

RENDERED: OCTOBER 6, 2017; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-001000-MR

KEMYIA MCGHEE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE AUDRA J. ECKERLE, JUDGE  
ACTION NO. 15-CI-003531

ALLSTATE NORTHBROOK  
INDEMNITY COMPANY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, COMBS, AND D. LAMBERT, JUDGES.

COMBS, JUDGE: Kemyia K. McGhee appeals from the order of the Jefferson Circuit Court dismissing a counterclaim that she sought to assert against her auto insurer, Allstate Northbrook Indemnity Company. Based upon our review of the record and the applicable law, we affirm.

On May 8, 2015, McGhee's vehicle was struck from behind in a multi-car accident in Louisville. There was minor damage to the vehicle's rear bumper. At the scene, McGhee did not report that she had suffered any personal injury.

McGhee later made claims for medical expense benefits with Allstate. Pursuant to the requirements of KRS<sup>1</sup> 304.39-210, Allstate responded to the claims. However, Allstate declined to make payment immediately. It explained to McGhee's medical providers that it would undertake what it believed to be further, necessary investigation. McGhee's medical treatment ended on July 1, 2015.

On July 17, 2015, Allstate filed a petition to compel McGhee to give a pre-litigation deposition pursuant to the provisions of our civil rules and of KRS 304.39-280(3). In its petition, Allstate alleged that the chiropractic treatment that McGhee had received following the motor vehicle accident appeared to be unreasonable and perhaps even unrelated to the accident. Allstate explained that although she was required by the terms of the insurance contract to appear and submit to an examination under oath, McGhee had steadfastly refused. Consequently, Allstate sought the court's intervention.

Before the circuit court, Allstate contended that it had not made a decision to reject the claim for basic reparation benefits (BRB) but that it merely

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<sup>1</sup> Kentucky Revised Statutes.

required additional information from McGhee to more thoroughly evaluate the claim and to make an adequate claims decision. It argued that it had shown good cause for an order directing McGhee to appear for a pre-litigation deposition aimed at discovering the facts and circumstances surrounding the motor-vehicle accident; the claims; her alleged injuries; her medical history; her claims history; and her criminal history. It also sought testimony to explain or to clarify the perceived inconsistencies contained in her statements and medical records. Finally, Allstate alleged that it had incurred unnecessary attorney fees and expenses as a result of McGhee's refusal to supply voluntarily the requested information.

On August 3, 2015, McGhee responded to the petition and filed what she styled a "counterclaim" against Allstate. In her "answer," McGhee defended her refusal to submit to an examination under oath and resisted any order directing her to provide deposition testimony. In her "counterclaim," McGhee alleged that Allstate's refusal to pay her medical expenses immediately constituted a violation of Kentucky's Motor Vehicle Reparations Act (MVRA). KRS 304.20-010, et seq. She sought to have her claims paid and to recover attorney fees, costs, and interest at a rate aimed at punishing Allstate for its unreasonable delay in paying her claims.

McGhee then filed a separate action against Allstate in Jefferson Circuit Court alleging a violation of the provisions of the MVRA. This action was

ultimately dismissed by the trial court, and McGhee did not file an appeal from this dismissal.

On August 17, 2015, Allstate filed a motion to strike. It contended that there was no provision in the MVRA or our rules of civil procedure for McGhee's responses to its petition.

On August 18, 2015, the Jefferson Circuit Court concluded that good cause had been shown for Allstate's request for a deposition and ordered McGhee to comply with the request within 30 days. By this time, our decision in *Adams v. State Farm Mutual Auto. Ins. Co.*, 2015 WL 3638004 (Ky.App. 2015) was rendered, and perhaps as a consequence, Allstate abandoned its request that McGhee be required to submit to an examination under oath pursuant to the terms of its insurance contract.<sup>2</sup>

After McGhee gave her deposition, Allstate agreed to provide the medical expense benefits that McGhee sought. However, McGhee refused to accept payment.

Allstate's motion to strike McGhee's pleadings was denied in an order entered on September 1, 2015. In an order entered on December 7, 2015, the trial

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<sup>2</sup> In *Adams*, we reversed the circuit court's decision in favor of the BRB obligor and held that "requir[ing] an EUO [examination under oath] prior to payment of the claim . . . would be in direct opposition to the purpose of the MVRA." That decision was recently reversed by the Supreme Court of Kentucky in *State Farm Mutual Auto. Ins. Co. v. Adams*, \_\_\_ S.W.3d \_\_\_, 2017 WL 3634221 (Ky. August 24, 2017), vindicating such a demand by the BRB obligor.

court declared that McGhee's purported counterclaim was "valid." On May 3, 2016, McGhee filed a motion requesting a trial date for her action against Allstate for its alleged failure to pay promptly the BRB claim.

In an order entered on July 7, 2016, the trial court concluded that McGhee had not presented reasonable proof of her claims to Allstate as required by the provisions of KRS 304.39-210 until she had been ordered to give her deposition. It concluded further that Allstate's decision to investigate her claims -- which resulted in a delay of payment -- did not lack a "reasonable foundation" under the provisions of KRS 304.39-210 and so did not require any "overdue" payments bearing an interest rate of eighteen percent (18%). The court observed that after its investigation, Allstate had made a timely offer to pay the claim in full and that McGhee had simply refused to accept it. It concluded that McGhee's "cross-claim" was no longer viable under the circumstances and dismissed the proceedings in their entirety. This appeal followed.

On appeal, McGhee contends that the trial court erred by dismissing the proceedings. She argues that the trial court failed to provide her with an opportunity to depose Allstate's representatives in an effort to show that they had violated provisions of KRS 304.39-210 by failing to pay in a timely manner the medical expense benefits that she sought.

The Supreme Court has very recently addressed the extent of the right of BRB obligors to conduct an investigation. *State Farm Mut. Auto. Ins. Co. v. Adams*, \_\_\_ S.W. 3d \_\_\_, 2017 WL 3634221 (Ky. August 24, 2017), the Supreme Court of Kentucky reversed our 2015 decision and held that BRB obligors are entitled to conduct a reasonable investigation to determine whether an insured is entitled to receive BRB. The court observed as follows:

Subject to certain exceptions, BRB are payable monthly unless a reparation obligor rejects the claim and gives written notice with an explanation for rejection. KRS 304.39-210(1) and (5). Thus, the MVRA is designed to ensure that victims of motor vehicle accidents promptly receive BRB for losses arising from those accidents without unnecessarily involving the courts. 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.

*Id.* at \_\_\_. The Court noted that the MVRA provides for: the disclosure of medical information; a method to obtain that information if it is not forthcoming (a petition to the circuit court for an order for discovery including the right to take written or oral depositions (KRS 304.39-280(3))); and a method to resolve disputes regarding a claimant's physical and mental condition (a petition to the circuit court for an order directing the person to submit to an examination by a physician (KRS 304.39-270(1))).

However, the Supreme Court determined that the disclosure of information regarding the underlying motor vehicle accident was not accounted for in the provisions of the MVRA. The court observed that nothing in the MVRA prevented BRB obligors from requiring anyone seeking benefits under its insurance policy to submit to an examination under oath as to the circumstances surrounding the motor vehicle accident. In fact, the court concluded that those seeking BRB **can be required to** submit to an examination under oath conducted by the insurer regarding accident-related issues **as a condition precedent to coverage.**

McGhee's insurance contract specifically provides that she must authorize Allstate to obtain medical reports and other records pertinent to her claim. It also specifically provides that she may be required to submit to an examination under oath as often as Allstate reasonably requires and to undergo medical examinations by physicians of Allstate's choosing as often as Allstate reasonably requires.

Under Allstate's policy provisions, McGhee was required to submit to an examination under oath as a condition precedent to coverage. Instead of denying coverage outright when McGhee refused to cooperate, Allstate attempted to secure the circuit court's assistance in obtaining information by way of deposition that Allstate reasonably believed was helpful to its claims decision. The

circuit court agreed that Allstate was entitled to conduct a reasonable investigation to determine whether McGhee was entitled to receive BRB. Under the circumstances, McGhee's resistance to Allstate's efforts was inappropriate under her contract of insurance. The circuit court did not err by concluding that McGhee failed to provide reasonable proof of her claims until ordered to do so by the court. Nor did it err in determining that once she had provided the requisite proof, Allstate agreed promptly to pay the claims. Thus, McGhee asserted no viable claim against Allstate. The circuit court did not err by dismissing the proceedings.

We affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brian R. Dettman  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Perry Adanick  
Louisville, Kentucky