

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000718-MR

SHERWIN AND DONNA DUNN

APPELLANTS

v.

APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 06-CI-00136

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND STUMBO, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE

STUMBO, JUDGE: Sherwin and Donna Dunn appeal the grant of summary
judgment in favor of Kentucky Farm Bureau Mutual Insurance Company (KFB)
that dismissed their class action claims. The Dunns argue that they are entitled, as
a matter of law, to interest on the money KFB paid out to them pursuant to a

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.

homeowners' insurance claim and that they should be allowed to pursue a class action claim as to this issue.

The facts are not in dispute. On December 22, 2005, the Dunns' mobile home caught fire. The mobile home was insured by KFB. On January 5, 2006, the Dunns submitted a proof of claim form to KFB. KFB investigated the claim and on May 12, 2006, made a payment on the claim. Further payments were made on June 8, 2006, and July 3, 2006. No payments or offers of settlement were made within the 30-day window set forth in KRS 304.12-235.

The Dunns filed the underlying lawsuit individually and on behalf of three classes of persons that they alleged would have a claim for interest under KRS 304.12-235.² The three named classes were:

A. All first party insureds who, within the last fifteen years, suffered a loss covered by their KFB policy, furnished KFB with a notice and proof of claim as required by the policy, and who received a settlement or claim payment from KFB, but who were not paid 12% interest on the ultimate settlement, and where KFB did not attempt to settle their claim within thirty days of being furnished the aforesaid notice and proof of claim.

B. All first party insureds and their health care providers who, within the last fifteen years, suffered a loss covered by their KFB policy (or in the case of health care providers, furnished health care for an injury covered by PIP or Added Reparations benefits), furnished KFB with a notice and proof of claims as required by the policy, and who have not yet received a settlement or claim payment from KFB, and where KFB did not attempt to

² Appellant also argued in the alternative that KRS 14-400 was applicable but conceded during oral argument that the statute was not.

settle their claim within thirty days of being furnished the aforesaid notice and proof of claim.

C. All health care providers who provided health care under PIP or Added reparations benefit coverage applicable to automobile policies issued by KFB, and who, within the last fifteen years, furnished KFB with a notice and proof of claim as required by the policy, and who received a settlement or claim payment from KFB, but who were not paid 12% interest on the ultimate settlement, and where KFB did not attempt to settle their claims within thirty days of being furnished the aforesaid notice and proof of claim.

Kentucky Farm Bureau filed a motion to dismiss pursuant to Civil Rule 12.02(f). The trial court dismissed the class action claims and all of the individual claims except the one dealing with payment of interest pursuant to Kentucky Revised Statute (KRS) 304.12-235.

KRS 304.12-235 states:

- (1) All claims arising under the terms of any contract of insurance shall be paid to the named insured person or health care provider not more than thirty (30) days from the date upon which notice and proof of claim, in the substance and form required by the terms of the policy, are furnished the insurer.
- (2) If an insurer fails to make a good faith attempt to settle a claim within the time prescribed in subsection (1) of this section, the value of the final settlement shall bear interest at the rate of twelve percent (12%) per annum from and after the expiration of the thirty (30) day period.
- (3) If an insurer fails to settle a claim within the time prescribed in subsection (1) of this section and the delay was without reasonable foundation, the insured person or health care provider shall be entitled to be reimbursed for his reasonable attorney's fees incurred. No part of the fee for representing the claimant in connection with this

claim shall be charged against benefits otherwise due the claimant.

The case progressed with the Dunns' filing of a motion for summary judgment, arguing that since KFB made no attempt to settle the claim until May 12, 2006, when they made the first payment, KRS 304.12-235 requires some interest to be paid. In other words, the statute makes it mandatory to pay interest when no attempt is made to pay the claim within 30 days. The trial court overruled the motion on the grounds that there is a genuine issue of material fact as to whether KFB acted in good faith to settle the claim.

The Dunns filed a second motion for summary judgment and stipulated that they would put on no evidence challenging KFB's good faith. KFB responded with its own motion for summary judgment arguing that since the Dunns will not put forth any evidence of bad faith, summary judgment should be granted in KFB's favor. The trial court granted summary judgment for KFB and denied the Dunns interest. This appeal followed.

The Dunns first argue that because there was no attempt to make a settlement until more than 30 days after submission of their claim, the good faith exception in KRS 304.12-235 does not apply. KFB points to the investigation it began before the Dunns submitted their proof of loss. One of the pieces of information it acquired during the investigation was that the Dunns had been in financial trouble and that some of the home's contents had been removed prior to

the fire. Additionally, KFB notes that when their representative attempted to take the Dunns' statements under oath as provided for in their policy, it was delayed first due to scheduling problems and then at the request of the Dunns' counsel. It then took another month for the statement to be transcribed and signed by the Dunns. Finally, KFB notes the stipulation that the Dunns would not attempt to introduce evidence of bad faith. The first payment was in the amount of \$78,715.86 and was made on the same day the statements were received.

Appellants' argument is that under KRS 304.12-235, the only time that interest is payable on a claim is when the claim is neither paid nor a good faith attempt to settle is made within 30 days of submission of a claim. Here, the Dunns stipulated that no evidence of bad faith was forthcoming, which essentially means that if a claim is submitted and it is not paid for any reason other than good faith, interest is payable. While an interesting argument, were we to accept it, the bad faith provision of subsection (2) would be completely superfluous and the statute would have the same effect as it would if it provided that interest is payable any time the claim is not paid within 30 days of submission of proof of loss. The trial court did not err in granting the motion for summary judgment.

The Dunns also argue that the class action aspect of their case was improperly dismissed. As stated above, the trial court dismissed the class action pursuant to a CR 12.02 motion to dismiss filed by KFB. "Under CR 12.02 a court should not dismiss for failure to state a claim unless the pleading party appears not

to be entitled to relief under any state of facts which could be proved in support of his claim.” *Weller v. McCauley*, 383 S.W.2d 356, 357 (Ky. 1964) (Emphasis added). Also, the class action portion of the complaint was dismissed before the Dunns could file a motion to certify the case as a class action and before a hearing could be held to present evidence regarding the class action.

As a general matter, we would note that issues regarding class action certification are not properly before the trial court until the plaintiffs have filed their motion for class certification. *Davis v. Department of Revenue of Finance and Admin. Cabinet*, 197 S.W.3d 557, 565 (Ky. App. 2006) (reversed on other grounds). Based on this precedent, it would be within our power to remand this case in order for the Dunns to file their motion for class certification regarding all three classes; however, our review of the complaint convinces us that the trial court properly granted the motion to dismiss.

A threshold issue regarding class actions is a plaintiff’s standing to sue on behalf of a class of people. “To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents.” *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 14 L.Ed.2d 706 (1974).

Although it is unclear why the lower court dismissed all of the class action claims, we note that the Dunns are not members of the second and third

classes they have identified. They do not have insurance claims pending against KFB, nor are they health care providers. Even though the Dunns had not yet filed their motion for class action certification, it was proper for the trial court to dismiss these two classes from the case based on their failure to plead facts that place them within the classes.

The class description of the first class established a possible defined class to which the Dunns could have belonged, to wit: the class of those who received a payment from KFB, but did not receive interest pursuant to KRS 304.12-235. However, since we have determined that their claim has no merit as discussed herein, there is no basis for a class action remaining.

For the foregoing reasons, we affirm the summary judgment.

ALL CONCUR.

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