, 711 S.W.2d 844, 846-47 (Ky. 1986) (Leibson, J., dissenting). "[A]n insurer is, however, entitled to challenge a claim and litigate it if the claim is debatable on the law or the facts." *Id*.

Our review of the jury instructions, in conjunction with the above case law, satisfies us that the instructions ultimately presented to the jury were proper. The instructions certainly met Justice Leibson's three-part test in that the jury had to find that there was no reasonable basis for Medical Protective's action (or inaction) or that Medical Protective acted with reckless disregard for whether a basis existed.

We are constrained to reject Medical Protective's contention that the "clear and convincing" language is necessary in this case, solely on the basis of the Supreme Court's holding in *Farmland*. However, we must remark that the Supreme Court's opinions in *Hardin* and *Farmland* related to punitive damages jury instructions appear to be in conflict with one another. In *Hardin*, which

predates *Farmland* by five years, the Supreme Court eloquently described the importance of adequately and appropriately instructing the jury when punitive damages are requested, as reflected above. *Hardin* went on to state as follows:

> The prevailing practice of merely instructing the jury that to render a verdict it must "believe" or be "satisfied" from the evidence is entirely appropriate when the standard is preponderance. However, as observed in *Ragsdale* and heretofore stated, the term "preponderance" should not be used because it may not be easily understood and is essentially redundant. But when the evidentiary standard is something greater than preponderance, it is necessary to expressly state the standard to assure an appropriately informed jury.

Hardin, 906 S.W.2d at 359. Because ours is an intermediate appellate court, we do not have the authority to resolve the apparent conflict between these two holdings, and we must follow the holding in *Farmland* because it specifically addresses the area of bad faith. It is up to the Supreme Court to finally resolve this conflict so that lower courts will be able to properly and consistently instruct juries on the correct standard of proof in bad faith cases.

Accordingly, we find no error on the issue of jury instructions, and we need not address the appellees' argument that KRS 411.184(1)(c) is unconstitutional as impeding on a jural right.

2. Sufficiency of Evidence to Warrant Finding of Punitive Damages

Medical Protective contends that the trial court erred when it denied its motion for summary judgment and submitted the issue of punitive damages to the jury because there was insufficient evidence to warrant a finding of punitive

damages. It contends that there was no evidence that would permit a jury to find that Medical Protective had acted so outrageously as to merit an award of punitive damages.

In *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993), the Supreme Court of Kentucky addressed this issue, stating that the trial court must first determine that there is sufficient evidence to justify submitting the issue of punitive damages to the jury:

> Before the cause of action exists in the first place, there must be evidence sufficient to warrant punitive damages:
>
> > "The essence of the question as to whether the dispute is merely contractual or whether there are tortious elements justifying an award of punitive damages depends first on whether there is proof of bad faith and next whether the proof is sufficient for the jury to conclude that there was 'conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.' *Restatement (Second) Torts*, Sec. 909(2) (1979), as quoted and applied in *Horton v. Union Light, Heat and Power Co.*, Ky., 690 S.W.2d 382, 388-90 (1985)." *Federal Kemper*, *supra*, 711 S.W.2d at 848.
>
> This means there must be sufficient evidence of intentional misconduct or reckless disregard of the rights of an insured or a claimant to warrant submitting the right to award punitive damages to the jury. If there is such evidence, the jury should award consequential damages and may award punitive damages. The jury's decision as to whether to award punitive damages remains discretionary because the nature of punitive damages is such that the decision is always a matter within the jury's discretion.

Wittmer, 864 S.W.2d at 890.

In addition to *Wittmer*, Medical Protective cites to a subsequent decision in *Motorists Mutual Insurance Co. v. Glass*, 996 S.W.2d 437, 452-53 (Ky. 1997), in which the Supreme Court reiterated its holding in *Wittmer*:

> [W]e held in *Wittmer* that in order to justify an award of punitive damages, there must be proof of bad faith sufficient for the jury to conclude that there was conduct that was outrageous, because of the defendant's evil motive, or his reckless indifference to the rights of others. If the evidence suffices to justify punitive damages under this standard, a cause of action for statutory bad faith premised on a violation of the UCSPA may be maintained. If not, the cause of action cannot be maintained. *Wittmer*, *supra*, at 890-91. Finally, we held in *Wittmer* that there can be no private cause of action for a mere "technical violation" of the UCSPA. *Id*. at 890. As required by KRS 446.070, a condition precedent to bringing a statutory bad faith action is that the claimant was damaged by reason of the violation of the statute.
>
> Although the jury in this case was instructed on seven separate sections of the UCSPA, the allegations against Motorists Mutual and Farm Bureau boil down to a claim that they did not promptly offer to pay Jeffrey Glass what his claim was reasonably worth. Pursuant to *Wittmer*, to prevail on this claim, Jeffrey needed to prove that the conduct of the insurers was outrageous, because of an evil motive or reckless indifference to his rights. In applying that standard to the evidence in this case, it must be kept in mind that mere delay in payment does not amount to outrageous conduct absent some affirmative act of harassment or deception. *Cf. Zurich Insurance Co. v. Mitchell*, Ky., 712 S.W.2d 340 (1986). In other words, there must be proof or evidence supporting a reasonable inference that the purpose of the delay was to extort a more favorable settlement or to deceive the insured with respect to the applicable coverage.

Glass, 996 S.W.2d at 452-53.

Based upon these rulings, Medical Protective contends that the Wileses failed to establish the requisite outrageous behavior to permit the issue to go to the jury. It contends that its initial offer of $500,000.00 was not a "low ball" offer, nor was that offer made too late in the process, based upon the discrepancies and uncertainties regarding the causation of Mrs. Wiles's symptoms and the financial damages. Rather, Medical Protective argues that the Wileses did not present any evidence of an evil motive or reckless indifference in either the amount or timing of the initial offer. In its brief, Medical Protective states that the investigation was neither too slow nor insufficiently thorough, pointing to the actions Duechle took during his investigation of the claim:

> Mr. Duechle sought independent medical advice, sought accounting records for the Wiles' [sic] alleged business loss, retained an independent accountant to review the Wiles' [sic] business loss claims, reviewed information submitted by the Wiles' [sic] counsel, interviewed Dr. Burchell and this staff regarding the incident, and retained outside counsel to obtain medical and accounting records.

On the other hand, the Wileses contend that Duechle's investigation was inadequate and was geared toward saving money from the company's indemnity budget. They further point to the financial performance objectives evident in Medical Protective's employee reviews, which they argue created an atmosphere promoting delayed payment of claims. The late setting of a $1 million reserve, which occurred the day Medical Protective closed its books for the year 2002,

arguably established its manipulation of the situation to appear more profitable. Finally, the Wileses argue that Medical Protective's action did not constitute "mere delay" in making a settlement offer. Rather, Medical Protective waited twenty-seven months after Mrs. Wiles's injury, for which they contend liability was clear, to make its first offer to settle her claim.

In reply, Medical Protective disputes that the value of the claim was readily apparent, as the Wileses contend, and that calculation of the claim's value required considerable investigation and evaluation. It also points out that the settlement offers and setting of reserves constituted separate considerations and that there was no correlation between those actions.

We have thoroughly reviewed the evidence submitted in this case, as well as the case law addressing this issue. Based upon this evidence, we believe the trial court acted appropriately in submitting the issue of bad faith to the jury to consider whether punitive damages were warranted. The twenty-seven-month delay between Mrs. Wiles's injury and the initial settlement offer, where fault was clear, cannot be considered "mere delay" in this case. While we appreciate that Medical Protective had to investigate and review the circumstances of Mrs. Wiles's injury and condition, as well as her financial claims, the evidence of Medical Protective's focus on the financial appearance of the company provides a basis to establish a questionable motive for the method of investigating claims in general and the timing of the settlement offer in this case. Accordingly, we hold that the trial court properly submitted this issue to the jury.

3. Whether the Punitive Damages Award is Excessive

Next, Medical Protective asserts that the amount of punitive damages award was excessive under the United States and Kentucky Constitutions. Relying upon the United States Supreme Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), Medical Protective argues that the punitive damages awarded should have been equal to the amount of compensatory damages awarded ($350,000.00), which it describes as a substantial amount.

The Wileses point out that Medical Protective did not raise this argument before the trial court and, therefore, may not raise the issue on appeal. As the former Court of Appeals stated in *Ford Motor Credit Co. v. Swarens*, 447 S.W.2d 53, 56 (Ky. 1969), "[w]e have held that whether damages awarded are excessive may not be considered on appeal if the appealing party has failed to present that question to the trial court." Accordingly, because Medical Protective did not first raise the excessiveness of the punitive damages award with the trial court, we decline to address this issue on appeal.

4. Other Rulings

Medical Protective makes four separate arguments addressing its contentions that the trial court made incorrect or prejudicial rulings. We shall address each issue in turn to determine whether the trial court abused its discretion. *See Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000)

("abuse of discretion is the proper standard of review of a trial court's evidentiary rulings.").

A. Lay Witness Testimony

Medical Protective argues that the trial court improperly allowed two of the Wileses' lay witnesses (attorneys Andre Busald and Terry Moore, whose testimony had been the subject of a motion *in limine*) to express expert opinions and to characterize its offers as "low ball" and "unreasonable." It argues that such testimony is not within the realm of a lay witness, as it would require specialized knowledge of an expert as set forth in Kentucky Rules of Evidence (KRE) 702, and that neither of the witnesses qualified as an expert. Medical Protective further argues that permitting them to describe the offer as "low ball" or "unreasonable" was prejudicial.

In response, the Wileses state that Busald and Moore were both involved in the underlying malpractice action, as counsel for Dr. Burchell and the Wileses, respectively, and they offered factual testimony concerning their actions during the course of the underlying lawsuit. Both expressed their concerns during that time about the way Medical Protective was handling the claim and the lack of any settlement offers, but neither expressed an opinion as to the ultimate issue of fact; namely, whether Medical Protective had violated the UCSPA. The Wileses cited to KRE 701 to describe this as permissible opinion testimony that is "[r]ationally based on the perception of the witness" and "[h]elpful to a clear understanding of the witness' testimony or the determination of a fact in issue[.]" Regarding the

description of the offer as "low ball," the Wileses contend that term is not a technical one, but an expression used by attorneys in settlement negotiations, and that in any event it was not prejudicial.

We agree with the Wileses that the trial court did not abuse its considerable discretion in permitting the two witnesses to characterize the settlement offer as they did. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We do not agree with Medical Protective that such testimony constituted expert opinion testimony, which would have been precluded. Rather, it provided an explanation for the actions of the witnesses in the underlying action. Nor do we believe that the testimony was prejudicial so as to prevent Medical Protective from receiving a fair trial.

B. Exclusion of Expert Witnesses

This issue arose from the parties' *Daubert* motions concerning Medical Protective's proposal of several expert witnesses. Medical Protective argues that the trial court improperly excluded James Keller, W.R. Patterson Jr., and Gary Weiss as expert witnesses pursuant to KRE 702. In support, Medical Protective relies upon the three proposed witnesses' extensive experience in handling insurance claims, and bad faith claims in particular. In response, the Wileses point out that similar witnesses they had proposed as experts were also excluded from testifying on the ultimate issue. They also contend that the opinions the excluded

experts would have expressed would not have been outside of the jury's common knowledge, meaning that it would not be considered expert testimony. In other words, the jury would be able to determine, without the aid of expert testimony, whether Medical Protective acted reasonably promptly, conducted a reasonable investigation, and other applicable questions related to the subject matter of this case. In order to resolve this issue, we must consider what testimony these proposed witnesses, as well as the witnesses proposed by the Wileses, would have given and whether this "specialized knowledge [would] assist the trier of fact to understand the evidence or to determine a fact in issue[.]" KRE 702. *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000).

At the oral argument in this matter, Medical Protective stated that the jury was not permitted to hear testimony as to how a claim is generally evaluated, negotiated, and settled, and argued that the jury needed to understand how these cases work in the real world, something with which the jury would not be familiar. Therefore, specialized knowledge as to how claims are evaluated and processed would have been necessary for the jury to answer the technical questions asked in the instructions. These questions included whether Medical Protective "[f]ailed to acknowledge and act reasonably promptly upon communications with respect to the claims of Aurelia and Donald Wiles" pursuant to KRS 304.12-230(2); "[f]ailed

to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies" pursuant to KRS 304.12-230(3); "[r]efused to pay the claims of Aurelia and Donald Wiles without conducting a reasonable investigation based upon all available information" pursuant to KRS 304.12-230(4); "[d]id not attempt in good faith to effectuate a prompt, fair and equitable settlement of the claims of Aurelia and Donald Wiles after liability had become reasonably clear" pursuant to KRS 304.12-230(6); and "[f]ailed to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of the claims of Aurelia and Donald Wiles or for the offer of a compromise settlement" pursuant to KRS 304.12-230(14).

We are guided in our review of the trial court's rulings by *Farmland, supra*, in which the Supreme Court upheld the lower court's decision to exclude the testimony of attorney Michael Breen, who would have testified that Farmland made a timely and reasonable settlement offer. The Supreme Court stated the trial court's reasons for excluding him as follows:

> In refusing to admit Breen's testimony, the trial court found that Breen had no experience working in the insurance industry, no experience adjusting claims from the insurance company's perspective, and no experience supervising the adjustment of insurance claims. With regard to fire claims, Breen had no experience investigating fire claims and had practiced only one fire case as an attorney.

Farmland, 36 S.W.3d at 378. The Court then concluded that, "the trial court's refusal to admit the testimony of . . . Breen did not constitute an abuse of

discretion. In this case, Breen was found not to be qualified as an expert based upon a paucity of experience in adjusting fire damage claims." *Id*. at 379.

We shall now set forth in detail the excluded testimony as described in the court filings and the submitted depositions or reports:

- Gary Weiss:

In an amended disclosure of expert witnesses, Medical Protective named Gary Weiss and identified him as an attorney with extensive experience in the medical/legal insurance industry. He was expected to testify that Medical Protective did not violate the UCSPA or act in bad faith in handling the claim, noting indicators of symptom magnification on Mrs. Wiles's part, her acceptance of the high-low arbitration agreement, her attorney's aggressiveness, and the difficulty in evaluating the case and determining liability due to the type of injury and length of treatment. The Wileses moved to strike Mr. Weiss based upon the trial court's prior rulings that no experts would be permitted to testify Medical Protective violated the UCSPA or acted in bad faith. In other words, his testimony would not be pertinent to the factual issues the jury had to decide. In response to the Wileses' motion, Medical Protective described Mr. Weiss's experience as a trial attorney, litigator, and mediator, as well as his extensive writings on the subject of personal injury claims as well as bad faith. Medical Protective argued that Mr. Weiss's specialized knowledge would be of help to the jury regarding the difficulty with which an injury such as Mrs. Wiles sustained is evaluated for claims purposes and when an insurance company's conduct would become reckless in

relation to the upper value of a case. Medical Protective specifically stated that Mr. Weiss would not be asked to testify about claims handling standards. It concluded that Mr. Weiss's expert testimony met the standards enunciated in *Daubert* addressing relevance and reliability, and would aid the jury in a complex field beyond the common experience of lay persons.

Medical Protective introduced Mr. Weiss's report by way of avowal at the end of the trial. The report details his opinions related to the handling of Mrs. Wiles's claim by Medical Protective and his ultimate belief that there was no violation of the UCSPA. He based his opinion on his review of the claims file as well as depositions, medical records, and a timeline listing a correspondence and medical chronology. These materials revealed, in his opinion, a conflict between what Mrs. Wiles's attorney was demanding and what Medical Protective requested and needed to properly evaluate the claim. He concluded that Medical Protective acted promptly with a settlement offer once her final surgery was unsuccessful in resolving her symptoms. Mr. Weiss also detailed parts of Ms. Wiles's lifestyle that might not have been favorable to a jury, including weekly trips to gambling boats she and her husband took, their gambling losses, and her business tax records. Coupled with the suggestion by a treating physician that her symptoms were exaggerated, these elements all worked to prevent a faster resolution of her claim and were not evidence of bad faith.

- James Keller:

Medical Protective identified former Kentucky Supreme Court Justice James Keller in a pre-trial disclosure of expert witnesses filed August 23, 2007, noting that prior to his retirement from the Supreme Court, Justice Keller served for twenty-two years as a circuit court judge in Fayette County. Medical Protective anticipated that he would testify that it did not violate the UCSPA or act in bad faith. Medical Protective deposed Justice Keller on August 5, 2008. Shortly thereafter, the Wileses filed a motion *in limine* to strike Justice Keller as an expert witness, citing his lack of relevant experience or expertise on the issue. Based upon his own testimony, Justice Keller had no experience as a claims adjuster and had never written an article dealing with claims handling. The Wileses also pointed out that he had been excluded as an expert witness by a federal district court on the topic of bad faith insurance claims. Because Justice Keller lacked the necessary qualifications and expertise in claims handling, they assert that his opinions did not meet the standard of reliability for admittance under KRE 702.

In his deposition, Justice Keller testified that he had never been an insurance claims adjuster or worked for an insurance company as an employee, but had done personal injury work as part of his practice before becoming a judge in 1976. He currently does arbitration and consulting work for other attorneys, including being retained as an expert for both the plaintiff and the defense in insurance bad faith cases. For this case, Justice Keller reviewed the available depositions, including ones critical to Medical Protective's handling of the claim, and determined that the criticism was invalid. Based upon his review, he determined that this was a very

difficult case to evaluate due to questions of the amount of coverage available, causation, and damages. He did not identify any evidence of bad faith in Medical Protective's handling of the claim. Justice Keller did not testify about general standards of claims adjustment in the insurance industry.

- W.R. Patterson Jr.:

Along with Justice Keller, Medical Protective identified Mr. Patterson as an expert witness in a pre-trial disclosure. At that time, Mr. Patterson had been practicing in the field of civil litigation for forty-two years. Medical Protective anticipated that he would testify that there was no violation of the UCSPA and that it did not act in bad faith in handling Mrs. Wiles's claim. Mr. Patterson was deposed on August 25, 2008, and the Wileses moved to exclude his testimony via a motion *in limine* filed September 5, 2008. They argued that his testimony was neither reliable nor relevant because he lacked the requisite qualifications and experience to meet the standard under KRE 702. He has never worked for an insurance company as an adjuster or written any articles on bad faith or claims adjusting. In response, Medical Protective argued that in his forty-two years of experience in insurance defense work, Mr. Patterson reviewed more than 1000 claims files and claims handling activities, and understands the relationship between insurance carriers, their insureds, and their counsel. Through his work, Mr. Patterson became familiar with insurance company perspectives of how insurance claims should properly be adjusted and handled. Furthermore, his work as a mediator also provided him with the necessary expertise to testify concerning

settlement negotiation standards and practices, including the timing of the offers of settlement in the case and whether the initial offer was a "low ball" offer.

In his deposition, Mr. Patterson testified that he had not practiced a bad faith case as an attorney in the prior ten years, had never worked as an employee for an insurance company, although he had experience in representing them, and had never been licensed or worked as an insurance adjuster. In light of his review of the file and several depositions, he opined that legitimate issues arose about Mrs. Wiles's damages, her injuries, and their causal relationship to the injury to her eardrum. Other issues he identified addressed her husband's loss of consortium claim and her loss of income from her business. He then went on to discuss the reserve process in this case and whether the initial offer could be considered a "low ball" offer. Based on his review, Mr. Patterson did not see any violation of the UCSPA or bad faith in the handling of the claim.

- Michael O. McDonald:

The Wileses identified former Judge Michael O. McDonald as an expert witness, who would have testified about Medical Protective's failure to properly investigate and settle the claim, as well as the reserves setting in this case. Like Medical Protective's proposed expert witnesses, his testimony was also excluded. His deposition testimony was admitted by avowal. Judge McDonald stated that since his retirement from the bench in 1995, he has worked in the mediation and arbitration field and has testified as an expert witness in cases, including two bad faith cases. In the early 1960s, he worked as an insurance adjustor, then went to

law school, but continued as an independent adjuster until he took the bench in 1972. Based upon his review of the case, Judge McDonald felt there was substantial bad faith due to Mr. Duechle's lack of investigation, inadequate reserves, lack of documentation in the file, and his failure to set up a claim file for Mr. Wiles's loss of consortium claim. He went on to address the shortcomings of Medical Protective as they related to each of the applicable subsections in KRS 304.12-230.

- Pete Karem:

In addition to Judge McDonald, the Wileses also identified Pete Karem as an expert witness. Judge Karem is a former judge who now works primarily in the field of arbitration and mediation. He reviewed several depositions and the file information, and then offered several opinions about how the claim should have been processed, including the settlement negotiations, in relation to his belief that Medical Protective violated the UCSPA.

Based upon our thorough review of the proposed expert testimony, we agree with the Wileses that the trial court did not abuse its discretion in excluding any of the three expert witnesses proposed by Medical Protective. None of the three had any claims handling or adjusting experience, but instead were trial lawyers or in one instance a former judge and justice. While it certainly would have been helpful for the jury to have been informed by an expert about the general workings of the adjustment of a claim, we were unable to discern that any of the three witnesses would have addressed this issue, or would even have been qualified to

express that information based upon their lack of experience in the field. What these three witnesses did express opinions about was the reasonableness of Medical Protective's actions in regard to this particular case. Similarly, the Wileses proposed expert witnesses, who were also excluded, testified to Medical Protective's action in this particular case, but did not address what should happen, generally, in the adjustment of a claim. We need not address whether the information sought to be introduced by Medical Protective would have been within the individual juror's common knowledge, as it appears that none of the proposed experts would have testified outside of the facts of this case. Therefore, we hold that the trial court did not abuse its discretion in excluding the testimony of Medical Protective's three expert witnesses from the trial in this matter.

C. Evidence of National Reserves

Medical Protective argues that the trial court should not have permitted evidence of its national reserves to be introduced, as such evidence was irrelevant pursuant to KRE 401 and 402, and prejudicial pursuant to KRE 403. This testimony exposed the jury to very large numbers, which Medical Protective contends was prejudicial to its defense.

In response, the Wileses argue that Medical Protective's aggressive reserve philosophy affected Duechle's adjusting of Mrs. Wileses' claim and caused unwarranted delay. The Wileses cite to two Kentucky cases in support of their argument. In *Grange Mutual Insurance Co. v. Trude*, 151 S.W.3d 803 (Ky. 2004),

the Supreme Court addressed the relevance of reserve-setting procedures in bad faith claims:

> The relevance of procedures for setting reserves to a bad faith claim seems obvious. Reserve setting procedures are controlled in part by statute. Evidence of Grange's reserve setting procedures would help show whether Grange is following the statutory and regulatory requirements and whether the specific system for setting reserves is aimed at achieving unfairly low values. We find that this evidence is relevant to the bad faith claim.

Id. at 813 (footnote omitted). We note that the *Trude* case arose from an original action in which the insurer was seeking a writ of prohibition to prevent having to produce various documents in discovery. Regarding reserves, the plaintiff had requested: "All documents which provide definitions, methods of calculating, criteria or guidelines for the establishment of reserves." *Id*. at 813 n.32.

The second case relied upon by the Wileses is *United Services Automobile Ass'n v. Bult*, 183 S.W.3d 181, 189 (Ky. App. 2003), in which this Court stated, "the amount of reserve set by an adjuster could be indicative of bad faith if the insurer has denied a claim or has attempted to 'low-ball' a claim. It is undoubtedly a red flag." As in *Trude*, *Bult* addressed a situation involving the setting of reserves in a particular case.

Relying on the above cases, the Wileses contend that Medical Protective's reserve setting process affected the adjustment of the claim. The Wileses state that after Medical Protective was sold to another company in 2005, it had to undergo considerable reserve strengthening for the years 2000, 2001, and 2002, years when

Mrs. Wiles's claim was active. The effect of the late setting of reserves in her case in particular meant that the company's financial state appeared to be stronger than it actually was, which in turn would positively affect incentives and bonuses for the employees. The Wileses point to a company-wide practice of what they term "creative reserving" to make the company more attractive to potential buyers.

Although *Trude* and *Bult* address the setting of reserves in a particular case, we agree with the Wileses that evidence of Medical Protective's setting of national reserves is relevant in this case to show a motivation for late reserving practices. By the same token, however, we cannot hold that Medical Protective has established that it was prejudiced by not being permitted to introduce evidence of comparable reserve practices in the insurance industry as a whole because it is this particular company's reserve setting process that is at issue. Therefore, we hold that the trial court did not abuse its discretion in permitting the introduction of national reserves.

D. Introduction of Litigation Conduct

Medical Protective contends that the trial court abused its discretion in permitting the introduction of litigation conduct, citing to *Knotts v. Zurich Insurance Co.*, 197 S.W.3d 512 (Ky. 2006). This litigation conduct is the ordering of a videotaped surveillance of Mrs. Wiles. Medical Protective also contends that the trial court improperly allowed Andre Busald to criticize the company for taking surveillance. However, the Wileses point out that neither they, nor Mr. Busald, criticized the fact that the surveillance was performed, but that Mr. Duechle failed

to review the videotaped surveillance after learning that it was not helpful to the defense while at the same time continuing to contend that Mrs. Wiles was exaggerating her symptoms. We agree with the Wileses that the trial court did not commit any error in allowing the introduction of the surveillance videotape.

5. Award of Statutory Interest, Attorney Fees, and Prejudgment Interest

Next, Medical Protective presents a two-part argument. It first argues that the Wileses are not entitled to statutory interest or attorney fees under KRS 304.12-235 because that statute does not apply to third-party claims. If we disagree with the first argument, Medical Protective then argues that the Wileses are not entitled to prejudgment interest on the amount of statutory interest and attorney fees awarded. In a post-trial ruling, the trial court relied upon *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993), *Motorists Mutual Insurance Co. v. Glass*, 996 S.W.2d 437 (Ky. 1997), and *State Farm Mutual Automobile Insurance Co. v. Reeder*, 763 S.W.2d 116 (Ky. 1988), to find that KRS 304.12-235 applied to third-party claims and that the Wileses were entitled to an award of 12% statutory interest and attorney fees.

Resolution of this issue requires that we interpret the applicable statute. We begin by recognizing that "[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state." KRS 446.080(1). Furthermore, "[t]he interpretation of a statute is a matter of law. A reviewing court is not required to

adopt the decisions of the trial court as to a matter of law, but must interpret the statute according to the plain meaning of the act and in accordance with the legislative intent." *Floyd County Bd. of Educ. v. Ratliff*, 955 S.W.2d 921, 925 (Ky. 1997). In *Reyes v. Hardin County*, 55 S.W.3d 337, 342 (Ky. 2001), the Supreme Court of Kentucky addressed statutory construction, stating:

> "The universal rule is, that in construing statutes it must be presumed that the Legislature intended *something* by what it attempted to do. . . ." *Grieb v. National Bond & Inv. Co.*, 264 Ky. 289, 94 S.W.2d 612, 617 (1936) (emphasis added). "All statutes are presumed to be enacted for the furtherance of a purpose on the part of the legislature and should be construed so as to accomplish that end rather than to render them nugatory." *Commonwealth ex rel. Martin v. Tom Moore Distillery Co.*, 287 Ky. 125, 152 S.W.2d 962, 967 (1939).

We also recognize that "[s]tatutory language must be accorded its literal meaning unless to do so would lead to an absurd or wholly unreasonable result." *Coy v. Metropolitan Property & Cas. Ins. Co.*, 920 S.W.2d 73, 74 (Ky. App. 1995).

The statute we must interpret in this case is KRS 304.12-235, which provides for the award of attorney fees and interest under the UCSPA:

> (1) All claims arising under the terms of any contract of insurance shall be paid to the named insured person or health care provider not more than thirty (30) days from the date upon which notice and proof of claim, in the substance and form required by the terms of the policy, are furnished the insurer.
>
> (2) If an insurer fails to make a good faith attempt to settle a claim within the time prescribed in subsection (1) of this section, the value of the final settlement shall bear interest at the rate of twelve percent (12%) per annum from and after the expiration of the thirty (30) day period.

> (3) If an insurer fails to settle a claim within the time prescribed in subsection (1) of this section and the delay was without reasonable foundation, the insured person or health care provider shall be entitled to be reimbursed for his reasonable attorney's fees incurred. No part of the fee for representing the claimant in connection with this claim shall be charged against benefits otherwise due the claimant.

The question before us is whether this statute applies to third-party claims. For the reasons stated below, we hold that it does not.

Medical Protective argues that the Wileses lack standing to seek either interest or attorney fees because the plain language of the statute limits recovery to a named insured or health care provider pursuing a claim arising under the terms of an insurance contract after notice and proof of claim have been submitted pursuant to the terms of the policy. In support of this argument, Medical Protective relies upon the Supreme Court's analysis in *Glass*, *supra*. In *Glass*, the Supreme Court addressed the propriety of an award of attorney fees pursuant to KRS 304.12-235(3) in the context of a third-party claim and held that "[t]his section applies only to an insurer's negotiations with its own policyholder or the policyholder's health care provider. Thus, the trial judge correctly held that Farm Bureau could not be liable for attorney fees." *Glass*, 996 S.W.2d at 455. The Court then went on to note that there was a reasonable foundation for the insurance company's failure to settle in the applicable time period, meaning that there was no authority at all to award attorney fees, even in a first-party claim situation.

Prior to *Glass*, the Supreme Court recognized this issue existed, stating in *Wittmer v. Jones*, 864 S.W.2d at 891:

> Further, Wittmer argues for consideration of the 1988 Amendment to the UCSPA which provides for statutory "interest at the rate of twelve percent (12%) per annum" "[i]f an insurer fails to make a good faith attempt to settle a claim" for "more than sixty (60) days from the date upon which notice and proof of claim" is properly submitted. See KRS 304.12-235(1) and (2), eff. 7/15/88. But, the precise language in -235(1) specifies claims payable "to the named insured." *Id*. Whether the General Assembly intended the obligations of KRS 304.12-235 to apply to claims due to third parties as well as to the "named insured" is an issue of statutory construction which we leave for another day when there is proof to satisfy the threshold issue of the insurer's failure "to make a good faith attempt to settle."

On the other hand, the Wileses point out that KRS 304.12-235 must be read in conjunction with the insurance code as a whole and assert that the language in that particular statute is ambiguous. They cite to *Reeder* for the Supreme Court's statement regarding the availability of prejudgment interest:

> Prejudgment interest may be awarded where justified by the facts of a particular case. *See* 22 Am.Jur.2d *Damages* § 179. A careful reading of *Atlantic Painting*, *supra*, indicates that as to what is admittedly due, the claimant is entitled to interest. The evidence here indicates the portion of the claim for damages in the amount of $8,471.14 was undisputed. If an item of damages is fixed or ascertainable with reasonable certainty and is not contested and the defendant fails or refuses to timely pay it unconditionally, or at least to tender it into court where it may be withdrawn unconditionally, he should be charged with interest on that item in the judgment.

Reeder, 763 S.W.2d at 119. They also cite to then-Chief Justice Lambert's dissent in *Glass*, wherein he adopted the majority opinion of the Court of Appeals. The Court of Appeals stated as follows:

> Concerning the issue of attorney fees, Motorists argues four specific points. First, it submits that KRS 304.12-235 does not apply to third party claimants. We disagree. Having already held that the UCSPA (KRS 304.12-230) applies to third party claimants, we perceive no logical basis for granting to such insured claimants the right to pursue a bad faith cause of action under KRS 304.12-230, but not under KRS 304.12-235. KRS 304.12-230 sets forth prohibited settlement practices of an insurer. KRS 304.12-235 stipulates the time allotted for payment of claims and the effect of failure to promulgate a settlement. Both statutes were enacted to protect the rights of an insured against unfair settlement practices. KRS 304.12-010. As such, they must be applied consistently to effectuate the purposes of both statutes. To do otherwise seems contrary to legislative intent.

Glass, 996 S.W.2d at 460 (Lambert, J., dissenting).

The Wileses also cite to this Court's prior decision in *Tennessee Farmers Mutual Insurance Co. v. Jones*, 2008 WL 4182022 (Ky. App. 2008) (2007-CA-000911-MR and 2007-CA-001006-MR). Because it is not a published opinion, the Wileses cite to *Tennessee Farmers* pursuant to CR 76.28(4). That statute provides in pertinent part:

> (a) When a motion for discretionary review under Rule 76.20 is filed with the Supreme Court, the opinion of the Court of Appeals in the case under review shall not be published until the Supreme Court rules on the motion for discretionary review or until the Court permits the motion to be withdrawn. Unless otherwise ordered by the Supreme Court, upon entry of an order denying the motion for discretionary review or granting withdrawal

> of the motion, the opinion of the Court of Appeals shall be published if the opinion was designated "To Be Published" by the Court of Appeals. Upon entry of an order of the Supreme Court granting a motion for discretionary review the opinion of the Court of Appeals shall not be published, unless otherwise ordered by the Supreme Court. All other opinions of the appellate courts will be published as directed by the court issuing the opinion. Every opinion shall show on its face whether it is "To Be Published" or "Not To Be Published."
>
> . . . .
>
> (c) Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action.

We hold that the Wileses have improperly cited this rule as the basis for their citation to *Tennessee Farmers*.

When it was originally rendered, the Court of Appeals designated the opinion in *Tennessee Farmers* as "To Be Published." The Supreme Court then denied the subsequent motion for discretionary review, which would ordinarily result in publication of the original opinion. But the Supreme Court, pursuant to its authority in CR 76.28(4)(a), de-published the opinion by order, bringing it outside of the parameters of CR 76.28(4)(c). Because the Supreme Court de-published this Court's opinion in *Tennessee Farmers*, it is not available for citation under any

circumstances. Therefore, we shall not consider any portion of the Wileses' arguments premised on their citation to *Tennessee Farmers*.

Turning back to the issue before us, we hold that the trial court erred as a matter of law when it determined that the Wileses were entitled to an award of attorney fees and statutory interest pursuant to KRS 304.12-235. The plain and unambiguous language of the statute limits its application to named insureds (Dr. Burchell, in this case) and health care providers; in other words, to first-party claimants. The Wileses fit neither of these descriptions, as they are third-party claimants. We do not find any logic in extending the reach of this statute to third-party claims, as was done in KRS 304.12-230. Unlike KRS 304.12-235, KRS 304.12-230 does not include language limiting who may file a claim pursuant to it. Rather, it sets forth a list of seventeen acts or omissions constituting unfair claims settlement practices. While some of the subsections reference the insured, the statute as a whole is certainly not limited as to who may seek relief under its provisions.

On the other hand, KRS 304.12-235 is expressly limited to the insured or health care provider. Subsection (1) provides that claims are to be paid "to the named insured person or health care provider" within a thirty-day period. Subsection (2) permits the imposition of 12% statutory interest, referencing subsection (1), which again applies to the named insured person or health care provider. Subsection (3) yet again references subsection (1) and provides for the reimbursement of attorney fees incurred by "the insured person or health care

provider[.]" Through this clear and unambiguous language, the General Assembly limited the application of this statute to first-party claims. This interpretation is further supported by the specification in subsection (1) that the thirty-day period begins to run "from the date on which notice and proof of claim, in the substance and form required by the terms of the policy, are furnished to the insurer[,]" again something that the policyholder or insured would have knowledge of, not a third-party claimant. Therefore, the Wileses, as third-party claimants, were not entitled to statutory interest or attorney fees pursuant to KRS 304.12-235. Accordingly, the trial court erred in permitting the Wileses to recover those amounts, and we must reverse that portion of the trial court's judgment.

Because of our holding that the Wileses were not entitled to an award of statutory interest or attorney fees, we need not address Medical Protective's alternate argument regarding the award of prejudgment interest on those amounts.

6. Award of Post-Judgment Interest

For its final argument, Medical Protective contends that the trial court abused its discretion in declining its request that the post-judgment interest rate on the jury's verdict be reduced from 12%, based upon today's economic climate. We shall review the trial court's ruling on this issue for abuse of discretion. *Owensboro Mercy Health System v. Payne*, 24 S.W.3d 675, 679 (Ky. App. 1999).

KRS 360.040 provides for post-judgment interest as set forth below:

> A judgment shall bear twelve percent (12%) interest compounded annually from its date. A judgment may be for the principal and accrued interest; but if rendered for accruing interest on a written obligation, it shall bear interest in accordance with the instrument reporting such accruals, whether higher or lower than twelve percent (12%). Provided, that when a claim for unliquidated damages is reduced to judgment, such judgment may bear less interest than twelve percent (12%) if the court rendering such judgment, after a hearing on that question, is satisfied that the rate of interest should be less than twelve percent (12%). All interested parties must have due notice of said hearing.

Medical Protective relies upon the affidavit of forensic economist Frank Slesnick, Ph.D., to argue that the 12% rate is unreasonably high to meet the purpose of the statute, which is to encourage prompt payment of a judgment debt. Dr. Slesnick based his opinions on today's market's lowered securities rates.

However, we are persuaded by the Wileses' citation to *Morgan v. Scott*, 291 S.W.3d 622, 644 (Ky. 2009), in which the Supreme Court addressed this issue and stated:

> But the fact that a trial court could have chosen to impose a lower interest rate does not necessarily mean that its decision to impose a higher rate was an abuse of discretion. Moreover, the fact that a twelve percent interest rate in today's economic climate may be well above the marketplace norm is a matter properly to be considered by the General Assembly because that body has the power and discretion to lower the *de facto* legal interest rate contained in KRS 360.040. [Footnote omitted.]

Therefore, we decline to hold that the trial court abused its discretion in denying Medical Protective's motion to lower the interest rate from 12%.

Finally, Medical Protective argues that the trial court abused its discretion when it ordered that interest on the award of attorney fees and interest pursuant to KRS 304.12-235 would begin to run from its August 17, 2009, as opposed to its November 13, 2009, order. Because we have reversed these particular awards of attorney fees and interest, we need not address this argument. Post-judgment interest on the jury verdict award will continue to accrue as of May 29, 2009, the date on which the trial court entered the judgment on the jury verdict.

For the foregoing reasons, the portion of the Kenton Circuit Court's judgment awarding statutory interest and attorney fees is reversed, and the judgment is affirmed in all other respects. This matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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