RENDERED: JULY 25, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001159-MR

JANIS COX, AS NEXT FRIEND
OF MARK COUCH; JANIS COX, AS NEXT
FRIEND OF BRYAN BROOKS; ARLETHA JEFFRIES,
AS NEXT FRIEND OF JEROHN JEFFRIES; AND
JULAONE COX — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 01-CI-000529

ALLSTATE INSURANCE COMPANY,
d/b/a DEERBROOK INSURANCE
COMPANY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: COMBS, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from a summary judgment entered against claimants seeking interest and attorney fees for PIP benefits they contend the insurance company unreasonably delayed in paying. We agree with the trial court that the insurance company had a reasonable basis to withhold payment of

PIP benefits until it had adequate proof that injured plaintiffs resided with the insured and that there was no material issue of fact regarding this issue. However, because the benefits were overdue pursuant to KRS 304.39-210, 12% interest on the payments was owed. Hence, we affirm in part and reverse in part, and remand the matter for further proceedings.

On July 26, 1999, appellants, Julaone Cox, Jerohn Jeffries, Mark Couch, and Brian Brooks were injured in a car accident in which Cox was driving a friend's uninsured vehicle. It is undisputed that all four individuals received medical treatment for their injuries. Because the car in which they were riding was uninsured, the four individuals sought PIP benefits from appellee, Deerbrook Insurance Company ("Deerbrook"), through an automobile insurance policy purchased by appellant, Janis Cox, with whom all four claimed they resided at the time of the accident. Janis Cox is the mother of Julaone Cox and Brian Brooks and the grandmother of Mark Couch and Jerohn Jeffries. Deerbrook was first given notice of Janis Cox's intent to seek PIP benefits for the four individuals by telephone on August 2, 2000, and on October 10, 2000, she filed her written application for said benefits. Thereafter, Deerbrook began an investigation into whether the car in which the four claimants were riding was covered by another insurance contract. Once Deerbrook established that the car in question

was uninsured, its focus shifted to the issue of whether all four claimants actually resided with Janis Cox at 1712 Dumesnil Avenue on the date of the accident such that they would be entitled to PIP benefits under KRS 304.39-020(3).

On October 11, 2000, Deerbrook advised appellants' attorney that it would need to provide proof of residence before it could confirm coverage. When said proof was not forthcoming, Deerbrook began its own investigation of the residency issue. On November 3, 2000, a Deerbrook investigator drove to 1712 Dumesnil Avenue and found the home to be abandoned. Although neighbors were questioned, no one could give the investigator any useful information about who had lived there. The investigator then contacted LG&E and ascertained that the electricity at the building obtained in the name of Janis Cox had been turned off on December 3, 1999. The investigation also revealed that Janis Cox obtained a Tennessee drivers' license on April 15, 1999, almost three months prior to the accident.

In November of 2000, the investigator learned that Julaone Cox had owned three cars on the date of the accident, all of which were registered at a Longworth Avenue address. It was also learned that the Longworth Avenue address was listed as Julaone's address on Julaone's driver's license at the time of the accident, on the police report for the accident, and on an

arrest report on a drug charge against Julaone two weeks before the accident.

On November 10, 2000, Janis Cox gave a recorded statement in which she stated that the four claimants had all been living with her on the date of the accident. However, she admitted that Bryan Brooks and Mark Couch did not go to school in the district containing the Dumesnil address. As to her connection to Tennessee, she stated that she had obtained a Tennessee drivers' license because she had been sent to Tennessee by her National Guard Unit and was looking for a job in Tennessee. Ms. Cox's military unit commmander refuted this statement, however, indicating that his unit had never sent her to Tennessee for any military assignments.

On December 14, 2000, appellants provided Deerbrook with a W-2 and other documents for Julaone Cox listing 1712 Dumesnil as his address. However, these documents were dated two weeks after the date of loss. Julaone Cox also submitted an affidavit to Deerbrook stating that he was living at the Dumesnil address on the date of the accident.

On January 23, 2001, appellants filed an action against Deerbrook seeking a declaration of rights regarding the entitlement to PIP benefits, 18% interest on any judgment, and attorney fees. On November 1, 2001, the deposition of Julaone Cox was taken in which he revealed that he had lived at the

Longworth Avenue address for most of his life with the exception of living at the Dumesnil address for about a year. He stated that he lived at the Dumesnil address in July of 1999 (at the time of the accident) and moved from there back to the Longworth Avenue address in November of 1999. Mr. Cox also admitted that around the time of the accident, his nephew, appellant Mark Couch, was not attending school in the district containing the Dumesnil address, but rather was being picked up by the school bus at the Longworth Avenue address. The school records for Couch listed his address as South Longworth Avenue from January 6, 1999 to October 2, 2000. The deposition of Arletha Jeffries was taken on December 21, 2001, in which she testified that Cox, Jeffries, Brooks, and Couch all lived with Janis Cox at the Dumesnil address on July 26, 1999.

On January 15, 2002, appellants' attorney provided Deerbrook with a copy of a Louisville water bill addressed to Julaone Cox at the Dumesnil address dated July 1999. Deerbrook thereafter confirmed that water service had been turned on in Julaone Cox's name on April 28, 1999 and had been cut off on November 20, 1999. Based on this evidence, Deerbrook determined that the four injured appellants had resided with the insured on the date of the accident. Accordingly, checks for PIP benefits were issued on February 22, 2002 and were delivered to appellants' attorney on February 26, 2002.

After Deerbrook's payment of PIP benefits, the parties advised the court that the remaining issues (interest and attorney fees) would be submitted to the court on the evidence contained in the record. The court subsequently entered summary judgment in favor of Deerbrook, finding:

> [T]he delay in awarding the PIP benefits was reasonable in nature, given the lengthy list of doubt-inducing facts [Deerbrook's] investigation revealed. Once it received some hard proof of co-Plaintiff living at Dumesnil, it acted within the statutory time limit to award the benefits.

Consequently, the court did not award attorney fees or any interest on the payments.

Appellants then filed a motion to reconsider, arguing that they were at least entitled to 12% interest because the payments were overdue pursuant to KRS 304.39-210. The court denied the motion, adjudging that the payments were not overdue because Deerbrook timely made the payments under KRS 304.39-210 once it had hard proof that Julaone Cox was living at the Dumesnil address in July 1999. This appeal followed.

Appellants first argue that the trial court misapplied the law regarding overdue PIP benefits and was required to at least order 12% interest on the overdue payments. Pursuant to KRS 304.39-020(3), only insureds or relatives "living in the same household with a named insured" are entitled to basic

reparation or PIP benefits. As to when PIP benefits must be paid, KRS 304.39-210(1) and (2) provide in pertinent part:

> (1) Benefits are overdue if not paid within thirty (30) days after the reparation obligor receives reasonable proof of the fact and amount of the 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.

Appellants maintain that unlike the 18% interest penalty, there is no exception to overdue payments bearing interest at the 12% rate when there is a reasonable foundation for the delay. The trial court found that the PIP benefits were not owing until January 15, 2002, when Deerbrook first received hard proof of residency. Thus, since Deerbrook paid the benefits within fifteen (15) days after the thirty-one (31) day accumulation period ending February 15, 2002, the court reasoned that the payments were not overdue and, therefore, not subject to the 12% statutory interest rate. The lower court's ruling interprets the definition of "overdue" under KRS 304.39-210(1) to be based on the reparation obligor's receipt of proof that the claimant is indeed a "basic reparation insured" under

304.39-020(3) i.e. that he or she meets the residency and relative requirements in the statute. However, the language in KRS 304.39-210(1) does not base its definition of "overdue" on proof that the claimant is a "basic reparation insured," but rather on "reasonable proof of the fact and amount of loss realized." See State Auto Mutual Insurance Co. v. Outlaw, Ky. App., 575 S.W.2d 489 (1978). Hence, once the reparation obligor receives reasonable notice of the loss and the amount of the loss, which Deerbrook undisputedly did in this case, the time for payment of PIP benefits begins to run. This does not mean that the insurer is obliged to pay the benefits if it does not have sufficient proof of residency/relative status under KRS 304.39-020(3). Indeed, if there is no such proof, benefits will not be owed at all and the interest penalties in KRS 304.39-210(2) will not be at issue. However, if it is ultimately determined that benefits are legitimately owed, 12% interest must be paid if the payments are overdue under the statute, even if the insurer had reasonable grounds to delay such payments. See Outlaw, 575 S.W.2d at 494. A contrary interpretation of KRS 304.39-210(1) and (2) would render the distinction between the 12% interest penalty and the 18% interest penalty meaningless because neither would apply if the insurer had reasonable grounds to delay payment. There is a presumption that the Legislature intends a statute to be effective as an entirety,

and statutes should not be construed such that their provisions are without meaning, whether in part or in whole. Aubrey v. Office of the Attorney General, Ky. App., 994 S.W.2d 516 (1998); George v. Scent, Ky., 346 S.W.2d 784 (1961). The only logical interpretation of the statute is that the 12% interest penalty applies when there is an overdue payment that was reasonably delayed, and the 18% interest penalty applies when the overdue payment was not reasonably delayed. Accordingly, we reverse the lower court's denial of 12% interest on the benefits and remand for further proceedings consistent with this opinion.

Appellants additionally argue that the trial court's finding that Deerbrook had reasonable grounds to delay payment was in error. Appellants maintain that the 18% interest penalty applied and further that they were entitled to attorney fees under KRS 304.39-220(1) which provides in pertinent part:

> 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.

Summary judgment should only be used to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial

warranting a judgment in his favor and against the movant. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). The claimant has the burden of proof to furnish the reparations obligor with reasonable proof of loss. Automobile Club Insurance Co. v. Lainhart, Ky. App., 609 S.W.2d 692 (1980); Outlaw, 575 S.W.2d 489. Likewise, we believe the claimant has the burden to prove that they are a "basic reparation insured" under KRS 304.39-020(3).

In the instant case, although there was conflicting evidence regarding whether appellants lived at the Dumesnil residence on the date of the accident, the issue of what information Deerbrook had available to it during its investigation of the matter is undisputed. Appellants initially provided Deerbrook with only self-serving statements that they resided at the Dumesnil address with Janis Cox on the date of the accident. In the face of the wealth of proof indicating otherwise – the abandoned residence, Janis Cox's Tennessee driver's license, the Longworth Avenue address listed by Julaone Cox on several public documents during the time of the accident, Couch and Brooks attending school in a district that did not include the Dumesnil address – we agree with the lower court that Deerbrook had reasonable grounds to delay payment of PIP benefits until it received the evidence of the July 1999 water bill in Julaone Cox's name and that Deerbrook was entitled to

summary judgment on this issue. Hence, the trial court properly denied the claimants' motion for 18% interest and attorney fees.

For the reasons stated above, the judgment of the Jefferson Circuit Court is affirmed in part and reversed in part and the matter remanded for further proceedings consistent with this opinion.

GUIDUGLI, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

COMBS, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the sound reasoning of the majority opinion construing KRS 304.39-210(1). It has thoroughly and correctly analyzed the distinction between situations triggering 12% *versus* 18% interest rates on overdue payments owed for PIP's. However, I believe that the trial judge correctly calculated the time allowed under the statute to pay the overdue benefits within 15 days of the "accumulation period" following receipt of reasonable proof that the payments were owed.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Grover S. Cox Louisville, Kentucky	Perry Adanick Louisville, Kentucky