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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001276-MR

JAMES MALONE — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 03-CI-01023

KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.[1]

STUMBO, JUDGE: James Malone appeals from an order of the McCracken Circuit Court sustaining the motion of Kentucky Farm Bureau for summary judgment. Malone argues that the circuit court erred in finding that he did not provide proper notice to his underinsured motorist coverage carrier, Kentucky Farm Bureau Mutual Insurance

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

Company, of his intention to settle a claim with a tortfeasor. For the reasons stated below, we affirm the order on appeal.

The facts are not in controversy. On November 22, 2002, Timothy Bruce was driving a motor vehicle which ran into the back of a motor vehicle being operated by Malone. Malone sustained property damage to the vehicle as well as bodily injury. At the time of the accident, Atlanta Casualty Insurance Company ("Atlanta Casualty") was Bruce's liability carrier. Malone had underinsured motorist coverage ("UIM") provided by Kentucky Farm Bureau Mutual Insurance Company ("Farm Bureau").

On September 10, 2003, Malone filed an action in McCracken Circuit Court against Bruce seeking damages arising from the accident. An amended complaint was later filed to include Farm Bureau as a party defendant. In July, 2005, Atlanta Casualty offered to pay $25,000 - its liability limit - to Malone in exchange for a release from further liability. A few days later, Malone, through counsel, delivered a letter via certified mail to Farm Bureau which Malone would later argue placed Farm Bureau on notice of Malone's intent to settle with Atlanta Casualty. The letter stated in relevant part that "we are considering whether to accept this offer." It was sent for the apparent purpose of complying with the statutory law and case law requiring notice to the UIM carrier of the insured's intention to settle with the tortfeasor. Farm Bureau responded with a letter on August 5, 2005, asking Malone to let it know if he decided to accept the settlement offer so that Farm Bureau would know whether to substitute its subrogation right as required by statute. Malone apparently did not respond.

Sometime thereafter, Malone accepted the settlement offer from Atlanta Casualty, and Farm Bureau was notified of same by way of an October 18, 2005, letter from Bruce's counsel. Farm Bureau then filed a motion for summary judgment seeking dismissal of Malone's UIM claim since Malone's settlement - of which it claimed to have no notice - prevented it from exercising its contractual and statutory right of subrogation as against Bruce. Farm Bureau argued in relevant part that Malone's purported notice merely stated that he was "considering whether to accept this offer" rather than stating with clarity that he *was* accepting - or was going to accept - the offer, and that this failed to give proper notice of the actual settlement as required by the insurance contract and the statutory law. The McCracken Circuit Court found this argument persuasive, and on January 12, 2006, rendered its order of summary judgment dismissing Malone's UIM claim as against Farm Bureau. Malone's subsequent motion to alter, amend or vacate was denied, and this appeal followed.

Malone now argues that the circuit court erred in granting Farm Bureau's motion for summary judgment arising from its claim of inadequate notice. He maintains that the notice complied with both the letter and intent of KRS 304.39-320 because it apprised Farm Bureau of the impending settlement and availed Farm Bureau of the opportunity to protect its subrogation rights by paying the amount of the contemplated settlement before release. Quoting Humpty Dumpty, Malone goes on to argue that he was in a conundrum, because he could not settle first and notify Farm Bureau second, while conversely he could not notify Farm Bureau of a settlement which had not yet

occurred. In sum, he argues that the notice was adequate to allow Farm Bureau to protect its subrogation rights, and that the circuit court erred in failing to so rule. Farm Bureau responds that Malone's notice only stated that he was *considering* whether to accept the settlement offer, and that until Malone resolved that issue there was no basis for Farm Bureau taking steps to protect its subrogation rights.

Having closely examined the written arguments, the record and the law, we find no basis to reverse. KRS 304.39-320 states,

> (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. (Emphasis added).

The dispositive language, then, requires the injured person to give notice that he agrees to accept the proposed settlement. This language was reaffirmed in *Coots v. Allstate Insurance Company*, 853 S.W.2d 895 (Ky. 1993), to which the parties cite and upon which the circuit court relied in part in sustaining Farm Bureau's motion

for summary judgment. *Coots* stated that, "[T]he underinsurer, however, will have this subrogation right against the tortfeasor only if it has paid underinsurance benefits prior to release of the tortfeasor. Thus, the underinsurer is entitled to notice of the tentative settlement and an opportunity to protect those potential rights by paying underinsurance benefits before release." *Coots*, 853 S.W.2d at 902, quoting *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn.1983).

When examining KRS 304.39-320 in light of *Coots*, it is clear that the injured party is required to give notice to the UIM carrier of his or her intention to accept the tortfeasor's proposed settlement. Contrary to Malone's assertion, there is no conundrum as to whether the injured party must settle first and then notify the UIM carrier (thus running afoul of the statutory scheme), or in the alternative notify the UIM carrier first of a settlement which has not been accepted (causing the UIM carrier to claim, as in the matter at bar, that notice was insufficient). Rather, a middle ground exists in which the injured party must apprise the UIM carrier of his intent to accept the proposed settlement. This allows the UIM carrier to protect its subrogation rights by paying the amount of the contemplated settlement before the settlement is executed.

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." 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 Service Center*, *Inc.*, 807 S.W.2d 476 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Finally, "[t]he 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).

In the matter at bar, Malone did not inform Farm Bureau of his intent to accept the proposed settlement. His statement tendered to Farm Bureau stating that he was "considering" whether to accept the proposed settlement was not sufficient to satisfy KRS 304.39-320 and *Coots,* and the circuit court properly so found. Since Malone never stated that he intended to accept the settlement, he could have declined the offer after Farm Bureau attempted to protect its subrogation rights by paying to Malone an amount equal to Atlanta Casualty's offer. KRS Chapter 304 seeks to avoid this scenario by requiring clear and unambiguous notice of the injured party's intent to settle with the tortfeasor. No genuine issue of material fact exists on this issue, and as such Farm Bureau was entitled to a summary judgment as a matter of law. Accordingly, we find no error.

For the foregoing reasons, we affirm the summary judgment of the McCracken Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David V. Oakes
Paducah, Kentucky

BRIEF FOR APPELLEE:

Mike Moore
Paducah, Kentucky