RENDERED: APRIL 10, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000939-MR

KELVIN THOMAS AND KEYAIRA THOMAS — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 16-CI-000713

ALLSTATE INSURANCE COMPANY — APPELLEE

AND

NO. 2017-CA-001019-MR

KELVIN THOMAS AND KEYAIRA THOMAS — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 16-CI-000691

ALLSTATE INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KRAMER, AND TAYLOR, JUDGES.

ACREE, JUDGE: Appellants, Kelvin and Keyaira Thomas, appeal rulings in two separate but related actions. The issue in both is resolved by proper application of a provision of the Kentucky Motor Vehicle Reparations Act (MVRA), KRS[1] 304.39-280(3). After careful review, we affirm as to both appeals.[2]

BACKGROUND

These are insurance cases stemming from a single automobile accident and claim procedure. Relevant to this case, the role of the Appellee, Allstate Insurance Company, was as a reparations obligor to the Appellants relative to any automobile accidents resulting in their personal injury. Specifically, the cost of treating any such injuries was covered by an insurance policy issued by Appellee that provided $10,000 in personal injury protection (PIP) benefits. The issue here arose when Appellants submitted claims under that policy.

[1] Kentucky Revised Statutes.

[2] The Court elected not to publish this opinion. Either party may, by filing a timely petition for rehearing or modification under Kentucky Rules of Civil Procedure (CR) 76.32(1)(a), move the Court of Appeals to publish the opinion notwithstanding the Court's designation, "Not To Be Published." *Commonwealth v. Crider and Rogers, Inc.*, 929 S.W.2d 179, 180 (Ky. 1996). The petition should state the reasons for urging publication.

Appellants claim they suffered significant bodily injury on July 26, 2015, when the automobile they occupied was sideswiped by an allegedly negligent motorist. The following information was stated in the police report. Both vehicles were headed in the same direction. The other motorist's vehicle was traveling between 15 and 20 miles per hour; the vehicle occupied by Appellants was traveling between 20 and 25 miles per hour. The collision occurred when the other vehicle's driver-side front fender struck the Appellants' vehicle's passenger-side rear fender causing minor to moderate damage to the first vehicle and moderate damage to Appellants' vehicle. Both vehicles remained in service. No party reported injuries at the time of the incident. The parties' respective insurers were informed of the accident and given a copy of the police report.

On October 9, 2015, Appellants submitted claims to Appellee seeking reimbursement for medical treatment. Kelvin claimed medical treatment expenses totaling $13,000 and Keyaira claimed medical bills of $5,800. These claims seemed to Appellee inconsistent with the limited vehicular damage and with the report of no injuries on the police report. Consequently, Appellee assigned the claims to its special investigation unit. Later in October, after acknowledging receipt of the claims, Appellee asked Appellants' counsel if his clients would voluntarily submit to examinations under oath (EUO) to substantiate their claims.

On November 3, 2015, Appellants told Appellee they would not agree to an EUO. In further correspondence between Appellee and Appellants' counsel that extended through the holidays, Appellee continued to pursue Appellants' voluntary submission to the EUO but found it necessary to retain counsel to compel the EUOs. Appellants continued to demand payment irrespective of Appellee's effort to substantiate the claim.

On February 12, 2016, Appellee filed a petition in Jefferson Circuit Court pursuant to KRS 304.39-280(3) for an order compelling each of the Appellants to submit to an EUO. As grounds, Appellee cited the minor damage to Appellants' vehicle, the lack of injuries reported at the scene, and its suspicion that Appellants' treating physicians made unnecessary referrals for diagnostic testing and pain treatment. The circuit court granted the petition over Appellants' objection. Appellants appealed that ruling in Appeal No. 2016-CA-000939-MR.[3]

Meanwhile, on April 22, 2016, Appellants were allowed to amend their complaint previously filed in a different division of the same circuit court against the original tortfeasor to add Appellee as a defendant and to press a claim that it violated the MVRA by refusing to pay PIP benefits. Appellants sought attorney's fees plus 18% interest on their unpaid benefits. After discovery, the

[3] The Court abated this first appeal while the second action proceeded in the circuit court. After both cases were ready for assignment, they were assigned to the same panel for decision.

parties filed cross-motions for summary judgment. Appellants' motion was denied; Appellee's motion for summary judgment was granted. Appellants appealed that ruling in Appeal No. 2017-CA-001019-MR.

STANDARD OF REVIEW

"The issue before us is one of law, which we review *de novo.*" *State Farm Mut. Auto. Ins. Co. v. Adams*, 526 S.W.3d 63, 65 (Ky. 2017) (citing *Cumberland Valley Contractors, Inc. v. Bell Cnty. Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007)) (interpreting the MVRA and, specifically, KRS 304.39-280(3)). However, "the question of good cause is essentially one of reasonableness to be determined by the particular facts of each case." *Nichols v. Kentucky Unemployment Ins. Comm'n*, 677 S.W.2d 317, 321 (Ky. App. 1984). To avail oneself of the benefit of a statute where a showing of good cause is a prerequisite, there must be "an adequate showing of 'good cause' on the part of the insurer." *Miller v. U.S. Fidelity & Guar. Co.*, 909 S.W.2d 339, 342 (Ky. App. 1995). The trial court makes the initial good-cause determination and this Court will reverse only upon a showing that the trial court abused its discretion in so finding. *Id.*

ANALYSIS

The "MVRA is a comprehensive act which not only relates to certain tort remedies, but also establishes the terms under which insurers pay no-fault benefits, and provides for the penalties to which insurers are subjected if they fail

to properly pay no-fault benefits." *Foster v. Kentucky Farm Bureau Mut. Ins. Co.*, 189 S.W.3d 553, 557 (Ky. 2006). And it is even more comprehensive than that.

The MVRA requires insurers to be alert to fraudulent claims that can cause rates to increase. Specifically, "[e]very insurer admitted to do business in the Commonwealth shall maintain effective procedures and resources to deter and investigate fraudulent insurance acts prohibited by this subtitle . . . ." KRS 304.47-080(1). Fraudulent insurance acts are crimes defined in KRS 304.47-020, such as presenting with sufficient *mens rea* "[a]ny written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy . . . knowing that the statement contains any false, incomplete, or misleading information concerning any fact or thing material to a claim[.]" KRS 304.47-020(1)(a)1.

In this case, carrying out its responsibility to investigate a claim it deemed suspicious, "Allstate s[ought] discovery from [its insured], i.e., testimony . . . provided under oath, which is exactly the function of KRS 304.39-280(3), the statute under which Allstate began this case." *Allstate Prop. & Cas. Ins. Co. v. Kleinfeld*, 568 S.W.3d 327, 332 (Ky. 2019).

Appellee's petition identified the following factors that caused it to suspect Appellants of fraudulent insurance acts:

a. Appellants received no first-aid at the scene of the accident and were not transported from the scene by ambulance;

b. Other passengers in Appellants' vehicle who similarly received no first-aid at the scene have since presented claims for "serious injuries";

c. There appears no correlation between the moderate damage to the rear fender of the Appellants' vehicle and the serious injuries claimed;

d. Appellee had "concerns regarding the alleged treatment received by [Appellants] at Kentucky Chiropractic Corporation, Dixie Chiropractic & Rehabilitation, and Preston Medical Center. These possible issues include: paying patients to treat at the facility, unnecessary referral to diagnostic testing, and unnecessary referral for pain management treatment."

(Record, Jefferson Cir. Ct. No. 16-CI-000713, pp. 7-8).

Upon this petition, the Jefferson Circuit Court found the requirement of good cause satisfied and ordered Appellants to present themselves for their examinations under oath. They appealed that decision to this Court.[4]

This Court must determine whether the circuit court abused its discretion when it found good cause justified granting Appellee the relief it sought under KRS 304.39-280(3). We are guided largely by *State Farm Mutual Automobile Insurance Co. v. Adams*, 526 S.W.3d 63 (Ky. 2017).

[4] Appellee argues this Court lacks subject matter jurisdiction to hear this appeal because it is taken from an interlocutory order. We disagree. Although this order did not dispense with the entirety of the case, the specific order was made final and appealable, with no just cause for delay, by the circuit court's separate, subsequent order pursuant to CR 54.02.

In *Adams*, the Supreme Court was tasked with determining whether an insurance company "is permitted unilaterally to require that a person seeking coverage undergo questioning under oath." *Id.* at 64. The question now before this Court is only slightly different – whether an insurance company is permitted unilaterally to require a party seeking benefits (rather than coverage) undergo questioning under oath. This difference does not affect the analysis the Supreme Court utilized in *Adams*; therefore, we apply it here.

In *Adams*, "the majority held that the injured party 'was required to submit to questioning under oath regarding [accident-related] issues as a condition precedent to coverage.'" *Government Employees Insurance Company v. Sanders*, 569 S.W.3d 923, 926 (Ky. 2018) (quoting *Adams*, 526 S.W.3d at 64) (bracketed language in *Sanders*). By analogy then, an injured party must be required to submit to questioning under oath regarding accident-related issues as a condition precedent to paying PIP benefits.

Adams distinguishes between accident-related issues and medical-related issues. Analyzing a medical-related issue first, the Supreme Court said, "[W]hether the bodily injury . . . was caused by the accident . . . involves medical information and [the reparations obligor] should have pursued resolution of that issue through the provisions of the MVRA." 526 S.W.3d at 68. "Because the bills are presumed reasonable, this would prevent [a reparations obligor] from

unilaterally denying [a claim] based upon a paper review of the medical record . . . [and the reparations obligor] has remedies available in the event it receives an invoice for medical treatment that misrepresents the need for the treatment, reasonable cost of the treatment, or any material fact that [the reparations obligor] relied upon in paying the invoice." *Sanders*, 569 S.W.3d at 928, 930.

On the other hand, questions regarding "whether the injury was caused by [the auto accident] . . . are related to the accident itself and are proper subjects for questioning under oath." *Adams*, 526 S.W.3d at 68. Furthermore, "whether [the claimant] had made false statements in connection with [the] claim . . . may involve both medical and accident-related questions." *Id*. Although the reparations obligor can pursue "any medical-related questions through the provisions of the MVRA[,]" *id.*, accident-related issues can be pursued pursuant to KRS 304.39-280(3) "which is exactly the function of" the statute. *Kleinfeld*, 568 S.W.3d at 332.

Excepting whether the alleged injuries resulted from the accident, Appellee's concerns do not correlate directly with those of the reparations obligor in *Adams*. However, none of Appellee's concerns are medical-related and therefore cannot be resolved through the provisions of the MVRA.

Therefore, we reach the same conclusion as in *Adams*. "Because some of the issues listed by [Appellee] involved the acquisition of accident-related

information, the circuit court correctly found that [each Appellant] was required to submit to questioning under oath regarding those issues as a condition precedent" to payment of PIP benefits. *Adams*, 526 S.W.3d at 68. For this reason, in Appeal No. 2016-CA-000939-MR, we affirm the Jefferson Circuit Court's order that each of the Appellants submit to an EUO in accordance therewith.

That takes us to the Appellants' second appeal challenging the circuit court's grant of summary judgment in favor of Appellee. Appellants' amended complaint sought immediate payment from Appellee of PIP benefits, plus interest at the penalty rate of 18%, in accordance with KRS 304.39-210(2), plus the recovery of their attorney's fees. After discovery, Appellants moved for summary judgment as did the Appellee. In denying the former motion and granting the latter, the circuit court stated, in pertinent part, as follows:

> [Appellants] argue that a delay in paying PIP benefits pending an EUO is unreasonable because the MVRA grants the reparations obligor the right to bring an action against one whose intentional misrepresentation caused it to pay benefits that it may subsequently learn were in fact not due. See KRS 304.39-201 [sic]. [They] contend this type of independent action, not a delay pending further investigation, is the [reparations] obligor's sole remedy for a fraudulent claim for basic reparations benefits. They opine that this limitation of remedies was simply a part of the "Ying" [sic] to the "Yang" of the MVRA, which expressly limits claimant's remedies to 18% interest and attorney's fees. [Citation to Appellants' response to Appellee's summary judgment motion omitted.]

> The Court is not convinced that the provision in the MVRA allowing the obligor to recover benefits that are paid because of an intentional misrepresentation requires the [reparations] obligor to pay all claims automatically upon the submission of medical bills and sue later. A Court can still – and has – granted an EUO upon a showing of "good cause," not just cause to believe the claim is fraudulent. KRS 304.39-280(3). It follows that there are situations where the reparations obligor may use an EUO as a tool to evaluate the merits of a claim when it has not received, as the MVRA puts it, "reasonable proof of the fact and amount of the loss realized." KRS 304.39-210(1). Thus, the Court does not believe that a successful petition for an EUO is always irrelevant to the timeliness of a PIP claim.
>
> In this case, there has not been a determination that the [Appellants'] benefits are actually due, let alone a finding of the date [Appellee] received reasonable proof of loss. [Appellee] also has not denied [Appellants'] claim[s]; rather, it is acting pursuant to a valid Court Order to perform more investigation before it determines whether to grant or deny their claims. At least one Trial Court believed good cause existed for an EUO here. [Appellants'] motion is not only requesting summary judgment without grounds in law, but is also asking the Court to overrule a different Trial Judge. This Court declines to do so.

(Record, Jefferson Cir. Ct. No. 16-CI-000691, pp. 543-44). Because Appellee sought to acquire accident-related and other non-medical-related information, we conclude that the circuit court's analysis is consistent with that of *Adams*.

Because there were no genuine issues of material fact, and because this Court agrees with the circuit court that Appellee was entitled to judgment as a

matter of law, we affirm the circuit court's summary judgment from which Appellants brought this appeal in Appeal No. 2017-CA-001019-MR.

CONCLUSION

For the foregoing reasons, the June 6, 2016 order of the Jefferson Circuit Court (Division 9) is affirmed, and the June 2, 2017 summary judgment of the Jefferson Circuit Court (Division 7) is affirmed.

ALL CONCUR.

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