

Certification of Word Court: 4487

Colorado Court of Appeals 2 East 14 th Avenue, Suite 300 Denver, CO 80203	FILED IN THE COURT of APPEALS STATE OF COLORADO JUL 19 2006 Clerk, Court of Appeals
Appeal from the Larimer County District Court Case No. 2003 CV 1058 – 5B Honorable James H. Hiatt, District Judge	
Plaintiff-Appellant: MARLENE BARNES v. Defendant-Appellee: SHELTER MUTUAL INSURANCE COMPANY	
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REPLY BRIEF	

Appellant, Marlene Barnes, by her attorney of record, Jan A. Larsen, hereby submits her Reply Brief.

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I. STATEMENT OF THE CASE

Statement of the Facts

Defendant, in its STATEMENT OF FACTS, has misstated or mischaracterized the record with respect to the following factual assertions:

1. On page 5 of the answer brief, Shelter states that Ms. Barnes' attorney sent to Laura Cuddihy an "Internet brochure" about kyphoplasty and that he did not send any research studies. The document is not a brochure but, instead, is "a short and concise treatise on the subject of vertebroplasty and kyphoplasty" entitled "Innovative Treatments for Compression Fractures," written by Jean-Jacques Abitbol, M.D., Orthopedic Surgeon, California Spine Group, MC, San Diego, California. (R.Vol. IX at 173-175).

2. On page 5 of the answer brief, Shelter states that Dr. Benz' office, the Orthopaedic Center of the Rockies ("OCR") sent to Laura Cuddihy an "advertisement brochure" from the vendor about kyphoplasty. Nowhere in the record is the brochure called an "advertisement." Examination of the exhibit (R.Vol. IX at 170-171) demonstrates that it is an informative brochure about the kyphoplasty procedure prepared by the company which presumably makes the materials used in kyphoplasty procedures.

3. On page 7 of the answer brief, Shelter asserts that, not until Ms. Cuddihy received the medical records from OCR on November 17, 2002, did she learn that Dr. Benz had concluded that Ms. Barnes had sustained new compression fractures, at T9 and T12. In fact, there were four communications from OCR to Ms. Cuddihy or Shelter, between October 21, 2002 and November 4, 2002, that Dr. Benz had concluded, first from x-rays and then from an MRI, that Barnes had fractures at T9 and T12. First, Ms. Cuddihy received a phone call from OCR on October 21, 2002 in which she was told that new x-rays showed compression fractures at T9 and T12. (R.Vol. II at 87:19 to 88:20 and Vol. XI at 42). Second, Dr. Benz' treatment note dated October 18, 2002 in which he stated that Marlene Barnes "has been having some increased pain in her back just below the area of the previous surgery" and described the x-ray findings of compression fractures at T9 and T12 was FAX'd directly to Shelter on October 21, 2002. Shelter's noted "Entry Date" for this record is October 22, 2002, confirming that it had notice then of Dr. Benz' opinion that the x-rays showed the T9 and T12 fractures. (R.Vol. IX at SHEL 250-251). Third, on October 30, 2002, Kate at OCR called Cuddihy regarding the scheduling of a kyphoplasty at T9 and T12. Finally, on November 4, 2002, OCR FAX'd to Shelter Dr. Benz' October 30, 2002 treatment note in which he discussed in detail his findings (based on an MRI done on that date) concerning

the T9 and T12 fractures and his recommendation for kyphoplasty. (R.Vol. IX at SHEL 287-288).

4. On page 8 of the answer brief, Shelter asserts that the compression fractures at T9 and T12 “had not previously been found after the motor vehicle accident” as one of the justifications for requiring a medical evaluation. As stated on page 9 of Barnes’ opening brief, Shelter did have in its file evidence of compression deformity at T9, both in Dr. Benz’ note of August 8, 2002 in which he stated “[t]here appears to be a mild compression deformity at T9 which from my reading does not appear to be significantly changed from previous films” and in Dr. Benz’ note of October 18, 2002 in which he states, referring to T9 and T12, “[a]lthough there was some deformity at these levels *previously*, it does appear that these may have worsened, especially at the T9 level.” (emphasis added)

5. On page 9 of the answer brief, Shelter asserts as one of the reasons it took Ms. Cuddihy longer to find a doctor to do the PPO exam “

“Third, Ms. Barnes’ attorney required that the evaluation be at a location relatively close to Ms. Barnes’ home. Ms. Cuddihy located a physician in the metro Denver area, but Ms. Barnes’ attorney said that the office was too far for Ms. Barnes to travel.”

The first sentence ignores the fact that Ms. Cuddihy admitted that Barnes’ attorney did not communicate a concern about the location of the exam being closer to Barnes’ home until January 2003, which was after Cuddihy claimed she

was working on finding a doctor to do the exam. (R.Vol. II at 111:3-17). With respect to the second sentence, i.e., that Cuddihy found a doctor in Denver and Barnes' attorney said it was too far, there is nothing in the record cited by defendant to support the assertion and nothing anywhere else in the record to support it.

II. SUMMARY OF THE ARGUMENT

Shelter does not refute that Laura Cuddihy, when she received the kyphoplasty brochure, read the "Final Note" which speaks of the need for "immediate intervention." Instead, Shelter attempts to justify Cuddihy's claim in her testimony that somehow "immediate" didn't mean "immediate." The point is that the trial court, as one of the primary justifications for its order, found that the "Final Note" was "not expressly called to Cuddihy's attention" but the fact that Cuddihy acknowledged reading it makes the trial court's finding meaningless.

The trial court's conclusion that prior MRIs and x-rays had not revealed fractures at T9 and T12 is not supported in the record and is clearly erroneous.

Shelter was, by the "Final Note" in the brochure, given a more urgent message than just a "window of opportunity" to approve the second kyphoplasty. It was told that "[a]s with hip fractures, treatment of a vertebral body compression fracture is most successful with immediate intervention," i.e., as soon as possible.

It is correct that Dr. Benz did not personally communicate to Shelter that the kyphoplasty procedure should be performed without inordinate delay but it was his office that provided the brochure in the first place that advised Shelter about the need for immediate action. Had Dr. Benz been told up front that the process was going to take three and a half months, he would have protested but it was not Dr. Benz' job to monitor Shelter's progress in investigating the requested procedure at T9 and T12.

The time taken by Shelter to investigate Dr. Benz' recommendation for the second kyphoplasty was unreasonable under all the circumstances. Shelter attempts to represent that it had no obligation to begin to do anything with respect to investigation of the T9 and T12 fractures until Laura Cuddihy had received the medical records on November 17, 2002. Shelter attempts to fault OCR and Barnes' attorney for its delays in investigating these fractures. But Shelter and Cuddihy had knowledge on October 22, 2002 that Dr. Benz had concluded from the October 18, 2002 x-ray that fractures at T9 and T12 were causing Barnes pain in the back and, by implication (since they were asking Shelter, the Barnes' PIP insurance carrier, to approve another MRI), that he considered it likely related to the subject motor vehicle accident. Further, OCR communicated the request for approval of a kyphoplasty procedure at T9 and T12 to Laura Cuddihy on October

30, 2002 and Dr. Benz' October 30, 2002 treatment note in which he explained in detail his findings and his recommendation for kyphoplasty was in Shelter's hands by November 4, 2002. Shelter's excuses for their delays are that it took time to re-open the file, that it took time to decide whether to do a PPO exam and that Laura Cuddihy needed five weeks (November 25 to December 31, 2002) to find a doctor to do the exam. Shelter emphasizes as one of the reasons it took Cuddihy so long to find a doctor was that Barnes' attorney told her the exam had to take place close to the Barnes' residence but there is no basis for that contention since the record is clear that Barnes' attorney made no such communication until after December 31, 2002.

Taking into consideration the facts that Shelter knew that immediate action was recommended for a kyphoplasty; that the potential consequences for Barnes if the treatment was not timely done were severe and that Shelter knew Barnes was, in the meantime, in significant pain, the delay was unconscionable.

III. ARGUMENT

A. THE EVIDENCE IS CONCLUSIVE THAT CUDDIHY DID READ THE “FINAL NOTE” IN THE KYPHOPLASTY BROCHURE AND THE COURT’S FINDING THAT IT WASN’T EXPRESSLY CALLED TO HER ATTENTION DOES NOT, THEREFORE, SUPPORT ITS IMPLIED CONCLUSION THAT CUDDIHY AND SHELTER WERE NOT CHARGED WITH THE KNOWLEDGE OF THE INFORMATION IN THE FINAL NOTE.

Cuddihy’s testimony established beyond all doubt that, when she received the kyphoplasty brochure from Dr. Benz’ office, she read the entire brochure including the “Final Note” that advised of the need for immediate treatment. (R.Vol. II at 73:11 to 74:8 and 77:20 to 78:8). The information in the brochure and, particularly, in the “Final Note” presumably was taken seriously by her because she acknowledged that, before receiving the brochure and the short treatise provided by Barnes’ attorney, she knew nothing about kyphoplasty. (R.Vol. II at 69:5-7). These were her only sources of information and were the basis of her recommendation to Shelter to approve the first kyphoplasty in July 2002. The trial court’s conclusion, therefore, that the “Final Note” wasn’t expressly called to her attention does not support the implied conclusion that she couldn’t be charged with knowledge of the content of the Final Note.

While Shelter attempts to argue, by implication, that Cuddihy, and Shelter, were justified somehow in concluding that “immediate” as used in the brochure

really didn't mean "immediate," they've provided no reasonable justification for that conclusion. Shelter has suggested that, because a period of 5 months elapsed between the subject motor vehicle accident and the first kyphoplasty, Cuddihy and Shelter could assume that they had at least five months to approve the procedure at T9 and T12. There was no medical evidence from Shelter, however, to support this rationale and Cuddihy, with her extensive training and experience in nursing, surely knew that healing time for fractures in one person can be variable. Even if Cuddihy was justified in thinking there was a five month window, Shelter had in its file the evidence of some compression deformity at T9 as early as August 8, 2002 and five months from that date was January 8, 2003. (R.Vol. X at SHEL 0845). Further, while Cuddihy and Shelter took their time to investigate Dr. Benz' recommendation for the second kyphoplasty, Cuddihy knew that spinal deformity caused by depression fractures in the spine "jeopardizes a patient's mobility, lung function and overall quality of life, and can lead to early mortality" (R.Vol. II, 76:5-10)) and she, therefore, knew that if the procedure was not done in a timely manner, there were potentially very serious consequences for Shelter's insured, Marlene Barnes. Cuddihy also knew, from Dr. Benz' records, during the three and half plus months that she and Shelter took to investigate the T9 and T12 fractures, that Ms. Barnes was in significant pain. (R.Vol. II at 100:14-21).

Shelter has, in fact, acknowledged, in its brief that the brochure reflects what would be true for any general orthopedic brochure, i.e., that “any fracture needs to be addressed as quickly as possible.” (p. 17, Answer Brief).

B. THE TRIAL COURT’S CONCLUSION THAT PRIOR MRIs AND X-RAYS HAD NOT REVEALED FRACTURES AT T9 AND T12 IS NOT SUPPORTED IN THE RECORD AND IS CLEARLY ERRONEOUS.

This issue has significance only if Cuddihy and Shelter were justified in concluding they had a five month window to approve the second kyphoplasty (based on the time interval between the motor vehicle accident the July 2002 kyphoplasty) as Shelter has suggested in its brief. As argued in paragraph A, above, there was no evidence that they were justified in that conclusion. In any event, Shelter had Dr. Benz’ treatment notes of August 8, 2002 and October 18, 2002, both of which told it that, as early as August 8, 2002, there was some compression deformity at T9 and, according to the October 18, 2002 note, possibly also at T12. Whether or not the degree of the compression deformity was as severe in August as it was in October does not matter. What matters is that Shelter had within its knowledge the fact that there was a compression deformity at T-9 and possibly T12, as early as August 8, 2002.

**C. THE INFORMATION CONTAINED IN THE “FINAL NOTE” IN THE
KYPHOPLASTY BROCHURE CONVEYED A MORE URGENT
MESSAGE THAN JUST A “WINDOW OF OPPORTUNITY” AND
CLEARLY REQUIRED SHELTER TO ACT EXPEDITIOUSLY TO
INVESTIGATE DR. BENZ’ RECOMMENDATION OF THE
KYPHOPLASTY AT T9 AND T12**

The information contained in the “Final Note” in the kyphoplasty brochure conveyed a more urgent message than just a “window of opportunity.” It made it clear that, in terms of the treatment (by kyphoplasty) being most successful, immediate intervention was recommended – not just that there was some specific window of time. Adding force to the sense of urgency in the “Final Note” was the information also in the brochure, that Cuddihy specifically said she read, that spinal deformity caused by compression fractures in the spine “jeopardizes a patient’s mobility, lung function and overall quality of life, and can lead to earlier mortality.” (R.Vol. XI at 170-171).

Shelter cites the testimony of its expert, Garth Allen, that the print of the Final Note was small and it didn’t mention the word “surgery” to argue that the “Final Note” has no importance. It doesn’t matter that the print was small since Cuddihy did read it. Mr. Allen, in pointing out that the Final Note didn’t use the word “surgery” seems to be attempting to say that the Final Note is really not talking about kyphoplasty – even though that is what the brochure is about. An

examination of Mr. Allen's cited testimony about the Final Note reveals that he goes to extremes and illogic in order to support Shelter's position.

Shelter, as discussed above in paragraph B, presented no evidence to support its contention that Cuddihy was justified in concluding she had a five month period of time to evaluate the recommendation.

Shelter repeatedly argues that, since neither Dr. Benz nor Marlene Barnes' attorney specifically expressed concern about the timing of the PPO exam, it was entitled to ignore what it knew from the "Final Note" in the brochure. The argument is specious. Both Dr. Benz and Ms. Barnes' attorney knew that, with respect to the first kyphoplasty, the processing by Shelter of the request to do the procedure had happened in reasonably prompt fashion and were justified in expecting that Shelter would, again, act reasonably promptly with respect to the second request. If Shelter had said to Dr. Benz (or to Barnes' attorney) when, on October 30, 2002 his office submitted the request for approval of the T9 and T12 procedure, "it will take us three and a half months to process this request," Dr. Benz would, no doubt, have protested. He testified that, generally, with treatment of any fractures he expected a "relatively quick answer" from the insurance company. If, when he was told by Shelter that a PPO exam was to be done, Dr. Benz had also been told the exam wouldn't occur until February 3, 2003 and the

report of the exam wouldn't be made available to him until February 18, 2003, he would have protested. If Laura Cuddihy told Dr. Benz that it would take her five weeks to find a doctor to do the exam, he would have protested. It was not Dr. Benz' job or Marlene Barnes' attorney's job to monitor Shelter's progress in investigating the recommendation for the T9 and T12 procedure. It was Shelter's job to act promptly and reasonably in light of all the circumstances.

D. THE TRIAL COURT'S CONCLUSION THAT THE TIME TAKEN BY SHELTER TO INVESTIGATE THE SECOND KYPHOPLASTY WAS NOT UNREASONABLE IS NOT SUPPORTED BY THE RECORD

With respect to the issue of whether or not the time Shelter took to investigate the second kyphoplasty was unreasonable, Barnes does not dispute that Shelter had the right to require a PPO exam. It is Barnes' position that the three and a half months taken by Shelter to investigate the recommended procedure, including the process in scheduling the PPO exam and providing the exam report, to Dr. Benz was unreasonable under any circumstances but egregiously unreasonable under the circumstances of this case. The Court cited as its factual basis for concluding the delay was not unreasonable, the desire to find a doctor closed to Barnes' residence, that the procedure, kyphoplasty, was new and not well known, that the file had to be re-opened, that information had to be gathered to bring the new adjuster current, etc.

With respect to this issue, Shelter again suggests that it had no obligation to begin any action until November 17, 2002 when Cuddihy received all the records from OCR. Shelter also attempts to put blame on OCR for not getting records to it sooner. Both of these contentions are without merit.

Section 3.C.1. of Amended Regulation 5-2-8 of the Colorado Division of Insurance, which addresses the question of what is reasonable proof of a PIP medical expense to trigger the 30 day payment period, provides guidance as to what was necessary to trigger Shelter's obligation to begin the process of investigating Dr. Benz' recommendation of the second kyphoplasty. According to the rule, three things are necessary: (1) the name and address of the medical provider, (2) the evaluation or diagnosis, and the medical procedure performed or the medical treatment provided; and (3) an itemized statement of the charges. 3 CCR 702-5, Amended Regulation 5-2-8.

OCR called Laura Cuddihy on October 30, 2002 to schedule the T9 and T12 kyphoplasty (R.Vol. II at 90:19 to 91:2) and Dr. Benz' October 30, 2002 treatment note describing his detailed medical findings based on the MRI was in Shelter's hands on November 4, 2002. (R.Vol. IX at SHEL 287-288). Since it was a proposed procedure, there was no statement of charges but Shelter already had information about the cost of the procedure because of the experience with the first

kyphoplasty. Shelter, if it contends it needed more information, should have requested it immediately but did not request further medical records until November 12, 2002 after Kate at OCR called Cuddy on November 11, 2002 to find out about the status of scheduling the kyphoplasty. (R.Vol. II at 101:21 to 102:8 and 104:17-20). Based on the guidance of the regulation and the facts, it is clear that Shelter's obligation to initiate the process of investigating the requested procedure commenced no later than November 4, 2002.

It took Shelter three weeks from November 4, 2002 to reopen the file and decide to require the PPO exam. (R.Vol. XI at 44). It is difficult to comprehend how the trial court could have concluded that these tasks should reasonably taken three weeks in any case but, in light of the fact that Shelter knew during this time of the need for prompt action, the potentially severe consequences if the procedure was not successful and the fact that Marlene Barnes was in pain, makes the three week delay unconscionable.

Shelter, in its brief, says it took Cuddihy "some time" to locate the physician to do the PPO exam because it was necessary to (1) find a physician who was familiar with kyphoplasty, (2) the physician must have been a PPO physician, i.e., one in Shelter's PPO network, and (3) the location had to be at a location convenient to Ms. Barnes.

The “some time” she took to find the doctor was five weeks, from November 25, 2002 to December 31, 2002. (R.Vol. II at 109:15 to 111:25). In this age of e-mail and availability of information on the Internet, it is incomprehensible how the trial court could conclude that five weeks was a reasonable time for Cuddihy to search for a doctor who was familiar with kyphoplasty, again, especially with the knowledge she had about the need for prompt action, the potentially severe consequences of a failed procedure if not done soon enough and her knowledge that Ms. Barnes was in pain. Assuring that the doctor was on Shelter’s PPO list would have been easy – presumably, she would have started with that list. The claim that she was trying to find a doctor that was near the Barnes’ residence because Barnes’ attorney had insisted on it or had expressed concern about it is without any basis in fact since Barnes’ attorney did not raise that concern until after December 31, 2002. (R.Vol. II at 111:3-17). And, in fact, the doctor she found in Boulder was hardly a convenient location for Barnes.

Cuddihy’s claims about all the telephone calls she was making during that five weeks to find the PPO doctor were patently suspect for the reasons discussed in the opening brief, pages 13-15. Shelter’s answer brief does not provide information from the record to demonstrate otherwise.

It took Shelter two more weeks, to January 14, 2003, to do the sole task of scheduling the PPO exam (R.Vol. II at 114:8-16) and the exam was to take place almost three weeks later on February 3, 2003. . This time period between calling the doctor's office and the date of the appointment may have been the one thing, in terms of time, over which Shelter had little control, although Shelter offered no evidence to show that they tried to get the appointment earlier.

Finally, Dr. Villavicienco's report was dated February 3, 2003 but not received by Cuddihy, according to her reports, until February 13, 2003 and she did not send the report to Dr. Benz until February 18, 2003. (R.Vol. XI at 31). Shelter provided no factual information to justify this additional two week period from the date of Dr. Villavicienco's report to the date it was provided to Dr. Benz.

In conclusion, examination of the record reveals that there was no basis in the record for the trial court's conclusion that the three and a half months taken by Shelter to investigate Dr. Benz' recommendation of the second kyphoplasty was reasonable.

E. BARNES IS CORRECT IN STATING THAT THE RECORD DEMONSTRATES THAT SHELTER HAD NOTICE OF DR. BENZ' RECOMMENDATION OF THE SECOND KYPHOPLASTY NO LATER THAN NOVEMBER 4, 2002

As discussed in paragraph D, above, the record demonstrates that Shelter had notice of Dr. Benz' recommendation of the second kyphoplasty no later than November 4, 2002.

F. DURING THE RELEVANT TIME PERIOD, WHEN SHELTER WAS INVESTIGATING THE RECOMMENDATION FOR THE SECOND KYPHOPLASTY, THERE WAS NO DISPUTE AS TO WHETHER THE ACCIDENT CAUSED THE NEW FRACTURES

An insurer's decision regarding payment of benefits under an insurance policy must be evaluated based upon the information available to it at the time of the decision. *Peiffer v. State Farm Mut. Auto Ins. Co.*, 940 P.2d 967, 970 (Colo. App. 1996), *affirmed on other grounds*, 955 P.2d 1008 (Colo. 1998). The entire issue in this case is the behavior of Shelter during the time it was in the process of making the decision as to whether or not it would approve the recommended second kyphoplasty. Therefore, the time period during which causation evidence was relevant was the three and a half month period they took to do the investigation.

As Barnes discussed in her in paragraph F of her opening brief, during the time that Shelter was investigating the recommendation for the second

kyphoplasty, there was no dispute about whether the accident was the cause, indirectly, of the T9 and T12 fractures. This was the unequivocal opinion of Dr. Benz (R.Vol. XI at 98) and Dr. Hughes, Barnes' family physician, also commented on this in his November 17, 2002 treatment note. (R.Vol. IX at SHEL 0308). Dr. Maruyama was a defense retained expert in the litigation of this case and his opinions were rendered well after the time period that Shelter was investigating the recommendation. Dr. Villaviciencio's opinion did not question causation with respect to T9 and T12 except to say he attributed 50% to the motor vehicle accident. (R.Vol. XI at 66-70). His opinion also was given, however, after the relevant time period.

G. THE TRIAL COURT'S CONCLUSION THAT SHELTER DID NOT ACT IN BAD FAITH IS NOT SUPPORTED BY THE RECORD

The opinions stated by Shelter's insurance expert, Garth Allen, do not excuse the trial court from making findings from the evidence which support its order and the trial court's findings here are not supported by the record, as discussed in paragraphs A through F, above. The testimony of Barnes' expert in the field of insurance, Bradley Levin, provided a sound logical analysis of the facts upon which he concluded, among other things, that Shelter breached its obligation of good faith and fair dealing owed to Barnes. A summary of his conclusions is found on pages 19 and 20 of the opening brief and won't be repeated here.

The holding in the *Peiffer* case, cited by Shelter and above, that an insurer's decision regarding payment of benefits under an insurance policy must be evaluated based upon the information available to the insurer at the time of the decision is important to the analysis of Shelter's conduct. As it considered Dr. Benz' recommendation for the second procedure, Shelter had information, discussed above in this brief which required it to act promptly and it failed to do that.

IV. CONCLUSION

The trial court's findings upon which it bases its judgment in favor of the defendant are clearly erroneous and without basis in the record and it's judgment should be reversed and the case remanded to the trial court with instructions to enter new findings consistent with the evidence that Shelter's conduct was unreasonable and constituted bad faith and for further findings with respect to the issues of compensatory and punitive damages. .

WHEREFORE, based on the arguments and authorities in this brief, plaintiff respectfully requests that this Court enter an order reversing the judgment of the trial court and remanding this matter to the trial court for entry of findings consistent with the evidence that Shelter's conduct was unreasonable and


constituted bad faith and for further findings with respect to the issues of compensatory and punitive damages. .

DATED this 18th day of July 2006.

Respectfully submitted,

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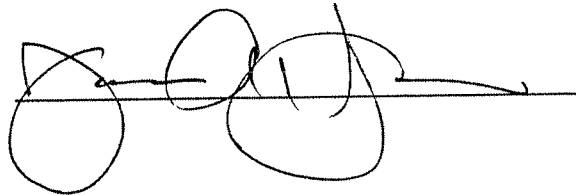
CERTIFICATE OF MAILING

I certify that on the 18th day of July, 2006, service of a true and complete copy of the foregoing pleading or paper, **REPLY BRIEF**, was made by depositing the same in the United States Mail with proper first class postage affixed, addressed to:

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Original and five copies by, U.P.S overnight delivery, to:

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