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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000460-MR

ANGELA JACKSON AND
LAMONT MARSHALL

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 15-CI-006537

THE ESTATE OF GARY DAY AND
USAA GENERAL INDEMNITY COMPANY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CLAYTON, AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: Angela Jackson and Lamont Marshall have appealed from the March 3, 2017, opinion and order of the Jefferson Circuit Court granting summary judgment in favor of the Estate of Gary Day and USAA General

Indemnity Company and dismissing their claims for damages. Finding no error in this ruling, we affirm.

The underlying cause of action arose from an automobile collision in February 2014 involving Marshall, the driver of one car, and Day, the allegedly at-fault driver of the other car. Jackson was a passenger in Marshall's vehicle. Marshall and Jackson sought damages from Day and underinsured motorist benefits from USAA, the insurance company with which Marshall had a policy of insurance. The defendants filed motions for summary judgment seeking dismissal of the complaint, which the court granted. Because the circuit court adequately and correctly set forth the facts and procedural history and properly applied the law in granting summary judgment, we shall adopt its opinion and order as our own:¹

This matter is before the Court upon the motion for summary judgment of Defendants, Gary Day (hereinafter, "Day") and USAA General Indemnity Company (hereinafter, "USAA"). After carefully considering and thoroughly reviewing the record, parties' arguments, and applicable law, the Court will grant the motion.

OPINION

On February 15, 2014, Plaintiffs, Angela Jackson (hereinafter, "Jackson") and Lamont Marshall (hereinafter, "Marshall") allegedly received injuries after a vehicle driven by Day struck their vehicle. A liability policy with State Farm Automobile Insurance Company (hereinafter, "State Farm") covered Day's vehicle. USAA covered the vehicle of Jackson and Marshall with an insurance policy providing Basic Reparation Benefits (hereinafter, "BRB") and Underinsured Motorist's (hereinafter, "UIM") benefits. Marshall received his last

¹ We shall omit citations to the record included in the opinion and order.

BRB payment on May 25, 2014. Jackson received her last BRB payment on June 23, 2014. Pursuant to [Kentucky Revised Statutes (KRS)] 304.39-230, the statute of limitations on their claims against Day expired in mid 2016.

On December 29, 2015, Jackson and Marshall filed suit against Day, who, unbeknownst to them, had died intestate on December 31, 2014. On March 8, 2016, Jackson and Marshall filed an Amended Complaint adding USAA as a Defendant for UIM benefits. In April 22, 2016, a paralegal for Jackson and Marshall, engaged in correspondence with a claims adjuster with State Farm about the claims against Day. The same day, the paralegal received an email from Zachary Richards (hereinafter, "Richards") who allegedly informed her that he had been retained to represent Day. There is no evidence in the record showing that either State Farm or Richards were aware that Day was deceased at this time.

After multiple unsuccessful attempts to serve Day, Kevin Duckworth (hereinafter, "Duckworth") was appointed special bailiff. On August 12, 2016, Duckworth reported to Jackson and Marshall that he had spoken to Day's ex-wife and learned that Day was deceased. Duckworth also reported that Day's ex-wife had alleged that she had received letters from an attorney regarding a car accident and that she had responded back that Day was deceased. The identity of this attorney is not contained in the record, but the record demonstrates that Jackson and Marshall reported this information to Richards on August 25, 2016.

On [August] 19, 2016, Jackson and Marshall petitioned the Probate Court to appoint the Public Administrator as the Administrator for the Day's Estate (hereinafter, "the Estate"). On November 1, 2016, Jackson and Marshall filed a Third Amended Complaint naming the Estate as a Defendant, and the Estate retained Richards. The Defendants then collectively moved for summary judgment, arguing that the claims were time barred. Defendant USAA further argued that the

inability to recover against the tortfeasor precluded Jackson's and Marshall's claim for UIM benefits.

ANALYSIS

Summary judgment should be granted when there is "no genuine issue as to any material fact," and "the moving party is entitled to a judgment as a matter of law." [Kentucky Rules of Civil Procedure (CR)] 56.03. In determining whether to grant a motion for summary judgment, the Court must view the record "in a light most favorable to the party opposing the motion[,] 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). "Only when it appears impossible for the nonmoving party to produce evidence at trial warranting judgment in his favor should the motion for summary judgment be granted." Id. at 482. Trial judges are forbidden from weighing the evidence. Welch v. American Publishing Co. of KY, 3 S.W.3d 724, 730 (Ky. 1999).

1. The Claims Against the Estate are Time Barred

A cause of action for injuries sustained in an automobile accident must be brought no later than two years after the injury, or the date the last BRB payment is made, whichever occurs later. KRS 304.39-230(6). Under the plain language of the statute, therefore, Jackson and Marshall timely filed suit against USAA, but not against the Estate. However, an amended complaint changing the party against whom a claim is asserted relates back to the date the original complaint is filed if the party brought in by amendment "(a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits" and "(b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." CR 15.03(2).

The argument that the claims against the Estate are time barred relied on the theory of the nullity of

complaint against a deceased party. Gailor v. Alsabi, 990 S.W.2d 597, 599 (Ky. 1999). In that case, the plaintiff was injured in a car accident on June 3, 1991. On February 3, 1994, one day before the statute of limitations expired, the plaintiff filed suit against the at-fault driver, who had died intestate on February 5, 1992. Id. at 600. On January 19, 1995, plaintiff filed an Amended Complaint substituting the tortfeasor's estate as the Defendant. Id. The trial court entered summary judgment in favor of the estate on the grounds that the plaintiff's claim was barred by the two-year statute of limitations. Id. The Kentucky Supreme Court affirmed:

[T]he period of limitations with respect to this cause of action expired on February 4, 1994, one day after the original complaint was filed. KRS 446.030(1)(a); *Derossett v. Burgher*, Ky., 555 S.W.2d 579 (1977). Although the action was filed within the period of limitations, the only defendant named in the complaint was deceased. **Since the complaint did not name a party defendant over whom the circuit court could acquire jurisdiction, the complaint was a nullity.** *Ratliff v. Oney*, Ky.App., 735 S.W.2d 338 (1987); *Mitchell v. Money*, Ky.App., 602 S.W.2d 687 (1980). The amended complaint was filed long after the expiration of the period of limitations.

Id. (emphasis added). The Supreme Court further held that the amended complaint could not relate back to the date of the original complaint because the Estate could not have known that an action would have been brought against it within the limitations period because the Estate did not even exist as a legal entity prior to the expiration of the statute of limitations. Id. at 601.

Jackson and Marshall argued that this case is distinguishable from Gailor because they brought suit within the limitations period against a defendant over whom the Circuit Court could acquire jurisdiction – namely, USAA. Thus, they contended that their

Complaint, unlike the plaintiff's complaint in Gailor, was not a legal nullity and not time barred under KRS 304.39-230(6). In the alternative, Jackson and Marshall argued that the Third Amended Complaint should relate back to the original because the record shows that Richards was aware of their attempt to make a claim against Day. They contend that Richards at least should have known that suit would have been brought against the Estate but for the lack of any reasonably discoverable evidence Day was deceased.

Defendants collectively replied that the Kentucky Court of Appeals had already rejected Jackson's and Marshall's first argument, albeit in an unpublished decision. Hendrix v. Holbrook, 2008-CA-001917-MR, 2010 WL 135122, at *1 (Ky. App. Jan. 15, 2010). Regarding the argument that Richards' knowledge should be imputed to the Estate for relation back purposes, they contended that Richards was not a party to the action and had no authority to act on the Estate's behalf within the applicable statute of limitations.

In Hendrix, the plaintiff was involved in a two-vehicle accident and filed a complaint naming the allegedly at-fault driver and his UIM carrier as defendants. However, the tortfeasor died before plaintiff filed the complaint. The plaintiff did not add the tortfeasor's estate as a defendant before the statute of limitations expired. Id. Even though the plaintiff timely brought suit against his UIM carrier, the Court of Appeals found that the case was "nearly identical" to Gailor and affirmed the trial court's entry of summary judgment. Id. at *3.

In this case, even though the unpublished case appears on point, no reliance on Hendrix is necessary because the Kentucky Supreme Court's opinion in Gailor compels the Court to find that Jackson and Marshall failed to bring suit before the statute of limitations expired. While they may have timely filed suit against their UIM carrier, the Court believes that fact is a distinction without a difference. The Supreme Court's decision in Gailor was based upon its finding that the

tortfeasor's estate could not have acquired knowledge that suit would have been brought against it because it did not exist as a legal entity within the applicable limitations period. Nothing in the opinion suggests that its holding would have been different had the plaintiff timely brought suit against his UIM insurer.

The Court also does not find that Richards['] knowledge, if any, of Day's death permits it to find that the Third Amended Complaint relates back to the date of the original. Jackson and Marshall have not cited, and the Court has not found, any case supporting the proposition that an attorney's knowledge can be imputed to a *future* client that did not even exist as a legal entity within the applicable statute of limitations.

2. Failure to Bring Suit Against the Estate Before the Statute of Limitations Expired Precludes Recovery of UIM Benefits

The Motor Vehicle Reparations Act (hereinafter, "MVRA") defines an underinsured motorist as "[a party with motor vehicle liability insurance coverage in an amount less than a judgment recovered against that party for damages on account of injury due to a motor vehicle accident.]" KRS 304.39-320(1). UIM coverage exists "without regard to whether the obligation of the tortfeasor can be reduced to judgment." Coots v. Allstate Ins. Co., 853 S.W.2d 895, 898 (Ky. 1993). Thus, "the liability of the tortfeasor and the amount of damages sustained are elements that must be established in measuring the UIM carrier's obligation and not a statutory precondition to coverage." Id. [at 899.] Moreover, settlement with the tortfeasor does not abrogate UIM coverage "so long as the UIM insured notifies his UIM carrier of his intent to [settle] and provides the carrier an opportunity to protect its subrogation. . . ." Id. at 900.

However, the insured is not entitled to payments under his UIM policy that he could not recover against the tortfeasor. The Kentucky Supreme Court explained this principle in a case in which it affirmed the trial

court's order deducting the amount the plaintiff received in worker's compensation [claim] from a jury verdict against the plaintiff's UIM carrier:

The UIM carrier and the tortfeasor are "codebtors *in solido*," *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895, 902 (Ky. 1993), *i.e.*, they are jointly and severally liable for damages recoverable as a result of the tortfeasor's negligence. *Black's Law Dictionary* 799 (7th ed. 1999) (defining "*in solido*"). The UIM carrier's liability is measured by the liability of the tortfeasor and the amount of the tortfeasor's insurance or lack thereof. *Coots*, 853 S.W.2d at 902.

[T]he purpose and intent of the uninsured [and underinsured] motorist statute is to treat the insured victim as if the tortfeasor is insured. Hence, the UM [and UIM] carrier stands in the wrongdoer's shoes for purposes of paying damages

.....

Robertson v. Vinson, 58 S.W.3d 432, 434 (Ky. 2001) (citations and quotations omitted). Thus, in *Kentucky Farm Bureau Mutual Insurance Co. v. Ryan*, 177 S.W.3d 797 (Ky. 2005), where liability was apportioned 50% against an underinsured motorist and 50% against an unidentified motorist, the UIM carrier was liable for only 50% of the excess damages over and above the underinsured motorist's liability policy limits. *Id.* at 804. KRS 304.39–320(2) requires "every insurer" to make available upon request UIM coverage to pay "for such uncompensated damages as he may recover on account of injury due to a motor vehicle accident because the judgment recovered against the owner of the other vehicle

exceeds the liability policy limits thereon” (Emphasis added.) In other words, the UIM carrier is liable only for damages for which the insured would have been compensated but for the fact that the tortfeasor was underinsured. It follows that if the underinsured tortfeasor could not be held liable for an item of damages, that item is not “uncompensated damages” payable by the UIM carrier. The UIM carrier is liable for damages only to the extent to which the underinsured tortfeasor is or could have been held liable.

Furthermore, although not exercised in this case, a UIM carrier has a statutory right of subrogation against the underinsured tortfeasor for any sums it pays to the plaintiff, KRS 304.39–320(4), and that right is derivative of the plaintiff's rights. *Wine v. Globe Am. Cas. Co.*, 917 S.W.2d 558, 566 (Ky. 1996) (“All subrogation rights are derivative and the insurer only acquires the rights of its insured.”); *Fireman's Fund Ins. Co. v. Gov't Employees Ins. Co.*, 635 S.W.2d 475, 476 (Ky. 1982) (“[A] compensation carrier's rights against a third-party tortfeasor are entirely derivative, and are not independent of the injured party's tort claim.”), *overruled on other grounds by Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 817 (Ky. 1991). Thus, if Samples could not recover damages against Howton that duplicated his workers' compensation benefits, neither could Cincinnati recover such damages against Howton as Samples's subrogee.

It follows from these principles that Samples's right to damages against Cincinnati are no greater than his rights against Howton. The purpose of UIM coverage is to place the insured in the same

position he would have occupied had the tortfeasor been fully insured, *Robertson*, 58 S.W.3d at 434, not in a better position. Samples could not recover damages duplicating his workers' compensation benefits against Howton; thus, he cannot recover those same damages against Cincinnati.

Cincinnati Ins. Co. v. Samples, 192 S.W.3d 311, 315-16 (Ky. 2006) [footnote omitted].

Applying the logic that UIM coverage only places the insured in the same position he would have been had the at-fault driver been fully insured, USAA argued that a time-barred claim against the tortfeasor precludes recovery of UIM benefits. USAA contended that any other construction of the UIM statute would effectively eliminate its right to subrogation. Jackson and Marshall responded that they were required to prove only that Day was a tortfeasor and the amount of damages they sustained. They contended that any other construction of the MVRA would contravene Kentucky policy that neither a judgment nor settlement with the tortfeasor is necessary to obtain UIM benefits.

On this point, the Court agrees with USAA. First, the tortfeasor's liability is an element of a UIM claim. See Coots, 853 S.W.2d at 898. In this case, the tortfeasor, Day, is not liable based upon the Court's finding regarding the statute of limitations. Second, Kentucky case law requires the insured to pursue settlement against the tortfeasor in a way that does not eliminate the UIM carrier's right to subrogation. Id. at 902-03. The Court sees no reason why he should not also be required to pursue his claim in a way that prevents the tortfeasor from raising any affirmative defenses that would similarly defeat the UIM carrier's right to subrogation.

Accordingly, the circuit court granted summary judgment and dismissed the complaint and amended complaints against USAA and the Estate of Gary Day. We find no error of law in this ruling.

In addition, while we agree that the result in this case appears harsh, we reject the appellants' argument that dismissal of their claims would result in unnecessary injustice. This argument is based upon Justice Liebson's dissenting opinion in *Nolph v. Scott*, 725 S.W.2d 860 (Ky. 1987), which does not represent the rule of law as set forth in the majority opinion.

For the foregoing reasons, the opinion and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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