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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001737-MR

SHARON SPALDING — APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 12-CI-00312

AUTO-OWNERS INSURANCE COMPANY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, KRAMER AND STUMBO, JUDGES.

STUMBO, JUDGE: Sharon Spalding ("Appellant") appeals from an Order of the Marion Circuit Court granting Summary Judgment in favor of Auto-Owners Insurance Company ("Appellee"). As a basis for the Judgment, the court determined that Appellant failed to give Appellee notice of a liability settlement prior to asserting an underinsured motorist claim as required by Kentucky Revised Statute (KRS) 304.39-320(3) and *Coots v. Allstate Insurance Company*, 853

S.W.2d 895 (Ky. 1993). For the reasons stated below, we REVERSE the Summary Judgment on appeal and REMAND the matter for further proceedings.

On April 19, 2011, a vehicle operated by Bashia Robinson struck a moped operated by Appellant. Robinson was at fault in the accident. Appellant suffered a badly broken arm requiring surgery, and she incurred substantial medical bills. According to the record, Appellant suffers from some degree of dementia and memory loss which pre-existed the accident.

Appellant retained counsel, Dallas George, to represent her in any claims arising from the accident. George investigated the matter, and determined that Robinson had automobile insurance on the vehicle through Kentucky Farm Bureau with the statutory minimum limits of $25,000/$50,000. George, who would later testify by way of deposition, also learned that all of Appellant's motor vehicle insurance was purchased through Energy Insurance Agency of Lebanon ("Energy Insurance"). The moped operated by Appellant was insured by Progressive Insurance Company ("Progressive"). That policy did not provide Underinsured Motorist Coverage ("UIM").

Energy Insurance is owned by Brenda Spalding.[1] According to George, when his paralegal, Gloria George, inquired from Brenda Spalding whether Appellant had any UIM coverage, she responded that Appellant did not have any such coverage. Based on this purposed answer, George then secured a

[1] There is no indication in the record that Appellant is related to Brenda Spalding.

$25,000 settlement with Kentucky Farm Bureau on the liability claim against Robinson.

George later testified that in approximately April 2012, and after closing the settlement, he learned that Appellant owned a 2010 Ford Focus which had insurance coverage issued by Appellee and was purchased through Energy Insurance. He also determined that this policy carried limits of $100,000/$300,000 in UIM coverage. As a result of this discovery, and after the settlement with Kentucky Farm Bureau, George made a claim to Appellee seeking UIM coverage. This claim was made without George having given the 30-day *Coots* notice to Appellee prior to closing the Kentucky Farm Bureau settlement.[2] As a result of the failure to provide the *Coots* notice, Appellee denied the UIM claim.

Thereafter, Appellee initiated an action in Marion Circuit Court seeking a Declaratory Judgment holding that Appellant's failure to provide the *Coots* notice barred her claim for UIM benefits.[3] The matter proceeded through discovery, after which both parties filed Motions for Summary Judgment. After taking proof, the Marion Circuit Court rendered an Order on September 25, 2014, sustaining Appellee's Motion for Summary Judgment. As a basis for the Order, the

[2] *Coots* at p. 899 held that UIM coverage permits an insured to settle with the tortfeasor and his carrier for the limits of tortfeasor's liability coverage, provided that the insured notifies the UIM carrier of his intent to settle and gives the carrier the opportunity to protect its subrogation rights by paying the amount of contemplated settlement before release.

[3] The instant action was consolidated with a separate action between Appellant and Energy Insurance for the limited purpose of discovery. The separate action, styled 13-CI-96, was subsequently settled.

court determined that "[c]ompliance with the notice requirements of the statute [KRS 304.39-320(3)] is mandatory." This appeal followed.

Appellant now argues that the Marion Circuit Court erred in sustaining Appellee's Motion for Summary Judgment. The question for our consideration is whether Brenda Spalding's alleged failure to inform George of the Ford's UIM coverage, in conjunction with the other factors set out by Appellant such as Appellant's performance under the insurance contract by making premium payments, collectively operate as a waiver for the notice requirement set out in the statute and *Coots*. Appellant's argument centers on her contention that the Appellee is bound by the acts of its sales agent, and Appellee therefore cannot rely on the lack of a *Coots* notice as a basis for denying UIM coverage. Appellant directs our attention to statutory law providing that an individual who sells insurance is an agent of the carrier, KRS 304.9-020(1), and argues that it would be inequitable to allow Appellee to escape coverage under these circumstances. She goes on to argue that Appellee was not prejudiced by the settlement, and that the circuit court's apparent reliance on *Kentucky Farm Bureau Mutual Insurance Company v. Young*, 317 S.W.3d 43 (Ky. 2010), is misplaced. Appellant seeks an Order reversing the Summary Judgment on appeal, and remanding the matter with instructions to enter Summary Judgment on Appellant's Counterclaim.

KRS 304.39-320(3) states that,

> 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).

This notice provision is reaffirmed in *Coots*.

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, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id*. "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).

When viewing the record in a light most favorable to Appellant and resolving all doubts in her favor, we must conclude that Summary Judgment was improperly rendered. The matter before us focuses on inquires made by Attorney George and/or his paralegal Gloria George to Brenda Spalding and/or Energy Insurance regarding whether Appellant had UIM coverage. Appellee asserts that this inquiry represents a question of law rather than a question of fact, and in so doing contends that Brenda Spalding had no duty to correctly answer a question of law. In examining the limited record, however, we cannot discern if the Marion Circuit Court addressed this issue. That is to say, it has not been established whether Brenda Spalding's response to George's inquiry constituted an act of non-feasance which can be imputed to Appellee. An additional question of law exists as to whether this purported act of non-feasance, if imputed to Appellee, operates as a waiver to the *Coots* notice requirement. A mixed question of law and fact also remains as to whether Brenda Spalding, as owner of Energy Insurance, was an agent of Appellee. And finally, an additional question remains as to whether Appellant's failure to notify George that she owned the Ford Focus affects this calculus. According to George's deposition, Appellant never informed him that she

owned a Ford Focus, and he learned of it only after securing the settlement with Kentucky Farm Bureau on the liability claim against Robinson.

Because this matter reached us via Summary Judgment, we are bound to construe these issues in favor of the non-movant, Appellant, and to resolve all doubts in her favor. *Steelvest*, *supra*. That is to say, we must examine whether the Marion Circuit Court correctly concluded that there were no genuine issues of material fact, and that Appellee was entitled to a Judgment as a matter of law. *Scifres*, *supra.* Given the foregoing, and resolving all doubts in favor of Appellant, we cannot conclude that Appellee was so entitled.

Accordingly, we REVERSE the Summary Judgment of the Marion Circuit Court and REMAND the matter for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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