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Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000107-MR

BRITTENY ANDREWS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 15-CI-000512

TRAVELERS INDEMNITY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, JOHNSON, AND NICKELL, JUDGES.

NICKELL, JUDGE: Britteny Andrews appeals from a Jefferson Circuit Court order granting Travelers Indemnity's (Travelers) motion for summary judgment.

The trial court found basic reparation benefits (BRB)¹ were not overdue and denied

¹ Also known as Personal Injury Protection (PIP) and no-fault benefits.

Andrews relief under KRS² 304.39-210(1)-(2) and 304.39-220(1). Following a careful review, we discern no error and affirm.

This case arises from an underlying motor vehicle accident (MVA) which occurred on July 22, 2014. Andrews was a passenger in an uninsured vehicle involved in the accident. Andrews applied for BRB through the Kentucky Assigned Claims Plan (KACP) on August 11, 2014. Her claim was assigned to Travelers on September 5, 2014.

Medical bills exceeding \$10,000 were submitted to Travelers in September 2014.³ Andrews also claimed lost wages and submitted wage and salary verification to Travelers on October 31, 2014. On November 4, 2014, Andrews sent a letter to Travelers reserving the right to direct BRB payments and requesting Travelers to contact her counsel should additional information be required.

Andrews sued Travelers for failure to issue BRB payments. Andrews later moved for summary judgment, penalty interest, and attorney's fees. Travelers also moved for summary judgment asserting BRB payments were not overdue because no direction of payment had been made pursuant to KRS 304.39-210. After oral arguments and written submissions, the trial court awarded summary judgment in favor of Travelers. This appeal followed.

² Kentucky Revised Statutes.

³ Medical bills were submitted to Travelers on September 12, 24, and 30, 2014.

Andrews raises multiple questions on appeal: (1) did she provide reasonable proof of loss, entitling her to BRB; (2) are BRB payments overdue; (3) are calculating net loss, directing payment of benefits, and submitting to a voluntary interview prerequisites to payment of BRB; (4) did Travelers waive its defenses regarding Andrews' alleged failure to direct payment of benefits and/or calculate her net loss; and (5) did Travelers act with reasonable foundation in denying Andrews BRB?

A trial court properly awards summary judgment when “the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR⁴ 56.03. Summary judgment should be granted only if it appears impossible the non-moving party will be able to produce evidence at trial warranting judgment in her favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). Further,

a trial judge must view the evidence in the light most favorable to the nonmoving party The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists and then the burden shifts to the party opposing summary judgment to produce at least some affirmative evidence showing that there is a genuine issue of material fact requiring trial.

First Federal Sav. Bank v. McCubbins, 217 S.W.3d 201, 203 (Ky. 2006) (citations omitted). We review a trial court's grant of summary judgment *de novo*. *Baptist*

⁴ Kentucky Rules of Civil Procedure.

Physicians Lexington, Inc. v. New Lexington Clinic, P.S.C., 436 S.W.3d 189, 194 (Ky. 2013).

Kentucky's Motor Vehicle Reparations Act (MVRA)⁵ defines BRB

as:

benefits providing reimbursement for net loss suffered through injury arising out of the operation, maintenance, or use of a motor vehicle, subject, where applicable, to the limits, deductibles, exclusions, disqualifications, and other conditions provided in this subtitle. The maximum amount of basic reparation benefits payable for all economic loss resulting from injury to any one (1) person as the result of one (1) accident shall be ten thousand dollars (\$10,000), regardless of the number of persons entitled to such benefits or the number of providers of security obligated to pay such benefits. Basic reparation benefits consist of one (1) or more of the elements defined as "loss."

KRS 304.39-020(2). "Loss" is defined by the MVRA as an "accrued economic loss consisting only of medical expense, work loss, replacement services loss, and, if injury causes death, survivor's economic loss and survivor's replacement services loss." KRS 304.39-020(5).

In Kentucky, every person suffering a loss because of use of a motor vehicle has the right to BRB coverage, unless the person rejected the limitation upon his or her tort right as provided in KRS 304.39-060(4). KRS 304.39-030. BRB payments are made "without regard to fault." KRS 304.39-040(1).

Pursuant to KRS 304.39-210(1), benefits "are payable monthly as loss accrues. Loss accrues not when injury occurs, but as work loss . . . or medical

⁵ KRS 304.39-010 *et seq.*

expense is incurred. Benefits are overdue if not paid within thirty (30) days after the reparation obligor receives reasonable proof of the fact and amount of loss realized[.]”

Andrews submitted unpaid medical bills to Travelers but failed to offer any proof of out-of-pocket medical expenses. A similar scenario was discussed in *Medlin v. Progressive Direct Ins. Co.*, 419 S.W.3d 60 (Ky. App. 2013).

In the case at hand, the PIP benefits, or basic reparation benefits, are reimbursement for losses suffered due to an automobile accident. Losses are defined by statute as “accrued economic loss”. [Andrews] has not accrued any economic loss in this instance because [s]he has not personally paid [her] medical bills; therefore, [s]he cannot be reimbursed for losses [s]he has not yet sustained. [Travelers] has offered either to reimburse [Andrews] for medical expenses [s]he has paid or to pay the medical providers directly. Both of these are designated in the MVRA statutes, but [Andrews] has declined both options. The MVRA does not require [Travelers] to do what [Andrews] requests; therefore, we affirm on this issue.

Id. at 63. BRB payments are available only as reimbursement for actual economic loss sustained by a claimant. Unpaid medical bills do not prove actual economic loss. *Id.*

A reparation obligor who rejects a claim for BRB payments is required to give the claimant “prompt written notice of the rejection, specifying the reason.” KRS 304.39-210(5). In *State Auto. Mut. Ins. Co. v. Outlaw*, 575 S.W.2d 489, 493 (Ky. App. 1978), this Court held insurers have an affirmative duty under

KRS 304.39-210 to promptly notify claimants of denial based on deficiency of proof of loss, stating:

Its argument assumes that the insurance company may sit indefinitely on a claim without incurring any liability for 18% Interest or attorney's fees so long as the claimant's proof of loss is inadequate. State Auto ignores the requirement of subsection (5) of KRS 304.39-210 that:

A reparation obligor who rejects a claim for basic reparation benefits shall give to the claimant prompt written notice of the rejection, specifying the reason.

Implicit in this statute is a duty on the part of the insurance company to make some response to a claim within the time limits contemplated by subsection (1) of KRS 304.39-210. Otherwise, the claimant may be lulled into the false assumption that he has furnished reasonable proof of loss and that the claim will be paid. [. . .] In the absence of such "prompt notice" of the reason for non-payment, the insurance company must be deemed to have waived any question of the sufficiency of the proof of loss for the purpose of determining when an otherwise valid claim became "overdue."

Id. at 493.

Travelers acknowledges the purpose of KRS 304.39-120 is to prohibit reparations obligors from denying claims based on insufficiencies in proof of loss documentation while failing to inform the no-fault claimant the proof was insufficient. *Id.* Travelers further admits such actions would not fulfill the purpose of the MVRA in ensuring prompt payment of medical expenses after MVAs. KRS 304.39-010(3).

Therefore, the answer to Andrews' question concerning whether she provided reasonable proof of loss, entitling her to BRB payments, is technically "no." However, Travelers' failure to respond within the time contemplated by the MVRA constitutes waiver on its part concerning adequacy of proof of loss.

The instant case is patently distinguishable both factually and legally from *Outlaw*. Shortly after providing proof of loss, however inadequate, Andrews reserved direction of the BRB payments. "[B]enefits are not overdue if a reparation obligor has not made payment to a provider of services due to the request of a secured person when the secured person is directing the payment of benefits among the different elements of loss." KRS 304.39-210(1). "An insured may direct the payment of benefits among the different elements of loss, if the direction is provided in writing to the reparation obligor." KRS 304.39-241. "A reparation obligor shall honor the written direction of benefits provided by an insured on a prospective basis." *Id.* After review of the record, we find no direction of payment concerning BRB has been made. Therefore, the answer to Andrews' question of whether BRB payments are currently overdue is "no."

Andrews further asks whether, given the facts of this case, directing payment of benefits, calculating net loss, and submitting to a voluntary interview are all prerequisites to BRB payment. For the reasons discussed above, directing payment became a prerequisite for payment of BRB after Andrews' November 4, 2014, letter specifically reserved this right in writing.

Under KRS 304.39-210(3) claims for BRB “shall be paid without deduction for the benefits which are to be subtracted pursuant to the provisions on calculation of net loss if these benefits have not been paid to the claimant before the reparation benefits are overdue or the claim is paid.” This statute “directs the reparations obligor to pay BRB without deducting [the claimant’s other benefits as set forth in KRS 304.39-160(3)] if the benefits have not been paid to the claimant before BRB are paid.” *Morrison v. Kentucky Cent. Ins. Co.*, 731 S.W.2d 822, 825 (Ky. App. 1987). KRS 304.39-210(3) unequivocally mandates the reparation obligor, in this case Travelers, timely pay the claimant as loss accrues. This is because the “assigned reparation obligor is entitled to reimbursement from the person obligated to make the payments or from the claimant who receives the benefits.” KRS 304.39-210(3). Calculation of net loss is **not** a prerequisite for paying BRB.

“Because a claimant is only entitled to receive BRB for motor vehicle accident-related losses, reparation obligors are entitled to conduct a reasonable investigation to determine if such a relationship exists.” *State Farm Mut. Auto. Ins. Co. v. Adams*, 526 S.W.3d 63, 66 (Ky. 2017). The MVRA provides for disclosure of certain information by BRB claimants in KRS 304.39-280(1)(b). A claimant or reparation obligor may also petition the circuit court for a discovery order under KRS 304.39-280(3). Additionally, if a claimant’s mental or physical condition is material to a claim for BRB, the reparation obligor may petition for an order directing claimant to submit to examination by a physician pursuant to KRS

304.39-270(1). “However, the MVRA does not specifically provide for the disclosure of information regarding the underlying motor vehicle accident.”

Adams, 526 S.W.3d at 67.

The Supreme Court of Kentucky has held insurers are “entitled not only to an explanation of the circumstances of the accident contained in a police report, but . . . also to the sworn statements of its insureds as to the details of its occurrence and, further, the ‘nature and extent of injuries, treatment, and other details entering the determination of the amounts payable.’” *Id.* (quoting *Temple v. State Farm Mut. Ins. Co.*, 548 S.W.2d 838, 840 (Ky. 1977)). Nothing in the MVRA prevents an insurer from requiring a person seeking benefits under the policy to give a statement under oath detailing circumstances of the accident. *Id.* at 68. As such, answering questions under oath about the MVA is a condition precedent to coverage. *Id.* However, the Supreme Court noted:

because the MVRA specifically provides for the sharing of documentation regarding a claimant’s medical condition and methods for resolving disputes regarding failure to provide that documentation as well as for resolving disputes regarding a claimant’s mental or physical condition, a reparation obligor must avail itself of the provisions of the MVRA to resolve such issues. A reparation obligor cannot attempt to resolve those issues through “questioning under oath” or any other similar procedure that is outside the boundaries established by the MVRA.

Id.

It is difficult to tell from the record the exact nature, purpose, and timing of the “interview” requested by Travelers. It is unclear whether the request

was initially made within the timeframe contemplated by the MVRA, as previously discussed. However, no documentation of the request to interview Andrews is of record until after she reserved the right to direct payment of benefits. Ultimately, Andrews was deposed. Nonetheless, an interview is a prerequisite to payment of BRB, to the extent and for the purposes detailed in *Adams*.

Andrews questions whether Travelers has waived its defenses regarding her failure to direct payment of benefits and/or calculate her net loss. As previously discussed, calculation of net loss is not a prerequisite for payment of benefits. Therefore, Travelers has no defense to “waive” concerning that issue. It appears from the record Travelers offered to pay the maximum BRB obligation to Andrews or as directed by her. It also appears, despite these offers, Andrews did not authorize issuance of BRB payments. Because of Travelers’ actions, Andrews argued Travelers waived the defense of Andrews failure to direct payment of BRB. We disagree. Her failure to direct payment prevented Travelers from making BRB payments and is therefore fatal to Andrews’ claim.

The final issue raised is whether Travelers had reasonable foundation to deny Andrews BRB. KRS 304.39-210(2) states “[o]verdue payments bear interest at the rate of twelve percent (12%) per annum, except that if delay was without reasonable foundation the rate of interest **shall** be eighteen percent (18%) per annum.” (Emphasis added). KRS 304.39-220(1) states in part,

[i]f overdue benefits are recovered in an action against the reparation obligor or paid by the reparation obligor after receipt of notice of the attorney’s representation, a

reasonable attorney's fee for advising and representing a claimant on a claim or in an action for basic or added reparation benefits **may** be awarded by the court if the denial or delay was without reasonable foundation.

(Emphasis added). Reading these provisions together, Andrews may be entitled to attorney's fees and an increased rate of interest if benefits are "overdue because of failure to pay within 30 days after receipt of 'reasonable proof of the fact and amount of loss realized;' and, the delay or denial must have been 'without reasonable foundation.'" *Auto. Club Ins. Co. v. Lainhart*, 609 S.W.2d 692, 694 (Ky. App. 1980).

A reasonable foundation for delay is defined as either "assertion of a legitimate and bona fide defense by the reparation obligor" or failure of the claimant to supply the obligor with reasonable proof of loss in a timely fashion. *Id.* at 695; *see also Kentucky Farm Bureau Mut. Ins. Co. v. Roberts*, 603 S.W.2d 498, 499 (Ky. App. 1980); *Outlaw*, 575 S.W.2d at 494-95.

In the instant case, Andrews supplied her application, medical bills, and proof of work and wage loss verification to Travelers. Travelers had a duty to pay or respond within the time contemplated by statute. Failure to do so waived inadequacies concerning proof of the claim for reasons discussed previously. Travelers asserted no legitimate and *bona fide* defense. Thus, Travelers failed to demonstrate a reasonable foundation for delay prior to receipt of the November 4, 2014, reservation letter. However, once Travelers received notice of Andrews'

reservation to direct benefits, it was prevented from issuing any payments until so directed pursuant to KRS 304.39-241.

Based on the foregoing, there is no genuine issue as to any material fact. There are only two facts material to whether BRB payments are overdue. First, Andrews reserved the right to direct payment of BRB. Second, she has not directed payment since reserving the right. Neither fact is disputed. Pursuant to KRS 302.39-241, these facts prevent BRB from being overdue and Travelers was entitled to judgment as a matter of law.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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