

RENDERED: FEBRUARY 28, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000308-MR

KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANIES

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 97-CI-00733

GRANGE MUTUAL CASUALTY COMPANY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND
REMANDING

** ** * * * **

BEFORE: EMBERTON, CHIEF JUDGE, BUCKINGHAM AND PAISLEY, JUDGES.

BUCKINGHAM, JUDGE: Kentucky Farm Bureau Mutual Insurance Companies (Farm Bureau) appeals from an order of the Pulaski Circuit Court dismissing its claims against Grange Mutual Casualty Company (Grange). Concluding that the trial court erred in dismissing one of the claims of Farm Bureau but not the other, we affirm in part, reverse in part, and remand.

Joanne Greer and Zelma Wright were involved in an automobile accident on May 21, 1996. It is uncontroverted that Wright was at fault in causing the accident. Farm Bureau was the insurer for Greer, and Grange was the insurer for Wright.

Greer claimed to be insured in the accident, and she filed a civil complaint in the Pulaski Circuit Court against Wright and against Farm Bureau, which provided underinsured motorist (UIM) coverage for Greer. Farm Bureau had paid Greer \$10,000 in basic reparation benefits (BRB), and it filed an intervening complaint against Grange to recover that amount.

Greer and Grange subsequently entered into an agreement whereby Grange would pay Greer \$20,000 in full settlement of her claims against Wright and Grange. This settlement was well within the \$100,000 liability limits in Wright's policy with Grange. Grange then notified Farm Bureau's attorney that it had entered into a settlement with Greer for \$20,000. Grange further advised Farm Bureau that if it failed to respond as required by KRS¹ 304.39-320(4), then Greer would execute a full release in favor of Wright and Grange. Within the thirty-day time period set forth in the statute, Farm Bureau forwarded a check in the amount of \$20,000 to Greer's attorney,

¹ Kentucky Revised Statutes.

designating the check as a "Coots advance," and sent a copy of the letter accompanying the check to Grange's attorney.

Approximately seven months later, on June 6, 2000, Greer's attorney advised Grange's attorney that Greer was willing to dismiss the case as settled. Farm Bureau's attorney was not sent a copy of this letter. Approximately eight months later, on February 2, 2001, Farm Bureau filed a motion for summary judgment on its intervening complaint seeking to recover its \$10,000 in BRB payments to Greer from Grange. The \$10,000 in benefits represented payments of \$3,400 for Greer's lost wages and \$6,600 for her medical expenses. On the same date Farm Bureau filed a motion for an order directing Grange to pay it \$20,000, the amount which Farm Bureau had paid Greer as a "Coots advance," plus any amount the court deemed appropriate for interest. Grange filed a response in opposition to both motions. At the same time, Wright filed a motion to dismiss Greer's claims based on the settlement agreement. Subsequent to her motion, Wright filed an agreed order of dismissal with prejudice in which it requested that "[t]his case shall remain on the docket of the Court for further proceedings on the claims of the Intervening Plaintiff."

Approximately ten months after Wright filed her motion for the entry of an order of dismissal, the trial court entered an order of dismissal which dismissed all claims in the case

including Farm Bureau's intervening complaint for sums paid Greer for BRB. In addition, the court noted that "Farm Bureau has not asserted or filed a complaint on its substitution claim, and as such, cannot now recover" the sum substituted under the Coots case.² Farm Bureau filed a motion requesting the court to reconsider its order, but the court denied the motion. This appeal by Farm Bureau followed.

Farm Bureau's first argument is that it was entitled to summary judgment against Grange on its claim for the recovery of the \$10,000 in BRB it paid to Greer. In support of its argument, Farm Bureau cites KRS 304.39-070(3) which provides in part as follows:

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.

² See Coots v. Allstate Ins. Co., Ky., 853 S.W.2d 895 (1993).

Farm Bureau asserts that it followed the statute by filing an intervening complaint against Grange and that the trial court erred in dismissing its claim.

In response to Farm Bureau's argument, Grange argues that the trial court was within its discretion to dismiss this claim on the ground that the arbitration remedy was available to Farm Bureau under KRS 304.39-070(3) and that "judicial economy was promoted" by having the claim resolved in that manner rather than by continuing to leave the case pending before the court on that sole issue. We reject Grange's argument for two reasons. First, there is no indication in the record that the court dismissed the claim for this reason. Second, even if it did, it abused its discretion in doing so because Farm Bureau had the right to assert its claim by either joining this lawsuit or through arbitration. KRS 304.39-070(3). The court did not have the discretion to dictate the manner in which the claim was asserted.

Grange also argues that any recovery by Farm Bureau in subrogation for payment of BRB is subject to a determination that the payments were for expenses or damages relating to the accident. Although Farm Bureau's affidavit in support of its summary judgment motion indicates that the payments were for medical expenses and lost wages, Grange asserts that "the vast majority of the expenses paid by Farm Bureau were for Greer's

injuries to her lower back, which were the result of pre-existing degenerative conditions to her lower back aroused by a sneeze which occurred several months after she stopped seeking treatment, and after she was released by her doctor following the subject motor vehicle accident." Grange argues that this a factual dispute that must be resolved by a jury or fact finder. In further support of its argument, Grange relies on Carlson v. McElroy, Ky. App., 584 S.W.2d 754 (1979). In that case the plaintiff prevailed on the issue of liability in the jury trial, but the plaintiff did not prevail in convincing the jury that her injuries and damages were as a result of the accident. This court held that the plaintiff's insurer's subrogation claim against the defendant's insurer necessarily failed because the plaintiff's claim failed. Id. at 756.

We agree with Farm Bureau that the trial court erred in not awarding it summary judgment on its subrogation claim against Grange for BRB. Farm Bureau's summary judgment motion was supported by an affidavit of a Farm Bureau employee stating that BRB in the sum of \$10,000 had been paid to Greer for medical services and lost wages incurred as a result of the accident. Grange's response to Farm Bureau's summary judgment motion stated that the vast majority of the medical expenses paid by Farm Bureau were incurred as a result of an injury to Greer which was unrelated to the accident. Thus, Grange argued

to the trial court that the merits of the claim must be adjudicated and that summary judgment was not appropriate. Grange made no specific reference to any evidence or testimony to support its assertion, and it did not file a counter-affidavit in opposition to the motion.

In Continental Cas. Co. v. Belknap Hardware & Mfg. Co., Ky., 281 S.W.2d 914 (1955), the court held as follows:

The party moving for a summary judgment has the burden of establishing that no genuine issue as to any material fact exists and also that he is entitled to judgment as a matter of law. If uncontroverted affidavits which clearly disclose the facts show that a genuine issue does not exist, the opposing party has an obligation to do something more than rely upon the allegations of his pleading. Since the moving party has the burden, he must make a prima facie showing that would entitle him to a summary judgment. The opposing party is then required by counter-affidavit, or otherwise, to show that evidence is available justifying a trial of the issue involved.

Id. at 916. In the case *sub judice* Farm Bureau filed an affidavit stating that all payments were for damages related to the accident. Grange disputed that the damages were related to the accident, but it did not file a counter-affidavit and did not specifically refer to any evidence in the record to support its argument. We conclude that the trial court erred in dismissing Farm Bureau's claim for reimbursement of the \$10,000

BRB payment. Further, it erred in not awarding summary judgment to Farm Bureau on the claim.

Farm Bureau's second argument is that the trial court erred when it denied its motion for repayment of the \$20,000 it substituted for the \$20,000 settlement between Grange and Greer. To review the facts, we note that Grange and Greer settled Greer's claim against Wright for \$20,000. Even though this \$20,000 settlement was well within the \$100,000 policy limits of Wright, Greer did not agree at the time of the settlement to dismiss her UIM claim against Farm Bureau. Therefore, Farm Bureau substituted its \$20,000 payment to Greer for that which Grange would have otherwise been responsible. When Greer later elected not pursue her UIM claim against Farm Bureau, Farm Bureau sought reimbursement of its \$20,000 payment to Greer from Grange.

Grange raises two main arguments in opposition. First, Grange argues that the trial court correctly dismissed Farm Bureau's claim because Farm Bureau had not asserted its claim by way of an amended intervening complaint. In its order dismissing the claim, the trial court stated that "Farm Bureau has not asserted or filed a complaint on its substitution claim, and as such, cannot now recover." Second, Grange argues that Farm Bureau bore the risk of nonrecovery of its payment. In

support of this argument, Grange cites Nationwide Mut. Ins. Co. v. State Farm Auto. Ins. Co., Ky., 973 S.W.2d 56 (1998).³

We agree with Grange that the trial court properly rejected Farm Bureau's motion for repayment because Farm Bureau failed to file a claim for the repayment. Causes of action are set forth in pleadings. See CR⁴ 8.01. "Motions are not pleadings." Commonwealth, Dept. of Highways v. Ginsburg, Ky., 516 S.W.2d 868, 870 (1974). Rather, a motion is an application to the court for an order. See CR 7.02(1). Therefore, since Farm Bureau's motion for repayment did not plead a claim for relief in the proper form, the trial court correctly denied the motion.

The order of the Pulaski Circuit Court dismissing Farm Bureau's claim for reimbursement of \$10,000 for BRB from Grange is reversed, and the issue is remanded to the court for an entry of a summary judgment in favor of Farm Bureau. The order of dismissal on Farm Bureau's motion for repayment of the \$20,000 payment in substitution is affirmed.

EMBERTON, JUDGE, CONCURS.

³ Grange's second argument has no application to the issues of this case as a finder of fact never concluded Greer's claim was worth less than the amount paid in settlement. Under these circumstances, Farm Bureau's risk of nonrecovery never comes into play.

⁴ Kentucky Rules of Civil Procedure.

PAISLEY, JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES A SEPARATE OPINION.

PAISLEY, JUDGE, DISSENTING. Respectfully, I dissent. I agree fully with the majority as to Farm Bureau's claim for Basic Reparation Benefits. It is clearly entitled to recover those payments from Grange.

I do not agree, however, with respect to the funds Farm Bureau advanced under Coots v. Allstate Insurance Company, Ky., 853 S.W.2d 895 (1993), and KRS 304.39-320. Under these circumstances, I do not believe Farm Bureau was required to file another intervening complaint to preserve its claim against Grange for recovery of those funds.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

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