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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000025-MR

KENTUCKY FARM BUREAU INSURANCE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 07-CI-001263

JOYCE & SONS, INC.;
RODGER WEIHE; AND
SHARON WEIHE — APPELLEES

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: Kentucky Farm Bureau Insurance Company (Farm Bureau) appeals from the trial court's summary judgments dismissing its subrogation claims. On appeal, Farm Bureau argues that it timely filed its complaint against Joyce & Sons, Inc. (Joyce & Sons) and that the trial court erred in finding that it

had not done so. Farm Bureau also argues that Joyce & Sons should have been estopped from asserting the statute of limitations as a defense because it opposed Farm Bureau's motion to intervene. For the reasons set forth below, we affirm in part, vacate in part, and remand.

FACTS

The underlying facts are not in dispute. Rodger and Sharon Weihe (the Weihes) hired Joyce & Sons to perform electrical work in the garage of their residence, which Joyce & Sons performed on December 17, 2004. The day after Joyce & Sons performed that work, the garage caught fire, damaging the structure and destroying personal property. The Weihes reported their loss to their insurer, Farm Bureau, and Farm Bureau paid the Weihes $74,690.06 for personal property loss and $33,372.06 for damage to the garage/residence. Two lawsuits arose from these underlying facts, and the resultant cases were assigned to separate divisions in the Jefferson Circuit Court. In an attempt to clarify some procedural complications at the trial court level, we will set forth the facts in each lawsuit separately by Division.

1. The Division Six Action

On December 16, 2005, the Weihes filed suit against Joyce & Sons. That case was assigned to Judge McDonald in Division Six of the Jefferson Circuit Court and will be referred to hereinafter as "the Division Six action."

On December 18, 2006, Farm Bureau filed a motion to intervene in the Division Six action pursuant to Kentucky Rule of Civil Procedure (CR) 24.

Coincidentally, that motion to intervene was filed the same day the Weihes and Joyce & Sons reached a mediated settlement of the Division Six action. On January 2, 2007, Judge McDonald denied Farm Bureau's motion to intervene noting that it was "untimely" and that the "[c]ase already settled via mediation." On January 2, 2007, Judge McDonald also signed an agreed order of dismissal again noting the settlement.

On March 8, 2007, Farm Bureau filed a motion to set aside Judge McDonald's January 2, 2007, order arguing that it had an absolute right to intervene and that it had timely sought to assert that right. Farm Bureau also moved the court to consolidate the Division Six action with another action it had filed in Division Ten. With its motions, Farm Bureau filed a typewritten order granting its motions for Judge McDonald's use. Rather than preparing a separate order, Judge McDonald wrote "Motion considered & denied 3-12-07" at the bottom of the order proffered by Farm Bureau and he affixed his signature. Farm Bureau did not file an appeal from Judge McDonald's March 12, 2007, order.

2. The Division Ten Action

On February 5, 2007, Farm Bureau filed suit against Joyce & Sons, asserting its right to subrogation. This lawsuit was assigned to Judge Montano in Division Ten and will be referred to hereinafter as "the Division Ten action." At the outset of our discussion of the Division Ten action, we note that while this action was pending, Judge Montano died. Following her unfortunate and premature death, Judges Shake, Mershon, and Maze all issued orders in the

Division Ten action. In an attempt to clarify what took place in the Division Ten action, we will, as necessary, identify orders by date and issuing judge.

On June 21, 2007, Joyce & Sons filed a motion to file a third party complaint against the Weihes in the Division Ten action. In that complaint, Joyce & Sons asserted that the Weihes had agreed to indemnify it against any claims for subrogation asserted by Farm Bureau. Judge Montano granted Joyce & Sons's motion and joined the Weihes to the Division Ten action.

On September 20, 2007, Joyce & Sons filed a motion for partial summary judgment. In its motion, Joyce & Sons argued that Farm Bureau filed its claim for subrogation related to personal property damage after expiration of the statute of limitations set forth in Kentucky Revised Statute (KRS) 413.125. In its response, Farm Bureau argued, as it does here, that: (1) it timely filed the subrogation action under the "savings statute," KRS 413.270; and (2) Joyce & Sons is estopped from relying on the statute of limitations.

On December 10, 2007, Judge Montano granted Joyce & Sons's motion and dismissed Farm Bureau's claims for property damage in the Division Ten action. In her order, Judge Montano mistakenly stated that Judge McDonald's March 12, 2007, order in the Division Six action granted Farm Bureau's motion to set aside, in effect permitting intervention, and consolidated the Division Six and Division Ten actions.[1] This mistaken interpretation of Judge McDonald's March 12, 2007, order formed, in part, the basis for Judge Montano's order. However, we

[1] It appears that Judge Montano read the typed portion of the order but not the handwritten portion.

note that Judge Montano also stated that KRS 413.270 was not applicable and did not extend Farm Bureau's statute of limitations. Therefore, Judge Montano found that Farm Bureau had not timely filed its complaint for damages relative to personal property, and she dismissed that portion of Farm Bureau's claim.

On April 14, 2008, Joyce & Sons filed a second motion for summary judgment. In that motion, Joyce & Sons sought dismissal of the remainder of Farm Bureau's claims, arguing that the Weihes had contractually agreed to indemnify it for any damages sought by Farm Bureau by way of subrogation. Therefore, Joyce & Sons could have no liability to Farm Bureau. The parties agreed that Farm Bureau would have until June 16, 2008, to file a response; however, they apparently neglected to inform the court of this agreement. On June 5, 2008, Judge Shake, who was the first judge to step into the case after Judge Montano's death, signed an order granting Joyce & Sons's motion. For reasons that are unclear, that order was not entered until June 20, 2008. In the interim, Joyce & Sons filed a motion for leave to file an extended reply brief. Judge Shake granted that motion.

After granting Joyce & Sons's motion to file an extended brief, Judge Shake apparently became aware that a response to Joyce & Sons's motion for summary judgment existed and that she had not considered it. Therefore, on July 11, 2008, Judge Shake sent correspondence to all counsel indicating that, although she had received a number of pleadings, she had not received a response from Farm Bureau to Joyce & Sons's motion for summary judgment. She stated that she had entered an order of dismissal on June 20, 2008, and that "[a]s the record now

stands, the case has been adjudicated on the merits." However, she indicated that, "[i]n the event there was a Response timely filed which may have been misfiled the court [would] reconsider the grant of judgment."

On July 16, 2008, Farm Bureau filed a motion asking Judge Shake to set aside her June 20, 2008, order granting summary judgment. Farm Bureau attached a copy of its response to Joyce & Sons's motion. In that response, Farm Bureau, for the first time, also sought reconsideration of the December 10, 2007, order from Judge Montano granting Joyce & Sons's motion for summary judgment regarding personal property.

On August 12, 2008, Judge Mershon, the second judge to step in for Judge Montano, entered an order setting aside Judge Shake's June 20, 2008, order and scheduling a hearing on all pending motions. Following that hearing, Judge Maze, the third and final judge to step in for Judge Montano, entered an order on November 7, 2008. In that order, Judge Maze stated at the outset that he would not set aside the findings of either Judge Montano in her December 10, 2007, order or Judge Shake in her June 20, 2008, order.[2] In doing so, Judge Maze stated that Judge Shake, in her July 11, 2008, correspondence stated "that the case had been adjudicated on the merits and that there was nothing to reconsider on behalf of Kentucky Farm Bureau." We note that this language appears to ignore Judge Shake's statement that she would reconsider her order granting summary judgment

[2] We note that Judge Maze refers to Judge Shake's order as being dated June 20, 2006, and June 5, 2008. However, it is clear from his order as a whole that Judge Maze is referring to Judge Shake's June 20, 2008, order.

if Farm Bureau had timely filed a response. It also appears to ignore Judge Mershon's August 12, 2008, order vacating Judge Shake's June 20, 2008, order. At the end of his order, Judge Maze states that he is "of the same opinion" as Judge Shake. Therefore, it is unclear if Judge Maze reviewed the record and came to an independent conclusion, simply adopted Judge Shake's findings, or refused to set aside Judge Shake's findings.

With regard to Farm Bureau's motion to vacate Judge Montano's December 10, 2007, order, Judge Maze noted that Judge Montano's order mistakenly stated that Judge McDonald had permitted Farm Bureau to intervene and that the Division Six and Division Ten actions had been consolidated. However, Judge Maze stated that neither misstatement was determinative. According to Judge Maze, Farm Bureau's claim for damages with respect to personal property was not timely filed, and Judge Montano's misstatements did not alter that fact.

Farm Bureau filed a motion to set aside, which Judge Maze denied on January 5, 2009. It is from Judge Maze's November 7, 2008, and January 5, 2009, orders, as well as Judge Montano's December 10, 2007, and Judge Shake's June 20, 2008, orders that Farm Bureau appeals.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson*

ex rel. Trent v. Nat'l Feeding Systems, Inc., 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Id.* at 480.

ANALYSIS

Because there are a number of orders involved in this appeal, we will analyze each separately, although not in chronological order.

1. Judge Shake's June 20, 2008, Order

Judge Mershon's August 12, 2008, order set aside Judge Shake's June 20, 2008, order. Therefore, Judge Shake's June 20, 2008, order was no longer effective after August 12, 2008, and was not subject to appeal.

2. Judge Maze's November 7, 2008, and January 5, 2009, Orders

First, we note that the portion of Judge Maze's November 7, 2008, order that states he will not set aside Judge Shake's June 20, 2008, order is erroneous. At the time Judge Maze entered his November 7, 2008, order, Judge Shake's order had already been set aside.

Second, Judge Maze mistakenly interpreted Judge Shake's July 11, 2008, correspondence as indicating that she saw no reason to reconsider her June 20, 2008, order. As noted by Farm Bureau and as set forth above, Judge Shake

indicated that, if a response had been timely filed, she would have reconsidered her order. Therefore, to the extent Judge Maze's November 7, 2008, order is premised on this mistaken interpretation of Judge Shake's correspondence, it is in error.

Third, Judge Maze states in his November 7, 2008, order that:

> the Honorable Judge Ann Shake reviewed the various orders and opinions that were previously issued in this matter and concluded that they were correct. As such, Judge Shake sustained Joyce & Son's [sic] motion for Summary Judgment on the remaining claims, dismissing them with prejudice in an effort to conclude the litigation.

Based on our review of the record, in particular Judge Shake's June 20, 2008, order and her July 11, 2008, correspondence, it is not clear that Judge Shake reviewed any of the prior orders or concluded that they were correct. In fact, Judge Shake was not asked to perform any such review or to reach any such conclusion. The only matter pending before Judge Shake was Joyce & Sons's second motion for summary judgment. Therefore, to the extent that Judge Maze relied on the mistaken belief that Judge Shake had reviewed or ruled on the correctness of any prior orders, his November 7, 2008, order is in error. We will discuss the implications of this and the other errors in Judge Maze's order after we discuss Judge Montano's December 10, 2007, order.

Fourth, in his November 7, 2008, order, Judge Maze correctly concluded that Judge Montano's misstatements of the facts related to the Division Six action were not determinative.

Fifth, Judge Maze correctly concluded in his November 7, 2008, order and his January 5, 2009, order that Judge Montano appropriately dismissed Farm Bureau's claims with respect to personal property. We will further discuss this and the immediately preceding holding in our analysis of Judge Montano's December 10, 2007, order.

3. Judge Montano's December 10, 2007, Order

As noted above, Joyce & Sons filed a motion for partial summary judgment in the Division Ten action. In its motion, Joyce & Sons asked Judge Montano to dismiss that portion of Farm Bureau's claim related to personal property damage, arguing that said claim was not timely filed. In her December 10, 2007, order granting Joyce & Sons's motion, Judge Montano incorrectly interpreted Judge McDonald's March 12, 2007, order as permitting Farm Bureau's intervention in the Division Six action and as consolidating the Division Six and Division Ten actions. However, as found by Judge Maze, that incorrect interpretation of Judge McDonald's March 12, 2007, order is not dispositive. Reading Judge Montano's December 10, 2007, order as a whole, it is clear that she granted Joyce & Sons's motion based on the statute of limitations, not on whether Farm Bureau had any other venue for relief. Therefore, we will not further address Judge Montano's mistaken interpretation of Judge McDonald's order.

Setting the preceding aside, Farm Bureau argues that KRS 413.270 provided it with additional time following Judge McDonald's January 2, 2007, order to file its complaint. We disagree.

Kentucky Revised Statute (KRS) 413.270(1) provides that:

> If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety (90) days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation.

Farm Bureau argues that Judge McDonald denied its motion to intervene because he "clearly believed that [he] had no authority to consider [Farm Bureau's] subrogation claim because the underlying matter settled prior to the hearing." According to Farm Bureau, this places its claim "squarely within the parameters" of KRS 413.270(1). To determine if this is correct, we must first look to Judge McDonald's order, which simply states, "Motion denied as untimely. Case already settled via mediation." The order states that the motion was denied because it was not timely filed, not because the court lacked jurisdiction. Furthermore, we note that Judge McDonald did not sign the agreed order of dismissal until January 2, 2008, the same day he signed the order denying Farm Bureau's motion to intervene. Therefore, Judge McDonald retained jurisdiction to rule on Farm Bureau's motion and there is nothing in the record, other than counsel's supposition, indicating that Judge McDonald thought otherwise.

Having determined that Judge McDonald's order does not mention jurisdiction, we must next look to the case law interpreting KRS 413.270, to

determine if the order otherwise falls within the purview of "jurisdiction." Farm Bureau argues that jurisdiction should be "interpreted broadly" to include a number of issues. We agree. In *Dollar General Stores, Ltd. v. Smith,* 237 S.W.3d 162 (Ky. 2007), the Supreme Court of Kentucky held that KRS 413.270(1) extends to dismissals for lack of jurisdiction, improper venue, and forum *non conveniens*. In *Rooks v. University of Louisville*, 574 S.W.2d 923 (Ky. App. 1978), *overruled on other grounds*, *Guffey v. Cann*, 766 S.W.2d 55 (Ky. 1989), this Court stated that KRS 413.270(1) extends to a case that was dismissed from circuit court because it should have been filed in the Board of Claims. In *Ockerman v. Wise*, 274 S.W.2d 385 (Ky. 1954), the Court determined that KRS 413.270(1) applies to actions filed in federal court subsequently dismissed due to lack of diversity. However, none of these cases indicate that an intervening party whose claim is, in effect, dismissed for failure to timely file a motion to intervene, is protected by KRS 413.270(1). Making such an interpretation would stretch the definition of jurisdiction beyond all reasonable bounds, and we refuse to do so.

Furthermore, we do not give any credence to Farm Bureau's argument that Judge McDonald's order amounted to a dismissal based on jurisdiction. If Judge McDonald had dismissed the Division Six action based on jurisdiction, or even on venue or forum *non conveniens*, he could have stated as much. Absent that language, Farm Bureau could have sought modification of the order, which it did not do. Finally, Farm Bureau has not set forth with any specificity what jurisdictional problem existed that would have mandated dismissal. As noted by

Joyce & Sons, Farm Bureau chose the exact same jurisdiction, venue, and forum to file its complaint; therefore, it does not appear that any of these were problematic.

Based on the foregoing, we hold that KRS 413.270(1) did not extend the time period within which Farm Bureau was required to file its claim relative to personal property damage.

Next we must address Farm Bureau's equitable estoppel argument. As we understand it, Farm Bureau is arguing that Joyce & Sons should have been foreclosed from making a statute of limitations argument in the Division Ten action because it objected to Farm Bureau's motion to intervene in the Division Six action.

> The essential elements of equitable estoppel are:
>
> > (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) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Gosney v. Glenn, 163 S.W.3d 894, 899 (Ky. App. 2005) (*citing Smith v. Howard*, 407 S.W.2d 139, 143 (Ky. 1996)).

Farm Bureau argues that Joyce & Sons should have been estopped from asserting the statute of limitations for three reasons. First, Farm Bureau

complains that Joyce & Sons did not notify it of the settlement prior to the hearing on Farm Bureau's motion to intervene. The problem with this argument is that Farm Bureau has not delineated how, if it had known that the parties had settled, it would have altered its behavior. Furthermore, Farm Bureau has not put forth any affidavits or other proof indicating that Joyce & Sons failed to notify Farm Bureau of the settlement with the expectation of altering Farm Bureau's behavior.

Additionally, Farm Bureau has not indicated how it lacked the means of finding out about the settlement. Farm Bureau knew of the loss for nearly two years and chose not to file suit in its own name or to intervene in the Division Six action. If Farm Bureau had taken either step, it would have known how the Division Six action was proceeding and could have monitored its progress and participated in the litigation. Furthermore, Farm Bureau knew the names of the attorneys representing the parties in the Division Six action because it served them with its motion to intervene. Farm Bureau has not indicated what kept it from simply contacting one of the attorneys and asking about the status of the case.

In support of this portion of its argument, Farm Bureau cites several cases. *Harris v. Jackson,* 192 S.W.3d 297 (Ky. 2006) involved a motor vehicle accident. During the course of litigation, the defendant died. Counsel for the defendant did not advise the plaintiff of his client's death although he continued to participate in the litigation on behalf of his deceased client. A year after his client's death, counsel moved for dismissal, arguing that the plaintiff had not revived the claim in the name of the defendant's estate. The Supreme Court held

that an attorney has a duty to advise the other parties of the death of a client. Because counsel for the defendant did not comply with that duty, he was estopped from asserting that the Plaintiff had not timely filed to revive the claim.

The case herein is distinguishable in at least two ways. First, unlike the plaintiff in *Harris*, Farm Bureau was not a party to the Division Six action the day the Weihes and Joyce & Sons undertook mediation and settled. Farm Bureau has pointed to no case law that imposes a duty on litigants to inform a non-litigant that a case has settled. Second, counsel for the Weihes stated at the hearing on Farm Bureau's motion to intervene and at the hearing on its motion to set aside, that he had advised the adjuster at Farm Bureau that the mediation was going to take place and that he talked to the adjuster the day of the mediation. Therefore, unlike the plaintiff in *Harris,* who had no knowledge of the defendant's death, Farm Bureau knew that settlement was, if not imminent, certainly possible. Because Farm Bureau chose to wait until the day of the mediation to file its motion to intervene, knowing in advance that the mediation was scheduled to take place, it cannot now complain about the negative impact of that delay.

In *Akers v. Pike County Bd. of Educ.*, 171 S.W.3d 740 (Ky. 2005), the plaintiff argued that the Department of Workers' Claims had not, as mandated by law, appropriately notified him of his statute of limitations. The Supreme Court cited the elements of equitable estoppel and held that nothing in the record compelled a finding that the Pike County Board of Education had acted to the detriment of the plaintiff. *Akers* can be distinguished because, unlike herein, the

Pike County Board of Education had a statutorily imposed duty to notify the Department when it stopped making temporary total disability benefits. Likewise, the Department had a statutorily imposed duty to advise the plaintiff of his statute of limitations. Farm Bureau has cited to no case law or statute that requires parties to litigation to advise a non-party that they have reached a settlement. Therefore, *Akers* is not persuasive.

In *Harralson v. Monger*, 206 S.W.3d 336 (Ky. 2006), the parties were involved in a multi-vehicle accident. Jacobs, one of the drivers, gave misleading and incomplete information to the police who investigated the accident, pointing the blame toward Monger. However, when deposed, after the statute of limitations had expired, Jacobs provided additional information indicating that he, not Monger, was at fault. Harralson then filed a motion to amend his complaint to add Jacobs as a defendant. The court granted that motion but subsequently dismissed the amended complaint as untimely. The Supreme Court reversed the trial court. In doing so, the Court noted that Jacobs had a duty to provide the police officers with accurate information at the time of the accident. The Court held that Jacobs could not then benefit from his violation of that duty by obtaining a dismissal of Harralson's claims against him. In *Harralson,* the estopped party, Jacobs, had a duty that he violated. As noted above, Farm Bureau has cited no case law or statute that imposed a duty on Joyce & Sons to notify it of the settlement. Therefore, *Harralson* has no application to this matter.

Second, it appears that Farm Bureau is arguing that, by filing its motions for summary judgment in the Division Ten action, Joyce & Sons acted inconsistently with its objection to intervention in the Division Six action. We are somewhat confused by this argument. Joyce & Sons wanted to prevent Farm Bureau from intervening in the Division Six action and wanted the court to dismiss Farm Bureau's claims in the Division Ten action. Because Joyce & Sons wanted to be rid of Farm Bureau in both actions, we believe these positions are consistent.

Furthermore, we do not believe that the case cited by Farm Bureau to support its argument, *Colston Investment Co. v. Home Supply Co.*, 74 S.W.3d 759 (Ky. App. 2001) is instructive. In *Colston*, Home Supply Co. (Home Supply) owned two hotels, both called Executive Inn. Colston Investment Co. (Colston) opened two hotels, which it named Executive Studios & More. Home Supply sued Colston for trademark infringement and the trial court found in Home Supply's favor. On appeal, Colston argued that Home Supply should have been judicially estopped from bringing the action because, in a lawsuit thirty years earlier, Home Supply had asserted that "executive" was not unique enough to warrant protection. This Court affirmed the trial court. In doing so, we noted that a party may not take a position that is inconsistent with one successfully and unequivocally asserted in a prior proceeding. However, a party asserting judicial estoppel must show that the earlier court adopted the earlier position. Unfortunately for Colston, Home Supply had settled the earlier lawsuit; therefore, that court had not adopted Home Supply's position.

Unlike the first proceeding in *Colston*, Judge McDonald did adopt Joyce & Sons's argument that Farm Bureau had not timely filed its motion to intervene. However, as we previously noted, we do not believe that Joyce & Sons's argument in the Division Six case, that Farm Bureau was too late in seeking to intervene, is inconsistent with its position that Farm Bureau filed its Division Ten action too late. Therefore, *Colston* is not applicable.

Third, Farm Bureau argues that Joyce & Sons "may not benefit from its own conduct that resulted in the denial of [Farm Bureau's] motion to intervene." According to Farm Bureau, it was entitled to intervene in the Division Six action and "Joyce & Sons persuaded the trial court to deny the intervention." Farm Bureau may be correct that the trial court should have granted its motion to intervene; however, it did not appeal Judge McDonald's order. Therefore, it is too late to complain about his denial of that motion.

CONCLUSION

Farm Bureau filed its complaint against Joyce & Sons more than two years after the personal property loss, which is untimely. Nothing that preceded Farm Bureau's filing of that complaint acted to trigger the provisions of KRS 413.270(1) or to extend the statute of limitations. Furthermore, Farm Bureau has not put forth sufficient evidence to support its claim that Joyce & Sons should have been equitably estopped from asserting the statute of limitations. Therefore, we affirm Judge Montano's summary judgment dismissing Farm Bureau's property

damage claims. Furthermore, we affirm Judge Maze's denial of Farm Bureau's motion to set aside Judge Montano's summary judgment.

Because of the confusion revolving around Joyce & Sons second motion for summary judgment and the orders dealing with that motion, we can neither affirm nor reverse. We must vacate and remand for clarification from the trial court. In doing so, we note the errors in Judge Maze's November 7, 2008, order discussed above. Because of those errors, it is unclear if Judge Maze made an independent review of the matter or simply relied on Judge Shake's June 20, 2008, order. As noted, by the time Judge Maze rendered his order, Judge Shake's June 20, 2008, order had been set aside. Therefore, any reliance on that order was error and must be corrected.

Furthermore, it is unclear to what extent Judge Maze reviewed Farm Bureau's response to Joyce & Sons's motion. Judge Shake indicated in her July 11, 2008, order that she would review any timely filed response. Although Judge Shake's correspondence is arguably not binding as an order, Farm Bureau was entitled to rely on Judge Shake's assurance. Therefore, on remand, the trial court should indicate that it has reviewed Farm Bureau's response.

Next, we note that there are two potential issues of fact that the court must address. The first is whether the settlement agreement binds the Weihes to indemnify Joyce & Sons for any and all claims Farm Bureau may assert or only to the extent of the settlement. We note that there is some indication in the record that the Weihes only claimed damages from Joyce & Sons in excess of what Farm

Bureau paid. The trial court must determine if the settlement agreement encompassed that limitation.

Second, it appears from the record that there is an issue regarding Joyce & Sons's liability. The trial court must determine whether that is the case and, depending on that determination, whether an action against the Weihes can proceed in the absence of Joyce & Sons. On remand, the trial court must address the errors and factual issues set forth above.

Finally, we recognize that Judge Montano's unfortunate and premature death caused this matter to traverse a somewhat convoluted path through the circuit court. Following Judge Montano's death, a number of judges stepped in to keep this matter moving and, although we have pointed out a number of errors made by the judges, we do not mean to slight or denigrate their efforts. To the contrary, we acknowledge and applaud the trial court's efforts to move this litigation forward.

Based on the foregoing, we affirm in part, vacate in part, and remand.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Philip J. Edwards
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE JOYCE & SONS, INC.:

Marie E. Dever
Louisville, Kentucky

NO BRIEF FOR APPELLEES RODGER AND SHARON WEIHE.