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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000566-MR

TOM COX

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
ACTION NO. 08-CI-01274

PROGRESSIVE NORTHERN
INSURANCE COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Tom Cox appeals from a judgment on the
pleadings entered in favor of Progressive Northern Insurance Company on his

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

claim that he was entitled to Pedestrian Personal Injury Protection (PIP) benefits under an insurance policy. Cox argues that: (1) the trial court erred by not accepting his factual allegations as true; (2) he is entitled to Pedestrian PIP benefits under his insurance policy; and (3) Progressive is required to pay interest and attorney's fees pursuant to KRS 304.39-210(2) and KRS 304.39-220. After reviewing the record and briefs, we affirm.

On June 25, 2008, Progressive issued a Kentucky motorcycle insurance policy to Cox. As part of his application, Cox completed a Kentucky no-fault rejection form, which expressly rejected basic PIP coverage. On September 23, 2008, Cox was operating a motorcycle and was injured in an accident. Subsequently, Cox demanded that Progressive pay him Pedestrian PIP benefits, which Progressive denied.

Cox filed a complaint against Progressive in the Laurel Circuit Court alleging that he was entitled to Pedestrian PIP benefits under the insurance policy. The trial court entered a judgment on the pleadings in favor of Progressive on March 24, 2009, concluding that Cox was not entitled to Pedestrian PIP benefits under the policy. This appeal followed.

Cox first argues that the trial court erred by not accepting all his factual allegations as true.

Kentucky Rules of Civil Procedure (CR) 12.03 states:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on such motion, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

The Supreme Court of Kentucky explained CR 12.03 as follows:

The purpose of the rule is to expedite the termination of a controversy where the ultimate and controlling facts are not in dispute. It is designed to provide a method of disposing of cases where the allegations of the pleadings are admitted and only a question of law is to be decided. The procedure is not intended to delay the trial in any respect, but is to be determined before the trial begins. The basis of the motion is to test the legal sufficiency of a claim or defense in view of all the adverse pleadings. When a party moves for a judgment on the pleadings, he admits for the purposes of his motion not only the truth of all his adversary's well-pleaded allegations of fact and fair inferences therefrom, but also the untruth of all his own allegations which have been denied by his adversary. The judgment should be granted if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief.

City of Pioneer Village v. Bullitt County ex rel. Bullitt Fiscal Court, 104 S.W.3d 757, 759 (Ky. 2003) (internal citations omitted).

Cox asserts that the trial court erred by failing to accept his factual allegations as true because it found that he was not entitled to Pedestrian PIP benefits when he alleged in his complaint that Progressive agreed to provide him Pedestrian PIP benefits under the policy. We disagree. The entitlement to reparation benefits under the policy is a legal conclusion drawn from the

interpretation of a contract, which is purely a matter of law to be decided by the court. *See Stone v. Kentucky Farm Bureau Mut. Ins. Co.*, 34 S.W.3d 809, 810 (Ky. App. 2000).

Next, Cox argues that he is entitled to Pedestrian PIP benefits under the express language of the policy. The provision at issue states as follows:

If **you** pay the premium for Basic Personal Injury Protection, Passenger Personal Injury Protection, Additional Personal Injury Protection, or Pedestrian Personal Injury Protection, **we** will pay for reasonable and necessary **covered expenses** incurred because of **bodily injury** sustained by an **insured person** in an accident arising out the operation, **maintenance**, or use of a motor vehicle as a motor vehicle.

If the **covered motorcycle** is a two or three wheeled **motorcycle** designed for operation principally upon public roads, Pedestrian Personal Injury Protection will be shown upon the **declarations page** and will apply even if **you** or a **relative** rejected the limitation upon tort rights under the Kentucky Motor Vehicle Reparations Act and did not purchase Basic Personal Injury Protection, Additional Personal Injury Protection, or Passenger Personal Injury Protection.

(Emphasis in original).

In the absence of ambiguity, the terms of an insurance policy are to be enforced as written. *Goodman v. Horace Mann Ins. Co.*, 100 S.W.3d 769, 772 (Ky. App. 2003).

We conclude that the policy is unambiguous. The absence of a definition for Pedestrian Personal Injury Protection does not create an ambiguity because “terms should be interpreted in light of the usage and understanding of the

average person.” *Stone*, 34 S.W.3d at 811. Further, “we must give also give the policy a reasonable interpretation, and there is no requirement that every doubt be resolved against the insurer.” *Id.*

Cox expressly rejected basic PIP benefits by completing the no-fault rejection form as part of his application for the policy. It is also undisputed that Cox did not pay any premiums for basic PIP benefits. Cox did purchase Pedestrian PIP and asserts that this entitles him to reparation benefits. We disagree. The policy plainly states that Pedestrian PIP will apply even if the insured rejected basic PIP. “Pedestrian” is defined in KRS 304-39.050(1) as “any person who is not making ‘use of a motor vehicle’ at the time his injury occurs.” There is no allegation that Cox struck a pedestrian or was himself a pedestrian at the time of the accident. It is patently unreasonable to interpret the policy so that the purchase of Pedestrian Personal Injury Protection entitles Cox to reparation benefits when he expressly rejected basic PIP and the accident did not involve a pedestrian. As there were no disputed issues of fact and the only issue was the interpretation of the policy provision, the trial court properly granted judgment on the pleadings in favor of Progressive.

Finally, Cox argues that he is entitled to interest and attorney’s fees pursuant to KRS 304.39-210(2) and KRS 304.39-220.

KRS 304.39-210(2) states that “[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.” KRS 304.39-220(1) states:

If 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. No part of the fee for representing the claimant in connection with these benefits is a charge against benefits otherwise due the claimant.

Cox was not entitled to basis PIP benefits or Pedestrian PIP benefits under the policy. Therefore, he is not entitled to interest and attorney’s fees.

Accordingly, the judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Todd K. Childers
Corbin, Kentucky

BRIEF FOR APPELLEE:

Robert L. Steinmetz
Louisville, Kentucky