4069 - Bad Faith - After a badly botched tummy tuck surgery, the plaintiff was left with a disabling abdominal injury – the plaintiff settled with the doctor on the eve of trial – then in this lawsuit, she sued the doctor's insurer and alleged it improperly delayed paying the claim

Daniels v. American Physicians Assurance Corporation, 07-1873

Plaintiff: Hans G. Poppe, *Poppe Law Firm*, Louisville and Kenneth Friedman, *Friedman Rubin & White*, Bremerton, WA

Defense: Walter E. Haggerty, Cincinnati, OH and Kendrick Wells, IV, Louisville, both of *Frost Brown Todd*

Verdict: $3,829,277 for plaintiff

Circuit: **Jefferson**, J. Chauvin, 6-3-09

Debbie Daniels, then age 39, underwent a hysterectomy in the summer of 2003 at Lourdes Hospital in Paducah. Her Ob-Gyn, Dr. David Grimes, also suggested that he perform a tummy tuck as well. Daniels agreed. The procedure used by Grimes is exceptionally rare, so rare in fact, he is the only physician in the U.S. who performs it in this manner.

The surgery went very badly for Daniels. She suffered a bowel obstruction and developed a huge abdominal wound. A permanent condition, the contents of her abdomen are virtually unprotected by a fatty layer. That leaves Daniels, who had been a respiratory therapist, limited to only the lightest of activity – even moderate activity can lead to hernias. Daniels has since endured ten surgeries and is on near constant pain medications. She remains unable to work.

Daniels retained a Louisville lawyer, Hans Poppe, who first sent a letter to the doctor's insurer, American Physicians Assurance Corporation (APA). He asked for a tolling of the statute. APA said to sue and Daniels did. The plaintiff sent a detailed settlement package and demanded the doctor's $1,000,000 policy limits. APA balked indicating it was waiting for plaintiff's expert disclosures. [The time prescribed for this disclosure had not yet passed.]

As this was occurring, Grimes filed for bankruptcy. That changed the complexion of the case as Grimes was off the hook – there was no excess verdict to worry about. The $1,000,000 policy was all there was to be had – this also meant that Grimes lost his right to consent to settle and APA had exclusive control of the settlement. Concurrently, APA was attempting to locate a medical witness – a first witness looked promising, Melissa Smith, Louisville, until she learned more of the facts. Ultimately she indicated she was appalled at the care Grimes delivered, calling it inexcusable and indefensible.

The litigation continued (APA still had no expert) and depositions were taken. The matter advanced to mediation in the summer of 2006. While the plaintiff's medicals were already $380,000 and her lost wages totaled $890,000, APA's highest offer was only $75,000.

Finally a few days before trial, APA sought a reservation of rights, explaining that Grimes had exceeded the scope of his licensure by attempting this procedure. Daniels balked at this tactic (the tactic essentially indicated that APA would defend Grimes, but it wouldn't pay) and ultimately APA withdrew this suggestion. Finally on the eve of trial, the underlying litigation settled and APA paid $650,000 on behalf of Grimes. Daniels reserved the right to sue APA for bad faith.

In this separate action filed in Jefferson County (the underlying case proceeding in McCracken County), Daniels alleged bad faith by APA. She postured that the insurer should have paid the entire policy limits much sooner, noting that despite the low offer of $75,000, internal APA documents valued it at more than $1,000,000. Similarly, plaintiff argued that when Smith (APA's own expert) began to balk, it knew or should have known that the matter was not defensible and liability was reasonably clear

Daniels also implicated the tactics of the insurer, namely, providing incentives to its adjusters to reduce payouts and increase the number of cases that were tried to a jury – the plaintiff thought that claims should be paid based on their value, not incentives. Essentially APA focused not on making a fair settlement of the claim, but instead on whether it could win at trial. Daniels too thought that the doctor's bankruptcy was a tactic to drive down the value of the case – if the upper limit of liability was $1,000,000, or so the insurer thought, why offer that sum to Daniels?

If Daniels prevailed, she sought $350,000, representing the difference between her settlement with Grimes and the policy limits. [She also took $500,000 from the hospital in a separate settlement.] She also sought $5,000,000 for mental anguish.

In arguing the case to the jury, Daniels sought an additional $60,000,000 in punitives. That represented her calculation that the insurer had hoped to save $12.5 million a year via incentives and more jury trials. Daniels thought it only fair to make APA pay that back (the five years these two cases were in litigation), it simply being a

repayment of what was improperly taken by the insurer's tactics. [There was another key number in terms of punitives that would later influence the jury - $3,479,277, a figure representing the goal provided to its adjustor to cut her claims.] An expert for Daniels was Steven Prater, who is an insurance law professor at Santa Clara in California. He was also an expert for the plaintiffs in the well-known *State Farm v. Campbell* case that was decided by the U.S. Supreme Court. Another expert for Daniels was W.R. Patterson, Louisville, Attorney.

APA had defended procedurally that bad faith should not apply as a matter of law in a third-party context. That argument was rejected in two summary judgment motions. It postured that to do so conflicted with its constitutional right to litigate. That argument did not prevail with the trial judge and this litigation advanced.

To the merits, APA argued it properly adjusted the case at every turn. It had a right to know and test the plaintiff's theory. Further any delay in settling was a function of the plaintiff herself in failing to submit CR 26 expert information. Once those experts were identified and deposed, the case settled within months, APA explaining the litigation process just takes time.

Consistent with that notion, APA wasn't obligated to pay until Daniels' experts were deposed because experts sometimes fall apart under examination. It also noted that it had an obligation to defend Grimes – APA also distanced itself from the bankruptcy, suggesting that was a decision made by Grimes and Grimes alone. [Plaintiff resisted and noted that mention of the bankruptcy was all over the claims file.]

APA also responded to the plaintiff's criticism of its goals and incentives. That is, claims are the biggest expense of any insurer and instituting efforts to control those costs is absolutely appropriate – never did it tell its adjustors not to pay legitimate claims, but only to pay what a claim is actually worth.

Experts for the insurer were several lawyers, John Phillips, Louisville, Marcus Carey, Covington and Frederick Straub, Paducah. [Straub represented Grimes in the underlying case.] The experts explained that the insurer defended the case as every medical case in Kentucky is defended. APA also called an insurance expert from Chicago, IL, Michael Baumel, who is bigwig at CNA.

Daniels prevailed at trial on several bad faith counts related to the delay in settlement, misrepresenting the policy coverage, failing to adopt reasonable standards and failing to act in good faith to effectuate a settlement. Then to damages, Daniels took $205,000 for the difference in the value of her settlement plus $145,000 more for emotional distress. The award of punitives was $3,479,277, less than argued for by plaintiff, but equal to the incentive goal for its adjustor. The verdict for Daniels totaled $3,829,277. The jury's deliberations lasted eleven hours. The case was settled before a judgment was entered.