COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2009-SC-000577

PROGRESSIVE MAX INSURANCE COMPANY — APPELLANT

v.

NATIONAL CAR RENTAL SYSTEMS, INC. — APPELLEE

BRIEF OF APPELLEE

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with CR 76.12(5), this is to certify that a copy of the foregoing was mailed, first clas, postage prepaid, to Robert L. Steinmetz and Christopher M. Mussler, Gwin Steinmetz & Baird PLLC, 401 West Main St., Suite 1000, Louisville, KY 40202, Counsel for Appellant and Honorable Brian Edwards, Jefferson Circuit Court, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, on this 9th day of July, 2010.

Michael F. Lawrence
Counsel for Appellee

I. INTRODUCTION

This appeal arises from a subrogation dispute regarding basic reparations benefits paid by National Car Rental Systems, Inc. (hereinafter "National") to a passenger traveling in National's vehicle while it was being driven by Progressive Max Insurance Company's (hereinafter "Progressive") insured. The issues on appeal are:

1. Where National and Progressive both had policies covering the subject vehicle, whether National is entitled to subrogation from Progressive for basic reparations benefits paid to the passenger, when Progressive's insured caused a one vehicle accident while operating National's car.
2. If National is entitled to subrogation, whether its exclusive remedies are arbitration or joinder pursuant to KRS 304.39-070(3).

II. STATEMENT CONCERNING ORAL ARGUMENT

National believes that oral arguments would be helpful to clarify and simplify the issues before the Court.

III. STATEMENT OF POINTS AND AUTHORITIES

IV. STATEMENT OF THE CASE

STATEMENT OF FACTS

On or about October 26, 2001, Ed Jones rented a motor vehicle from National. National owned and self-insured this vehicle. Mr. Jones was involved in an accident while he was operating the vehicle he rented from National. His passenger, Shannon Wilkerson, was injured. At the time of the accident, Jones had insurance coverage on his personal motor vehicle issued by Progressive Max, which included liability benefits while driving a rental vehicle, such as the one he was operating at the time of the accident. This was a one vehicle accident and liability has never been contested.

Although both National and Progressive are basic reparation obligors, through their respective policies of insurance, National paid the basic reparation benefits to Ms. Wilkerson. Accordingly, and since Mr. Jones was also the at fault driver, National sought subrogation from Progressive for the amounts paid to Ms. Wilkerson.

TRIAL COURT PROCEEDINGS

National filed suit against Progressive alleging that since there were two policies of insurance covering the vehicle; Progressive's insured was at fault; and National, not Progressive, paid the basic reparations benefits to the injured party; National was entitled to recover the amounts paid pursuant to KRS 304.39-070. KRS 304.39-070 provides in pertinent part:

> [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...

Under the same facts National is also entitled to subrogation pursuant to KRS 304.29-050, which provides in pertinent part:

> [T]he 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.

The Jefferson Circuit Court entered a ruling in favor of National based on the statutes and well established case law.

APPELLATE COURT PROCEEDINGS

Progressive appealed the Trial Courts decision, arguing that 1) to recover under KRS 304.39-070 a party must either join in a lawsuit brought by the injured party or submit to arbitration through the Kentucky Insurance Arbitration Association and National should not be allowed to bring suit in their own name and 2) that KRS 304.39-050 does not apply because it "applies only to disputes between basic reparation obligors that are both obligated to pay benefits without regard to fault and that Progressive Max was never a basic reparation obligor for Wilkerson."

National responded to the first argument by citing to *Affiliated FM Ins. Companies v Grange Mut. Cas. Co.*, Ky. App, 641 SW2d 49 (1982), which clearly states:

> 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. Accordingly, the trial court acted correctly in ruling that the appellee's claim was not barred by the provisions of KRS 304.39-070(3).

Like the situation in *Affiliated* where intervention was impossible because the injured party did not file a separate suit, in the case before us, Wilkerson dismissed her own suit 30 days after she filed it, without notifying National suit had been filed as required by KRS 411.188, without notifying National that the suit was being dismissed and before National had any reasonable opportunity to discover that suit had been filed and intervene on its own accord.

National, as an out of state, self-insurer, is not a member of the Kentucky Insurance Arbitration Association. Thus, as pointed out in *Affiliated*, the statute cannot be construed 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).

In response to Progressive's second argument National cited to KRS 304.39-100 which clearly establishes that Progressive is in fact a basic reparations obligor. KRS 304-.39-100 reads in pertinent part:

> (1) An insurance contract which purports to provide coverage for basic reparation benefits or is sold with representation that it provides security covering a motor vehicle has the legal effect of including all coverages required by this subtitle.
>
> (2) An insurer authorized to transact or transacting business in this Commonwealth shall file with the executive director of insurance as a condition of its continued transaction of business within this Commonwealth a form approved by the executive director of insurance declaring 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** and minimum security for tort liabilities required by this subtitle, except a contract which provides coverage only for liability in excess of required minimum tort liability coverage. Any nonadmitted insurer may file such form. (emphasis added)

Progressive Max admits in the Stipulation of Facts (#3) that "at the time of the accident, Ed Jones carried liability insurance with Progressive Max Insurance Company, which included liability benefits while driving a rental vehicle." It is undisputed that Progressive Max is an insurance company which provided a contract of liability insurance covering the use of a motor vehicle within the Commonwealth. Per KRS 304.39-100 an insurance company which provides a contract of liability insurance covering the use of a motor vehicle within the Commonwealth is deemed to provide basic reparations benefits. Progressive Max is statutorily bound to provide reparations benefits.

Pursuant to KRS 304.39-020(13) reparation obligor is defined as follows: "Reparation obligor means an insurer, self-insurer, or obligated government providing basic or added reparation benefits under this subtitle." Progressive Max is an insurer providing basic reparation benefits. Pursuant to KRS 304.39-020(13) Progressice Max is clearly a reparation obligor. Their recent claims that they are not a reparation obligor are without merit.

In *Affiliated* the Court stated that "Here, the appellant admitted that it provided motor vehicle insurance on the vehicle driven by Caldwell at the time of his injury. In effect, it was a primary insurance carrier. Therefore, under the language of the statute, it had the primary responsibility to provide basic reparation benefits to its insured." Id. at 50.

The Appellate Court held, based on the statutes and well established case law, that National had a right to subrogation pursuant to KRS 304.39-050. Progressive has now requested discretionary review by this Court.

V. ARGUMENT

PROGRESSIVE'S ASSERTED ISSUES

In the introduction to Progressive's brief it identifies three issues. National disagrees that the first two are actually relevant issues, but out of an abundance of caution, will briefly address them here.

The first non-issue is whether Progressive was obligated to provide basic reparation benefits for a passenger in a vehicle owned by National, which Progressive did not insure. Progressive admitted in the stipulation of facts that "at the time of the accident, Ed Jones carried liability insurance with Progressive Max Insurance Company, which included liability benefits while driving a rental vehicle." There is no dispute that the vehicle which Mr. Jones was driving was rented from National. Thus, Progressive did provide liability insurance coverage on the

vehicle while it was being driven by Mr. Jones. KRS 304.39-100 is clear that "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." Thus, Progressive was required by statute to provide basic reparation benefits coverage. Both lower Courts correctly ruled based on the statutes and case law and Progressive has not cited any new authority for its position.

The second non-issue is whether Progressive or National was the "primary" basic reparation obligor. A "primary" basic reparation obligor is one who provides a policy of insurance covering the vehicle. A secondary basic reparation obligor is a basic reparation obligor who insures either the driver, owner, or injured party, but whose policy does not cover the vehicle or only provides "excess" coverage. See *Kentucky Farm Bureau Mutual Insurance Co. v. Rodgers*, 179 S.W.3d 815, 818 (Ky. 2005) ("[Appellant] was the liability insurer of the tort defendant in the Raines case, thus providing primary coverage, but was only the UIM insurer in Rodgers's case, thus providing only secondary or excess coverage... UIM coverage is only secondary coverage, analogous to excess liability insurance"); and *Couch on Insurance*, 3rd Edition (2008 Thompson West), Chapter 219:47 "other insurance" clauses ("Where two primary policies both contain excess "other insurance" clauses, the excess clauses are generally treated as mutually repugnant and the loss is pro rated between the insurers"). It is clearly possible to have multiple primary basic reparation obligors just as it is possible to have multiple secondary basic reparation obligors.

In the case before the Court, Progressive failed to produce its policy despite discovery requests seeking all documents relevant to the claims asserted herein. In fact, they failed to produce any documents at all, despite National's discovery requests, follow up correspondence, and motion to compel (Discovery sent September 7, 2004; Motion to compel filed March 16, 2007, Order entered March 27, 2007, TR at p.59-61). Progressive admitted in the stipulation of facts that "at the time

of the accident, Ed Jones carried liability insurance with Progressive Max Insurance Company, which included liability benefits while driving a rental vehicle." There has never been any mention of an "excess," "escape," or "other insurance" clause in the policy which would make it secondary to the policy provided by National nor can Progressive be allowed to imply that their policy included such terms at this late point in litigation. By failing and refusing to produce their policy, as discussed further below, the rules of spoliation of evidence require this court to find that the policy language would have been unfavorable to Progressive.

It is undisputed that Mr. Jones was driving the rental vehicle. Progressive's policy therefore covered the vehicle at the time of the accident. National also self insured the vehicle. Hence, there were two equally primary basic reparation obligors. Regardless of whether one or both parties was the primary reparation obligor, the reason this is a non-issue is that National has already paid the basic reparations benefits, as a primary reparation obligor should, and this suit is for subrogation from the other basic reparation obligor. For a more comprehensive discussion of coverage priority see: *Couch on Insurance*, 3rd Edition (2008 Thompson West), Chapter 219 "Other Insurance" clauses.

Kentucky case law reflects that when public policy is satisfied and compulsory coverage is provided, disputes between two insurance companies involving a question of the extent of each insurer's liability only requires an analysis of the policy language. *Royal-Globe Insurance v. Safeco Insurance Company*, 560 S.W. 2d 22 (Ky. App. 1977) and *Omni Insurance Company v. Kentucky Farm Bureau Mutual Insurance*, 999 S.W. 2d 724 (Ky. App.1999).

When an insurance policy fails to provide or attempts to take away what public policy requires the offending provision is void. See for example, *Universal Under Writers Insurance Company v. Veljkovic* 613 S.W. 2d 426 (Ky. App. 1980). Even if Progressive's policy attempted to deny BRB benefits to Mr. Jones it would still be void as against public policy.

Progressive's statement on page nine that National never put the Progressive policy into evidence is disingenuous at best. The only reason the contract was not entered into evidence is that Progressive failed and refused to produce it and eventually, in an effort to move forward despite Progressive's blatant disregard for discovery requests and a motion to compel, National accepted Progressive's stipulation that "at the time of the accident, Ed Jones had insurance coverage on his personal motor vehicle issued by [Progressive] which included liability benefits while driving a rental vehicle." Only after Progressive failed to produce the policy did the parties enter into the stipulation of facts. Under the rules of spoliation of evidence, a presumption arises in favor of National and the only conclusion that can be reached by this Court is that the policy language was unfavorable to Progressive's case specifically, that it provided BRB coverage to any rental vehicle granted to Mr. Jones and that it lacked an "excess" or "escape" clause that would have shifted the coverage to National.

NATIONAL'S RIGHT TO SUBROGATION

The determinative issues in this case are whether National is entitled to subrogation from Progressive and if so, whether its exclusive remedies are arbitration or joinder pursuant to KRS 304.39-070(3).

Clearly National is entitled to Subrogation. Progressive has never contested that their insured, Ed Jones, was at fault for the single vehicle accident in which he was the driver of the single vehicle. Progressive has also never contested that there is a statutory right of recovery, via subrogation, for the party that pays basic reparation benefits to recover from the at fault party.

It has been almost three decades since the Court in *Affiliated Mutual Affiliated FM Insurance Companies v. Grange Mutual Casualty Co.*, 641 S.W.2d 49 (Ky.App. 1982) stated:

> 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...

The Court in *Affiliated* based its final ruling on statutory priority rather than the right to subrogation under the law of torts. In the present case National is claiming a right to recovery based on both statutory priority and the law of torts. National cites to *Affiliated* for the clear analysis it gives of the inadequacies of the remedies provided in KRS 304.39;070(3).

Pursuant to the clear dictates in *Affiliated* arbitration and intervention are NOT the exclusive remedies. As *Affiliated* recognized, there are situations, such as the situation presented in the present case, where intervention is impossible. Likewise, there are situations where arbitration will not provide full recovery. *Affiliated* did not even consider that there are situations where arbitration would be impossible. Many out of state insurer's and out of state self-insurer's are not members of the Kentucky Insurance Arbitration Association (hereinafter KIAA). These out of state insurer's and self insurers are not required to be members of the KIAA. Hypothetically, if an out of state insurer in Colorado insures a vehicle whose owner decides to travel across the country and is in an accident in Kentucky and the out of state insurer is not a member, nor required to be a member of the KIAA, the out of state insurer has no right or access to arbitration. These insurer's thus do not have the ability to arbitrate through the KIAA. The KIAA specifically recognizes this fact and has procedures for members to voluntarily leave the KIAA. National is a foreign corporation, which is self insured and is not a member of the Kentucky Insurance Arbitration Association. Under the circumstances of this case National could not intervene nor file for arbitration.

In the recent case of *Auto Owner's Insurance Company v. Omni Indemnity Company*, 2008-SC-000606-DG, the court was faced with a post "*Coot's*" subrogation issue under 304.39-320(4) that was complicated by the bankruptcy of the tortfeasor. That Court held that Auto Owner's inability to seek subrogation from the tortfeasor had no bearing on the statutory right to seek subrogation from Omni. The Court felt that the language of the statute did not inextricably link those two subrogation rights together such that if one is lost, the fate of the other is determined. Likewise, if this Court was to determine that National could not pursue statutory subrogation under KRS 304.39-070(3) National should still be able to proceed on its subrogation claim for recovery from the primary reparation obligor under KRS 304.39-050.

Furthermore, to limit recovery to arbitration and intervention amounts to a constitutional violation of the Interstate Commerce Clause. In-state insurers are required to be members of the KIAA. Out of state insurers are not required to be members of the KIAA. This court must accept the fact that every day vehicles travel through Kentucky that are insured by out of state insurers and self insurers which are not required to be licensed or registered in Kentucky. The fact is that under Progressive's interpretation of the statute, an out of state insurer of a vehicle or driver that is involved in an accident in our state has less right to recovery then in state companies.

Under Progressive's reading of the law many insurance companies that write policies in states other than Kentucky would automatically be deprived of the right to arbitration through the KIAA that in state insurers have. To limit out of state insurer's subrogation and recovery rights to intervention, a mechanism which sometimes does not exist, while allowing in state insurers the alternative ability to arbitration is unreasonable discrimination in favor of intrastate commerce and against interstate commerce. To allow intrastate insurer's recovery options which

are not available to interstate insurers is manifestly unfair to out of state insurer's, is clear discrimination, and such discrimination is a clear constitutional violation.

Progressive has stated that *Affiliated* does not apply since the decision reached in *Affiliated* was based on statutory priority. However, the analysis given of the inability for intervention and arbitration to provide recovery is applicable and determinative of the issues before the Court.

In the present case it is undisputed that National was not given notice of the lawsuit prior to its dismissal. Progressive claims that "Kentucky law charges reparation obligors with the duty to investigate and remain informed about such actions if they wish to seek subrogation by joining those lawsuits" and cites to KRS 304.39.070(3). However, KRS 304.39.070(3) has no language which could even be remotely construed as requiring a reparation obligor to investigate or remain informed of such lawsuits. To the contrary, the relevant statute is KRS 411.188(2) which states:

> At the commencement of an action seeking to recover damages, it shall be the duty of the plaintiff or his attorney to notify, by certified mail, those parties believed by him to hold subrogation rights to any award received by the plaintiff as a result of the action. The notification shall state that a failure to assert subrogation rights by intervention, pursuant to Kentucky Civil Rule 24, will result in a loss of those rights with respect to any final award received by the plaintiff as a result of the action.

It is undisputed that National was never given notice of the lawsuit prior to its dismissal. With regard to National's membership in the KIAA, National is an out of state car rental company. National was not required to be a member of the KIAA.

In the present case we are faced with a situation just like the Court in *Affiliated* anticipated, where neither intervention nor arbitration were possible or available vehicles for recovery. Without receiving notice, as required by statute, and without the remedy of arbitration, National has been left without any possible means of recovery under Progressive's interpretation

of KRS 304.39-070(3). Clearly it was not the intention of the legislature to provide a right without a remedy.

VI. CONCLUSION

This case has had a long and tortured path, made more difficult by Progressive's failure to provide a copy of their policy. If in fact they had any valid defenses that could have been raised by the policy language, they have been waived. Accordingly, as a matter of law, having admitted that they provided coverage for their insured while he operated National's vehicle they should be deemed a primary reparation obligor and National is entitled to recover BRB benefits that they paid on behalf of the injured passenger. In addition, since Progressive's insured was in fact the at fault driver, National should also be able to pursue subrogation claims on that basis as well. For all the forgoing reasons Appellee, National Car Systems Inc., respectfully request that this Court enter an Opinion and Award confirming the decisions of the Court of Appeals and the Trial Court.

Respectfully Submitted,

Michael F. Lawrence