

RENDERED: MAY 8, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001800-MR

PROGRESSIVE MAX INSURANCE COMPANY

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 04-CI-000472

NATIONAL CAR RENTAL SYSTEMS, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

CLAYTON, JUDGE: This is an appeal from a summary judgment entered in favor of the appellee, National Car Rental Systems, Inc. (“National”). The appellant, Progressive Max Insurance Company (“Progressive”) brings this appeal arguing that a reparation obligor such as National cannot bring a subrogation action to recover basic reparation benefits (“BRB”) against a liability insurer.

BACKGROUND INFORMATION

The underlying facts are not in dispute and were stipulated at the trial court level. Ed Jones (“Jones”) rented a motor vehicle from National on October 26, 2001. On November 1, 2001, Jones was involved in a motor vehicle accident while driving National’s vehicle. Shannon Wilkerson (“Wilkerson”) was a passenger in Jones’s vehicle and was injured in the accident. At the time of the accident, Jones was insured by Progressive on his personal vehicle. The policy with Progressive included liability benefits should Jones have an accident while in a rented vehicle.

Wilkerson sought damages for her injuries by filing a personal injury claim against Jones as well as receiving \$10,000.00 in BRB from National. On September 16, 2002, Wilkerson’s personal injury action against Jones was dismissed. She neither notified National that she had filed the action, nor that it had been dismissed.

National brought an action in Jefferson Circuit Court against Progressive for reimbursement of the BRB it paid Wilkerson. As a result of Wilkerson’s failure to notify National of her personal injury claim, National did not intervene in the action she filed against Jones. In order to recover the BRB payments, National filed suit against Jones and Progressive.

The trial court entered judgment in favor of National on July 9, 2007. Progressive now appeals that order.

DISCUSSION

Progressive begins by arguing that under Kentucky law, a reparation obligor cannot bring a subrogation action to recover reparation benefits against a liability insurer. It cites *Progressive Casualty Ins. Co. v. Kidd*, 602 S.W.2d 416 (Ky. 1980) in support of this argument. Progressive argues National's exclusive remedy is to pursue a subrogation claim under Kentucky Revised Statutes (KRS) 304.39-070(3). This statute mandates that National either join an existing action by the injured person against the alleged tortfeasor or submit the subrogation claim for arbitration.

In KRS 304.39-070(2) and (3), a reparation obligor's rights are set forth as follows:

(2) A reparation obligor which has paid or may become obligated to pay basic reparation benefits shall be subrogated to the extent of its obligations to all of the rights of the person suffering the injury against any person or organization other than a secured person.

(3) A reparation obligor shall have the right to recover basic reparation benefits paid to or for the benefit of a person suffering the injury from the reparation obligor of a secured person as provided in this subsection, except as provided in KRS 304.39-140(3). The reparation obligor shall elect to assert its claim (i) by joining as a party in an action that may be commenced by the person suffering the injury, or (ii) to reimbursement, pursuant to KRS 304.39-030, sixty (60) days after said claim has been presented to the reparation obligor of secured persons. The right to recover basic reparation benefits paid under (ii) shall be limited to those instances established as applicable by the Kentucky Insurance Arbitration Association as provided in KRS 304.39-290.

National, however, argues that Progressive is incorrect in its argument that it is not a reparations obligor. KRS 304.39-100(2) provides that “in any contract of liability insurance for injury, wherever issued, covering the ownership, maintenance or use of a motor vehicle other than motorcycles while the vehicle is in this Commonwealth shall be deemed to provide the basic reparation benefits coverage[.]”

National contends that, since Progressive is an insurance company which provided a contract of liability insurance covering the use of a motor vehicle within the Commonwealth, it is deemed to provide BRB under KRS 304.39-100.

The following definition of a reparations obligor is found in KRS 304.39-020(13):

“Reparation obligor” means an insurer, self-insurer, or obligated government providing basic or added reparation benefits under this subtitle.

In *Kidd*, 602 S.W.2d at 417, the Supreme Court of Kentucky held that “[t]he statute plainly says that the ‘reparation obligor shall elect to assert its claim’ in one of two specified ways.” The two specific ways are arbitration or joinder in a claim made by the injured person.

The present action is different, however, in that there are two insurance companies for whom liability exists. Priority must, therefore, attach to one over the other. KRS 304.39-050(1) provides that:

The basic reparation insurance applicable to bodily injury to which this subtitle applies is the security covering the vehicle occupied by the injured person at the

time of the accident or, if the injured person is a pedestrian, the security covering the vehicle which struck such pedestrian. If the reparation obligor providing such insurance fails to make payment for loss within thirty (30) days after receipt of reasonable proof of the fact and the amount of loss sustained, the injured person shall be entitled to payment under any contract of basic reparation insurance under which he is a basic reparation insured and the insurer making such payments shall be entitled to full reimbursement from the reparation obligor providing the security covering the vehicle. . . .

In *Affiliated FM Ins. Companies v. Grange Mut. Cas. Co.*, 641 S.W.

2d 49, 50 (Ky. App. 1982), the Court held that:

KRS 304.39-050 sets forth a remedy as well as a right. We do not construe the statute as limiting a reparation obligor's right to full reimbursement to situations in which it has either intervened or submitted its claim to arbitration under the guidelines set forth in KRS 304.39-070(3). Intervention may be impossible if – as is the instant case – no separate action has been filed. And, if the insurer were required to submit its claim for reimbursement to the arbitration procedures set forth in KRS 304.39-070(3), it would not obtain *full* reimbursement given the minimum deductible requirement set forth in KRS 304.39-290.

In the present action, Jones elected not to purchase extended coverage on the vehicle from National. As a result, and under the contract of insurance he had with Progressive, his primary insurer was Progressive. Under his policy with Progressive, Jones was provided with insurance coverage on rental vehicles. While *Affiliated* dealt with an insurer driving a vehicle he did not own, it is distinguishable. In *Affiliated*, the employer owned and insured the vehicle. The employee did not maintain insurance on the vehicle nor is there any indication that

his personal insurance policy covered vehicles he drove which were owned by his employers. The trial court correctly held Progressive to be primarily liable for BRB. We will, therefore affirm the summary judgment.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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