RENDERED: OCTOBER 10, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001949-MR

ALLSTATE INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 01-CI-00947

RANDALL McDOWELL — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BAKER, COMBS, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. Allstate Insurance Company appeals from a summary judgment entered in favor of appellee, Randall McDowell. Having reviewed the record, applicable law, and after the benefit of oral arguments, we affirm the judgment of the Boyd Circuit Court, although on different grounds.

The facts of this case are essentially undisputed. On October 8, 1999, a motor vehicle accident occurred involving

appellee, Randall McDowell. McDowell's vehicle was insured by Allstate Insurance Company (Allstate) at the time of the accident. On October 12, 1999, McDowell was seen by a chiropractor, Dr. Tommy Taylor. In his notes of the October 12, 1999, visit, Dr. Taylor recorded that McDowell presented with pain in his neck and shoulders, along with a headache, after being involved in a motor vehicle accident on October 8, 1999. Dr. Taylor subsequently began rendering chiropractic treatment to McDowell. Allstate received claims from Dr. Taylor for this treatment, all of which were paid by Allstate and are not at issue in this case.

On November 11, 1999, McDowell visited his regular dentist, Dr. Joseph Frazier, who diagnosed him with pulpal necrosis in several teeth. Dr. Frazier recorded the following history in McDowell's chart, "Randy stated he was in an accident (car) and hit his mouth about 1 month ago. It is possible that the trauma may have caused the pulp necrosis." Dr. Frazier began providing dental treatment for the pulpal necrosis, which concluded in February of 2000, at which time Dr. Frazier submitted the bills for this treatment to Allstate.

Prior to receiving Dr. Frazier's bills, in December of 1999, Allstate had sent to McDowell a letter requesting him to complete and return an application for no-fault benefits. Allstate received the completed form from McDowell on

January 20, 2000. The form was signed by McDowell and dated January 17, 2000. In a space on the form which requested McDowell to describe his injury, McDowell wrote “neck and shoulder”.

Allstate received the aforementioned dental bills, totaling $1,260.00, from Dr. Frazier on February 25, 2000. However, the bills were not accompanied by any information linking them to McDowell’s October 8, 1999, motor vehicle accident. On March 23, 2000, Allstate sent a letter to Dr. Frazier informing him that it was declining payment of the bills at the time, on grounds that the dental treatment did not appear to be related to the accident. The letter explained that Allstate’s records indicated that McDowell had injury to his neck and shoulders, but no injury to his mouth or teeth. The letter requested that Dr. Frazier submit complete records and a report stating the relationship of the dental treatment to the accident, if further consideration of the claim was requested. Additionally, the letter explained that the information would be submitted for an independent review, and that McDowell might be asked to undergo an independent exam to determine the relationship of the dental treatment to the accident.

In response to Allstate’s March 23, 2000, letter, Dr. Frazier, on March 29, 2000, sent to Allstate his post-accident records on McDowell, including the November 11, 1999, record in

which he had written “it is possible that the trauma may have caused the pulp necrosis.” Additionally, Dr. Frazier enclosed a completed Allstate form entitled “Attending Dentist’s Report”. These items were received by Allstate on April 3, 2000. On this form, in a section entitled “History of Occurrence as Described by Patient”, Dr. Frazier reported that “[p]atient stated he was in a car accident and hit his mouth about 1 month prior to the appointment”. Dr. Frazier additionally explained elsewhere on the form that “[i]t is not uncommon for teeth to need [root canal treatment] several weeks after an accident. [P]atient probably clenched his teeth during impact and these teeth took the most force.”

Allstate subsequently retained Concentra Managed Care (Concentra) to arrange for an independent dental review of the records pertaining to McDowell’s treatment. Concentra retained Dr. Robert Kuhl, a Louisville dentist, to perform the review. Concentra forwarded McDowell’s records and x-rays to Dr. Kuhl, accompanied by a letter dated April 17, 2000, requesting Dr. Kuhl’s opinion as follows:

> We are requesting your opinion on only the areas which have been listed below. Please comment only on these areas and/or those within your immediate specialty unless otherwise requested:
>
> 1. Prior injuries and/or pre-existing dental conditions;

2. There is no record of injury to the mouth, so is dental treatment related to the motor vehicle accident of 10/08/99?" (emphasis original.)

On April 19, 2000, Allstate wrote to Dr. Frazier requesting McDowell's pre-accident records and x-rays, and notifying Dr. Frazier that McDowell's treatment had been submitted for an independent dental review. Allstate received and forwarded these additional records to Concentra. After reviewing all of the x-rays and records provided by Dr. Frazier, Dr. Kuhl concluded that "[w]ithout evidence of facial trauma, the dental treatment, although necessary, was not due to the [motor vehicle accident] on 10-8-99. The dental treatment was needed because of the very large fillings, probable recurrent decay and malocclusion." (emphasis added.) Dr. Kuhl's opinion was forwarded from Concentra to Allstate per a letter dated May 15, 2000.

In a letter dated June 9, 2000, accompanied by a copy of Dr. Kuhl's report, Allstate informed Dr. Frazier that, based upon the information in Allstate's files and Dr. Kuhl's report, Allstate was declining payment of the dental bills. The letter did, however, invite Dr. Frazier to submit additional information if further consideration was requested, and that Allstate would schedule an independent dental examination if requested. An independent dental exam was initially scheduled

for July 20, 2000, which was subsequently cancelled for reasons that are unclear from the record.

On October 20, 2000, McDowell filed a complaint in Boyd Circuit Court alleging that Allstate's failure to pay Dr. Frazier's bills within thirty days of receipt constituted a violation of Kentucky's Motor Vehicle Reparations Act. Additional claims asserted by McDowell were ultimately dismissed by agreement of the parties and are not a part of this appeal.

Subsequent to McDowell's filing his complaint, Allstate scheduled an independent examination of McDowell to be conducted by Dr. Ralph Beadle, an Ashland dentist. Dr. Beadle examined McDowell on January 8, 2001. Dr. Beadle concluded that, although "[t]here is no way to know for sure that trauma was the need for endodontic therapy", there was "a very high probability" that the October 8, 1999, accident played a significant role in causing McDowell's dental problems. After receiving Dr. Beadle's report, Allstate paid Dr. Frazier's bills on January 12, 2001.

In March, 2002, Allstate moved for summary judgment dismissing McDowell's claims. In an order entered April 25, 2002, the trial court denied Allstate's motion, stating, in part:

> Although some minor facts are in dispute the significant facts that control this decision are not in dispute. Allstate received a

> collection of bills from Plaintiff's dentist with no supporting material to relate it to the accident. At that point, the thirty-day time limit has not begun to run. When the Defendant subsequently received the letter from Dr. Frasure [sic] relating those bills to the accident the thirty days began to run. It was at that point that the Defendant had thirty days to either pay the claim or advise the claimant that it was rejected. Instead, Allstate attempted to have it both ways by not paying the claim or rejecting it, thereby extending its thirty-day time frame to one that was much longer. This cannot be tolerated since it defeats one of the primary objectives of basic reparations benefits being paid without regard to fault which is to have providers promptly taken care of and all necessary treatment provided without unreasonable delay. The thirty-day requirement is based on a standard of "reasonable proof" which must be viewed in a flexible manner because of the time limitation imposed. Claimants cannot be required to essentially present their case on damages during the thirty day period and there certainly is not time for various reviews and independent medical exams. Although this Court feels that Allstate's failure to pay the claim or deny same within thirty days as required by statute entitles Plaintiff to summary judgment on that issue, the Plaintiff has not requested summary judgment for some tactical purpose. Accordingly, the Motion of the Defendant Allstate for Summary Judgment is overruled.

McDowell subsequently filed a motion for summary judgment, and, in an order dated July 10, 2002, and entered July 11, 2002, the trial court granted McDowell's motion. The court acknowledged that reasonable proof of loss was sent by Dr. Frazier to Allstate on March 29, 2000, (but then mistakenly

stated in the order that the April 17, 2000, and April 19, 2000, correspondence by Allstate was beyond thirty days of receiving this information). The trial court found that Allstate violated KRS 304.39-210 as it did not pay the bills of Dr. Frazier within thirty days of receiving reasonable proof of loss, and that such failure was without reasonable foundation. The trial court therefore determined that McDowell was entitled to interest at a rate of 18% on the unpaid bills (a sum of $193.25), the cost of taking the deposition of Dr. Frazier (a sum of $685.50) and an award of attorney fees (a sum of $4000.00).

The July 11, 2002, order granting McDowell's motion for summary judgment was made final and appealable in an order entered on August 20, 2002. This appeal followed. (In its notice of appeal, Allstate states that it is appealing from the August 20, 2002, order, and from the April 25, 2002, order denying Allstate's motion for summary judgment. The second order implicitly adopts or follows the first order and together become the final judgment.)

Allstate first argues that the trial court erred when it held, in its July 11, 2002, order granting McDowell summary judgment, that Allstate did not respond within thirty days of receipt of reasonable proof of loss, in violation of KRS 304.39-210. Allstate is correct. In its April 25, 2002, order denying Allstate's motion for summary judgment, the trial court found

that the thirty-day time limit did not begin to run until Allstate received the March 29, 2000, letter from Dr. Frazier which provided information linking the dental bills with the October 8, 1999, motor vehicle accident. In its July 11, 2002, order, however, the trial court inexplicably made the statement that the thirty-day time period to respond had already expired as of April 17, 2000, when Allstate began the independent review. We agree with Allstate that this statement was in error. We believe the error is harmless, however, because the court was not referencing back to February 25, 2000, (the date Allstate first received the collection of dental bills), as Allstate contends, but was merely miscalculating thirty days. The thirty-day period began to run after Allstate received reasonable proof that the dental bills were related to the motor vehicle accident. KRS 304.39-210(1); State Automobile Mutual Insurance Co. v. Outlaw, Ky. App., 575 S.W.2d 489, 493 (1978). In its April 25, 2002, order, the trial court found that reasonable proof of loss was established when Allstate received the March 29, 2000, submissions from Dr. Frazier. It is uncontroverted that this information was received on April 3, 2000, by Allstate.

More importantly at issue in this case, is Allstate's argument that the trial court erred when it interpreted KRS 304.39-210 as requiring an insurer to either pay or reject

benefits within thirty days of receiving "reasonable proof", and that the insurer cannot investigate the claim beyond thirty days once it receives "reasonable proof." We disagree with the trial court's conclusion that after receiving the March 29, 2000, documentation, that Allstate had only two options, to either pay or deny the claim. KRS 304.39-210(1) provides that when benefits are not "paid within thirty (30) days after . . . receiv[ing] reasonable proof of the fact and amount of loss realized", the payments become overdue. See Outlaw, 575 S.W.2d 489. Thus, the relevant question is not if the benefits were paid, but were the benefits overdue.

Shelter Mutual Insurance Company v. Askew, Ky. App., 701 S.W.2d 139 (1985), recognized that an insurer may investigate a claim. Askew similarly involved the issue of whether dental work was causally related to the covered accident. The Askew Court recognized that an insurer may contest a claim but if the finding is ultimately against the insurer, the valid claim is overdue as of the date it received reasonable proof of the fact.

Because the General Assembly recognized that claims may be contested, and some rulings would be against the insurer, KRS 304.39-210(2) sets forth a penalty for overdue payments, providing for 12% interest if there was a reasonable foundation for contesting the expense, but 18% interest if the "delay was

without reasonable foundation" See Outlaw, 575 S.W.2d at 493-494. Additionally, if the delay was without reasonable foundation, KRS 304.39-220 provides for an award of attorney's fees. See Automobile Club Insurance Co. v. Lainhart, Ky. App., 609 S.W.2d 692, 694 (1980).

The facts of this case demonstrate that the dental bills became "overdue" thirty days after April 3, 2000. The question then before the trial court was whether the insurer was "without reasonable foundation" for not paying the bills until January 12, 2001. KRS 304.39-210(2). We agree with the trial court that, in this case, the insurer, Allstate, did not have a reasonable foundation for not paying the benefits after receiving the March 29, 2000, documentation from Dr. Frazier. This documentation constituted reasonable proof of the fact and amount of loss. KRS 304.39-210(1). That did not mean, however, that there could not still have been a reasonable foundation for an issue as to causation. Indeed, the failure of McDowell to list a facial injury on his "application for benefits" or to tell the chiropractor about facial injury, would give Allstate a reasonable foundation or cause to investigate. However, Allstate did not investigate the claim honestly or "reasonably"; it learned on April 3, 2000, that, on November 11, 1999, McDowell had told Dr. Frazier of injury to his mouth, and that Dr. Frazier believed that there could be a causal relationship

between the dental problems and the accident. Instead of investigating the claim, which would have been reasonable, Allstate went on the defensive and sought an opinion based on "no record of injury to the mouth." Allstate then relied on this opinion (Dr. Kuhl's), which could not consider facial injury as a cause for the dental problems, to justify denying benefits when it was aware that there was some evidence of facial injury, which Allstate knew created a real question of fact. Rather than seeking the answer, however, Allstate denied benefits.

It was not until the independent exam by Dr. Beadle that Allstate allowed evidence of facial injury to be considered. If Allstate had asked the correct question earlier (allowing facial injury to be considered), it would have learned that it no longer had a reasonable foundation for delay, would have paid the claim earlier, and would therefore have been liable for only 12% interest on the overdue benefits.

For the foregoing reasons, the judgment of the Boyd Circuit Court is affirmed.

COMBS, JUDGE, CONCURS.

BAKER, JUDGE, CONCURS IN RESULT ONLY.

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