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OPINION OF DECEMBER 7, 2007 WITHDRAWN

**SUPREME COURT GRANTED DISCRETIONARY REVIEW:
SEPTEMBER 10, 2008
(FILE NO. 2008-SC-0244-D)**

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001995-MR

KENTUCKY SCHOOL BOARD ASSOCIATION APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 04-CI-00106

VERONICA JEWELL APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

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

[1] Senior Judge Michael 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.

HENRY, SENIOR JUDGE: The Kentucky School Board Association (KSBA) appeals the Whitley Circuit Court's denial of its motion to alter or amend a judgment which awarded Veronica Jewell $75,769.32 in damages for medical expenses, lost wages, and pain and suffering stemming from an injury she incurred while employed by the KSBA. The KSBA argues that the following should have been deducted from this judgment: first, the amounts that were paid to Jewell in the form of workers' compensation benefits and second, basic reparations benefits (BRB) which Jewell did not actually receive but to which the KSBA argues she was entitled. We agree, and therefore vacate the judgment and remand the case for entry of a judgment which reflects these deductions.

On September 24, 2001, Veronica Jewell injured her left knee when the school bus on which she was working as a monitor was rear-ended by another vehicle. Because the injury occurred while Jewell was acting within the scope of her employment, she received workers' compensation benefits for her medical expenses totaling $17,734.55. She also received temporary total disability payments totaling $784.55. Because there was some dispute with the workers' compensation carrier as to whether her injury was attributable in part to a pre-existing condition, she eventually entered into a settlement on August 23, 2005, in which she agreed to relinquish her right to reopen the workers' compensation case. In exchange, she received $25,000.00, of which $8,307.45 was paid to reimburse Jewell's health insurer in settlement of her medical bills. Additionally, the workers' compensation carrier assigned to Jewell its third party subrogation rights. The pertinent part of the agreement states as follows:

> As additional consideration for Plaintiff's waiver of payment of past medical expenses related to the left total knee replacement, Defendant and Rawlings Company o/b/o

> Bluegrass Family Health agree to waive and assign to claimant its **third party subrogation rights.**

(Emphasis supplied.)

Jewell also settled her claim against the tortfeasor's insurer for the policy limit of $25,000.00. At some point, Jewell also received $333.45 in BRB from the KSBA for lost wages which were not covered by workers' compensation.

Jewell filed suit against the KSBA on February 11, 2004, to recover underinsured motorist (UIM) benefits payable to her under the KSBA's insurance trust. Before the trial, the parties stipulated that no mention would be made to the jury of the workers' compensation benefits that Jewell had received. The jury returned a verdict that awarded Jewell $70,558.77 for medical expenses, $5,544.00 for lost wages and $25,000.00 for pain and suffering, for a total award of $101,102.77. The trial court offset from this amount the $25,000.00 Jewell had received in her settlement with the tortfeasor's insurer, and the $333.45 which she had received in BRB from the KSBA. The final judgment reflecting these offsets was entered on July 14, 2006.

The KSBA filed a motion to alter or amend the judgment, in which it argued that the workers' compensation payments totaling $26,826.55 for past medical bills and lost wages, and $19,666.55 in BRB payable to Jewell under the KSBA's insurance policy, should also have been subtracted from the amount of the judgment. The trial court denied the motion and this appeal followed.

The KSBA contends that it was entitled to an offset of Jewell's workers' compensation benefits because Jewell had in effect received a "double recovery" in violation of Kentucky Revised Statutes (KRS) 342.700(1), which states in part:

> Whenever an injury for which compensation is payable under this [workers' compensation] chapter has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages, the injured employee may either claim compensation or proceed at law by civil action against the other person to recover damages, or proceed both against the employer for compensation and the other person to recover damages, **but he shall not collect from both.**

(Emphasis supplied.)

In *Cincinnati Insurance Co. v. Samples*, 192 S.W.3d 311 (Ky. 2006), the Kentucky Supreme Court interpreted this statutory provision to hold that if an insured cannot recover damages duplicating his workers' compensation benefits from the tortfeasor, he cannot recover those same damages from the UIM carrier. *Samples*, 192 S.W.3d at 316 ("Samples [the claimant] could not recover damages duplicating his workers' compensation benefits against Howton [the tortfeasor]; thus, he cannot recover those same damages against Cincinnati [the UIM carrier].") This rule clearly precludes Jewell from recovering any amounts in her action against the KSBA which duplicate amounts she received in the form of workers' compensation benefits, since her recovery of these amounts from the tortfeasor was barred by KRS 342.700(1).

According to Jewell, however, her situation is distinguishable because she received the workers' compensation carrier's rights of subrogation against third parties as part of her settlement agreement. The success of this argument is dependent upon whether the workers' compensation carrier had the right to recover from the UIM carrier the payments it had made to Jewell.

The KSBA contends that a workers' compensation carrier's statutory right of subrogation is confined solely to the tortfeasor, not the injured employee's auto

liability insurance carrier. We agree. Under KRS 342.700(1), the workers' compensation subrogation statute which we quoted earlier in this opinion, a workers' compensation carrier is entitled to subrogate only against

> "the other person in whom legal liability for damages exists" [which] quite clearly refers to the third-party tortfeasor who is liable at common law. A payment made in performance of a contractual obligation [by a UIM carrier] is not a payment of "damages."

State Farm Ins. Co. v. Fireman's Am. Fund Ins. Co., 550 S.W.2d 554, 557 (Ky. 1977) (construing KRS 342.055, an earlier version of KRS 342.700(1)); *see also G&J Pepsi-Cola Bottlers, Inc. v. Fletcher*, 229 S.W.3d 915 (Ky.App. 2007) (holding that an employer who had paid workers' compensation benefits had no subrogation claim against UIM carriers for the employer and employee.) Therefore, the rights which Jewell gained in her settlement agreement do not include subrogation rights against the KSBA, since the workers' compensation carrier had no subrogation rights against the UIM carrier. As the KSBA has aptly stated, a workers' compensation carrier cannot assign a subrogation right that it itself does not possess.

As part of her response to the KSBA's first argument Jewell contends that the holding of *AIK Selective Self-Insurance Fund v. Minton*, 192 S.W.3d 415 (Ky. 2006), eliminates the KSBA's right under KRS 342.700(1) to offset workers' compensation benefits against the jury's damage award. In that case Minton, who was injured at work by a third party tortfeasor, collected workers' compensation benefits, then sued the tortfeasor. AIK, which had paid workers' compensation benefits to Minton on behalf of Minton's employer, intervened and claimed its subrogation rights under KRS 342.700(1). The tortfeasor settled with Minton for $150,000.00. Although AIK had paid Minton

$28,227.11 in workers' compensation benefits, Minton's legal fees and expenses resulting from his claim against the tortfeasor totaled $68,475.59. The statute KRS 342.700(1) provides that when a compensation award is made and the employer, his insurance carrier, the special fund or the uninsured employer's fund have paid the award or are liable therefor, they may recover "in his or its own name or that of the injured employee from the other person in whom legal liability for damages exists, **not to exceed the indemnity paid and payable to the injured employee, less the employee's legal fees and expense**."(Emphasis added). The court held that the statute had no constitutional infirmities and that its meaning was clear, with the result that AIK's entire subrogation claim amount was swallowed up by Minton's legal fees and expenses.

Jewell asserts that the *Minton* holding requires that her attorney fees in the amount of $30,307.72 plus her expenses of $4,781.73 must be deducted from the offset claimed by KSBA in this case, entirely eliminating it. We disagree. The limit imposed by the last sentence of KRS 342.700(1) is a limit on the **subrogation right** of an entity which has paid workers' compensation benefits and takes action to recoup what it has paid. The legislature has limited this recoupment to the amount paid to the injured employee by the entity, less the attorney fees and expenses paid by the employee in an effort to recover from the responsible third party. The public policy behind such a limitation is obvious; injured employees should be encouraged to recover from the party actually at fault. This case is factually different from *Minton.* The KSBA's workers' compensation carrier paid Jewell's compensation benefits, not the KSBA. Here, the KSBA took no action to recoup amounts it had paid, but was itself sued after the injured employee had negotiated a settlement with the tortfeasor. Rather than seeking

subrogation, the KSBA asked the court to reduce the verdict against it by setoff amounts established by statutes and case law. *Minton* has no application here.

The KSBA's second argument is that the amount of BRB available to Jewell should also be offset against the $70,558.77 awarded by the jury for past medical expenses. The parties agree that the KSBA paid $333.45 in BRB to Jewell. Under the KSBA policy, however, there was a total of $20,000.00[2] payable in BRB. The trial court offset the amount Jewell had actually received in BRB benefits, $333.45, from the final judgment. KSBA argues that it was entitled to a full offset of the remaining total available BRB ($19,666.55).

KRS 304.39-060(2)(a), a key provision of the Motor Vehicle Reparations Act, states in pertinent part:

> Tort liability with respect to accidents occurring in this Commonwealth and arising from the ownership, maintenance, or use of a motor vehicle is "abolished" for damages because of bodily injury, sickness or disease to the extent the basic reparation benefits provided in this subtitle are **payable** therefor, or that would be payable but for any deductible authorized by this subtitle[.]

(Emphasis supplied.)

Due to the presence of the word "payable" in the statute, our courts have concluded that the full amount of BRB payable may be offset against a claimant's damages, whether or not a claimant actually received the BRB.

[2] The KSBA claims that $20,000.00 in BRB is required pursuant to 702 Kentucky Administrative Regulations (KAR) 5:130. Under the regulation as it was written in 2001, the year of the accident, the regulation required a minimum of only $10,000.00 in "no fault" coverage per person. Later versions of the regulation specify a minimum of $20,000.00 in coverage. The insurance policy contained in the record specifies $20,000.00 in BRB coverage. Jewell has not disputed that $20,000.00 in BRB was the amount specified in the policy.

> We believe that KRS 304.39-060(2)(a) is unambiguous on this point; it clearly states that tort liability is abolished "to the extent the basic reparation benefits provided in this subtitle are **payable** therefor[.]" (Emphasis added.) That an individual does not elect to pursue basic reparation benefits to the maximum payable under the Motor Vehicle Reparations Act does not somehow give him an opportunity to obtain the difference between what he has received and the maximum payable in any recovery that he may secure by legal action against a tortfeasor because, by the statute, there is no tort liability on the tortfeasor for the $10,000 of damages on those elements included in basic reparation benefits.

Dudas v. Kaczmarek, 652 S.W.2d 868, 870 (Ky.App. 1983); s*ee also Bohl v. Consolidated Freightways Corp. of Delaware* 777 S.W.2d 613, 615 (Ky.App. 1989), *quoting Thompson v. Piasta*, 662 S.W.2d 223 (Ky.App. 1983) ("The Legislature made no exception to the word 'payable' requiring actual payment of the benefits as a condition precedent to the abolishment of tort liability to the extent that the benefits were 'payable.'")

Just as the tortfeasor is not liable for damages in the amount of the BRB, so too is the UIM carrier exempt from the payment of such damages, since the role of the UIM carrier is to place the injured party in the same position he would have been in had the tortfeasor carried sufficient insurance. "The UIM carrier is liable for damages only to the extent to which the underinsured tortfeasor is or could have been held liable." *Samples*, 192 S.W.3d at 316.

> Conceptually the UM [UIM]coverage may be thought of as excess to the PIP[BRB] coverage. Thus, no award may be made under UM coverage which includes any damages **paid or payable** under PIP coverage.

State Farm Mut. Auto. Ins. Co. v. Fletcher, 578 S.W.2d 41, 44 (Ky. 1979) (emphasis supplied).

Jewell contends that because workers' compensation paid for her medical expenses, she was unable to receive the total payable amount of BRB and that she should not now be penalized by having the full amount of BRB deducted from the judgment.

"Basic reparation benefits reimburse a person's loss not covered by workers' compensation benefits." *Morrison v. Kentucky Central Insurance Co.*, 731 S.W.2d 822, 824 (Ky.App. 1987). Jewell was entitled to receive BRB to reimburse those losses she had incurred which were not covered by workers' compensation benefits. The jury awarded Jewell over $70,000.00 for past medical expenses, an amount over $20,000.00 in excess of what she received in workers' compensation benefits.

Jewell maintains, however, that the KSBA refused to pay her BRB, claiming that workers' compensation was her only source of coverage.
As evidence in support of this contention, she produced a letter, dated October 29, 2003, and addressed to a paralegal at the office of Jewell's attorney. The letter is from an insurance adjuster. It states as follows:

> This will acknowledge receipt of your letter of October 27, 2003, with which you enclosed an itemized print-out of prescriptions purchased by Veronica Jewell. You requested that we reimburse Ms. Jewell $242.52 under the PIP [BRB] coverage.
>
> We will be unable to pay for these prescriptions under the PIP coverage. You should submit the prescriptions to Ms. Jewell's workers' compensation carrier, as that coverage is primary.

We agree with the KSBA that this letter is insufficient proof that it denied Jewell's BRB claim. Under KRS 304.39-210(3), a BRB obligor is allowed to deduct items such as workers' compensation benefits from a claim. Jewell has provided no

evidence that the workers' compensation carrier did not cover the prescriptions mentioned in the letter, nor has she provided any evidence that the KSBA failed to pay BRB after she had exhausted her workers' compensation benefits. Indeed, she admits that the KSBA did pay BRB of $333.45 for lost wages which were not covered by workers' compensation.

As to the amount of the offset, the KSBA argues that it should be for the entire remaining $19,666.55 because, as we have already noted, the amount of Jewell's medical expenses and lost wages, as determined by the jury, exceeded the amount she received from workers' compensation by more than $20,000.00. We agree. Because there was insufficient evidence that her BRB claim was denied, Jewell's reliance on *Slone v. Caudill*, 734 S.W.2d 480 (Ky.App. 1987), and *Henson v. Fletcher*, 957 S.W.2d 281 (Ky.App. 1997), is misplaced. In those cases, the claimants' actual accrued damages did **not** exceed the available amount of BRB. Accordingly, this Court held that the defendants were not entitled to an offset of the full amount of BRB, precisely because the full amount was not "payable."

For the foregoing reasons, the judgment of the Whitley Circuit Court pertaining to the calculation of damages is affirmed as to the deduction of $25,000.00 from the jury award representing the amount received by Jewell from the tortfeasor's insurer, but reversed as to the other items of damage discussed herein, and the case is remanded for a recalculation of the damages. Upon remand, in addition to the aforementioned $25,000.00 deduction, the court shall deduct from the jury verdict workers' compensation benefits in the amount of $26,042.00 for past medical expenses and $784.55 for lost wages, and $20,000.00 for payable BRB.

ALL CONCUR.

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