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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002053-MR

STEPHEN DAVIS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 02-CI-04848

USAA CASUALTY INSURANCE COMPANY

APPELLEE

AND

NO. 2004-CA-002147-MR

USAA CASUALTY INSURANCE COMPANY

CROSS-APPELLANT

v. CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 02-CI-04848

STEPHEN DAVIS; EMILY A. COX;
AND LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

CROSS-APPELLEES

OPINION
AFFIRMING IN PART; VACATING AND REMANDING IN PART

** ** * * * * *

BEFORE: BARBER AND McANULTY, JUDGES; POTTER, SENIOR JUDGE.¹

McANULTY, JUDGE: Appellant Stephen Davis appeals a grant of summary judgment in the Fayette Circuit Court to appellee USAA Casualty Insurance Co. (hereinafter USAA) on the basis that Davis failed to give timely notice of his accident before seeking underinsured motorist's (UIM) coverage from USAA. Davis argues on appeal² that the motion for summary judgment was improperly granted because an insurance carrier alleging lack of notice as a defense must demonstrate a probability of substantial prejudice. Davis also asserts that the filing of the UIM claim against USAA was well within the time allowable for such claims under Kentucky law.

The automobile collision in question occurred on September 25, 2001, involving a vehicle owned and operated by Emily Cox and a vehicle owned by the Lexington Fayette Urban

¹ Senior Judge John W. Potter sitting as Special Judge by assignment of the chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Davis filed a motion for reconsideration of the summary judgment the day after it was granted. Davis also filed a notice of appeal to this Court. The trial court entered an order reversing its decision as to the summary judgment. Davis moved this Court to remand the case to the trial court and/or dismiss the appeal. USAA opposed those motions on grounds that the motion for reconsideration was not proper or timely.

This Court, in an order entered February 4, 2005, agreed that the motion for reconsideration was not timely. The three-judge motion panel found that Davis's motion was not specific as to the grounds for relief and that his memorandum in support of the motion was filed outside of the time limits of the trial court's jurisdiction. The panel concluded that the case was properly brought before this Court by Davis' filing of a notice of appeal, and the case was ripe for appellate review.

Though the parties make arguments in this appeal regarding the appropriateness of the motion for reconsideration, we will not revisit our final decision on that matter herein.

County Government (LFUCG) and operated by Davis, who was at the time of the accident working for LFUCG as a police officer.³

USAA maintains that summary judgment was properly granted based on Davis' failure to provide notice of the accident or the litigation against the tortfeasor, Cox, for approximately two and a half years after the accident. USAA notes that the summary judgment was granted without any counter-affidavits being filed.

Our review of a trial court's grant of a summary judgment concerns whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law. Pearson ex rel. Trent v. National Feeding Systems, Inc., 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is appropriate where the movant shows that the adverse party could not prevail under any circumstances. Id. The function of summary judgment is to terminate litigation when it appears that it would be impossible for the respondent to produce evidence at trial warranting judgment in his or her favor. Id.

When considering the notice a policy holder must give regarding a claim, each case is governed by its own circumstances and the terms of the insurance contract in question. Davis argues that in this case his notice was

³ Davis received payment for his medical expenses from the LFUCG workers' compensation plan.

reasonable given that it was not until he knew the extent of his damages and the fact that the tortfeasor was underinsured that he could make a UIM claim against USAA. He contends that he did not know that he would be unable to continue working as a police officer since for a time he was able to perform light duty. When the lawsuit was filed against Cox, he and his counsel did not know the amount of Cox's liability insurance limits. He states that he did not know that Cox had only \$50,000 as a liability limit until his opportunity to review interrogatories and responses to requests for production in March 2003. He asserts that he promptly reviewed his USAA insurance policy and determined that he had underinsured motorist coverage, and then moved for leave to amend his complaint in June 2003.

The policy in this case, nevertheless, states simply, "We must be notified promptly of how, when and where an accident or loss happened." The policy further requires that the person seeking coverage must cooperate with USAA in the investigation, settlement, or defense of any claim or suit, including submission to physical exams, authorization for obtaining medical records, and submission of proof of loss. Finally, the policy states that: "No legal action may be brought against us until there has been full compliance with all the terms of this policy." USAA argues, as it did below, that Davis completely

failed to comply with the terms of the policy and summary judgment was therefore appropriate.

There was no question that there was a significant delay in notice. Davis is correct in stating, however, that before a carrier is entitled to judgment for breach of a notice provision, it must show that it was prejudiced as a result. We agree with Davis that USAA thus failed to show that it was entitled to judgment as a matter of law. Under Kentucky law, once it is demonstrated that the insured failed to provide timely notice, or, for that matter, a similar breach of the policy requirements, the burden of proof is on the insurance company to prove that it has been prejudiced by the breach. Jones v. Bituminous Casualty Corp., 821 S.W.2d 798, 803 (Ky. 1991). The question is

whether it is reasonably probable that the insurance carrier suffered substantial prejudice from the delay in notice. If the evidence on this issue is in conflict, or if reasonable minds could differ as to what the evidence proves in this regard, the issue is one for the trier of fact.

Id. Davis asserted that USAA had not shown prejudice at the hearing on the summary judgment motion.

USAA contends that its prejudice was obvious in that it was unable to perform its own investigation of the accident, and the investigation performed and information supplied to USAA came from "adverse parties." Davis maintains that USAA suffered

no actual prejudice. He argues that it is unreasonable to believe that USAA would have performed any better or more extensive investigation than that conducted by the primary party, Cox, and her counsel. He states that following a thorough inquiry it was determined that he and Cox were the only witnesses to the accident, and both would be available for depositions. As for damages, he argues that Davis' medical records are available, and that USAA will actually benefit from the existence of independent medical evaluations conducted at the request of Davis' employer, LFUCG, for workers' compensation purposes.

The trial court did not examine this issue before ruling on the summary judgment motion. We conclude that the question, under Jones, of whether USAA was prejudiced is an issue of fact which must be considered by the court below. Therefore, we remand this case for a determination of whether USAA has shown substantial prejudice from the failure of notice and cooperation in this case.

USAA makes a supplemental argument that summary judgment was proper because the UIM claim was untimely filed in terms of statutes of limitation. USAA alleges that because the limitations period for Davis to file a claim for bodily injury under KRS 304.39-230(6) of the Motor Vehicle Reparations Act would be two years from the date of the accident (since no

reparations payments were made), that should be the period of limitations applicable to his UIM claim. We disagree. We believe that this issue was settled in Gordon v. Kentucky Farm Bureau Ins. Co., 914 S.W.2d 331 (Ky. 1995). It was held that the fifteen year statute of limitations for contracts governs such actions rather than the statute of limitations for tort actions in the Motor Vehicle Reparations Act, KRS 304.39-230(6). Id. at 333. If USAA required a shorter limitations period, it could have included one in the insurance policy as long as that shorter limitation was for a reasonable period. Id. As USAA did not dictate a shorter limitation, it is bound by the statutory limitation of fifteen years.

CROSS-APPEAL

USAA files a cross-appeal asking that we consider whether its consent pursuant to KRS 304.39-320(3) may be held to be substantial compliance when payment pursuant to KRS 304.39-320(4) was not made within thirty days. USAA argues that the time period was not sufficient for it to comply with the statute given the lack of notice from its insured, Davis.

The Underinsured Motorist Coverage statute, KRS 304.39-320, subsections (3) and (4) state:

(3) If an injured person or, in the case of death, the personal representative agrees to settle a claim with a liability insurer and its insured, and the settlement would not fully satisfy the claim for personal

injuries or wrongful death so as to create an underinsured motorist claim, then written notice of the proposed settlement must be submitted by certified or registered mail to all underinsured motorist insurers that provide coverage. The underinsured motorist insurer then has a period of thirty (30) days to consent to the settlement or retention of subrogation rights. An injured person, or in the case of death, the personal representative, may agree to settle a claim with a liability insurer and its insured for less than the underinsured motorist's full liability policy limits. If an underinsured motorist insurer consents to settlement or fails to respond as required by subsection (4) of this section to the settlement request within the thirty (30) day period, the injured party may proceed to execute a full release in favor of the underinsured motorist's liability insurer and its insured and finalize the proposed settlement without prejudice to any underinsured motorist claim.

(4) If an underinsured motorist insurer chooses to preserve its subrogation rights by refusing to consent to settle, the underinsured motorist insurer must, within thirty (30) days after receipt of the notice of the proposed settlement, pay to the injured party the amount of the written offer from the underinsured motorist's liability insurer. Thereafter, upon final resolution of the underinsured motorist claim, the underinsured motorist insurer is entitled to seek subrogation against the liability insurer to the extent of its limits of liability insurance, and the underinsured motorist for the amounts paid to the injured party.

(Emphasis added.)

The statute must be read as a coherent whole giving consistent meaning to the terms throughout the statute. Cosby v.

Commonwealth, 147 S.W.3d 56 (Ky. 2004). In this case, USAA essentially agreed to the terms of the statute by relating to Davis and Cox its decision to substitute payment, but no payment was made pursuant to section (4).

USAA reports that its failure to make the payment was due to the dual problems of the lack of earlier notice from Davis and its inability to complete the procedures for issuing payment. USAA reiterates that it did not receive notice of the accident or litigation until it received a summons and amended complaint on March 17, 2004. (An amended complaint was filed on August 1, 2003, but no summons was issued nor answer served on USAA at that time.) On March 26, 2004, Davis' counsel sent a letter by facsimile to USAA's claims examiner purporting to grant a 30 day extension of time in which to file an answer, and enclosed a copy of the police report concerning the accident, Cox's insurance information, and "relevant medical reports" consisting of one-page medical reports from two physicians.

On April 5, 2004, Davis' counsel sent to USAA notice by a certified letter, pursuant to KRS 304.39-320(2), of the proposed settlement between Davis and the underinsured motorist, Cox. This letter, also known as a Coots letter⁴, starts the running of the time period in KRS 304-39-320(3) and (4). It was

⁴ Pursuant to Coots v. Allstate, 853 S.W.2d 895 (Ky. 1993), the opinion which approved the procedure for an underinsured motorist carrier to protect its subrogation rights when its insured proposes to settle with the tortfeasor, now codified in KRS 304.39-320(3) and (4).

received by USAA on April 8. USAA received the additional medical records it had requested from Davis' counsel on April 20, 2004.

On May 7, 2004, USAA notified Davis's counsel by facsimile and mail that it would make advance payment of an amount equal to Cox's policy limits of \$50,000 and asked to be advised as to the exact manner in which the check was to be made payable. USAA reports that both the existence of a workers' compensation lien from the LFUCG and not having Davis' counsel's federal tax identification number precluded issuance of a check until that information could be determined. USAA states that under federal tax regulations, it could not issue a check without Davis's counsel's federal tax identification number or withholding a significant portion thereof for mandatory tax withholding.⁵

Communications difficulties ensued between the parties, and the check was not received by Davis' counsel until May 17, 2004. Thereafter, Davis moved for declaratory relief as to his entitlement to execute a full release to Cox, and the circuit court held a hearing. The circuit court determined that the statute reflected a "narrow window of opportunity expressly

⁵ At the hearing on this question, counsel for Davis agreed that this was the law. On appeal, Cox argues that the check could have been issued and the tax identification number supplied in a year-end return to the IRS, or that USAA could have withheld the standard backup withholding amount from the check. Cox believes USAA's argument is a mere excuse for its inability to reach a decision under the statute and timely act on it.

crafted by the legislature," and that it contained mandatory language which in the context of the statute established that it was to be given strict enforcement. Thus, the court held that since USAA had failed to timely substitute payment of Cox's liability limits, Davis was entitled to accept Cox's insurance proceeds and provide her a full release.

USAA argues on appeal that it did not have sufficient time to make an informed decision as to whether to substitute payment due to the circumstances of this case. USAA argues that the problem arose because Davis violated the policy provisions requiring prompt notice by an insured. USAA argues that the insured can place its insurance carrier in the "impossible predicament" of having to make an uninformed decision as to the election required by KRS 304.39-320(3) and (4). He also argues that Davis would be benefiting from his failure to abide by his contractual obligations to his underinsured motorist carrier.

USAA argues that the words of a statute need not be given their literal meaning when to do so would lead to an absurd or wholly unreasonable conclusion, citing Bailey v. Reeves, 662 S.W.2d 832, 834 (Ky. 1984). USAA argues the procedure is not workable and it defies common sense. USAA requests that we determine whether its substantial compliance was suitable, or if the statute requires the actual payment of funds to the injured party.

In order to determine whether strict compliance or substantial compliance is sufficient to satisfy a statutory provision, it first must be determined whether the applicable provision is mandatory or directory. Knox County v. Hammons, 129 S.W.3d 839, 842 (Ky. 2004). In determining whether a provision is mandatory or directory, form is not as important as the legislative intent, which is derived from "consideration of the entire act, its nature and object, and the consequence of construction one way or the other." Id. at 843, citing Skaggs v. Fyffe, 266 Ky. 337, 98 S.W.2d 884, 886 (1936). The governing standard is that if the directions given by the statute to accomplish a given end are violated, but the given end is in fact accomplished without affecting the real merits of the case, then the statute may be regarded as merely directory. Id.

We agree with the trial court that KRS 304.39-320(3) and (4) provide mandatory requirements and "substantial compliance" is not available as an exception. In addition to the mandatory language, there is a penalty for failure to comply with the 30 day time limit in that that the opportunity to preserve subrogation rights is lost. When reading the statute, it is the evident intention of the legislature that settlement decisions be finalized expeditiously. In addition, the legislature evidently intended for the injured party to receive the payment, rather than a mere agreement to pay, for the same

reason of avoiding delay. There is no way to allow compliance outside the given time limit without impinging on the underinsured motorist's interest in resolution within the thirty days. This interpretation squares with the legislature's statement of "Policy and purpose" in KRS 304.39-010(2) of the Motor Vehicle Reparations Act, "[t]o encourage prompt medical treatment and rehabilitation of the motor vehicle accident victim by providing for prompt payment of needed medical care and rehabilitation"; and KRS 304.39-010(5), "[t]o reduce the need to resort to bargaining and litigation through a system which can pay victims of motor vehicle accidents without the delay, expense, aggravation, inconvenience, inequities and uncertainties of the liability system[.]"

The legislature evidently believed that thirty days was a sufficient amount of time to make a decision as to preserving subrogation rights and to tender payment. Furthermore, we do not believe that USAA has shown that the statute is impossible to comply with, particularly on the record before us which only details the difficulty of one insurance carrier's attempt to follow the statute. We do not agree that USAA has shown that the statutory time period is absurd or lacks common sense.

Finally, we do not agree that Davis has obtained any sort of benefit or advantage since he is entitled to payment

either way, and presumably has no preference as to who issues the check. Thus, we affirm the declaratory judgment of the circuit court.

For all the foregoing reasons, we vacate the summary judgment in favor of USAA Casualty Insurance Co. and remand for a determination of whether it was prejudiced by the lack of timely notice from Davis. We affirm the declaratory judgment which allowed Davis to accept Cox's insurance proceeds and provide her a full release.

ALL CONCUR.

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