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DISCRETIONARY REVIEW GRANTED BY SUPREME COURT:
AUGUST 19, 2009
(FILE NO. 2008-SC-0333-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001386-MR

JAMES O. YOUNG;
PATRICIA YOUNG — APPELLANTS

v.

APPEAL FROM UNION CIRCUIT COURT
HONORABLE C. RENE WILLIAMS, JUDGE
ACTION NO. 05-CI-00112

KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY; ANTHEM HEALTH
PLANS OF KENTUCKY, INC. — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: James O. Young and Patricia Young appeal from an order of the Union Circuit Court granting summary judgment to Kentucky Farm Bureau Mutual Insurance Company and determining that Farm Bureau was not obligated to pay underinsured motorist (UIM) benefits to the Youngs because they failed to comply with

[1] Senior Judge Michael L. Henry, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the notification requirements contained in Kentucky Revised Statutes (KRS) 304.39-320(3). For the reasons stated below, we reverse the trial court's award of summary judgment to Farm Bureau, and remand.

FACTUAL AND PROCEDURAL BACKGROUND

On May 1, 2003, James Young was driving a vehicle occupied by himself, James David Buckman, and Chris Wolf. The Young vehicle was struck by a tractor-trailer rig operated by Andrew Winger. Buckman suffered devastating and permanent brain injuries; Young suffered severe injuries to one of his arms,[2] which required five surgeries to repair; and Wolf suffered lesser injuries.

It is undisputed that Winger was at fault in causing the accident and, consequently, is the tortfeasor in this case. Winger had a $1,000,000.00 liability insurance policy issued by Sagamore Insurance Company. In connection with a federal lawsuit, Winger and the victims settled for the Sagamore policy limits. Based upon the relative severity of their injuries, it appears that pursuant to the original settlement agreement, Buckman was to receive $900,000.00 of the policy proceeds, Young $75,000.00, and Wolf the balance.

The Youngs have seven automobile insurance policies with Farm Bureau. Each of the policies, in turn, has a unit of UIM coverage in the amount of $25,000.00 per person/$50,000.00 per accident which, it appears, may be stacked. Farm Bureau was notified of the accident and the potential coverage under the Farm Bureau policies early in the process, and the claim was assigned to Senior Claims Adjuster Larry J. Wahnsiedler, SCLA. The Youngs were represented by Zack Womack throughout the proceedings below.

As discussed in more detail below, upon reaching a settlement with Winger and Sagamore, by letter dated January 26, 2005, Womack notified Wahnsiedler

[2] It is not readily apparent from the record which arm was injured.

of the settlement pursuant to KRS 304.39-320(3) and *Coots v. Allstate Insurance Company*, 853 S.W.2d 895 (Ky. 1993). While the notification did not comply with the certified/registered mail requirement of 304.39-320(3), Farm Bureau concedes that it received the notification.

The January 26, 2005, Womack letter stated that the Youngs' settlement amount was for $100,000.00. That amount, however, includes sums unrelated to the Sagamore policy. More specifically, the record discloses that the $100,000.00 sum included one unit of Farm Bureau UIM coverage in the amount of $25,000.00, which unit of coverage was put into the settlement pot in the federal lawsuit.[3] The letter stated that the Youngs were settling their claim against Winger, and were placing Farm Bureau on notice of the settlement pursuant to KRS 304.39-320 and *Coots*.[4]

At about the same time, Wahnsiedler received a letter from Buckman's attorney, Charles E. Moore, seeking payment of $25,000.00 upon one unit of the Youngs' Farm Bureau UIM coverage. This letter, dated January 25, 2005, explained in more detail the federal court settlement and identified the Youngs as being scheduled to receive $75,000.00 under the settlement from the Sagamore policy (not $100,000.00 as stated in the January 26, 2005, Womack letter). Thus, understandably, Farm Bureau was confused regarding the amount the Youngs were to receive under the settlement and the sources of those sums.

In light of the confusion, by letter dated January 28, 2005, Wahnsiedler sent a letter to Womack wherein he stated, in relevant part, as follows:

> I am in receipt of your letter of January 26th. Please give me some clarification as to the $100,000.00 which Mr. Young is to receive as a part of this tentative settlement and where the proposed proceeds are coming from. This case involves

[3] It appears that the federal lawsuit settlement also contemplated Buckman collecting $25,000.00 under this unit of coverage.

[4] See pg. 13, *infra*, for the full text of the relevant portions of the letter.

> a lot of money and I don't want to assume anything incorrectly.
>
> We will likely be advancing the amount tentatively offered from Sagamore's policy to Mr. Young in order to preserve our subrogation rights against the tort feasor.
>
> As soon as we have sufficient documentation for our purposes we will be forwarding a check payable to Mr. Young to advance said monies to which he has agreed.
>
> I would assume you have in your possession a copy of a certified declaration's page regarding Mr. Winger's policy with Sagamore. I would appreciate your forwarding me a copy of this declaration sheet.

Following this, though KRS 304.39-320 prescribes a 30-day time limit for an insurance company to front the settlement money in order to comply with the *Coots* process and thereby preserve its subrogation rights against the tortfeasor, no additional action was taken by either Womack or Wahnsiedler until February 22, 2005, when Womack sent Wahnsiedler a copy of the declarations page of the Sagamore policy.

On March 22, 2005, James Young executed settlement and release papers settling his claim against Winger for $72,900.00.[5] As is standard practice, the release contained language binding the Youngs' subrogees to the settlement and release, which effectively extinguished Farm Bureau's subrogation rights to recover from Winger any UIM sums it paid out under the Youngs' UIM coverage.

Meanwhile, on March 21, 2005, just before the settlement and release was executed, Womack sent Wahnsiedler a letter wherein he demanded on behalf of James Young the payment of $175,000.00, which represents the policy limits of seven stacked units of $25,000.00/$50,000.00 UIM coverage. The letter also now for the first

[5] The record discloses that $2,100.00 reduction from the original $75,000.00 was associated with an accommodation to Wolf in order to salvage the settlement. Winger was originally to have paid $4,200.00 into the settlement pot from his personal funds, with this amount to go to Wolf. When Winger was unable to come through with his share of the funds, Young and Buckman each agreed to give up $2,100.00 of their original share to satisfy Winger's obligation to Wolf, and thereby preserve the settlement.

time informed Farm Bureau that the exact final settlement amount with Winger under the Sagamore policy was $72,900.00

By letter dated March 24, 2005, Wahnsiedler sent a correspondence to Womack wherein he attempted to advance the $72,900.00 settlement amount to Young pursuant to *Coots* and KRS 304.39-320, and thereby preserve Farm Bureau's subrogation rights. As the settlement and release papers had been executed by Young on March 22, 2005, the attempted preservation was too late. By letter dated March 30, 2005, because the Youngs had already received the proceeds from Sagamore, Womack returned the $72,900.00 check. The letter also contained other attachments in support of the Youngs' UIM claim.

On April 1, 2005, Wahnsiedler sent a letter to Womack indicating that Farm Bureau would deny the Youngs' UIM claim. The letter stated, in relevant part, as follows:

> In my letter of January 18, 2005, I wrote requesting clarification regarding the amount James O. Young was to receive as a result of the proposed settlement with Andrew Winger and his liability carrier, and once that information was provided, and as you were previously advised, we would likely be advancing that amount in order to preserve our subrogation rights against Mr. Winger pursuant to KRS 304.39-320(4). Your letter of March 21, 2005, provided the required information, so by my letter dated March 24, 2005, I advised you of our intention to advance the $72,900.00. In accordance with that decision accompanying my letter of March 24, 2005, was our check in the amount of $72,900.00 I also included an Underinsured Motorist Loan Agreement and Receipt for Mr. Young to execute acknowledging our payment. Even though we had made clear our expectation to advance the amount Mr. Young was to receive from the proposed settlement, your letter of March 21, 2005, in which you returned our check, seems to indicate that you have already settled with Mr. Winger and accepted payment. If indeed, this is correct, our rights under KRS 304.39-320(4) have been extinguished, in that by virtue of Mr. Young settling with Mr. Winger we can no longer seek subrogation against Mr. Winger on his liability carrier. Therefore, given that Mr. Young has seemingly denied us our statutory right

> to pursue any subrogation claim against Mr. Winger and his liability carrier, he has waived any claims he may have had for underinsured motorist coverage.

Young's claim for UIM benefits having been denied by Farm Bureau, on May 17, 2005, the Youngs filed a Complaint in Union Circuit Court seeking payment of UIM benefits upon a breach of contract theory. The Complaint also included a claim for additional damages pursuant to the Unfair Claims Settlement Practices Act, KRS 304.12-230, et. seq.

Farm Bureau filed an answer denying liability for breach of contract and a counterclaim seeking a declaration of noncoverage.

In due course Farm Bureau filed a motion for summary judgment. On June 15, 2006, the trial court entered an order granting the motion. The order bases summary judgment upon the Youngs' failure to comply with the notice requirements of KRS 304.39-320(3); however, the order does not specifically enumerate which of those requirements the Youngs failed to meet. The Youngs appeal the award of summary judgment to Farm Bureau.

STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the

moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).

DISCUSSION

In *Coots*, the Supreme Court established a procedure whereby an injured party with UIM coverage could settle with a tortfeasor and the tortfeasor's liability carrier and still retain a claim against his or her UIM insurer. Under the *Coots* procedure, when the injured party, the tortfeasor and the tortfeasor's liability carrier tentatively agree to settle the injured party's claim against the tortfeasor for the policy limits, the injured party may preserve his or her UIM claim by giving notice to its UIM insurer of the parties' intent to settle and affording the UIM insurer the opportunity to preserve its subrogation rights against the tortfeasor by paying the injured party the policy limit amount. If the UIM insurer elects not to substitute its own funds by paying the liability insurer's policy limits to the injured party: (1) the UIM insurer forfeits its subrogation rights against the tortfeasor for any amounts that it is later required to pay the injured party under its UIM coverage; (2) the tortfeasor's liability carrier pays the injured party the settlement amount; (3) the tortfeasor is released from all further liability to either the injured party or UIM insurer; and (4) the injured party may proceed against his or her UIM insurer for any damages in excess of the liability insurer's policy limits. However, if the UIM insurer elects to preserve its subrogation rights against the tortfeasor and substitutes its own funds for the settlement amount by paying the policy limit to the injured party, the UIM carrier: (1) has subrogation rights against the tortfeasor's liability carrier for the substituted amount paid to the injured party; and (2) retains its subrogation rights against the tortfeasor for any amount that it is required thereafter to pay the injured party under its UIM coverage. *True v. Raines*, 99 S.W.3d 439, 445 (Ky. 2003).

The 1998 General Assembly substantially codified the Coots procedure in KRS 304.39-320, the Underinsured Motorist Coverage statute. The amendments imposed specific statutory duties upon both the insured and the insurer to implement the *Coots* process. KRS 304.39-320, subsections (3) and (4), the sections which concern us, state as follows:

> (3) If an injured person or, in the case of death, the personal representative agrees to settle a claim with a liability insurer and its insured, and the settlement would not fully satisfy the claim for personal injuries or wrongful death so as to create an underinsured motorist claim, then written notice of the proposed settlement must be submitted by certified or registered mail to all underinsured motorist insurers that provide coverage. The underinsured motorist insurer then has a period of thirty (30) days to consent to the settlement or retention of subrogation rights. An injured person, or in the case of death, the personal representative, may agree to settle a claim with a liability insurer and its insured for less than the underinsured motorist's full liability policy limits. If an underinsured motorist insurer consents to settlement or fails to respond as required by subsection (4) of this section to the settlement request within the thirty (30) day period, the injured party may proceed to execute a full release in favor of the underinsured motorist's liability insurer and its insured and finalize the proposed settlement without prejudice to any underinsured motorist claim.
>
> (4) If an underinsured motorist insurer chooses to preserve its subrogation rights by refusing to consent to settle, the underinsured motorist insurer must, within thirty (30) days after receipt of the notice of the proposed settlement, pay to the injured party the amount of the written offer from the underinsured motorist's liability insurer. Thereafter, upon final resolution of the underinsured motorist claim, the underinsured motorist insurer is entitled to seek subrogation against the liability insurer to the extent of its limits of liability insurance, and the underinsured motorist for the amounts paid to the injured party.

It is conceded by the Youngs that Womack did not, as required by KRS 304.39-320(3), send the January 26, 2005, notification letter by certified or registered mail. In *Liberty Mut. Fire Ins. Co. v. Massarone*, 326 F.3d 813 (6th Circ. 2003), the insured sent his *Coots* notification by first-class mail and the insurance company

claimed not to have received it. The Sixth Circuit held that the insured's failure to comply with the mailing requirements of KRS 304.39-320(3) was fatal to his attempted *Coots* notification, and he was thus precluded from seeking UIM benefits against the insurance company because he was at fault in defeating the company's subrogation rights against the torfeaser.

In this case however, Farm Bureau concedes that it received Womack's letter and, in fact, the company responded to the letter. Farm Bureau raised no objection at the time to Womack's failure to comply with this aspect of the statute. Having received Womack's letter January 26, 2005, *Coots* notification letter; having not objected to the letter not having been sent by certified or registered mail; and having responded to the letter without stating such objection, we conclude that Farm Bureau waived its right to the statutorily prescribed form of notice and, correspondingly, waived any defense to UIM payments based upon the lack of that form of notice.[6]

Aside from the certified/registered mailing requirement, the only other burden placed upon the insured is that "written notice of the proposed settlement must be submitted . . . to all underinsured motorist insurers that provide coverage." Womack's January 26, 2005, letter to Wahnsiedler stated, in relevant part, as follows:

> Please be advised that a tentative settlement has been effectuated. Mr. Young is to receive $100,000.00 from the proceeds. The proceeds were calculated on the basis of the remainder of the policy limits of [Winger], including the $50,000 coverage on the vehicle operated by Mr. Young. So there is no misunderstanding, the claim of Mr. Young on the availability of the coverage is $100,000.00.
>
> **Please consider this our formal notice, pursuant to KRS 304.39-320, as is required, 30 days to consent to settlement for purposes of retention of your subrogation rights and/or the fronting of the money. Please consider**

[6] We note that if Farm Bureau had any concern with Womack's having sent the *Coots* notice by first-class mail, the company need only have pointed out the shortcoming and afforded him the opportunity to resend the notification in compliance with the statute.

this formal notice, pursuant to *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895 (Ky. 1993). (Emphasis added).

While the letter is ungrammatical in part, the correspondence states in no uncertain terms that the Youngs have a pending settlement and are presenting a formal *Coots* notice thereof in compliance with KRS 304.39-320. Thus we construe the issue as not a lack of notice but, rather, the potentially misleading content contained in the notification. While the letter stated that Young was settling for $100,000.00, that amount included $25,000.00 unrelated to the Sagamore policy. However, there is no evidence in the record to support a theory that Womack intended to deliberately mislead Farm Bureau, or that he acted in bad faith in putting the potentially misleading information in the letter, and Farm Bureau does not allege this.

We next note that Farm Bureau does not allege that the $25,000.00 difference between a settlement of $100,000.00 versus $75,000.00 would have been decisive in its *Coots* decision. Further, the record discloses that Winger is in all likelihood judgment-proof at this time, and that any decision to pursue a judgment against him, Farm Bureau admits, would be based upon the hope of a substantial change in his financial position within the fifteen-year limitations period for enforcing a judgment.[7] Thus we do not believe Farm Bureau could make a credible argument that its decision of whether to invoke the *Coots* procedure hinged upon the $25,000.00 differential.

Upon having received the Youngs' *Coots* notification in Womack's January 26, 2006, letter, KRS 304.39-320(3) prescribes that the insurance company was then required to act within 30 days to advance the settlement amount to the insured; otherwise the insured is authorized to proceed with settlement. The statute does not, however, authorize the insurance company to toll the 30-day limitations period by

[7] *See* KRS 413.090.

seeking additional documentation. Thus, Wahnsiedler's request in his January 28, 2005, letter for "sufficient documentation for our purposes," we conclude, did not toll the limitations period.

In light of the conflicting information contained in the January 26, 2005, Womack letter (indicating that Young's settlement amount was $100,000.00) and the January 25, 2005, Moore letter (indicating that Young's settlement amount was $75,000.00) follow-up and clarification were appropriate. Even so, we are persuaded that under the circumstances of this case, the onus remained upon Farm Bureau to undertake compliance with the *Coots* process pursuant to the statutorily prescribed duties contained in KRS 304.39-320, including compliance with the 30-day response requirement. Farm Bureau's failure to do so compels that it bear the responsibility for the loss of its subrogation rights against Winger and Sagamore.

"[I]t does not abrogate UIM coverage to settle with the tortfeasor and his carrier for the policy limits in his liability coverage, so long as the UIM insured notifies his UIM carrier of his intent to do so and provides the carrier an opportunity to protect its subrogation[.]" *Coots* at 900. Here, the Youngs provided notice to Farm Bureau of their intent to settle, and the company was provided with an opportunity to protect its subrogation rights.

We again note that Farm Bureau does not claim that the difference between a $100,000.00 settlement and a $75,000.00 settlement would have been decisive in its *Coots* decision. We further note that Farm Bureau was aware of the discrepancies between the Womack letter and the Moore letter. With the Youngs having given their *Coots* notice and the statutory clock running, it was the responsibility of the insurance company to either advance the settlement money as contained in the January 26, 2005, Womack letter, or timely clear up the discrepancy by efforts beyond

simply requesting "sufficient documentation for our purposes." In this vein, we note that a telephone call by Wahnsiedler to Womack – a commonplace task for a claims adjuster - would have resolved the discrepancy. "[An] insurer's subrogation rights are generally not prejudiced by a nonconsensual settlement when: . . . . (4) [] the insurer is given reasonable notice of the insured's intent to settle and has an opportunity to preserve its rights, but chooses not to do so." Lee R. Russ & Thomas F. Segalla, 9 *Couch on Insurance 3d* § 124:10. Here, the notice provided afforded Farm Bureau a reasonable opportunity to preserve its rights.

Farm Bureau appears to argue that if it had advanced the $100,000.00 sum as stated in the January 26, 2005, letter, it would have ultimately have received only $72,900.00 (the actual settlement amount) back from Sagamore, thereby incurring prejudice as a result of the misinformation. However, Farm Bureau would, of course, have been entitled to reimbursement from the Youngs for the overpayment. In summary, Farm Bureau would not have suffered a detriment by simply relying upon the January 26, 2005, *Coots* notification. In the alternative, again, due diligence and a telephone call would have resolved the discrepancy.

In conclusion, Womack's January 26, 2005, letter to Farm Bureau provided reasonable and sufficient notice to the company whereby, through the exercise of appropriate diligence, it could have protected its subrogation rights if it chose to do so. While the letter contained potentially misleading information, Farm Bureau was not prejudiced thereby, and as between the Youngs and Farm Bureau, we believe that under the facts of this case, Farm Bureau must bear the responsibility for the loss of its subrogation rights, and the Youngs are entitled to the UIM coverage they paid for.

CONCLUSION

For the foregoing reasons the judgment of the Union Circuit Court is reversed, and the cause is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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