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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000473-MR

CHRISTOPHER JOINER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 15-CI-004861

KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KRAMER, AND TAYLOR, JUDGES.

ACREE, JUDGE: The question under review is whether the Jefferson Circuit Court erred by granting summary judgment in favor of Kentucky Farm Bureau Mutual Insurance Company and dismissing Christopher Joiner's claim that Farm Bureau violated the Kentucky Motor Vehicle Reparations Act (MVRA) by failing to pay basic reparations benefits (BRB).[1] We affirm.

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[1] The MVRA is codified in Kentucky Revised Statute (KRS) Chapter 304.39-010, *et seq.*

FACTS AND PROCEDURE

On September 20, 2013, Joiner, a pedestrian, was struck by a vehicle operated by Michael Michalski. Michalski's vehicle was insured by a policy issued by Farm Bureau. Within twenty-four hours, Dr. Gregory Sanders with Diagnostic X-Ray Physicians (DXP) was treating Joiner. (Joiner's Reply Brief, p. 2.) If an invoice was generated for that medical care, it is not a part of the record. However, the subsequent billing summary is a part of the record.

The billing summary shows that on September 21, 2013, Dr. Sanders took three x-rays of Joiner's leg, ankle, and foot, and he took a CT scan of his lumbar spine. The total medical expenses were $320.00. (R. 48.) The billing summary further shows DXP's bill was adjusted down by $242.93. Finally, the billing summary shows "Insurance Payment" of the $77.07 balance and "TOTAL BALANCE" of $0.00. After Joiner filed suit, he acknowledged the source of the "Insurance Payment" was the Kentucky Medical Assistance Program, Medicaid.

DXP printed the billing summary on October 28, 2013. On that same day, October 28, 2013, Joiner's attorney sent a letter to Farm Bureau, notifying it of a pending claim and requesting the name of the adjuster "assigned to the Kentucky No-fault claim and/or medical payment benefits[.]" (R. 46.) The next day, October 29, 2013, Farm Bureau drafted and mailed a letter to Joiner's attorney

acknowledging receipt of the representation letter, identifying the adjuster, and stating the loss number assigned to Joiner's claim for future reference.

On the same day, October 29, 2013, Joiner's attorney's paralegal sent a second letter to Farm Bureau enclosing the above-referenced billing summary. The letter asked Farm Bureau to "please process the enclosed for payment . . .", despite that the billing statement indicated all amounts due had already been paid by other insurance. Farm Bureau made no response.

No further communication took place between Joiner or his counsel and Farm Bureau until just short of the two-year anniversary of the accident. On September 18, 2015, Joiner filed a personal injury complaint against Michalski,[2] and a second complaint against Farm Bureau alleging it violated the MVRA by failing to timely pay BRB. Joiner claimed entitlement to interest and attorney's fees pursuant to KRS[3] 304.39-210 and KRS 304.39-220 because Farm Bureau failed to pay the billing summary when submitted.

For the next year after filing the complaint, Joiner undertook no discovery; neither did Farm Bureau. Joiner sent no other medical bills or claims to Farm Bureau. On October 31, 2016, Farm Bureau moved for summary judgment.

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[2] *Christopher Joiner v. Michael Michalski*, 15-CI-004850 (Jefferson Cir. Ct. filed September 18, 2015). Service of the complaint on Michalski was never successful.

[3] Kentucky Revised Statutes.

It asserted that Joiner never sent a BRB application, never sent an unpaid medical bill, and never claimed reimbursement for medical or other expenses not already reimbursed by insurance. Based on those assertions, Farm Bureau argued Joiner's complaint stated no justiciable cause of action and should be dismissed.

As for DXP's billing summary, Farm Bureau posited that it did not constitute proof of a net loss suffered by Joiner; rather, it was proof the medical expenses were fully satisfied by another insurer. Farm Bureau supported its position by attaching to its summary judgment motion the affidavit of Michelle Reed, a Farm Bureau employee, averring that:

> [Joiner] has never made any claim for payment of PIP benefits with Kentucky Farm Bureau. As of October 27, 2016, no PIP[4] application, medical bill, or wage loss document has been submitted by [Joiner], his attorneys or anyone acting on his behalf (including a medical provider or employer).
>
> Because [Joiner] has never made any claim for payment of PIP benefits, no PIP claim pertaining to [Joiner] has been denied by Kentucky Farm Bureau.

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[4] Farm Bureau's standard form automobile policy refers to basic reparation benefits (BRB), which are defined in KRS 304.39-020(2) as personal injury protection (PIP) benefits. As noted in *Stevenson v. Anthem Cas. Ins. Group*, Ky., 15 S.W.3d 720, 723 (1999), those terms are used interchangeably in describing what are often referred to as 'no-fault' benefits. There was uncontradicted evidence in this case that "PIP, BRB and no-fault benefits" are synonymous terms used interchangeably in the insurance industry to describe those benefits mandated by KRS 304.39-080(5) and KRS 304.39-110(1)(c).

Lawson v. Helton Sanitation, Inc., 34 S.W.3d 52, 53, n.1 (Ky. 2000).

(R. 37.) Farm Bureau independently asserted a statute of limitations argument.

Joiner responded to Farm Bureau's summary judgment motion by pointing to the only submission he ever made to Farm Bureau, the DXP billing summary.

At the hearing on the motion, Farm Bureau repeated its position and argument. Joiner's counsel argued – without offering proof – that Joiner, in fact, had incurred "some $9,000 in medical bills." (R. 59.) Joiner's counsel could not answer the trial court's question why Joiner had not submitted those medical bills to Farm Bureau for payment. He did acknowledge, however, that bills had been sent to another insurer.

By order entered February 15, 2017, the trial court granted Farm Bureau's motion. After entry of the summary judgment, Joiner moved the trial court pursuant to CR[5] 59.05 to alter, amend, or vacate the trial court's decision, again pointing out it indeed submitted a claim in October 2013. He filed his own affidavit stating that in the three and one-half years since the accident, the expenses for his medical treatment made necessary by the accident totaled $10,000. No invoices or other evidence for medical expenses were submitted to support his affidavit. The trial court denied the CR 59 motion. Joiner appealed.

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[5] Kentucky Rules of Civil Procedure.

STANDARD OF REVIEW

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Summary judgment involves only legal questions; whether a fact is material and, if so, whether there is a genuine issue regarding that material fact are legal questions. *Stathers v. Garrard County Bd. of Educ.*, 405 S.W.3d 473, 478 (Ky. App. 2012). Thus, we utilize a *de novo* review standard. *Id.*

Kentucky courts have repeatedly stated, and we continue to adhere to these bedrock principles, that summary judgment is an extraordinary remedy, it is to be "cautiously applied[,]" and it "should not be used as a substitute for trial." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). "The trial court must review the evidence, not to resolve any issue of fact, but to discover whether a real fact issue exists." *Shelton v. Kentucky Easter Seals Soc'y*, 413 S.W.3d 901, 905 (Ky. 2013) (footnote omitted). This requires both the trial court and this Court to review the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest*, 807 S.W.2d at 480. Here, the facts must be viewed in a light most favorable to Joiner.

ANALYSIS

Joiner argues the trial court erred in granting summary judgment. His first three arguments focus on the circuit court's ruling that the limitations period expired. He correctly identifies the applicable statute as KRS 304.39-230(1). The statute says:

> If no basic or added reparation benefits have been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two (2) years after the injured person suffers the loss and either knows, or in the exercise of reasonable diligence should know, that the loss was caused by the accident, or not later than four (4) years after the accident, whichever is earlier.

There is no dispute that Joiner was an insured under the Farm Bureau policy covering the vehicle that struck him. *Capital Enterprise Ins. Co. v. Kentucky Farm Bureau Mut. Ins. Co.*, 804 S.W.2d 377, 378 (Ky. App. 1991) ("in an instance involving a pedestrian, the applicable BRB insurance is that which covers the vehicle which struck the pedestrian"). There is also no dispute that Farm Bureau paid no reparation benefits under that policy for this accident. Finally, there is no dispute that, less than two years after the accident, Joiner sued Farm Bureau to claim his right to reparations benefits under KRS 304.39-030(1), and to hold Farm Bureau accountable to pay reparation benefits under KRS 304.39-040(2). And there's the rub. Though Joiner's timing of his suit did not prevent his claim from

going forward, the substance of his claim cannot survive scrutiny under these latter cited statutes.

Farm Bureau argued before the circuit court that Joiner's complaint did not assert a justiciable claim because he never presented to Farm Bureau the predicate proof of loss that would have created its obligation under KRS 304.39-040 or would have entitled Joiner to reparations under KRS 304.39-030. The circuit court was persuaded and held as follows:

> The uncontroverted affidavit of Michelle Reed states that no proof of loss has ever been provided to [Farm Bureau]. As no claim as been submitted within the period provided for in KRS 304.29-230(1) and *Milby v. Wright*, 952 S.W.2d 202 (Ky. 1997), [Farm Bureau] can have no liability at this point.

(Summary Judgment, R. 60-61.) The implication here is that Joiner was required to submit a claim for BRB within the two-year window established by KRS 304.39-230(1). In effect, the circuit court is correct.

With the passage of the MVRA, and KRS 304.39-230(1) specifically, as judicially interpreted, the legislature created a new cause of action for reparations benefits for pedestrians injured by another party's operation of a motor vehicle. Because the legislature created the cause of action, the legislature could set the terms upon which it can be pursued without running afoul of the jural rights doctrine. *Sargent v. Shaffer*, 467 S.W.3d 198, 212 (Ky. 2015) ("jural rights doctrine holds that the Kentucky legislature may not abrogate a plaintiff's right of

recovery under causes of action in existence at the time of the adoption of our present constitution in 1892"). That includes "limiting the time for taking action, [even though] it may extinguish a cause of action before it arises." *Nygaard v. Goodin Bros., Inc.*, 107 S.W.3d 190, 192 (Ky. 2003).[6]

A timely action under the MVRA must allege predicate facts entitling a BRB claimant to pursue those benefits in court. If those predicate facts are challenged by the reparations obligor with a motion for summary judgment that, uncontroverted, justifies judgment in its favor, the BRB claimant must meet that challenge with countervailing evidence. The effect of KRS 304.39-230(1) is to prohibit a claimant from attempting to establish the necessary predicate facts after lapse of the time allowed by the statute. We believe that, and nothing more, is what the circuit court meant when it referred to "the period provided for in KRS 304.39-230(1) and *Milby v. Wright* . . . ."

The reference to *Milby* convinces us. In that case the Supreme Court was referring to the submission of claims to the insurer, not the filing of a lawsuit, when it said, "[T]he claim for payment is subject to the limitation set forth in KRS 304.39-230(1)." *Milby*, 952 S.W.2d at 204. The rationale given was avoidance of

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[6] Whether the limitations in KRS 304.39-230(1) violate the jural rights doctrine when the BRB claimant is not a pedestrian but, instead, is the party to and beneficiary of the applicable contract of insurance is not before this court. *But see France v. Kentucky Farm Bureau Mut. Ins. Co.*, 605 S.W.2d 773, 774 (Ky. App. 1980) ("Under KRS 304.39-040(1), . . . any action to recover [BRB] is an action on an insurance contract.").

fact patterns such as now before this Court. If the BRB claimant was not required to present proof of loss to the reparations obligor under the time restrictions of KRS 304.39-230(1), "the potential plaintiff [could] hold the alleged tortfeasor hostage by the leisured submission of medical claims, thereby forestalling the running of the statute of limitations" and that would be contrary to one of the purposes of the MVRA. *Id.*

We do not interpret the circuit court's reference to the statute as a legal determination that Joiner failed to file a timely lawsuit. Clearly, the circuit court concluded KRS 304.39-230(1) was a legal bar to Joiner's claim because he failed to submit proof of loss, under MVRA, to Farm Bureau within two years of the accident.

That takes our review to the heart of the issue – whether Joiner's response to Farm Bureau's motion created any genuine issue regarding the material fact of his submission of a proof of loss that would entitle him to BRB. We conclude he did not.

KRS 304.39-040(2) obligates an insurer to "pay basic reparation benefits, under the terms and conditions stated in this subtitle . . . ." The first of those terms and conditions is expressed in KRS 304.39-210 which "clearly places the burden on the reparations obligee to furnish the obligor with reasonable proof

of loss." *Automobile Club Ins. Co. v. Lainhart*, 609 S.W.2d 692, 694 (Ky. App. 1980).

Joiner asserts there was reasonable proof of loss and Michelle Reed's affidavit to the contrary is "unequivocally false." (Appellant's brief, p. 6.) He says his attorney's written notice of Appellant's claim of PIP benefits in October 2, 2013 is reasonable proof. (*Id.* at 7.) However, this Court said long ago that "the statement of the claimant alone would not, as a matter of law, satisfy the statutory requirement of 'reasonable proof of the fact and amount of loss realized.'" *State Auto. Mut. Ins. Co. v. Outlaw*, 575 S.W.2d 489, 493 (Ky. App. 1978). This also applies to statements of the claimant's lawyer, and perhaps more so. However, Joiner does not rely on this statement alone.

Joiner claims "medical bills were subsequently provided to" Farm Bureau. Of course, a medical bill would suffice as reasonable proof of loss. As this Court said:

> In order for an insurance company to make an intelligent evaluation of its obligation to pay a bill for medical expenses, a copy of the bill itself should be furnished to the company. The importance of the medical bill was recognized by the legislature. There is a statutory presumption that any medical bill submitted is reasonable. KRS 304.39-020(5)(a).

Id.

A medical bill is evidence that medical expenses were incurred, and the provider is expecting payment. What Joiner insists is a medical bill is, in fact, a billing statement showing more than the mere fact that medical expenses were once owed. This billing statement shows that medical expenses were fully paid. That is, it shows Joiner paid nothing and is owed nothing; it shows DXP is owed nothing. That makes a difference.

It is necessary for a reparations obligor to "calculate [a claimant's] net loss to determine his right to BRB. . . . [T]he medical benefits received from [another insurance provider] should be subtracted from [the claimant's] actual medical expenses. Any impermissible duplicative payments, resulting in a double recovery for the same medical expenses, should be reimbursed to [the reparations obligor]." *Morrison v. Kentucky Cent. Ins. Co.*, 731 S.W.2d 822, 825 (Ky. App. 1987). Keep in mind that *Morrison* remedied a circumstance of duplicative payments because there was no calculation of net loss prior to paying BRB. Here, Farm Bureau did undertake that calculation because it is, by "the terms and conditions stated in this subtitle," a prerequisite to its obligation to pay BRB. KRS 304.39-040(2).

Among the terms and conditions of the subtitle bearing on the issue are those found in the MVRA definitions of "basic reparations benefits," "loss," and "net loss." KRS 304.39-020(2), (5), (10).

"'Basic reparation benefits' mean benefits providing *reimbursement for net loss* . . . . Basic reparation benefits consist of one (1) or more of the elements defined as 'loss.'" KRS 304.39-020(2) (emphasis added). Ignoring for the moment that Joiner never paid the medical expenses and DXP never failed to collect them, DXP's billing summary could count as evidence of Joiner's "loss" because "'Loss' means accrued economic loss consisting only of medical expense . . . [and] 'Medical expense' means reasonable charges incurred for reasonably needed . . . services . . . including those for medical care . . . ." KRS 304.39-020(5).

However, DXP's billing summary is also proof that Joiner did not suffer a "net loss" – "'Net loss' means loss less benefits or advantages, from sources other than basic and added reparation insurance, required to be subtracted from loss in calculating net loss." KRS 304.39-020(10). Joiner was not out of pocket any sum of money and the medical provider was fully compensated under the Medicaid system. Farm Bureau's payment to either Joiner or DXP would have yielded a duplicative payment as decried in *Morrison*.

"[T]he only requirements set forth in the MVRA are [for a reparations obligor] either to reimburse the insured for money spent out of pocket or to pay the medical providers directly." *Medlin v. Progressive Direct Ins. Co.*, 419 S.W.3d 60, 63 (Ky. App. 2013). When Medicaid pays an injured party's medical

expenses, there is no one left for the reparations obligor to pay. There is no one to reimburse.

When Farm Bureau's motion for summary judgment placed upon Joiner the onus of presenting evidence to counter Reed's affidavit, he failed to present medical bills he said were at his disposal. His own affidavit alone, presented after the circuit court entered judgment, was too little and certainly too late. *Skaggs v. Vaughn*, 550 S.W.2d 574, 578 (Ky. App. 1977) ("[N]ot filed until after the date of the hearing on the motions for summary judgment, the affidavit was filed too late.").

We also find meritless Joiner's argument in reliance on KRS 205.520 that Medicaid "shall be the payor of last resort" and, because Farm Bureau refused to pay medical expenses he incurred at DXP, "he will unjustly and unreasonably be responsible to repay to Medicaid the cost of medical expenses . . . ." (Reply brief, p. 3.) This is not a persuasive argument.

Joiner is correct that KRS 205.520(5) states: "The Kentucky Medical Assistance Program [Medicaid] shall be the payor of last resort . . . ." But the statutory scheme also says: "Prior to billing the Kentucky Medical Assistance Program, all participating vendors shall submit billings for medical services first to a third party when such vendor has knowledge that such third party may be liable for payment of the services." KRS 205.622. If Joiner informed DXP that a third

party (Michalski or his insurer, Farm Bureau) might be liable for DXP's bill, then it appears DXP ignored him because it quickly accepted Medicaid payment.

Once Medicaid paid DXP's bill, the matter was taken out of Joiner's hands as a matter of law. "An applicant [for] or recipient [of Medicaid payments] shall be deemed to have made to the cabinet an assignment of his rights to third-party payments to the extent of medical assistance paid on behalf of the recipient under Title XIX of the Social Security Act."[7] KRS 205.624(1).

Furthermore, Joiner does not cite the full text of KRS 205.520(5). That section of the statute goes on to say that Kentucky Medicaid's "right to recover under KRS 205.622 to 205.630 shall be superior to any right of reimbursement, subrogation, or indemnity of any liable third party." KRS 205.520(5). Joiner lost the right to pursue BRB to the extent he accepted Medicaid benefits and, by operation of KRS 205.624(1) assigned the right to Medicaid.

Implicit in Joiner's arguments is the suggestion that Farm Bureau is expected to inquire or cooperate regarding the Medicaid payments. That is not so.

DXP's billing summary does not identify the source of the "Insurance Payment" as Kentucky Medicaid. But even if it had, Farm Bureau was under no obligation to acknowledge Medicaid's right to subrogation, thereby effectively

[7] The statute cites 42 U.S.C.A. § 1396 to 1396v.

admitting Michalski's or its own liability. In fact, Farm Bureau was not even required to cooperate with Kentucky Medicaid as some other kinds of insurers are.

Certain kinds of insurers are required to cooperate with Kentucky Medicaid to assure it is, as Joiner and KRS 205.520(5) say, "the payor of last resort . . . ." Specifically, "Each insurer issuing policies or contracts under Subtitle 17 [health insurance contracts], 18 [health benefit plans], 32 [non-profit hospital, medical-surgical, dental and health service corporations], or 38 [health maintenance organizations] of KRS Chapter 304 shall cooperate fully with the Cabinet for Health and Family Services or an authorized designee of the cabinet in order for the cabinet to comply with the provisions of subsection (1) of this section." KRS 205.624(3). Farm Bureau's contract with Michalski, under which Joiner is potentially insured, was issued pursuant to Subtitle 20 of KRS Chapter 304. KRS 304.5-070(1)(b); KRS 304.20-010, *et seq.* Therefore, it was not incumbent upon Farm Bureau to reach out to Kentucky Medicaid to solve the coverage question. In fact, the statutory scheme obligates Joiner more than Farm Bureau.

The reason is obvious. These other kinds of insurance owe payment to the injured or ill person because that person contracted for the insurance coverage. But third-party BRB claims asserted by, in this case, an uninsured

pedestrian, require proof of a tortfeasor's liability. Chapter 205 provides more than one way to establish that proof.

Under KRS 205.624, "[t]he injured . . . person may proceed in his own name, collecting costs without the necessity of joining the cabinet or the Commonwealth as a named party, provided the injured . . . person shall notify the cabinet of the action or proceeding entered into upon commencement of the action or proceeding." KRS 205.624(2)(b). Joiner proceeded in his own name to collect costs from Farm Bureau, but nothing in the record to which we have been directed indicates Joiner notified Medicaid of the action.

The same statute gives the Cabinet the right to intervene or institute an action in its own name or in Joiner's name. KRS 205.624(2)(a). If Joiner did not defraud Medicaid by falsely claiming indigency or otherwise, his obligation to repay Medicaid should not be a concern. However, it surely is not a concern for which Farm Bureau is responsible.

CONCLUSION

For the foregoing reasons, we affirm the Jefferson Circuit Court's February 15, 2017 opinion and order granting summary judgment in favor of Farm Bureau.

ALL CONCUR.

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