

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Beverly M. Kennedy,

*Appellant-Plaintiff,
Counterclaim Plaintiff,*

v.

The Lincoln National Life
Insurance Company,

*Appellee-Plaintiff,
Counterclaim Defendant*

April 19, 2023

Court of Appeals Case No.
22A-PL-2624

Appeal from the
Washington Circuit Court

The Honorable
Larry Medlock, Judge

Trial Court Cause No.
88C01-1411-PL-652

Memorandum Decision by Judge Vaidik
Judges Tavitas and Foley concur.

Vaidik, Judge.

Case Summary

- [1] For over a decade, Beverly Kennedy and Lincoln National Life Insurance Company (“Lincoln National”) have been engaged in a dispute regarding disability benefits. Lincoln National ultimately filed for declaratory judgment, seeking reimbursement for overpayments it made to Kennedy. The trial court granted summary judgment for Lincoln National, and Kennedy now appeals. We affirm.

Facts and Procedural History

- [2] Lincoln National is a purveyor of group long-term disability insurance. Kennedy received a group long-term disability policy (“the Policy”) from Lincoln National as part of her compensation from her former employer, the University of Louisville. The Policy is governed by Kentucky law and provides monthly benefits to insureds who become totally disabled. To determine the monthly benefits, Lincoln National takes a percentage of the insured’s previous earnings and subtracts any “Other Income Benefits,” including social-security disability benefits. Appellant’s App. Vol. II p. 243. These “Other Income Benefits” “must result from the same Disability for which a Monthly Benefit is payable” under the Policy. *Id.* at 248. The Policy also provides that,

If benefits have been overpaid on any . . . long-term disability claim, full reimbursement to [Lincoln National] is required within 60 days. If reimbursement is not made, [Lincoln National] has the right to:

1. reduce future benefits and suspend payment of the Minimum Monthly Benefit under this Policy, until full reimbursement is made;
2. reduce benefits payable to the Insured Employee or his or her beneficiary under any group insurance policy issued by [Lincoln National], until full reimbursement is made; or
3. recover such overpayments from the Insured Employee or his or her estate.

Id. at 237.

- [3] In December 2010, Kennedy became unable to work due to medical conditions including chronic obstructive pulmonary disease, fibromyalgia, and back issues, and she applied for long-term disability benefits under the Policy. Lincoln National denied her claim, and Kennedy filed suit in Kentucky. Thereafter, Lincoln National reversed its denial and settled Kennedy's suit. In June 2011, Lincoln National began paying Kennedy \$2,322 a month. Kennedy also applied for and received social-security disability benefits from the Social Security

Administration (SSA). Her initial, gross social-security disability benefit was \$1,964.¹

[4] In February 2013, Lincoln National sent a letter to Kennedy notifying her that, as of June 2013, the Policy provided that her monthly benefits could be offset by other income she received, including social-security disability benefits.² Lincoln National requested information about her social-security disability benefits and offered two options for how to offset those benefits:

OPTION 1: To avoid a potential overpayment by full [Policy] benefits being advanced, we can estimate the monthly amount Ms. Kennedy will receive in [social-security disability] benefits and reduce her [Policy] benefit by this monthly estimate amount. This helps prevent large overpayments and allows Ms. Kennedy to keep all or most of her lump sum [social-security disability benefits] award. We estimate that Ms. Kennedy's [social-security disability] benefits would be \$1,650.00 per month beginning 6/1/2011

OPTION 2: We can continue to pay Ms. Kennedy her full [Policy] benefits until SSA approves her claim. Remember, if this option is chosen, Ms. Kennedy will be required to pay back

¹ Although Kennedy's monthly gross amount of social-security disability benefits was \$1,964, her Medicare Part B premiums were deducted from this amount, so she actually received less than \$1,964 a month.

² From June 2011 to June 2013, Kennedy received monthly benefits under the Policy's "Own Occupation Period" wherein an insured is found to be unable to perform each of the main duties of her own occupation. Appellant's App. Vol. II p. 231. This period expired in June 2013, at which point Kennedy began receiving monthly benefits under the Policy's "Any Occupation Period," wherein an insured is found to be unable to perform each of the main duties of any occupation which her training, education, or experience will reasonably allow. *Id.* During the "Any Occupation Period," the Policy provided Kennedy's monthly benefits could be reduced based on her social-security disability benefits.

[Lincoln National] any past due amounts that were overpaid once the award amounts and calculations have been verified.

Appellant's App. Vol. IV p. 96.

- [5] Lincoln National sent several similar correspondences throughout 2013 and 2014. Kennedy refused to provide Lincoln National information about her social-security disability benefits, arguing the disability that made her eligible for benefits under the Policy was a different disability than that which made her eligible for social-security disability benefits, and thus Lincoln National was not permitted to reduce her Policy benefits.
- [6] In November 2014, Lincoln National filed this suit in Washington County, Indiana, where Kennedy resides, seeking declaratory judgment of its right to offset her Policy benefits by the amount of her social-security disability benefits and recoup any overpayment and to compel Kennedy to provide information about her social-security disability benefits. In January 2015, Kennedy provided the requested information to Lincoln National, and the following month Lincoln National began offsetting Kennedy's monthly Policy benefits by \$1,964, reducing her monthly Policy benefits to \$358.
- [7] In March 2015, Kennedy filed her answer as well as counterclaims for breach of contract, breach of duty of good faith and fair dealing, and unfair claims-settlement practices. Lincoln National moved for summary judgment on its complaint. Kennedy opposed Lincoln National's motion and moved for summary judgment on her counterclaims. The trial court granted partial

summary judgment to Lincoln National, concluding under the Policy it had a right to offset the amount of Kennedy’s social-security disability benefits from her monthly Policy benefits and rejecting Kennedy’s “different disabilities” argument. Kennedy appealed, and this Court affirmed summary judgment to Lincoln National. *See Lincoln Nat’l Life Ins. Co. v. Kennedy*, 167 N.E.3d 349, 361 (Ind. Ct. App. 2021), *trans. denied*. In doing so, the panel noted it was affirming summary judgment only “on the liability issues” and that “Kennedy would have the opportunity to present her alleged defenses [as to damages] if this matter proceeds to a damages phase.” *Id.*³

[8] On remand, Kennedy received permission to amend her answer and added counterclaims on behalf of a nationwide putative class, asserting breach of contract and breach of good faith and fair dealing. She also renewed or added several affirmative defenses, including failure to mitigate and waiver. Lincoln National moved for summary judgment as to its claim for damages and Kennedy’s class counterclaims. As to damages, Lincoln National argued it was entitled to the \$39,280 it overpaid Kennedy between June 2013 and February 2015, plus 12% interest accrued annually, for a total of \$93,088. Kennedy moved for summary judgment on her counterclaims and opposed summary

³ The trial court also granted partial summary judgment to Kennedy, who argued that even if Lincoln National could offset her monthly Policy benefits, it could only do so based on the amount she actually received (the amount after her Medicare Part B premiums were deducted), not the gross amount she was eligible for. Lincoln National appealed this issue, and this Court reversed, finding the Policy allowed Lincoln National to offset the monthly Policy benefits by the gross amount of social-security disability benefits. *See Kennedy*, 167 N.E.3d at 359.

judgment on Lincoln National’s damages claim, arguing among other defenses that Lincoln National’s damages claim is barred due to waiver, its failure to mitigate damages, and the voluntary-payment doctrine.

[9] The trial court granted summary judgment on all issues in favor of Lincoln National and ordered Kennedy to pay back “all overpayments plus the 12% interest accrued annually until May 2021, totaling \$93,088.” Appellant’s App. Vol. II p. 46.

[10] Kennedy now appeals on the issue of damages only.

Discussion and Decision

[11] Pursuant to its terms, the Policy is governed by Kentucky law. Procedural matters, on the other hand, are governed by Indiana law. *See Homer v. Guzulaitis*, 567 N.E.2d 153, 156 (Ind. Ct. App. 1991) (“When the parties to a contract agree on the law which should control the contract, we will give effect to their agreement. At the same time, Indiana procedural law applies.” (citation omitted)), *trans. denied*. Thus, we review this matter under Indiana’s summary-judgment standard, which provides that summary judgment is appropriate if the designated evidence “shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Ind. Trial Rule 56(C).

I. Failure to Mitigate

- [12] Kennedy argues the trial court erred in granting summary judgment for Lincoln National because it failed to mitigate its damages. A party claiming damages for breach of contract is obligated to use reasonable efforts to mitigate his damages. *Jones v. Marquis Terminal, Inc.*, 454 S.W.3d 849, 852 (Ky. Ct. App. 2014). The injured party must act reasonably to avoid enhancing the damages caused by the breach. *Id.* However, the efforts to minimize or avoid losses need not be unduly risky, expensive, burdensome, or humiliating. *Id.* The party committing the breach bears the burden of proving that the plaintiff failed to mitigate his damages. *Id.* While the question of whether a plaintiff has taken reasonable efforts to mitigate their damages often presents factual issues, summary judgment is appropriate when the defendant fails to present evidence of reasonable steps the plaintiff should have but failed to take to mitigate its damages. *Fifth Third Bank v. Waxman*, 726 F. Supp. 2d 742, 751 (E.D. Ky. 2010).
- [13] The Policy provides that, in the event of overpayment, Lincoln National may reduce monthly benefits to make up the difference or recover a full reimbursement. Citing this provision, Kennedy argues that Lincoln National had a right under the Policy to reduce her monthly benefits, but chose not to do so, and this is sufficient to show a failure to mitigate damages and to preclude summary judgment.

[14] Lincoln National argues, and the trial court found, that under Kentucky law Kennedy cannot claim Lincoln National failed to mitigate damages where she too failed to do so, citing *Jones*, 454 S.W.3d at 852. There, Marquis rented equipment from Jones and later failed to pay the monthly rental fee. Jones demanded payment or the return of the equipment, and when neither occurred he sued for breach of contract. The trial court ultimately found for Jones but determined he could not collect full damages because he “should have sought injunctive relief to recover the equipment” during the pendency of the breach-of-contract case to prevent the damages from accruing. *Id.* The Kentucky Court of Appeals disagreed. The Court stated:

Marquis has not produced sufficient evidence to establish that Jones failed to mitigate his damages in this matter. Under the terms of the parties’ agreement, Marquis was plainly under a duty either to pay the rental cost or to return the equipment to Jones. Once Marquis realized that it could not pay under the terms of the agreement, Marquis could have—and arguably should have—returned the equipment. Thus, it had an opportunity to mitigate damages itself. Instead of doing so, it elected to retain and to use the equipment.

Id.

[15] The same can be said here. Under the clear terms of the Policy, Kennedy was required to provide Lincoln National with information about her social-security disability benefits so Lincoln National could reduce her Policy benefits by that amount. Yet she did not, even after Lincoln National informed her numerous times of her obligation and the potential consequences of noncompliance,

including that she may have to pay a large reimbursement. Thus, Kennedy had the same opportunity to mitigate the damages and cannot now claim that Lincoln National failed to do so.

[16] The trial court properly determined there was no failure to mitigate damages that would preclude summary judgment.

II. Waiver

[17] Kennedy next argues that Lincoln National “knowingly and intentionally waived its right to reduce or to suspend her [Policy benefits] based on its estimate of her [social-security disability] benefits.” Appellant’s Br. p. 35.

Waiver is the voluntary and intentional relinquishment of a known, existing right or power under the terms of an insurance contract. *Howard v. Motorists Mut. Ins. Co.*, 955 S.W.2d 525, 526 (Ky. 1997). What facts are necessary to create a waiver is a question of law; but whether such facts are true, if denied, is a question to be determined by the jury. *Thomas Jefferson Fire Ins. Co. of Louisville v. Barker*, 251 S.W.2d 862, 864 (Ky. Ct. App. 1952).

[18] Here, Kennedy argues that Lincoln National waived its claim because “it could have reduced or suspended [her Policy] benefits but made the knowing and intentional choice not to do so.” Appellant’s Br. p. 35. But this does not mean Lincoln National waived its right to reimbursement. The Policy makes clear that Lincoln National may reduce benefits **or** seek later reimbursement. Lincoln National also stated in several correspondences with Kennedy in 2013 and 2014 that, should she not comply with the Policy, it could later seek reimbursement.

Kennedy does not dispute that Lincoln National repeatedly asserted this right. And after Kennedy would not comply, Lincoln National filed suit to collect reimbursement under the Policy. As such, we cannot say there is any evidence Lincoln National made a voluntary and intentional relinquishment of its right to reimbursement. *See Edmondson v. Pa. Nat'l Mut. Cas. Ins. Co.*, 781 S.W.2d 753, 756 (Ky. 1989) (no waiver where it was “quite evident from the correspondence on the behalf of the insurer that it did not intend to waive.”).

[19] The trial court did not err in concluding there is no evidence Lincoln National waived its reimbursement claim.

III. Voluntary Payment

[20] Kennedy next argues that Lincoln National’s claim for reimbursement is barred by the “voluntary payment doctrine.” Appellant’s Br. p. 36. In support, she cites *City of Morganfield v. Wathen*, 261 S.W. 12 (Ky. Ct. App. 1924). There, the plaintiff paid taxes to the city in an amount later found to be illegal under state statute, and he sued the city for reimbursement. The court stated,

Whether the plaintiff Wathen was entitled to recover the tax thus paid depends upon whether the payment was voluntary or otherwise. Where one pays an illegal demand with full knowledge of all the facts which render the demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention or to prevent an immediate seizure of his person or property, the payment is voluntary.

Id. at 14.⁴ Thus, Kennedy argues that Lincoln National voluntarily paid her the full amount and has thus waived its ability to recover reimbursement.

[21] However, a key component of the voluntary-payment doctrine is that the payor has “full knowledge of all the facts.” Lincoln National argues the doctrine does not apply here because it did not have such knowledge, and we agree. When Lincoln National “voluntarily” paid Kennedy her full monthly Policy benefits, she had refused to provide Lincoln National with the information needed to offset her benefits amount.

[22] Nonetheless, Kennedy argues that even if Lincoln National did not have full knowledge of the amount of her social-security disability benefits, it knew she was receiving some and could have offset her monthly Policy benefits by an estimated amount or suspended payments entirely. But Kennedy had also informed Lincoln National that she was receiving her social-security disability benefits due to a separate disability than the one she was receiving Policy benefits for, which, if accurate, could have meant that Lincoln National still owed her the full Policy amount. Thus, it does not appear that Lincoln National had full knowledge, as not only did it not know the amount of Kennedy’s social-security disability benefits, but it also did not know what she

⁴ Although Kennedy refers to this analysis as the “voluntary payment doctrine,” no published Kentucky case uses that term. However, other jurisdictions, including our own, do refer to this general theory as the voluntary-payment doctrine. *See City of Jeffersonville v. Hallmark at Jeffersonville, L.P.*, 937 N.E.2d 402, 408 (Ind. Ct. App. 2010) (referring to rule that “money voluntarily paid with knowledge of all the facts, and without any fraud on the part of the party receiving payment, may not be recovered back even if the money was not legally due” as the “voluntary payment doctrine”), *trans. denied*.

was receiving those benefits for. Furthermore, punishing Lincoln National for paying Kennedy her full monthly benefits would be against Kentucky public policy, as it would encourage insurance companies to withhold payments in the midst of any uncertainty to avoid later claims of waiver. *See Phoenix Indem. Co. v. Steiden Stores*, 267 S.W.2d 733, 735 (Ky. Ct. App. 1954) (declining to adopt rule that insurance companies assume the risk in overpaying beneficiaries to avoid incentivizing companies to “delay payment of claims” as well as to avoid “needless litigation and encourage prompt payment of insurance claims”).

[23] The trial court did not err in determining the voluntary-payment doctrine did not apply.⁵

[24] Affirmed.

Tavitas, J., and Foley, J., concur.

⁵ Kennedy also challenges the amount of damages awarded, arguing it is erroneous and not supported by sufficient evidence, and that the award of 12% interest is an abuse of discretion. Lincoln National responds that Kennedy did not challenge the damages calculations during the summary-judgment proceedings and has thus waived these claims for our review. We agree. Lincoln National’s summary-judgment motion clearly stated that it was requesting \$93,088 in damages, including a 12% interest rate, and designated evidence to support this figure. Aside from a conclusory statement in her surreply, Kennedy made no argument as to the damages calculation in her summary-judgment briefing. *See Appellant’s App. Vol. VI p. 179* (“Contrary to [Lincoln National’s] assertion, Ms. Kennedy does dispute the \$93,088—both as to its calculation and under the terms of the Policy.”). As such, she has failed to preserve this claim for our review. *See Huntington v. Riggs*, 862 N.E.2d 1263, 1269 (Ind. Ct. App. 2007) (“[I]ssues not raised before the trial court on summary judgment cannot be argued for the first time on appeal and are therefore waived.”), *trans. denied*.