

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001644-MR

MELISA BAYS

APPELLANT

v.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 15-CI-00017

LIBERTY MUTUAL FIRE
INSURANCE COMPANY

APPELLEE

OPINION
REVERSING AND REMANDING
WITH DIRECTIONS

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Melisa Bays brings this appeal from an August 5, 2015, summary judgment of the Henry Circuit Court dismissing Bays' claim for interest and attorney's fees under the Motor Vehicle Reparatons Act (MVRA) against Liberty Mutual Fire Insurance Company. We reverse and remand with directions.

On April 15, 2014, Bays was involved in a motor vehicle accident that occurred in Henry County, Kentucky. At the time of the accident, Bays was a passenger in a motor vehicle insured by a policy issued by Indiana Farmers in Indiana, and Bays also possessed a motor vehicle insurance policy covering her vehicle issued by Liberty Mutual in Indiana.

By letter dated April 29, 2014, Bays' attorney sent a letter to Liberty Mutual's claim department, placing the company on notice of a pending claim under Bays' policy. On July 8, 2014, Bays forwarded to Liberty Mutual a copy of an unpaid bill for medical care related to the motor vehicle accident from University of Louisville Hospital and requested the statutory minimum (\$10,000) of basic reparation benefits (BRB) be paid directly to her.¹ The hospital bill totaled over \$38,000. Liberty Mutual finally acknowledged Bays' BRB claim on September 29, 2014. Then, on October 6, 2014, Liberty Mutual informed Bays that it was conducting a coverage investigation and requested Bays' complete a form entitled Statement of Claim Personal Injury Protection Benefits. On the form, Bays indicated that she suffered a broken sternum, broken tailbone, broken hand, and six broken ribs. She also indicated that her medical bills presently

¹ Under the Kentucky Motor Vehicle Reparations Act, an out-of-state insured involved in a motor vehicle accident in Kentucky is statutorily entitled to the minimum amount (\$10,000) of basic reparation benefits (BRB) if the insurer is an insurance company registered to do business in Kentucky. Kentucky Revised Statutes (KRS) 304.39-100(2); *Stephenson v. State Farm Ins. Co.*, 217 S.W.3d 878 (Ky. App. 2007). It is uncontroverted that Liberty Mutual Fire Insurance Company was registered to transact business in this Commonwealth and was statutorily mandated to provide the minimum coverage of BRB to Melisa Bays. KRS 304.39-050(2). The insurance policy covering the motor vehicle involved in the accident was issued in Indiana by Indiana Farmers, and Indiana Farmers does not transact business in Kentucky. Therefore, BRB was unavailable under the insurance policy covering the motor vehicle.

totalled \$60,000, and that her lost wages presently totaled \$12,000. Bays forwarded the completed form to Liberty Mutual on October 21, 2014. Accompanying the completed form, Bays also sent a letter to Liberty Mutual once again requesting full payment of BRB be made directly to her within thirty days. Liberty Mutual neither denied the BRB claim nor paid the BRB claim.

Consequently, on January 26, 2015, Bays filed a complaint against Liberty Mutual in the Henry Circuit Court. Therein, Bays alleged that Liberty Mutual violated the MVRA by failing to timely pay BRB. Bays sought payment of BRB in the statutorily minimum amount of \$10,000, representing medical expenses and lost wages. Bays claimed that Liberty Mutual's payment of BRB was statutorily overdue, thus also entitling her to interest and attorney's fees pursuant to KRS 304.39-210 and KRS 304.39-220.

On February 5, 2015, almost ten months after being placed on notice of the claim, Liberty Mutual issued a check to Bays in the amount of \$10,000 for payment of BRB. Seven days later, on February 12, 2015, Liberty Mutual filed an answer. In the answer, Liberty Mutual maintained that its payment of BRB was not overdue; thus, Bays was not entitled to interest or attorney's fees.

Liberty Mutual subsequently filed a motion for summary judgment. Therein, Liberty Mutual argued that Bays submitted an unpaid hospital bill evidencing her entitlement to payment of BRB but that Bays failed to offer any proof of out-of-pocket medical expenses. Citing to *Medlin v. Progressive Direct Insurance Company*, 419 S.W.3d 60 (Ky. App. 2013), Liberty Mutual maintained

Bays was not entitled to BRB because such benefit is available only as reimbursement for actual economic loss sustained by a claimant. Liberty Mutual claimed that an unpaid medical bill is not proof of actual economic loss; hence, it had no duty to pay BRB to Bays. Bays filed a response and argued that *Medlin*, 419 S.W.3d 60 was not controlling. Rather, Bays asserted that Liberty Mutual failed to timely deny or timely pay the BRB claim, thus entitling her to interest and attorney's fees under KRS 304.39-210 and KRS 304.39-220. Bays pointed out that Liberty Mutual only paid BRB some six months after formal submission of her BRB claim and after the present action was filed.

By summary judgment entered August 5, 2015, the circuit court agreed with Liberty Mutual and viewed *Medlin*, 419 S.W.3d 60 as dispositive:

Liberty Mutual submits that other than supplying a copy of a bill from University Hospital and requesting that it make payment to Ms. Bays directly based on the bill, there were no other directions for [sic] make particular payments pursuant to KRS 304.39-241. In defense of the claim, Liberty Mutual notes Ms. Bays did not provide any proof that she had incurred any out of pocket expenses to justify the payment, nonetheless, Liberty Mutual made the payment.

. . . .

To encourage prompt payment of claims, the MRVA provides that a reparations obligor may be liable for the payment of 18% Interest and attorney's fees if its delay in the payment of "overdue" benefits was "without reasonable foundation." KRS 304.39-210(2) and 304.39-220(1). Whether a payment is "overdue" must be determined under KRS 304.39-210(1) which provides that the time for payment does not commence until the

reparations obligor "receives reasonable proof of the fact and amount of loss realized." (Citation omitted.)

. . . .

The Court finds as a matter of law that Liberty Mutual has met its obligation to pay over to Plaintiff, Ms. Bays, the maximum amount of BRB benefits. The Court further finds that as there is no proof of any expenses incurred, that as a matter of law, the payment made by Liberty Mutual was not "overdue" under the MVRA. . . .

Opinion and Order at 2-4. The Court dismissed Bays' claims against Liberty Mutual. This appeal follows.

To begin, summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). The facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *Id.* Our review shall proceed accordingly.

Bays contends that the circuit court erred by rendering summary judgment dismissing her claims for interest and attorney's fees pursuant to KRS 304.39-210 and KRS 304.39-220. For the reasons hereinafter elucidated, we conclude that the circuit court erroneously held that *Medlin*, 419 S.W.3d 60, was dispositive and improperly rendered summary judgment.

The timely payment of BRB is of paramount importance under the MVRA.² The Act sets forth strict time frames in which a reparation obligor must pay BRB or must deny payment of BRB. And, the Act provides the insured with a

² The Motor Vehicle Reparations Act is codified in KRS Chapter 304.39.

remedy for “overdue” payments of BRB – interest and/or attorney’s fees. Two statutes contained in the Act, KRS 304.39-210 and KRS 304.39-220, primarily address the timely payment or timely denial of BRB, and the consequences for failure to do so.

KRS 304.39-210 provides, in relevant part:

(1) Basic and added reparation benefits are payable monthly as loss accrues. Loss accrues not when injury occurs, but as work loss, replacement services loss, or medical 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, unless the reparation obligor elects to accumulate claims for periods not exceeding thirty-one (31) days after the reparation obligor receives reasonable proof of the fact and amount of loss realized, and pays them within fifteen (15) days after the period of accumulation. . . .

(2) Overdue 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.

. . . .

(5) 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. If a claim is rejected for a reason other than that the person is not entitled to the basic reparation benefits claimed, the written notice shall inform the claimant that he may file his claim with the assigned claims bureau and shall give the name and address of the bureau.

KRS 304.39-220 reads, in pertinent part:

(1) 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.

(2) In any action brought against the insured by the reparation obligor, the court may award the insured's attorney a reasonable attorney's fee for defending the action.

To aid in our interpretation and understanding of KRS 304.39-210 and KRS 304.39-220, we turn to two Court of Appeals decisions: *Medlin*, 419 S.W.3d 60 and *State Auto. Mutual Ins. Co. v. Outlaw*, 575 S.W.2d 489 (Ky. App. 1978).

In *Medlin*, 419 S.W.3d 60, Medlin was involved in a motor vehicle accident and filed an application for BRB with his insurer, Progressive Insurance Company. Medlin forwarded to Progressive an unpaid medical bill totaling over \$8,000 and directed that payment of BRB be made directly to him. By letter, Progressive informed Medlin that it would not pay BRB directly to Medlin but would pay medical expenses to the medical providers or would pay Medlin for out-of-pocket medical expenses. The Court of Appeals held that Medlin was not entitled to payment of BRB because Medlin had accrued no economic loss consisting of out-of-pocket medical expenses:

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”. Medlin has not accrued any economic loss in this instance because he has not personally paid his medical bills; therefore, he cannot be reimbursed for losses he has not yet sustained. Progressive has offered either to reimburse Medlin for medical expenses he has paid or to pay the medical providers directly.

Medlin, 419 S.W.3d at 63. In *Medlin*, 419 S.W.3d 60, the Court clearly held that an insured must suffer accrued economic loss to be entitled to payment of BRB per KRS 304.39-210(1).

In *Outlaw*, 575 S.W.2d 489, Outlaw was a pedestrian struck by an automobile. Outlaw filed a claim for BRB and forwarded an unpaid hospital bill in the amount of \$7,467.69 to State Farm Mutual Insurance Company. State Farm neither paid BRB nor rejected the BRB claim. Eventually, Outlaw filed a complaint against the tortfeasor and against State Farm. After the filing of the complaint, State Farm paid \$4,159.63 directly to the hospital.³ Thereafter, Outlaw filed a motion for summary judgment seeking interest and attorney’s fees from State Farm for its overdue payment of BRB. The Court of Appeals initially concluded that Outlaw failed to fulfill his statutory duty under KRS 304.39-210(1) to provide State Farm with reasonable proof of loss; however, the Court also held that State Farm, likewise, breached its duty under KRS 304.39-210(1) and (5) to

³ The remaining \$3,308.06 of the hospital bill was previously paid under the Kentucky Medical Assistance Act.

either pay the BRB claim within the proscribed time limits or to promptly reject the claim by giving written reasons thereof:

Nevertheless, State Auto's argument with respect to proof of loss has one fatal flaw. 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. If the insurance company does not intend to pay a claim for medical expenses because the claimant has not furnished copies of the medical bills, the company should give the claimant "prompt notice" of the reason why the claim is not being 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."

Outlaw, 575 S.W.2d at 493. In *Outlaw*, 575 S.W.2d 489, the Court held that where a reparations obligor failed to give prompt written notice detailing the reasons for nonpayment of BRB, the reparations obligor effectively waived any issue

pertaining to sufficiency of the proof of loss for determining if an otherwise valid BRB claim was “overdue.” *See also Shelter Mutual Ins., Co. v. Askew*, 701 S.W.2d 139 (Ky. App. 1986).

Under *Medlin*, 419 S.W.3d 60 and *Outlaw*, 575 S.W.2d 489, it is clear that an insured is statutorily mandated under KRS 304.39-210(1) to provide the reparation obligor with reasonable proof of loss to be entitled to payment of BRB. An unpaid medical bill does not constitute reasonable proof of loss under KRS 304.39-210(1). *Medlin*, 419 S.W.3d 60. However, if the insured fails to provide sufficient proof of loss, the reparation obligor possesses a statutory duty to then provide the insured with prompt written notice setting forth the reasons for nonpayment of BRB pursuant to KRS 304.39-210(5). Per *Outlaw*, 575 S.W.2d 489, the failure of a reparation obligor to provide prompt written notice of nonpayment in conformity with KRS 304.39-210(5) constitutes a waiver concerning the sufficiency of the insured’s proof of loss. *Outlaw*, 575 S.W.2d 489. In such event, if the insured’s claim for BRB was otherwise valid, the payment of BRB is considered overdue. *Id.* And, KRS 304.39-210(2) provides the sanction of 12 percent interest for the overdue BRB payment, and if the overdue payment was withheld “without reasonable foundation,” the interest is increased to 18 percent, and the insured is also entitled to reasonable attorney’s fees per KRS 304.39-220. *Outlaw*, 575 S.W.2d 489.

Relying upon *Medlin*, 419 S.W.3d 60, the circuit court concluded that Bays failed to offer sufficient proof of loss; therefore, the payment of BRB was not

overdue. However, in *Medlin*, 419 S.W.3d 60, the reparations obligor gave written reasons for its nonpayment of BRB. *Medlin*, 419 S.W.3d 60 did not involve the failure of a reparation obligor to give prompt written notice of the reasons for denying a BRB claim. Conversely, in *Outlaw*, 575 S.W.2d 489, the reparation obligator failed to give prompt written notice of its nonpayment of BRB and only paid BRB after the filing of an action against it. This distinction between *Medlin*, 419 S.W.3d 60 and *Outlaw* 575 S.W.2d 489 is pivotal. Similar to the facts in *Outlaw*, 575 S.W.2d 489, Liberty Mutual failed to give prompt written notice of the reasons for nonpayment of BRB and only made payment of BRB after Bays filed the instant action. Under the facts of this case, *Outlaw* 575 S.W.2d 489 is dispositive.

As Liberty Mutual failed to timely pay the BRB claim and failed to give prompt written notice of its reasons for nonpayment, it is clear that Liberty Mutual has waived any defect as to the sufficiency of proof of loss submitted by Bays. We, therefore, reverse the summary judgment and remand to the circuit court with directions. The circuit court is directed to initially determine if Bays' claim for BRB is valid,⁴ and if valid, then whether Liberty Mutual possessed a reasonable foundation to justify its overdue payment of same. In so doing, the circuit court shall be guided by this Court's decision in *Outlaw*, 575 S.W.2d 489.

⁴ When determining whether Bays possesses a valid BRB claim, the circuit court may follow *Medlin v. Progressive Direct Insurance Company*, 419 S.W.3d 60 (Ky. App. 2013). Thereunder, BRB are only available for economic losses actually sustained by the insured, for example, out-of-pocket medical expenses and lost wages.

For the foregoing reasons, the summary judgment of the Henry Circuit Court is reversed and remanded with directions consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard J. Bension
Michael L. Stevens
Louisville, Kentucky

BRIEF FOR APPELLEE:

W. Douglas Kemper
Louisville, Kentucky