



INTRODUCTION

The Supreme Court of Kentucky has agreed to review a Court of Appeals decision, which reversed the Circuit Court's finding that claims for bad faith for denial or delay in payment of basic reparation benefits are barred in accordance with Kentucky's Exclusive Remedy Doctrine. Indeed, the Court of Appeals panel that made this decision overruled and ignored established precedent from another panel of the Court of Appeals, which resolved the identical issue in an opinion published just ten months earlier.

Due to the far reaching implications of the more recent Court of Appeals panel's decision, Amicus Curiae submits the following brief for consideration by the Kentucky Supreme Court.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE 1

ARGUMENT 1

Phoenix Healthcare of Kentucky v. Kentucky Farm Bureau Mut. Ins. Co.
Ky.App., 120 S.W.3d 726 (2003) 1, 2, 3, 4, 6

KRS Chapter 304.39 1

Grzyb v. Evans
Ky., 700 S.W.2d 399 (1985) 1

KRS Chapter 344 1

KRS Chapter 344.450 1

KRS Chapter 342 2

Traveler's Indemn. Co. v. Recker
Ky., 100 S.W.3d 756 (2003) 2

General Acc. Ins. Co. v. Blank
Ky.App., 873 S.W.2d 580 2

Zurich Ins. Co. v. Mitchell
Ky., 712 S.W.2d 340 (1986) 2

KRS Chapter 304.12-230 2, 3

Crenshaw v. Weinberg
Ky., 805 S.W.2d 129 (1991) 2

KRS Chapter 304.39-210 2, 3, 5

KRS Chapter 304.39-220 2, 3, 5

I. THE COURT OF APPEALS PANEL BELOW MISCONSTRUED
PHOENIX AS IT ATTEMPTED TO DISTINGUISH IT. 3

KRS Chapter 304.39-210(2) 3

II. THE COURT OF APPEALS PANEL BELOW MISCONSTRUED
ITS OWN PRECEDENT IN MAKING ITS DECISION.5

FB Insurance Co. v. Jones
Ky.App., 864 S.W.2d 926 (1993)5, 6

KRS Chapter 304.12-235 5

KRS Chapter 304.39-010-340 5

CONCLUSION 6

STATEMENT OF THE CASE

Amicus Curiae Property Casualty Insurers Association of America (“PCI”) adopts herein by reference the Statement of the Case contained in Appellant’s Brief, which, based upon information and belief, accurately reflects the record.

ARGUMENT

The decision of the Court of Appeals panel below should be reversed to the extent that it limits, restricts, or fails to follow the earlier decision in Phoenix Healthcare of Kentucky v. Kentucky Farm Bureau Mut. Ins. Co., 120 S.W.3d 726 (Ky.App. 2003); which had correctly applied the Exclusive Remedy Doctrine to the Kentucky Motor Vehicle Reparations Act, KRS Chapter 304.39 (“KMVRA”).

In 1985 this Court clearly enunciated and affirmed the Exclusive Remedy Doctrine as follows::

Under KRS 446.070, a person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation. But this is limited to where the statute is penal in nature, or where by its terms the statute does not prescribe the remedy for its violation.

. . . .
Where the statute both declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute

(emphasis added). Grzyb v. Evans, 700 S.W.2d 399, 401 (Ky. 1985). In Grzyb, this Court concluded that this “Exclusive Remedy Doctrine” applied to the Kentucky Civil Rights Act, KRS Chapter 344, as that statutory scheme defined various unlawful acts and provided specific remedies for their violation. Id. Those remedies are injunctive relief, actual damages, costs and reasonable attorney’s fees, but nothing more. KRS 344.450.

Similarly, the Exclusive Remedy Doctrine also applies to Kentucky's Workers' Compensation Act—KRS Chapter 342. This statutory scheme creates both the right to Workers' Compensation benefits and the remedy if those benefits are not timely paid. Traveler's Indemn. Co. v. Recker, 100 S.W.3d 756, 760-61 (Ky. 2003); General Acc. Ins. Co. v. Blank, 873 S.W.2d 580, 580-81 (Ky.App. 1993); and Zurich Ins. Co. v. Mitchell, 712 S.W.2d 340, 340-42 (Ky. 1986). This Court recently applied this doctrine to prevent an employee from pursuing a bad faith claim against his employer. Recker at 758-60. That result was also dictated by the fact that, as it is the more specific statute, the Workers' Compensation Act prevailed over the more general Unfair Claims Settlement Practices Act, KRS 304.12-230 ("UCSPA"). Id. at 760-61.

Similar to the Worker's Compensation Act, the KMVRA provides the "comprehensive" statutory law regarding all issues coming within its purview—including basic reparation benefits—and any remedies for wrongful delay in payment. Crenshaw v. Weinberg, 805 S.W.2d 129, 131 (Ky. 1991). Basic reparation benefits are a unique right created by the KMVRA. Like the Workers Compensation Act, individuals are given the right to "opt out" if they so choose.

On October 3, 2003, a Court of Appeals panel rendered an opinion applying the Exclusive Remedy Doctrine to the KMVRA, barring a claim for bad faith asserted in connection with the handling of a claim for no-fault benefits. Phoenix Healthcare of Kentucky v. Kentucky Farm Bureau Mutual Insurance Company, 120 S.W.3d 726, 727-28 (Ky.App. 2003). It reasoned that, since KRS 304.39-210 & 220 provided a punitive remedy (18% interest and attorney's fees) for the failure to timely pay basic reparation benefits without a reasonable basis, the Exclusive Remedy Doctrine prohibited a claimant from seeking additional remedies for alleged violation of the UCSPA. Id. This Court gave tacit approval to this decision when it did not de-publish the

opinion.

I. THE COURT OF APPEALS PANEL BELOW MISCONSTRUED
PHOENIX AS IT ATTEMPTED TO DISTINGUISH IT.

In an apparent attempt to side-step the Phoenix Healthcare opinion, published just ten months earlier by a different Court of Appeals panel, the panel below stated:

While the holding in Phoenix Healthcare at first blush appears to be determinative in the case presently before us, we must hold that it is not and find it necessary to clarify the holding in Phoenix Healthcare. In Phoenix Healthcare, the lower Court and the Court of Appeals only addressed the actual late payment of the medical bill in determining that Phoenix was limited to the remedies provided for in KRS 304.39-210 and 220. Neither the parties nor the Courts addressed any conduct behind the late payment; the pleadings and the arguments were solely dependent on the law as no facts were actually introduced into the record.

.....
Therefore, the holding in Phoenix Healthcare is limited to actions brought to recover for a late payment, and has no impact on suits regarding the conduct, if any, behind the delay in payment

(emphasis added). 9/17/04 Court of Appeals Opinion at 10-12.

In fact, the “conduct behind the payment” was at issue in Phoenix Healthcare. The question of whether the delay was “without a reasonable foundation”, KRS 304.39-210(2), necessarily involves an assessment of “the conduct, if any, behind the delay in payment.” As the Court of Appeals’s opinion in Phoenix Healthcare itself bears out, the basic reparation benefit payment in that case was delayed while the basic reparation obligor *conducted* a peer review. Phoenix Healthcare at 727. “Phoenix contends that this delay is actionable under KRS 304.12-230 of the Unfair Claims Settlement Practices Act” and that it is also entitled to punitive damages. *Id.* Both the pleadings of record in that case and the briefs clearly indicate that it was this peer review—“the conduct behind the delay”—that formed the basis for an alleged violation of

the UCSPA and the claim for punitive damages.

In its Complaint, Phoenix alleged that the delay in payment of basic reparation benefits caused by the peer review request was made “without conducting a reasonable investigation.”

Phoenix Record at 2. During the Circuit Court hearing on Kentucky Farm Bureau’s Motion to Dismiss, Phoenix’s counsel stated the following:

This isn’t the only patient that they’re not paying on time. We’re trying to work with them to get these bills on time, and they’re not paying them. And I–It’s pretty much been my experience that they’re treating everybody like this. . . . And I think my client, who is an imaging company, they’ve had enough of Farm Bureau not paying their claims on time and then not paying what they should pay.

...
there’s a lot of factual issues here Judge, that need to be explored.

Phoenix Record, 7/12/2002 hearing transcript at 4 & 5. Thus, it was not just the particular late payment at issue in Phoenix Healthcare but also the conduct underlying that payment that was at issue and considered by the Court.

The attempt by the Court of Appeals panel below to limit and distinguish Phoenix Healthcare is, therefore, premised upon an incomplete or inaccurate interpretation of the record in Phoenix Healthcare and the issues before the trial court in that case. The conduct of both No-Fault carriers in delaying payment was clearly at issue in both cases. The standard for justifying an award of 18% in interest and attorneys fees (i.e., whether the delay was without a reasonable foundation) is obviously and in every instance a question of the conduct behind the delay in payment.

II. THE COURT OF APPEALS PANEL BELOW MISCONSTRUED ITS OWN PRECEDENT IN MAKING ITS DECISION.

The only authority cited by the Court of Appeals panel below in refusing to apply the Exclusive Remedy Doctrine to the KMVRA is FB Insurance Co. v. Jones, 864 S.W.2d 926 (Ky.App. 1993). In that case, the Court of Appeals concluded that the Exclusive Remedy Doctrine did not apply to bar a bad faith claim following an award of interest under KRS 304.12-235, for a fire loss claim that had been denied. Id. at 929 & 927. The insured brought a bad faith claim under the UCSPA as well as a claim for interest under KRS 304.12-235, since the loss payment was not made within thirty days. Id. at 929. The fire insurer defended, claiming that KRS 304.12-235 was a statute that defined both an unlawful act—the failure to pay an insurance claim within thirty days—and the remedy for its violation—12% interest on the unpaid payment: thus, it argued that the Exclusive Remedy Doctrine prevented the application of the UCSPA. Rejecting that assertion, the Court of Appeals concluded that the general KRS 304.12-235 was merely a “prod to prevent laxity in the adjustment of claims” while the UCSPA was designed to deal with “more egregious behavior.” Id.

Applying this principle, the Court of Appeals panel below concluded that the KMVRA’s interest and attorney fee provisions, KRS 304.39-210 and KRS 304.39-220, were akin to the more general penalty provisions of KRS 304.12-235. In other words, they were nothing more than a “prod to prevent laxity in the adjustment of claims.” Geico Opinion, Page 11. However, this interpretation misses the more important distinction between KRS 304.12-235 and the KMVRA. KRS 304.39-010-340.

Unlike KRS 304.12-235, which is only a general insurance statute like the UCSPA, the

KMVRA is a specific and comprehensive statutory scheme that provides its own rights and remedies. Prior to the enactment of the KMVRA, no-fault claims, benefits, coverage, etc. had no application in Kentucky. No-fault benefits are entirely a creature of statute that did not exist prior to 1975. The Court of Appeals's conclusion in FB Insurance dealt with the application of the Exclusive Remedy Doctrine to a general statute, rather than a specific and comprehensive statutory scheme like the KMVRA. A key component of the Exclusive Remedy Doctrine is that it applies to legal rights and remedies created by statute, such as the Worker's Compensation Act, and here, the KMVRA. Thus, the FB Insurance holding cannot be used as a basis to sidestep the clear binding precedent of Phoenix Healthcare, which properly applied the Exclusive Remedy Doctrine to a claim arising under the KMVRA.

CONCLUSION

The Court of Appeals panel's decision below mistakenly concluded that the conduct of the No-Fault carrier in Phoenix was not at issue in that case. As set forth above, the record in that case establishes otherwise. Therefore the basis for the distinction drawn by the Court in avoiding Phoenix as controlling precedent is seen to be clearly erroneous.

Neither the Court of Appeals in this case, nor Appellees have demonstrated any basis for reversing the ruling in Phoenix, or side-stepping its precedent. If the Exclusive Remedy Doctrine does not apply to the KMVRA, it simply has no application. To so find would be to ignore well-settled law and prior rulings of this honorable Court directly dealing with this issue.

Wherefore, for the reasons stated herein, Amicus Curiae respectfully submits that to the extent that the Court of Appeals' decision below seeks to reverse, limit, or distinguish the ruling in Phoenix Healthcare that said decision should be reversed.

Respectfully submitted,



A. Campbell Ewen
William P. Carrell II
EWEN, KINNEY & ROSING
1090 Starks Building
455 South Fourth Street
Louisville, Kentucky 40202-2511
(502) 584-1090
Counsel for PCI