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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001117-MR

MELISSA RODGERS-MURPHY APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 00-CI-00022

MELISSA FAIR APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, MAZE, AND NICKELL, JUDGES.

COMBS, JUDGE: Melissa Rodgers-Murphy appeals an order of the Casey Circuit Court granting the motion for summary judgment filed by Safeco Insurance Company of Illinois. The court concluded that Rodgers-Murphy breached the notice and subrogation provisions of Safeco's automobile policy. On appeal, Rodgers-Murphy argues that the motion was improvidently granted because she

did provide adequate notice that she intended to pursue a claim for uninsured motorist coverage under the policy and because she filed the action against Safeco within the applicable period of limitations. In the alternative, she contends that the issue of whether Safeco might have been prejudiced by a breach of the policy's notice provision is one to be resolved by the trier of fact. After our review, we affirm.

On July 23, 1998, a small car driven by Melissa Fair rear-ended a pick-up truck driven by Rodgers-Murphy. The accident occurred in Casey County. The pick-up truck was owned by Ronald Rodgers (Rodgers-Murphy's father) and was insured under his Safeco policy. Safeco was advised of the accident on March 18, 1999; it paid basic reparations benefits to Rodgers-Murphy in the amount of $9,816.25.

At the time of the accident, Fair was insured under a policy issued by Globe American Casualty Company. The policy required Fair to provide Globe American notice in the event of an accident, and she did so. Globe American quickly settled the property damage claims asserted by Rodgers-Murphy. The policy also imposed a duty upon Fair to "send [Globe American] promptly any legal papers received relating to any claim or suit and a duty to [c]ooperate with [Globe American] concerning a claim or suit." Fair failed to comply with this provision of the Globe American policy.

On January 31, 2000, attorney Robert L. Bertram forwarded a letter to Globe American indicating that his firm had been retained to represent the interests of

Rodgers-Murphy. He asked that Globe American contact him regarding a possible settlement of her personal injury claim against Fair.

On February 2, 2000, Bertram filed Rodgers-Murphy's complaint against Fair in Casey Circuit Court. Fair was served with a copy of the complaint on February 9, 2000, but the circuit court clerk failed to include a civil summons. Fair failed to notify Globe American of the lawsuit. Although Bertram and Globe American frequently engaged in settlement discussions, Bertram never revealed that a civil action had been filed against Globe American's insured. Instead, in correspondence dated March 2000, Bertram effectively represented to Globe American that an action had *not* been filed against Fair. Safeco was not notified that an action had been filed against the alleged tortfeasor.

Over the next two years, Rodgers-Murphy and Globe American attempted to negotiate a settlement. Both Globe American and Safeco remained unaware of the pending civil action against Fair. On April 29, 2000, the Casey Circuit Court granted the motion of Rodgers-Murphy for default judgment against Fair as to liability. Fair never received a copy of the default judgment or notice of the hearing.

A 20-minute, *ex parte* hearing on damages was conducted on April 30, 2002. The last settlement demand made by Rodgers-Murphy was for $25,000.00, Fair's policy limits. However, following the *ex parte* hearing, she was granted a judgment against Fair in the amount of $770,498.00.

In early May of 2002, Safeco and Globe American first became aware that a civil action had been filed against Fair. A week later, Globe American learned that the default judgment had been granted, that a damages hearing had been conducted, and that damages far exceeding its policy limits had been awarded. On June 14, 2002, Bertram faxed to Globe American copies of the complaint and default judgment. He asked Globe American to "let us know when [sic] should expect a check."

Globe American retained an attorney to represent Fair. A motion to set aside the default judgment was soon filed. On August 26, 2002, the Casey Circuit Court denied Globe American's motion to set aside the default judgment. Globe American appealed.

On appeal, this Court concluded that the trial court had abused its discretion in its excessive award of damages and ordered the award to be set aside. Although we criticized the conduct of Rodgers-Murphy's counsel, we nonetheless upheld entry of the underlying default judgment.

Globe American then filed a declaratory judgment action against Fair in federal district court. In an opinion rendered November 9, 2004, the federal court concluded that Globe American had been prejudiced by Fair's breach of its policy terms. The court determined that Fair's failure to inform the company of the personal injury action filed against her resulted in the entry of default judgment (forever foreclosing any opportunity to contest the issue of liability) as well as the expenditure of substantial resources in litigation to have the judgment set aside.

Relying on the decision of the Supreme Court of Kentucky in *Jones v. Bituminous Casualty Corp.,* 821 S.W.2d 798 (Ky.1991), the federal court concluded that Globe American had met its burden to show probable prejudice and that its denial of coverage was proper under the circumstances. The court concluded that Globe American was entitled to judgment as a matter of law.

On June 19, 2009, nearly five years after the federal court decision, Rodgers-Murphy amended her complaint against Fair to include Safeco as a party defendant. In her amended complaint, Rodgers-Murphy alleged as follows: "at the time of the aforesaid collision on July 23, 1998, the Defendant, Melissa Fair, was the operator of an un-injured (sic) motorists insurance provisions of the aforesaid insurance policies (sic)." Amended Complaint at 2. Rodgers-Murphy contended that she was entitled to recover damages from her father's insurance company, Safeco, under the uninsured motorist coverage provisions of that policy.

In its answer, Safeco denied that Fair was an uninsured motorist at the time of the accident as contemplated by the provisions of Kentucky Revised Statute[s] (KRS) 304.20-020 and as defined by the terms of its policy. It also asserted that several of its policy terms (including the policy's fraud provisions) had been breached.

On January 23, 2012, Safeco filed a motion for summary judgment on the basis of a breach of the notice, subrogation, and cooperation provisions of its policy. The motion was supported by several affidavits. In her response, Rodgers-

Murphy argued only that the amended complaint had been timely filed against Safeco within the period of limitations.

On April 9, 2012, the trial court granted summary judgment in favor of Safeco. The circuit court concluded that the notice and subrogation provisions of Safeco's policy had been breached and that Safeco had been substantially prejudiced as a result. The court held that Safeco was entitled to judgment as a matter of law. Its judgment was made final and appealable by order entered May 25, 2012. This appeal followed.

On appeal, Rodgers-Murphy argues that the trial court erred by granting Safeco's motion for summary judgment. In her brief (submitted *pro se*), Rodgers-Murphy contends that the action against Safeco was timely filed and that Safeco had adequate notice of the accident and the course of the litigation against the tortfeasor. In the alternative, she contends that the adequacy of notice should have been evaluated by a fact-finder and not resolved by the court as a matter of law. Safeco argues that the circuit court correctly concluded that it had demonstrated a probability of substantial prejudice as a result of the tardy notice as well as the loss of its subrogation rights so that coverage under the policy was effectively waived.

We review a trial court's decision to grant summary judgment *de novo*. *Blevins v. Moran*, 12 S.W.3d 698 (Ky.App. 2000). The judgment should be granted only where the pleadings, the discovery, the admissions, the stipulations, and any affidavits show that there is no genuine issue as to any material fact and

that the movant is entitled to judgment as a matter of law. Kentucky Rule(s) of Civil Procedure 56.03.

With respect to notice that must be provided to an insurance carrier regarding a claim, we evaluate the specific facts and circumstances of the matter and consider the requirements of the insurance contract. *Jones v. Bituminous Casualty. Corp.,* 821 S.W.2d 798 (Ky.1991). Rodgers-Murphy contends that notice to Safeco was reasonable under the circumstances since her counsel did not believe that it was necessary to consider the uninsured motorist claim until the federal court determined that Globe American could deny coverage to Fair, the alleged tortfeasor. She argues that "[i]t was not until after the federal court determined that Fair was *not* covered by insurance that her claims against Safeco for uninsured motorist coverage arose."[1] We conclude that the summary judgment cannot be affirmed on the basis of insufficient notice.

The Safeco policy provides, in pertinent part, as follows:

> PART E – DUTIES AFTER AN ACCIDENT OR LOSS
>
> We have no duty to provide coverage under this policy unless there has been full compliance with the following duties as soon as reasonably possible:
>
> A. We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses. . . .
>
> B. A person seeking any coverage must:

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[1]While it is not directly relevant to this proceeding, this assertion is in conflict with the allegation included in her amended complaint indicating that "the Defendant, Melissa Fair, was the operator of an un-injured (sic) motorists (sic)" *at the time of the accident* in July 1998.

1. Cooperate with us in the investigation, settlement or defense of any claim or suit.

2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss.

* * * * *

C. A person seeking Uninsured Motorist Coverage or Underinsured Motorist Coverage must also:

* * * * *

2. Promptly send us copies of the legal papers if a suit is brought.

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PART F—GENERAL PROVISIONS

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LEGAL ACTION AGAINST US

A. No legal action may be brought against us until there has been full compliance with all the terms of this policy. . . .

* * * * *

OUR RIGHT TO RECOVER PAYMENT

A. If we make payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person shall do:

1. Whatever is necessary to enable us to exercise our rights; and

2. Nothing after loss to prejudice them.

Pursuant to *Jones, supra,* an insurer may deny coverage if the insured failed to provide prompt notice of loss and the insurer can prove that it is reasonably probable that it suffered substantial prejudice from the delay in notice. However, we are not persuaded by the facts and circumstances of this case that Safeco can prove that it is reasonably probable that it suffered substantial prejudice from any delay in receiving notice of how, when, and where the accident or loss occurred. To the contrary, it appears from the record that Safeco was provided reasonable notice of the accident.

Nor is there evidence to indicate that Rodgers-Murphy failed to provide Safeco with "copies of any notices or legal papers ***received*** in connection with the accident or loss." (Emphasis added.) Safeco contends that it should have received a copy of the complaint against Fair, which it characterizes as a legal document "generated" as a result of the accident. However, the provisions of the policy did not require Rodgers-Murphy to provide Safeco with legal documents that were "generated" on her behalf – only those that were ***received***.

Safeco has not argued (nor it does not appear from the record) that Rodgers-Murphy failed to provide prompt notice of her claim for uninsured motorist coverage. Consequently, we cannot affirm the summary judgment on any of the bases related to the issue of notice.

However, we are persuaded that the trial court correctly determined that coverage was properly denied by Safeco on the basis that Rodgers-Murphy

violated the policy provision that required her to do "whatever is necessary to enable [Safeco] to exercise our [subrogation] rights . . . ."

This case involves a highly unusual set of circumstances. Rogers-Murphy was fully aware that Globe American was laboring under a critical misimpression as she attempted to negotiate a settlement of her claim against its insured. In fact, a panel of this Court was convinced by the circumstances that Rodgers-Murphy's counsel affirmatively acted to create that misimpression. Under the circumstances, Rodgers-Murphy's decision not to alert Safeco that coverage under the alleged tortfeasor's policy was potentially at risk violated the obligation placed upon her by the provisions of her father's policy.

In *Gilbert v. Nationwide Mut. Ins. Co.,* 275 S.W.3d 690, 692-693 (Ky. 2009), the Supreme Court of Kentucky observed that an insurer is "almost always more knowledgeable about claims settlement practices than its insured" and concluded that the insurer "should bear the principal burden of protecting its subrogation rights. . . ."

In this case, Rodgers-Murphy was required not only to "do nothing to prejudice" the insurer's subrogation rights, but she was affirmatively required by Safeco's policy provisions to do "[w]hatever is necessary to enable us to exercise our [subrogation rights]. . . ." While timely notice of the loss would ordinarily have enabled Safeco to take whatever steps it deemed necessary to protect its potential rights, Safeco was entitled -- under the express terms of this policy -- to rely upon Rodgers-Murphy for assistance in preserving its ability to assert its

rights. In light of her obligation to act affirmatively on Safeco's behalf, Rodgers-Murphy failed to advise the insurer before entry of the default judgment that its subrogation rights were potentially in jeopardy. Because of the inappropriate nature of the communication between Rodgers-Murphy's counsel and the alleged tortfeasor's insurer, Rodgers-Murphy had constructive – if not actual – notice of the risk that had likely been created. Under these circumstances, the trial court did not err by concluding that Rodgers-Murphy violated her contractual duty to act affirmatively to protect Safeco's rights and that, as a result, Safeco had no duty to provide coverage under the policy.

We affirm the summary judgment entered in favor of Safeco.

ALL CONCUR.

BRIEF FOR APPELLANT:

Melissa Rodgers-Murphy, *pro se*
Springfield, Kentucky

BRIEF ON BEHALF OF SAFECO INSURANCE COMPANY OF ILLINOIS:

David G. Richardson
Lexington, Kentucky