RENDERED: OCTOBER 9, 2009; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002099-MR

ERICA BRYANT — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 06-CI-00987

JUSTIN HOPKINS, AND
GRANGE INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

LAMBERT, JUDGE: In this appeal, Erica Bryant seeks equitable relief against Grange Insurance Company (hereinafter "Grange"). She claims the insurance company should be estopped from denying liability for the payment of underinsured motorist ("UIM") benefits in excess of $100,000 to her after it

[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 Kentucky Revised Statutes (KRS) 21.580.

elected to substitute payment for the tortfeasor, Justin Hopkins, and after the insurance company admitted liability for said UIM coverage in its initial answer to Bryant's complaint for damages sustained in an automobile collision. The trial court determined that under the circumstances of this case, estoppel was not warranted as a matter of law. Finding no error in the trial court's determination, we affirm.

On September 2, 2004, while driving her father's car, Erica Bryant sustained damages in an automobile collision with Justin Hopkins. Bryant alleged that she sustained damages in excess of $100,000 as a result of Hopkins' negligence. Hopkins had liability coverage up to $100,000 under a policy issued by Liberty Mutual Insurance Company. On August 25, 2005, Hopkins offered his policy limit of $100,000 to settle any claims Bryant had against him for negligence resulting from this automobile collision. Bryant accepted Hopkins' settlement offer.

In addition to filing a claim for damages with Hopkins' insurance carrier, Liberty Mutual Insurance Company, Bryant also filed a claim for UIM benefits with Grange Insurance Company. Bryant and her husband had a GEICO automobile insurance policy for the two vehicles that they owned but had rejected UIM insurance coverage under their GEICO policy. However, Erica Bryant was also listed as a driver on her parents' automobile insurance policy with Grange. The Grange policy provided UIM coverage for insured individuals and family members residing with the insured individuals.

In order to preserve her claim for UIM benefits against Grange for damages sustained in excess of $100,000, Bryant sent Grange a *Coots* letter on August 26, 2005. Pursuant to *Coots v. Allstate Insurance Company*, 853 S.W.2d 895 (Ky. 1993), an injured party with a claim for UIM benefits may settle its underlying claim with the alleged tortfeasor for the tortfeasor's policy limits without waiving the injured party's right to seek additional benefits under a UIM insurance policy by following certain procedures outlined therein. *Id.* at 902. "Under the *Coots* procedure . . . the injured party may preserve his or her UIM claim by giving notice to his or her 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." *True v. Raines*, 99 S.W.3d 439, 445 (Ky. 2003); *see also* Kentucky Revised Statutes (KRS) 304.39-320 (codifying the *Coots* procedure).

On September 23, 2005, Grange elected to preserve any subrogation rights it may have against Hopkins and Hopkins' insurance carrier by paying Bryant Hopkins' $100,000 policy limit amount. No offer to settle Bryant's UIM insurance claim in excess of the $100,000 already advanced was ever made. On October 1, 2006, Bryant filed suit against Hopkins for a determination of damages sustained in the September 2, 2004, automobile accident and later amended her complaint to add Grange as a defendant.

In paragraph eight of her amended complaint, Bryant alleged as follows: "The plaintiff, Erica Bryant, was at the time of the accident referred to

herein, insured under a policy of insurance with the Defendant, Grange Insurance Company . . . belonging to Alan Van Turner, Erica Bryant's parent, which amount [sic] other coverage's provided the Plaintiff with underinsured motorist coverage; upon which policy premiums were paid and which policy was in full force and effect on the date of the accident referred to above." Paragraph eleven alleged: "The Plaintiff, Erica Bryant has demanded payment from Grange Insurance Company in accordance with the underinsured provision of its policy with the Plaintiff referred to above, and the Defendant, Grange Insurance Company, has refused to pay the Plaintiff in accordance with said coverage."

On December 8, 2006, Grange filed an answer to Bryant's amended complaint and a cross-claim against Hopkins. In both its answer and cross-claim, Grange *admitted* that Bryant was "covered under a policy of insurance liability coverage with the Defendant/Cross-Claimant, Grange Mutual Insurance Company. Said automobile coverage included underinsured motorists coverage."

Thereafter, the parties engaged in discovery proceedings. During these proceedings, it was discovered that Bryant was not actually entitled to UIM benefits under her parents' policy because she did not reside with them at the time of the accident. Residence at the address listed on the declarations page of the policy was a manifest requirement of an insured and the insured's family members under the Grange policy. This fact was not uncovered until August 2007, when Bryant testified via deposition that she resided in Hi Hat, Kentucky, with her husband and two children at the time of the September 2, 2004, accident. The

policy itself, issued on June 17, 2004, listed Bryant as a single family member. Also, in April 2007, when asked the name and address of each and every person purporting to have knowledge about the automobile accident, Bryant listed herself, her husband, and her mother and indicated that they all resided at the same P.O. Box in McDowell, Kentucky. On April 24, 2008, Bryant's mother confirmed in her deposition that Bryant had moved out of her parents' home in 2003, but still drove a car belonging to her parents which was covered under the Grange policy at the time of the accident.

Based on the above, Grange moved for summary judgment on October 17, 2007. In its motion, Grange asked that Bryant's claim for UIM benefits in excess of the $100,000 already advanced be dismissed due to the fact that she was not an eligible insured or family member of an insured under the plain language of her parents' policy. Bryant responded, arguing that she was an eligible insured, that the policy was ambiguous, and that Grange was estopped from denying liability for UIM benefits in excess of the $100,000 already advanced as said liability was already admitted in Grange's answer and cross-claim filed in December 2006.

On November 21, 2007, Grange filed a motion for leave to amend its answer. In its motion, Grange stated that it did not intend to admit liability for UIM benefits in excess of the $100,000 already advanced to Bryant in its answer, but rather it only intended to admit that a policy of insurance existed and that Bryant was named as a driver in that policy. Further, Grange argued that it had no

way of discovering Bryant's physical address at the time of the accident until after the answer was filed and discovery was initiated. Since Grange's policy was unambiguous in its requirement that family members of named insureds must reside with said insureds in order to be eligible for UIM benefits, and it was Bryant not Grange who was in a better position to know whether Bryant met this manifest requirement, Grange Insurance Company urged the trial court to exercise its discretion to allow amendment of its answer. Grange further argued that electing to protect one's subrogation rights under *Coots* in no way constitutes an admission of coverage under a UIM insurance policy and should not be used against the company, since pursuant to statute, they were permitted only thirty days from receipt of the *Coots* letter to make a determination as to whether the company should substitute payment for the tortfeasor and, thus, protect any future subrogation claims it may have against that tortfeasor. *See* KRS 304.39-320.

After reviewing arguments of counsel, including Bryant's objection to the motion, the trial court granted Grange's motion to amend its answer on November 28, 2007. Thereafter, Grange amended its answer, specifically denying that Bryant was entitled to UIM benefits in excess of the $100,000 already advanced. After this amendment, the parties engaged in further discovery. Then, on August 8, 2008, Grange renewed its motion for summary judgment, arguing that Bryant's complaint for UIM benefits in excess of the $100,000 already advanced should be dismissed as she clearly was not entitled to UIM insurance benefits under her parents' policy. Bryant filed a response on August 15, 2008.

After hearing arguments of counsel, the trial court granted summary judgment on September 2, 2008, dismissing Bryant's complaint against Grange for damages in excess of the $100,000 already advanced to her.

On September 11, 2008, Bryant filed a motion to alter, amend, or vacate the trial court's September 2, 2008, summary judgment order pursuant to the Kentucky Rules of Civil Procedure (CR) 59.05. After a hearing, the trial court denied Bryant's CR 59.05 motion by order entered on November 3, 2008. Bryant now appeals from both the September 2, 2008, summary judgment order dismissing Bryant's complaint against Grange Insurance Company and the November 3, 2008, order denying her CR 59.05 relief.

In her appeal, Bryant asserts only one argument: the trial court erred in ruling that Grange was not estopped from denying liability for UIM insurance benefits in excess of the $100,000 already advanced. "Estoppel is a question of fact to be determined by the circumstances of each case." *Sebastian-Voor Properties, LLC v. Lexington-Fayette Urban County Gov't*, 265 S.W.3d 190, 194 (Ky. 2008). However, summary judgment is appropriate on questions of estoppel where the moving party is entitled to judgment as a matter of law. *See Bruestle v. S & M Motors, Inc.*, 914 S.W.2d 353, 355 (Ky. App. 1996); *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 643 (Ky. App. 2003). Such determinations are reviewed *de novo*. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

In order to be entitled to judgment as a matter of law, the moving party must demonstrate that it would be impossible for the nonmoving party to produce any evidence at trial warranting a judgment in the nonmoving party's favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). When the dismissal of a nonmoving party's equitable estoppel claim is sought via summary judgment, it is the nonmoving party's obligation to "present some evidence to support his theory of estoppel." *Gailor v. Alsabi*, 990 S.W.2d 597, 604 (Ky. 1999).

In *Weiand v. Bd. of Trs. of Kentucky Ret. Sys.*, 25 S.W.3d 88 (Ky. 2000), the Kentucky Supreme Court set forth the following essential elements of equitable estoppel:

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Id. at 91 (quoting *Electric and Water Plant Bd. of Frankfort v. Suburban Acres Dev., Inc.*, 513 S.W.2d 489, 491 (Ky. 1974)).

Bryant claims she was entitled to judgment as a matter of law on her theory of estoppel because Grange engaged in conduct which was "calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which [Grange] subsequently attempt[ed] to assert[.]" *Id.* Specifically, Bryant cites the undisputed evidence that Grange substituted payment for Hopkins pursuant to the requirements set forth in *Coots*, *supra*, and KRS 304.39-320. She argues that an insurance company's decision to substitute payment for a tortfeasor and, hence, protect its rights of subrogation against that tortfeasor and the tortfeasor's insurance company "is an implied acknowledgment by the UIM carrier that the injured party has UIM coverage." Accordingly, Bryant asserts that Grange's attempt, in the subsequent litigation, to deny UIM coverage to Bryant in excess of the $100,000 already advanced under its policy was inequitable and must be estopped.

We disagree that an insurance company's election to protect its subrogation rights under *Coots*, *supra*, and KRS 304.39-320 constitutes such an admission of liability for damages in excess of the amount advanced or a representation of UIM coverage to the injured party. Indeed, Bryant cites to no holding or dicta from this or any other jurisdiction which would create such an admission or presumption. To the contrary, as noted in *True v. Raines*, 99 S.W.3d 439 (Ky. 2003), the *Coots* procedure has a two-fold purpose: (1) to allow an injured party to settle with a tortfeasor while still maintaining a claim against the alleged UIM insurance carrier; and (2) to allow the alleged UIM insurance carrier

an opportunity to protect its potential subrogation rights against the tortfeasor and the tortfeasor's insurance carrier while at the same time ensuring the injured party adequate and timely compensation for his damages from the tortfeasor. *Id.* at 445; *see also Coots,* 853 S.W.2d *at* 902.

Neither of the above purposes encompasses or presumes "an implied acknowledgment by the UIM carrier that the injured party has UIM coverage." Rather, the *Coots* procedure codified in KRS 304.39-320 is simply a mechanism for ensuring injured parties the right and opportunity to settle their claims against tortfeasors in motor vehicle cases without undue interference from UIM insurance carriers seeking to protect their potential subrogation claims. *See* KRS 304.39-320.

Bryant argues that language in *Nationwide Mut. Ins. Co. v. State Farm Auto. Ins. Co.*, 973 S.W.2d 56 (Ky. 1998), supports her position. The issue determined in that case concerned who bore the risk of overpayment when the amount settled for between the tortfeasor and the injured party, but advanced by the UIM insurance carrier pursuant to *Coots*, *supra*, is greater than the actual award of damages determined by a jury. *Id.* at 57. Our Supreme Court held that the most "accurate and logical" answer was the party who advanced payment prior to the jury's final determination of damages. *Id.* at 58. In explaining its decision, the Supreme Court noted that placing the risk of loss on the UIM insurance carrier seeking to protect its subrogation rights was preferable since this resulted in more efficient, simplified, and less costly litigation proceedings by encouraging the UIM

carrier to "determine the value of the plaintiff's claim and the value of the potential subrogation claim when the liability carrier has offered the policy limits." *Id.*

We disagree that the language or reasoning set forth in *Nationwide Mut. Ins. Co., supra*, is persuasive or even relevant to the determination of this case. Encouraging UIM insurance carriers to "determine the value of the plaintiff's claim and the value of the potential subrogation claim" at the time of settlement is not equivalent to creating a binding admission of liability upon the UIM insurance carrier seeking to protect its potential subrogation rights by advancing payment. *Id.* "[A]n admission by definition is a formal act done in the course of judicial proceedings." *Arnett v. Thompson*, 433 S.W.2d 109, 114 (Ky. 1968) (internal quotation and citation omitted), *see also Nolin Production Credit Ass'n v. Canmer Deposit Bank,* 726 S.W.2d 693, 701 (Ky. App. 1986). No judicial proceedings were pending at the time Grange advanced payment in this case. In any event, all parties acknowledged that Bryant had a strong claim for damages against the tortfeasor, Hopkins, and thus, Grange's obligation, if any, under *Nationwide Mut. Ins. Co., supra*, to assess the strength of Bryant's tort claim was met in this case.

What both Bryant and Grange failed to do at the time of settlement was examine the UIM insurance policy and Bryant's residence status closely enough to ensure that Bryant was actually eligible for UIM insurance benefits under her parents' policy. Nothing in our caselaw or in the reasoning set forth in *Nationwide Mut. Ins. Co., supra*, requires that such a mutual mistake of due

diligence be borne exclusively by the UIM insurance carrier. As previously noted, Grange has already accepted and does not dispute that it is exclusively liable for the $100,000 already advanced to Bryant and that Grange's only recourse at this juncture would be to proceed with its subrogation claims against Hopkins and his insurer, Liberty Mutual Insurance Company, for the $100,000 already advanced. The only issue in dispute in this case is whether by advancing this payment in advance of a final determination of UIM insurance policy coverage by either a court of law or by agreement of the parties, Grange has waived any coverage defenses it may have in subsequent litigation.

It is significant that Grange was required by statute to advance payment or abandon its subrogation rights within thirty days of notification of a settlement between Bryant and Hopkins. KRS 304.39-320. It would be inequitable and impractical to require an alleged UIM insurance carrier to engage in the discovery necessary to make a binding determination of coverage within such an abbreviated period of time or at any time prior to the initiation of judicial proceedings. *See* 27 Corpus Juris Secundum (C.J.S.) Discovery § 2 (2009) (litigation allows parties to utilize the rules of discovery which "permit a litigant to obtain whatever information he or she may need to prepare adequately for the issues that may develop without imposing an onerous burden on his or her adversary"). For these reasons, we hold that the act of protecting one's potential subrogation rights by the advancement of payment to an injured party pursuant to the procedure mandated in KRS 304.39-320 and *Coots*, *supra*, in no way creates a

presumption or acknowledgment, implied or otherwise, that the UIM insurance carrier has admitted coverage to the injured party beyond the amount advanced under its policy or that it has waived any defense of non-coverage in any subsequent litigation against the injured party. Accordingly, Bryant's arguments to the contrary are rejected.

Bryant argues that in addition to the substitution of payment pursuant to KRS 304.39-320 and *Coots*, *supra*, Grange engaged in two other acts which, taken together, support her claim for equitable relief. First, Grange "sent multiple letters to Bryant's counsel over an [eleven] month period discussing her UIM claim without ever raising a challenge to coverage" prior to the filing of Bryant's lawsuit in this case. Second, Grange admitted in its answer that Bryant was entitled to UIM benefits under its policy.

As to the pre-lawsuit "discussions," Bryant cites no authority or rationale as to how simply discussing a claim prior to the initiation of litigation would imply or create a reasonable presumption that the claim was accepted or admitted. As to the admission, the trial court granted Grange leave to amend its answer to correct this error. *See* CR 15.01. Once this amendment was permitted, the amended answer replaced the original answer and the existence of an admission upon the record was essentially extinguished. *See* CR 15.03 (relation back of amendments); *Curry v. Cincinnati Equitable Ins. Co.*, 834 S.W.2d 701, 704 (Ky. App. 1992) (defense effectively pleaded and not waived where it was included in amended answer which related back to the date of the original

pleading). Bryant does not appeal the trial court's order permitting this amendment, nor does she argue that the trial court abused its discretion in permitting this amendment. Accordingly, we find no merit in Bryant's arguments that this additional evidence warranted a finding that Grange was equitably estopped as a matter of law from asserting a defense of non-coverage against her in its amended answer.

Finally, and in any event, Bryant's claim of equitable estoppel must fail as it is axiomatic that a "contract of insurance cannot be created or enlarged by estoppel or waiver." *Old Republic Ins. Co. v. Begley*, 314 S.W.2d 552, 557 (Ky. 1958). Bryant's citation to *American Cas. Co. of Reading, Pa. v. Shely*, 314 Ky. 80, 234 S.W.2d 303 (1950), is without effect. In *Shely*, the Kentucky Supreme Court held estoppel arguments viable in cases "where an insurance company undertakes the defense of an accident case [since] the loss of the right by the insured to control and manage the case is itself a prejudice." *Id.* at 305. Grange undertook no defense of Bryant in this case, and Bryant never lost her right to control and manage her case. In fact, the opposite was true, as Bryant was afforded complete control and management of her case via the *Coots* procedure.

The *Shely* Court actually distinguished its facts from another case with facts most similar to the ones found here. *Id.* at 304. In a case out of Texas where the insured accidently shot himself in the leg and received insurance benefits for a period of eleven weeks prior to the insurer denying coverage to the insured, the *Shely* Court cited with approval the Texas Court's holding "that an accident insurer

does not, by paying disability benefits in respect of an injury not within the coverage of the policy, thereby render itself liable to continue to pay such benefits for the full stipulated period, since waiver is ineffectual to extend the coverage of a policy." *Id.*

In *Morgan v. Maryland Cas. Co.*, 458 S.W.2d 789 (Ky. 1970), the Kentucky Supreme Court rejected an estoppel claim in a case where the employer at first paid a worker benefits pursuant to a workers' compensation claim but then later denied coverage under the applicable statute after the statute of limitations had appeared to run on the workers' alternative common law claim. *Id.* at 790. In explaining its holding, the Court held that "[t]he office of an estoppel is not to work a positive gain to a party, and it does not create a new right or give a cause of action; rather, it serves to prevent losses otherwise inescapable." *Id.* at 790-791. In this case, it is undisputed that Bryant never had coverage under the UIM benefits section of the Grange insurance policy. Thus, estoppel was not available in this case to provide Bryant with benefits in excess of the $100,000 already advanced as there were no losses to prevent since Bryant was not entitled to UIM benefits in the first place.

Bryant argues that if she knew Grange intended to deny her UIM benefits in excess of the amount advanced, she never would have settled with the tortfeasor, Hopkins, for his policy limits, but rather she would have sought a full recovery from Hopkins beyond his policy limits. While Bryant's strategy may have been a miscalculation in hindsight, we do not find any evidence in this record

that would allow a jury to reasonably believe that Bryant's reliance on the availability of UIM benefits in excess of the amount advanced was the result of any false representations or concealment of material facts by Grange. To the contrary, it was Bryant not Grange who was in a better position to discover the dispositive fact concerning Bryant's residence at the time of the accident in this instance. As for any delays or confusion caused by Grange's erroneous admission in its initial answer, this could not have been prejudicial to Bryant since she had already waived her claims against Hopkins prior to the filing of this lawsuit by settling with Hopkins and accepting the substitution payment from Grange. *Raines*, 99 S.W.3d at 446.

Finding no reversible error in the trial court's failure to grant Bryant equitable relief in this case, the judgments of the Floyd Circuit Court entered on September 2, 2008, and October 30, 2008, dismissing Bryant's complaint against Grange for UIM benefits in excess of the amount already advanced and denying Bryant's motion for CR 59.05 relief, are hereby affirmed.

HENRY, SENIOR JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING: Respectfully, I dissent for the reasons set forth in *Nationwide Mut. Ins. Co. v. State Farm Auto. Ins. Co.*, 973 S.W.2d 56 (Ky. 1998). The fact that litigation has not commenced does not relieve an insurer such as Grange in this instance, of its duty to investigate claims made against it, which would include determining whether there actually was coverage.

The fact that Grange may have made a bad decision in this case should not permit it to renege on the bargain.

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