

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001767-MR

KENTUCKY NATIONAL INSURANCE COMPANY

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 92-CI-00282

RILEY BOTTOMS

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BAKER AND SCHRODER, JUDGES; AND HUDDLESTON, SENIOR
JUDGE.¹

SCHRODER, JUDGE. This is an appeal from a judgment awarding
appellee \$9,668.26 in underinsured motorist benefits. Appellant
argues that the award was in error because it was entitled to a
set-off for the \$10,000.00 in PIP benefits that were paid to
appellee. We agree with the trial court that appellant was not

¹ Senior Judge Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580. This opinion was prepared and concurred in prior to the expiration of the Special Judge assignment on November 25, 2003.

entitled to another set-off for PIP benefits paid because the \$45,000.00 settlement between the tortfeasors and the victim included a set-off and reimbursement of the victim's PIP insurer for PIP benefits. Also, the language in KRS 304.39-060(2), (which prevents a victim from making a double recovery) does not prevent the PIP insurer from asserting its subrogation claim under KRS 304.39-070(2). Under the victim's UIM coverage, he has a contractual right to recover from his insured that amount of the jury verdict which exceeded the tortfeasor's liability limits. Hence, we affirm.

On November 10, 1990, appellee, Riley Bottoms, was rear-ended by Ryan Kissell and sustained injuries to his neck and back. It is undisputed that Kissell was at fault in causing the car accident and that he had \$50,000.00 in liability coverage through Kentucky Farm Bureau ("Farm Bureau"). Bottoms thereafter made a claim for PIP or basic reparation benefits (BRB) from his own insurance company, appellant, Kentucky National Insurance Company ("Kentucky National"). Kentucky National eventually paid Bottoms the full \$10,000.00 in PIP benefits for his incurred medical expenses.

On September 1, 1992, Bottoms filed a personal injury action against Kissell and against Kentucky National for underinsured motorist ("UIM") benefits under his own policy. Kentucky National in turn joined Farm Bureau in the action as a

third party in an attempt to obtain reimbursement for the PIP benefits paid to Bottoms (as authorized by KRS 304.39-070(2)). Prior to trial, Bottoms settled with Farm Bureau/Kissell for \$45,000.00, \$35,000.00 to be paid to Bottoms and \$10,000.00 to be paid directly to Kentucky National for reimbursement of the \$10,000.00 PIP benefits it paid to Bottoms. Farm Bureau also settled the subrogation claim with Kentucky National and did in fact reimburse Kentucky National the \$10,000.00 PIP benefits it paid Bottoms. Kissell, the tortfeasor, was dismissed from the action, but Bottoms and Kentucky National were unable to agree to the benefits due Bottoms under his UIM policy, thus the issue proceeded to trial.

Prior to trial, but after Kentucky National received the \$10,000.00 reimbursement from the tortfeasor's insurance company, Kentucky National filed a motion to have the \$10,000.00 in PIP benefits it paid to Bottoms set-off from any judgment entered against it even though it had been reimbursed by Farm Bureau. The court did not rule on this motion prior to trial. On February 28, 2002, after a two-day trial, the jury returned a verdict for Bottoms in the amount of \$59,668.26, consisting of \$11,156.98 for medical expenses, \$8,885.28 for lost wages, \$3,126.00 for future medical expenses, and the remaining \$36,500.00 for pain and suffering. Thereafter, Kentucky National requested that the court set-off the \$50,000.00

liability policy limits based on the settlement and \$10,000.00 in PIP benefits when entering its final judgment. Although Bottoms conceded (because of a settlement for less than policy limits) that the judgment should be set-off by \$50,000.00, which represented the limits of Kissell's Farm Bureau policy, Bottoms maintained that Kentucky National was not entitled to have the \$10,000.00 in PIP benefits set-off because Kentucky National had already been fully reimbursed for the payment of the PIP benefits by Farm Bureau (which was required by KRS 304.39-070(2) and was included in the settlement). The trial court ultimately agreed with Bottoms and entered judgment against Kentucky National in the amount of \$9,668.26. This appeal by Kentucky National followed.

Kentucky National argues that under KRS 304.39-060(2)(a) and the cases interpreting that statute, Bottoms is not entitled to recover for items of damages already paid by the PIP carrier. We agree that Bottoms is not entitled to recover again for items of damages already paid to him by his PIP carrier. The purpose of this statutory scheme was clearly to prevent double recovery by the injured party by allowing the PIP carrier (BRB obliger) to be directly reimbursed by the tortfeasors. See Progressive Casualty Insurance Co. v. Kidd, Ky., 602 S.W.2d 416 (1980). This is what happened in this case. Kentucky National recovered the benefits it paid to Bottoms.

The PIP benefits were then set-off against the \$45,000.00 settlement. Bottoms did not recover twice. He recovered \$10,000.00 PIP benefits from his insurer, Kentucky National, and \$35,000.00 in settlement, from the tortfeasor's insurance company, Farm Bureau, with a total set-off against the policy of \$50,000.00. In Saxe v. State Farm Mutual Auto. Ins. Co., Ky. App., 955 S.W.2d 188, 191 (1997), a panel of this Court recognized:

[t]he entire MVRA statutory scheme reflects a zero-sum approach where the injured person's losses are fully compensated by a combination of reparation benefits, liability insurance and, if necessary, underinsured motorist coverage. The reparation obligor then recovers its payments (BRB's or ARB's) from the insurer for the responsible secured party. Under this system, the injured party is fully compensated or "made whole" (if appropriate coverages are in place) but never realizes a net gain from his injuries. (footnote omitted).

Applying the Court's reasoning to the facts of our case, Bottoms has no double recovery, his PIP benefits, plus the tortfeasor's insurance (\$45,000.00 settlement less \$10,000.00 deducted for the PIP subrogation claim) equals a total credit of \$50,000.00. There is no windfall to Bottoms in these numbers. At this point Bottoms received only one recovery for PIP benefits under KRS 304.39-060(2) and Kentucky National received reimbursement under KRS 304.39-070(2) for the PIP benefits it paid to Bottoms. Both

parties received what was intended under the statutory scheme for torts.

At this point, Bottom's UIM policy comes into play. The UIM coverage agreed to pay the difference between the policy limits and the jury verdict. We agree with the trial court that Bottoms's right to UIM benefits is strictly contractual. As stated by the Court in Coots v. Allstate Ins. Co., Ky., 853 S.W.2d 895, 902 (1993), "The UIM insurer is a primary obligor for the UIM insured's loss by contractual obligation just as the tortfeasor is a primary obligor by reason of his tort obligation." KRS 304.39-320 is the statute which governs UIM liability.

We do recognize that the underlying tort action and the recovery therefrom serve as the basis for determining the amount of UIM benefits to which the insured is entitled:

[U]nderinsured motorist coverage comes in to play whenever the insured has uncompensated damages that he is entitled to recover under a judgment in excess of the policy limits of the owner of the other vehicle.

Dupin v. Adkins, Ky. App., 17 S.W.3d 538, 542 (2000). In our case the jury verdict was for \$59,668.26, and the policy limits of the tortfeasors was \$50,000.00. Under contract law, Bottoms would be entitled to \$9,668.26 from his UIM carrier.

It is Kentucky National's position that since the jury award to Bottoms included damages for items which were undisputedly covered by the PIP benefits he received, \$10,000.00 must be deducted from the jury's award (pursuant to the dictates of KRS 304.39-060(2)(a)) to arrive at the judgment to which he would have been legally entitled from the tortfeasor for purposes of determining UIM liability. While it is true that KRS 304.39-060(2)(a) "abolished" liability to the injured party to the extent of PIP/BRB benefits received, KRS 304.39-070(2) simply transferred that entitlement to the BRB obligor by giving it (Kentucky National) the right of subrogation to obtain reimbursement for the PIP/BRB benefits it paid to its insured. Progressive Casualty Insurance Co. v. Kidd, Ky., 602 S.W.2d 416 (1980). The purposes of this statutory scheme, to prevent double recovery by the injured party and to allow the BRB obligor to be directly reimbursed by the tortfeasor, were clearly achieved in the instant case. Kentucky National was reimbursed by Farm Bureau the full \$10,000.00 in PIP/BRB benefits paid as part of and set-off from Bottoms's settlement with Kissell. Hence, Kentucky National has been made whole and Bottoms did not receive double recovery. Accordingly, the lower court did not err in computing the amount of UIM benefits owed to Bottoms.

For the reasons stated above, the judgment of the
Nelson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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