RENDERED: JUNE 17, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2015-CA-000435-MR

JEFF H. CHOATE, a.k.a. JEFF L. CHOATE;
AND ELLA CHOATE — APPELLANTS

v.

APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 13-CI-00152

BANK OF CADIZ & TRUST CO. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Appellants Jeff and Ella Choate appeal a grant of summary judgment in the Bank of Cadiz & Trust Co.'s favor. For the following reasons, we affirm.

## FACTS

### I. Trigg Circuit Court Action No. 02-CI-00189: the Deficiency Judgment.

The instant appeal is of a declaratory judgment action instituted to obtain funds being held in a deficiency judgment. The Trigg Circuit Court had entered a deficiency judgment against Jeff Choate in Civil Action No. 02-CI-00189. During the instant declaratory judgment action's pendency, Jeff Choate was appealing the deficiency judgment.

On July 10, 2015, a panel of this Court affirmed the $337,194.52 deficiency judgment. *Choate v. Bank of Cadiz & Trust Co.*, 2013-CA-001849-MR. This Court laid out the facts as follows:

> In 2002, Bank of Cadiz & Trust Company (Cadiz Bank) instituted a foreclosure proceeding in the Trigg Circuit Court. Cadiz Bank claimed that Choate defaulted under the terms of a promissory note which was secured by a mortgage upon certain real property owned by Choate. Cadiz Bank sought to accelerate payment of the promissory note due to Choate's default and to enforce its mortgage lien against the real property to satisfy payment of the note.
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> By judgment and order of sale entered January 13, 2003, the circuit court determined that Cadiz Bank was entitled to recover $439,785 plus interest upon the promissory note. The court also ordered the sale of the real property subject to the bank's lien by the master commissioner with the net proceeds from the sale to be applied against the judgment debt. Kentucky Revised Statutes (KRS) 426.570; Kentucky Rules of Civil Procedure (CR) 53.02. The real property was duly sold by the master

commissioner, and the circuit court confirmed the sale by order entered April 16, 2003. KRS 426.571; KRS 426.575. Then, by order of distribution entered June 6, 2003, the circuit court determined that Cadiz Bank was entitled to receive $167,193.61 of the sale proceeds in partial satisfaction of the judgment indebtedness against Choate.

After the sale, the case was dormant until August 7, 2013. On that date, Cadiz Bank filed a Motion for Deficiency Judgment. Therein, Cadiz Bank asserted "there remains a deficiency balance on the foreclosure judgment" in the amount of $337,194.52. Motion for Deficiency Judgment at 2. Choate responded and filed a motion under CR 12.02(a) to deny the motion. Choate argued that the circuit court lost jurisdiction to render a deficiency judgment due to the passage of time. Choate maintained that Cadiz Bank was required to bring an independent action in order to obtain a deficiency judgment.

By order entered September 23, 2013, the circuit court concluded that it retained jurisdiction to render the deficiency judgment and granted Cadiz Bank's motion for deficiency judgment. The court noted that "a separate deficiency judgment will be entered." Order at p.3.

Cadiz Bank then filed an affidavit for Writ of Non-Wage Garnishment on September 25, 2013. Cadiz Bank sought to garnish insurance proceeds payable to Choate held by State Farm Fire and Casualty Company.[] KRS 425.501. The Clerk of the Trigg Circuit Court issued an Order of Garnishment on September 25, 2013.

On September 26, 2013, the circuit court rendered a deficiency judgment against Choate in the amount of $337,194.52 plus interest. Thereafter, on October 2,

> 2013, Choate filed a motion to quash the garnishment issued against State Farm. KRS 425.501(4). Choate argued that the insurance proceeds were exempt from execution per KRS 427.110(1) and that Choate's wife possessed an interest in the insurance proceeds that was not subject to execution.
>
> By order entered October 10, 2013, the circuit court directed $337,194.52 of the insurance proceeds to be deposited with the clerk pending outcome of the proceedings. CR 67. The circuit court also observed that it was "not prepared to decide" the legal issue of whether the insurance proceeds were exempt from garnishment but reserved the ruling for a later time.
>
> On October 25, 2013, Choate filed a notice of appeal in this Court form the September 26, 2013, deficiency judgment. This appeal follows.

Slip Op. at 1-4 (footnote omitted).

In that appeal, Jeff Choate also argued the trial court did not have jurisdiction to render a deficiency judgment almost fifteen years after the January 13, 2003 judgment. A panel of this Court disagreed, holding:

> In this case, the September 26, 2013, deficiency judgment merely set forth the current outstanding deficiency owed by Choate under the January 13, 2003, judgment and was simply a step in the enforcement of the January 13, 2003, judgment.[] Accordingly, we conclude that the circuit court possessed jurisdiction to render the September 26, 2013, deficiency judgment.

Slip Op. at 5-6 (footnote omitted).

Jeff Choate also argued that the insurance proceeds from State Farm are exempt from execution under Kentucky Revised Statutes (KRS) 427.110(1). Because the trial court expressly reserved ruling on that issue, the panel of this Court declined to address the claim on appeal. The panel cautioned, "Choate must bring an appeal from the court's final order or judgment adjudicating that issue." Slip Op. at 6.

The Kentucky Supreme Court denied discretionary review on March 9, 2016. What has occurred in Trigg Circuit Court Civil Action No. 02-CI-00189 since this Court's opinion in 2013-CA-001849-MR is not before this Court, as a separate civil action – the declaratory judgment action – is the subject of the instant appeal.

## II. Trigg Circuit Court Action No. 2013-CI-00152: the Declaratory Judgment.

On September 24, 2013, two days before the deficiency judgment was entered, Cadiz Bank filed in Trigg Circuit Court a Petition for Declaratory Judgment under civil case action number 2013-CI-00152. The result of that proceeding comprises the appeal currently before this Court. In that action, Cadiz Bank asked the trial court to determine each party's rights (now including Ella Choate, who apparently became Jeff Choate's wife sometime after the 2002 foreclosure proceeding commenced) to the funds then being held by State Farm Fire and Casualty Company. While the Declaratory Judgment action was pending, the parties entered an agreed order in the Deficiency Judgment action, to wit State

Farm Fire and Casualty Company would settle the funds it owed on the fire insurance claim: (1) Cadiz Bank received $28,763.52 in full satisfaction of the outstanding mortgage and promissory note balance for the insured residence; (2) Jeff and Ella Choate received $44,671.55; and (3) $337,194.52 was deposited into an interest bearing account in Trigg Circuit Court to be held for resolution of the garnishment order in the 02-CI-00189 Deficiency Judgment action.

After entry of the agreed order, the parties conducted extensive discovery and filed in the record over 600 pages of answers to interrogatories and responses to requests for production of documents. Then, on December 1, 2014, some fifteen months after initiating the Declaratory Judgment action, the Bank filed a lengthy motion for summary judgment.

On January 8, 2015, the Choates, collectively, filed a two-page response. They first argued more time was necessary to complete discovery because a deposition of Cadiz Bank's officer who compiled the discovery requests was needed to resolve whether Cadiz Bank had forgiven the indebtedness owed in the Deficiency Judgment action. They next argued the motion was premature as the Deficiency Judgment action was still being appealed. (Indeed, a motion for discretionary review by the Kentucky Supreme Court was not ruled upon until March 9, 2016.) On February 11, 2015, Cadiz Bank filed a reply, responding to the Choate's two claims.

On February 20, 2015, the trial court granted summary judgment and declaratory judgment in favor of Cadiz Bank. The trial court found ample time –

some fifteen months – had passed between the action's initiation and the summary judgment motion, which was sufficient time for the parties to take depositions. It found that though there had been a "write-off" of the debt on the bank's books and such write-off was simply an internal bookkeeping matter and not debt forgiveness, as Cadiz Bank received no valid consideration for an actual release of the debt. It further found the exemption in KRS 427.110 is inapplicable to the instant case because State Farm Fire and Casualty Insurance Co. is a stock insurer, not an assessment or cooperative life or casualty insurance company. The trial court also found Ella Choate's separate entitlement to the garnished proceeds was resolved in the October 24, 2013 agreed order. Finally, the trial court found Jeff Choate was the property's sole title holder, thus destroying any entitlement Ella Choate would have to the insurance proceeds based upon dower or contribution.

The Choates timely appealed. The case now stands submitted for resolution by this Court.

## ISSUES

The Choates present a number of issues for our resolution. After careful review of the briefs, the record, and the applicable case law, we affirm the trial court's order granting summary judgment and declaratory judgment.

### I. The trial court gave the parties sufficient time to conduct discovery.

Initially, we address whether the trial court permitted the parties sufficient time to conduct discovery. Approximately fifteen months passed

between the action's initiation and the summary judgment grant. During that time, the parties engaged in significant discovery, including the propounding of interrogatories and requests for production of documents. The instant record includes hundreds of pages of documents that were produced.

Generally, courts should not take up motions for summary judgment until "the opposing party has been given ample opportunity to complete discovery." *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010) (quoting *Pendleton Bros. Vending, Inc. v. Commonwealth Finance and Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988)). "It is not necessary that litigants be allowed to complete discovery but only that they be granted sufficient time to complete discovery and then fail to produce any evidence to create a genuine issue of material fact." *Martin v. Pack's, Inc.*, 358 S.W.3d 481, 485 (Ky. App. 2011) (citing *Pendleton, supra*). Appellate review involves a consideration of "whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery before the court entered its ruling." *Blankenship*, 302 S.W.3d at 668. A trial court's determination that sufficient time has passed for discovery is reviewed for an abuse of discretion. *Id*.

Here, we find the trial court did not abuse its discretion by granting summary judgment fifteen months after the action's initiation. Aside from a general allegation that there are material issues of fact that require additional discovery, on appeal the Choates provide no specific lines of discovery they needed to pursue to make their defense. At the trial court, it appears the Choates

wanted to depose a Cadiz Bank officer about the debt's alleged "write-off." They had not done so during the fifteen months because they were awaiting the appellate results from the Deficiency Judgment action.

Under these facts, we cannot say the trial court's decision was "arbitrary, unreasonable, unfair, [or] unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 917 (Ky. 2004). The Choates could have deposed their witness while awaiting a decision of this Court in the other case. Or, they could have filed a notice to take a deposition once the summary judgment motion was filed.

Regardless, we need not resolve whether the witness would have helped the Choates's claim nor whether the Choates acted properly in securing the deposition of the witness. We only need to ask whether the trial court abused its discretion by finding it had given the Choates sufficient time to conduct discovery. Because the Choates were given more than a year to conduct discovery but purposefully chose to await a final decision by this Court rather than continue to defend their cause, we find the trial court did not abuse its discretion by denying the Choates additional time. Accordingly, we affirm the trial court's order inasmuch as it found the parties had sufficient time to conduct discovery.

**II. Choate cannot re-litigate whether the trial court had jurisdiction in the Deficiency Judgment case.**

The Choates also re-raise the claim that the trial court lost jurisdiction over the Deficiency Judgment action and was without jurisdiction to issue a non-

wage garnishment. We need not readdress this issue, as a panel of this Court has already ruled against Jeff Choate. *Choate v. Bank of Cadiz & Trust Co.*, 2013-CA-001849-MR. Choate cannot relitigate this issue that was "actually litigated and finally decided in an earlier action." *Id. See also Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 374 (Ky. 2010). In the instant case, there is no doubt the two lawsuits concern the same "transactional nucleus of facts." The parties are the same and the facts and issues are identical. Accordingly, we affirm the trial court's order on this issue.

**III. The trial court had a judgment to enforce.**

The Choates also argue the trial court lacked a judgment to enforce because the Deficiency Judgment was not entered until September 26, 2013. Again, this issue was resolved by a panel of this Court in the Deficiency Judgment appeal:

> In this case, the September 26, 2013, deficiency judgment merely set forth the current outstanding deficiency owed by Choate under the January 13, 2003, judgment and was simply a step in the enforcement of the January 13, 2003, judgment.[] Accordingly, we conclude that the circuit court possessed jurisdiction to render the September 26, 2013, deficiency judgment.

Slip Op. at 5-6 (footnote omitted). In other words, there has existed a judgment against Jeff Choate since January 13, 2003. The September 26, 2013 Deficiency Judgment merely established the outstanding deficiency owed. The trial court had

jurisdiction to enforce its own judgment. *Akers v. Stephenson*, 469 S.W.2d 704 (Ky. 1970).

Regardless, the current order being appealed was entered long after both judgments were in force, and neither judgment has been overturned on appeal. *Marshall v. Goodwine*, 332 S.W.3d 51, 54-55 (Ky. 2010). Thus, the trial court had authority to enforce its judgments. We affirm its order on this issue.

**IV. The insurance proceeds are not exempt from garnishment.**

The Choates' next issue brings us to an issue left outstanding in the 2013-CA-001849-MR appeal: whether KRS 427.110 exempts the fire insurance proceeds from garnishment. Under that statute, "[a]ny money or other benefit to be paid or rendered by any *assessment or cooperative life or casualty insurance company* is exempt from execution or other process to subject such money or other benefit to the payment of any debt or liability of a policyholder." (Emphasis added). The Choates read "assessment or cooperative life or casualty insurance company" in the disjunctive – assessment insurance company *or* cooperative life insurance company *or* casualty insurance company. Cadiz Bank reads the phrase as referring to assessment or cooperative insurance companies that underwrite either life or casualty insurance. State Farm Fire and Casualty Company, the bank argues, is not an "assessment or cooperative" insurance company. The trial court agreed with Cadiz Bank. We also agree.

Insurance companies, much like other businesses, form in different associations. For example, some become joint stock insurance companies. Such a

company has been described as a multi-person partnership with articles of association "and having a capital stock, divided into shares transferable at the pleasure of the holder." *Attorney General v. Mercantile Marine Ins. Co.*, 121 Mass. 524, 527 (1877). "Stock companies insure at their own risk[.]" *Union Ins. Co. v. Hoge*, 62 U.S. 35, 46, 21 How. 35, 16 L.Ed. 61 (1858). *See also Sheldon v. Bills*, 166 N.W. 117 (Neb. 1918) (noting joint-stock insurance company sold shares and had elected directors). In Kentucky, stock insurance companies are defined in KRS 304.3-010 as "an incorporated insurer with its capital divided into shares and owned by its shareholders."

Mutual insurance companies, on the other hand, are "a body of persons, each of whom was desirous of effecting an insurance, and he agreed with the rest of the members to contribute his premiums to a common fund, on terms that he should be entitled to receive out of that fund." *Hoge*, 62 U.S. 35 at 47. (citation omitted). In Kentucky, a mutual insurer "is an incorporated insurer without permanent capital stock, and the governing body of which is elected by its policyholders or those policyholders specified in its charter, or by any other reasonable method." KRS 304.3-020.

Some companies are hybrids of mutual companies and joint stock companies. *See Driscoll v. Washington County Fire Ins. Co., Washington, Pa.*, 110 F.2d 485, 489 (3d Cir. 1940) (discussing joint stock insurance companies, mutual insurance companies, and "hybrid" companies). In Kentucky, a combined mutual and stock life insurance company "is an incorporated insurer with capital

divided into shares owned by its shareholders, but which is controlled by the votes both of its stockholders and of its participating policyholder members to the extent any such rights of membership are granted and specified in the insurer's policies or its articles of incorporation." KRS 304.3-025.

Another type of insurance company is the cooperative. Cooperative insurance companies developed late in the nineteenth century as workers sought to avoid limitations in the tort system and a lack of reliable commercial accident insurance. Michael C. Duff, *A Hundred Years of Excellence: But is the Past Prologue? Reflections on the Pennsylvania Workers' Compensation Act*, 87 Pa. B.A.Q. 20, 28 (2016) (footnote omitted). Groups of workers, *i.e.*, a railroad brotherhood, would develop cooperative associations that would pay out disability and death benefits. *Id*. By creating "bonds of class loyalty[,]" these cooperatives would keep healthy customers paying premiums and convince members to avoid engaging in risky behavior. *Id*.

Cooperative insurance companies blossomed post-Civil War, especially in terms of life and disability insurance. "By 1895 fraternal and other cooperative insurance associations reported $6.6 billion of life insurance in force, an amount substantially greater than the total life insurance in force through commercial companies – mutual and stock companies combined." John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement*, 114 Harv. L. Rev. 690, 798 (2001) (footnote omitted). However, they faced mounting problems during the

early twentieth century, including increases in immigration and industrial accidents, and dwindling number. *Id*. at 836-37. *See also Duff*, *supra*, at 28.

Insurance associations also formed assessment companies. Assessment insurance collects premiums at the end of a determined period of time based on the total losses incurred by the participating group. "The pure type [of assessment insurance] contemplates that assessments may be made only to cover losses that have occurred, and that assessments cannot be levied in anticipation of losses." *In re National Ben. Ass'n v. Insurance Commissioner*, 72 S.D. 320, 34 N.W.2d 166, 168 (1948). For example, a group of rural farmers may form an assessment to cover losses to crops due to fire. Should the group incur no fire damages that year, the group would pay no premiums. "Consequently it is impossible, in cases where pure assessment insurance is put into practice, to determine beforehand what is going to be the amount realized by any assessment that may be levied." *Id*.

Some companies combine assessment and cooperative insurance into "assessment cooperatives":

> The cooperative insurance industry began in the late 1800's as farmers found that large companies refused to insure rural property. Local community leaders, many affiliated with the Grange movement, organized cooperatives that enabled their members to insure each other.
>
> The cooperatives issued policies on demand but charged no premiums until October after crops were harvested

> and they could total the year's expenses and incurred losses. That total became policyholders' "assessment."

Midstate Mutual Insurance Company, *Our History* (accessed on April 22, 2016), https://midstatemutual.com/history#12.

In Kentucky, our General Assembly codified assessment or cooperative companies in KRS Chapter 299. That Chapter's provisions lay out numerous requirements for assessment or cooperative insurance companies and their policies. For example, under KRS 299.015, every policy issued by a Chapter 299 company must have "This is an assessable policy" printed or stamped on the face page. Assessment or cooperative insurance companies that fail to actively and in good faith operate for a one-year period "become and remain forever inoperative and void." KRS 299.017. Furthermore, the statutes define a company that pays benefits upon a member's decease as a life insurance company, and a company that pays benefits upon the sickness or physical disability of a member as a casualty insurance company. KRS 299.020(2). The statutes also permit assessment or cooperative companies to write insurance policies for real or personal property against loss or damage "from any or all hazards or causes[.]" KRS 299.310.

In addition to the statutes delineating operating practices for assessment or cooperative life or casualty insurance companies, KRS 299.220 provides a mechanism for assessment or cooperative life insurance companies to "change to stock or mutual plan" insurance companies:

> Any domestic company may, upon complying with the provisions of KRS 299.230 to 299.300, become a life insurance company upon the mutual or stock plan, subject to the laws of this state applicable to such companies, and those prescribing how articles of incorporation shall be amended.

KRS 299.550 likewise allows assessment or cooperative casualty companies to change to mutual companies. The continuing statutes lay out: meetings that are necessary to change the form of the company, KRS 299.230; the amount of shares of capital stock that are necessary, KRS 299.240; requirements for how a reorganized company may begin business, KRS 299.250; the types of insurance a reorganized company may write, KRS 299.260; how directors of the newly-created "stock or mutual plan" company are to elect directors, KRS 299.270; how previously written assessment policies are to be handled in the newly created stock or mutual plan company, KRS 299.280; and how assets and liabilities of the former company are to be used, KRS 299.290.

Clearly, then, Kentucky permits "assessment or cooperative" insurance companies as well as stock or mutual insurance companies. It also permits assessment or cooperative *life* insurance companies as well as assessment or cooperative *casualty* insurance companies.

We now turn to the issue put before us by the Choates, namely whether KRS 427.110 exempts from garnishment the State Farm Fire and Casualty payment for the property loss. As this issue requires us to construe statutory language, we address this issue of law *de novo*. *Jefferson Co. Bd. of Educ. v. Fell*,

391 S.W.3d 713, 718 (Ky. 2012) (citing *Cumblerland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007)). "All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature[.]" KRS 446.080(1). The Kentucky Supreme Court identified the governing standards for statutory construction accordingly:

> In construing statutes, our goal, of course, is to give effect to the intent of the General Assembly. We derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration. *Osborne v. Commonwealth*, 185 S.W.3d 645 Ky. 2006). We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes. *Hall v. Hospitality Resources, Inc.*, 276 S.W.3d 775 (Ky. 2008); *Lewis v. Jackson Energy Cooperative Corporation*, 189 S.W.3d 87 (Ky. 2005). We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one. *Layne v. Newberg*, 841 S.W.2d 181 (Ky. 1992). Only if the statute is ambiguous or otherwise frustrates a plain reading, do we resort to extrinsic aids such as the statute's legislative history; the canons of construction; or, especially in the case of model or uniform statutes, interpretations by other courts. *MPM Financial Group, Inc. v. Morton*, 289 S.W.3d 193 (Ky. 2009); *Knotts v. Zurich*, 197 S.W.3d 512 (Ky. 2006); *Stephenson v. Woodward*, 182 S.W.3d 162 (Ky. 2005).

*Shawnee Telecom Resources, Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011). Under these standards, we are compelled to find the General Assembly intended only to exclude assessment or cooperative insurance proceeds from garnishment.

First, the plain language in KRS 427.110 refers only to "assessment or cooperative" insurance companies. In Chapter 299, the General Assembly specifically codified "assessment or cooperative" insurance companies in one combined Chapter using one combined phrase: assessment or cooperative. As shown above, the General Assembly has codified mutual, stock, assessment, cooperative, and hybrid insurance companies. If the General Assembly in enacting KRS 427.110 intended on it applying to all casualty insurance companies, the statute would have included the words "mutual" or "stock" to indicate the same. Because the General Assembly chose to only use the phrase "assessment or cooperative" in KRS 427.110, it intended the statute only to apply to insurance proceeds from companies so associated.

Second, the grammar used by the General Assembly in KRS 427.110 requires us to read the noun phrase "insurance company" as being defined by two sets of adjectives with disjunctive conjunctions: "assessment or cooperative" and "life or casualty." *Cf. Hall v. Hospitality Resources, Inc.*, 276 S.W.3d 775, 784 (Ky. 2008). The resulting statute thus refers to benefits paid by four types of insurance companies: assessment life insurance; assessment casualty insurance; cooperative life insurance; and cooperative casualty insurance.

We come to this conclusion using the sentence's natural reading. Take, for example, if the statute exempted from garnishment all "blue or black cars or trucks." The statute would exempt four classes of vehicles, namely: blue cars, blue trucks, black cars, and black trucks. It would not exempt, as the Choates

would have us read such a statute, all blue or black cars and all trucks (regardless of color). However, if the statute exempted from garnishment all "blue or black cars, or trucks," then the Choates's reading would be correct, as "trucks" would not be defined by "blue or black," but "cars" would be.

Third, we read the statute as exempting from garnishment only assessment or cooperative casualty insurance policies because the statute best harmonizes with other statutes and leads to a non-absurd result. *Cf. Ledford v. Faulkner*, 661 S.W.2d 475, 476 (Ky. 1983); *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789, 793 (Ky. 2008). As shown above, the General Assembly has codified numerous statutes relating to assessment, cooperative, mutual, stock, and hybrid insurance companies. KRS 427.110 as written only singles out two such insurance associations – assessment and cooperative insurance companies. It never mentions mutual or stock or hybrid companies, and we will not read into the statute what is not apparent. Furthermore, it would lead to an absurd result to say that individuals who have life insurance policies through mutual or stock or hybrid companies are not excluded from garnishment, but those who have casualty insurance policies through the same companies *are* excluded from garnishment. In summary, KRS 427.110 plainly exempts only life or casualty monies or benefits paid by assessment or cooperative insurance companies. Having determined the scope of the statute, we now examine whether the Choates' fire insurance policy was with an assessment or cooperative insurance company.

Initially, we note that the parties disagree as to who bears the burden of proof on the KRS 427.110 exemption. We find the arguments to be a *non sequitur*, as the evidence put forward by Cadiz Bank, and not contested by the Choates, is sufficient to demonstrate that State Farm Fire and Casualty Company is not an assessment or cooperative casualty insurance company. State Farm Fire and Casualty Company is a stock insurance company organized under the laws of the State of Illinois on June 12, 1935. It is a wholly owned subsidiary of State Farm Mutual Automobile Insurance Company. All of State Farm Fire and Casualty Company's common stock is held by State Farm Mutual Automobile Insurance Company. State Farm Fire and Casualty Company collects premiums from its policies, invests the capital, and pays losses therefrom. It has no members and collects no assessments. The fire insurance policy owned by the Choates was not based on an assessment plan, nor did it bear a legend that stated, "This is an assessable policy."

Simply put, nothing about the Choates' policy nor anything about State Farm Fire and Casualty Company rendered it an assessment or cooperative casualty insurance company. Indeed, the Choates implicitly concede as much by arguing that KRS 427.110 applies to all casualty insurance companies, not just assessment and cooperative insurance companies. Thus, the State Farm Fire and Casualty Company policy held by the Choates was not subject to exemption from garnishment under KRS 427.110.

Accordingly, we affirm the trial court's order inasmuch as it found KRS 427.110 applied only to assessment or cooperative insurance companies, and the Choates' State Farm Fire and Casualty Company policy was not issued by an assessment or cooperative insurance company.

**V. Ella Choate's marital share.**

Finally, the Choates argue that material issues of fact still exist regarding Ella Choate's share of the fire insurance proceeds. Below, Cadiz Bank argued Ella Choate was only entitled to a small portion of the proceeds due to: (1) Ella Choate's dowry interest in the land; and (2) Ella Choate's contributory interest in the residence. That portion of the proceeds, Cadiz Bank claimed, was already returned to Ella Choate in the Deficiency Judgment's agreed order disbursing the State Farm Fire and Casualty Insurance proceeds.

In response to Cadiz Bank's motion for summary judgment, the Choates elected not to respond to these issues. On appeal, the Choates now raise Ella Choate's possessory and insurable interests in the insurance proceeds. They claim Ella Choate is entitled to one-half of the fire insurance proceeds minus the $28,000 balance for the real estate mortgage.

Cadiz Bank avers that neither of the Choates' appellate arguments is properly before this Court. Cadiz Bank notes that the Choates, in their response to the summary judgment motion, did not raise either issue. Accordingly, the trial court did not rule on Ella Choate's possessory or insurable interest in the insurance proceeds. Cadiz Bank alleges the Choates are feeding one can of worms to the

trial court and another to us. *Dever v. Commonwealth*, 300 S.W.3d 198, 202 (Ky. App. 2009). In spite of Cadiz Bank's persuasive argument, the Choates elect in their Reply Brief to give us no rebuttal to the preservation claim. They only respond to the substantive issue.

We begin our analysis, then, with Cadiz Bank's summary judgment issues relating to Ella Choate about which the trial court ruled. Summary judgment may only be granted when the movant demonstrates "no genuine issue of material fact exists." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). Under that standard, "[t]he 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." *Id*. at 480 (citing *Dossett v. New York Mining and Manufacturing Co.*, 451 S.W.2d 843 (Ky. 1970)). "Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists." *Shelton v. Kentucky Easter Seals Society, Inc*., 413 S.W.3d 901, 905 (Ky. 2013) (footnote omitted). "So we operate under a de novo standard of review with no need to defer to the trial court's decision." *Id*.

Summary judgment should only be granted "when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest*, 807 S.W.2d at 483 (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky.

1985)). "'[I]mpossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

Here, Cadiz Bank produced sufficient evidence of record to warrant a judgment in its favor as to Ella Choate's dowry and contributory interest in the property. Concerning the contributory interest in the property, we assume, as did Cadiz Bank, that Ella Choate is entitled to an insurable interest based on an equitable claim that she contributed to the residence's construction. Ella Choate's answer to an interrogatory about her contribution was that she provided 60 hours of work valued at approximately $25 per hour. Accordingly, her contributory insurable interest in the property is $1,500. That amount was already remitted to Ella Choate in the Deficiency Judgment's agreed order. Thus, the trial court did not err by granting summary judgment for Cadiz Bank on that issue.

Concerning the dower interest, Ella Choate had none as her husband was still alive. That "inchoate right is made perfect or becomes absolute in the wife in the event she survives the husband[.]" *Smith v. Myers*, 7 Ky.L.Rptr. 443, 1885 WL 5723, 13 Ky. Op. 830, 832 (1885). *See also Faulkner v. Terrell*, 287 S.W.2d 409, 414-415 (Ky. 1956); *Trimble v. Kentucky River Coal Corp.*, 235 Ky. 301, 31 S.W.2d 367, 369 (Ky. 1930) ("Thus, when J.C. Eversole died April 15, 1887, his wife was at once invested with dower in this property."). As stated in KRS 392.020, a "dower" or "curtesy" is a "surviving spouse's interest" created "[a]fter the death of the husband or wife intestate[.]" As there is no allegation that Jeff Choate was deceased when summary judgment was entered, Ella Choate had

no dower interest in the real property. Thus, her dower interest in the fire insurance proceeds was nil, and the trial court did not err by granting summary judgment on this issue.

Having resolved the two summary judgment issues that were before the trial court, we now turn to the Choates' novel claims raised for the first time on appeal. The Choates claim Ella Choate had a possessory interest in the property or the real estate that was the subject of the fire insurance. "We have long held in Kentucky that an issue not raised in the circuit court may not be presented for the first time on appeal." *Keeton v. Lexington Truck Sales, Inc.*, 275 S.W.3d 723, 726 (Ky. App. 2008) (citations omitted). The Choates had an opportunity to raise this issue in their response to the motion for summary judgment. They did not raise it. They likewise had an opportunity to address their procedural deficiency in their Reply Brief to this court, yet they chose to make none.

Having failed to properly present their claim below, we will not find fault with the trial court's non-ruling on an issue not before it. Accordingly, the Choates's latest claims regarding Ella Choate's possessory or insurable interest will not be addressed on appeal. The trial court's order is affirmed.

**CONCLUSION**

For the foregoing reasons, the order granting summary judgment and declaratory judgment in favor of Cadiz Bank is affirmed.

ALL CONCUR.

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