RENDERED: June 12, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-001766-MR

KENTUCKY NATIONAL INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE DENNIS A. FRITZ, JUDGE
ACTION NO. 96-CI-00005

WANDA BRYNER; THOMAS D. PHELPS; ITT HARTFORD INSURANCE COMPANY; and OMNI INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

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BEFORE: ABRAMSON, BUCKINGHAM and EMBERTON, Judges.

EMBERTON, JUDGE. This case arises from a January 14, 1994, motor vehicle accident. The appellee, Wanda Bryner, was sitting in a parked police cruiser after her vehicle was in an accident in the same parking lot, when a vehicle driven by appellee, Thomas D. Phelps, slid into the cruiser. Phelps was insured by the appellee Omni Insurance Company, and Bryner by the appellee,

Kentucky National Insurance Company. The cruiser was insured by ITT Hartford.

ITT paid approximately $10,000 in basic reparation benefits to Bryner and Kentucky National paid $16,982.79, in added reparation benefits. Bryner then demanded the policy limits of $25,000 from Omni, and on August 10, 1995, Omni replied that it would settle all claims for the policy limits. Kentucky National was notified by letter on August 31, 1995, that Omni had offered the policy limits and that Bryner intended to make an underinsured motorist claim.

Kentucky National did not advance the policy limits and on January 3, 1996, filed a declaratory judgment action in the Oldham Circuit Court naming Omni, Phelps, and Bryner as respondents. The basis for the action was its position that Coots v. Allstate Insurance Co., Ky., 853 S.W.2d 895 (1993), is ambiguous as to when and how an insurer is to decide whether to make an advancement or otherwise lose its subrogation rights. It argues that Coots is practically and constitutionally unsound.

Bryner filed an action on January 11, 1996, against Phelps and Kentucky National seeking benefits from Kentucky National and charging it with violations of the Kentucky Unfair Claims Settlement Practices Act.

On March 12, 1996, it being clear that Kentucky National would not advance the $25,000, Bryner executed a full release in favor of Phelps and Omni. At this point Kentucky

National's subrogation rights against Phelps were also terminated.

The trial court entered a partial order dismissing as settled the claim against Phelps in the suit by Bryner and also dismissed Kentucky National's declaratory judgment action.

Kentucky National does not seek an interpretation of Coots, supra, but a reversal of the holding promulgated in that opinion. Coots is a Supreme Court case and we, as a lower appellate court, are bound to follow the Kentucky Supreme Court's mandate. Tucker v. Tri-State Lawn & Garden, Inc., Ky. App., 708 S.W.2d 116 (1986). Even if we disagree with Coots, we could do nothing more than discuss our view which would serve no purpose to the litigants.

Coots, supra, involved an interpretation of Ky. Rev. Stat. (KRS) 304.39-320 and the balancing of the UIM insured's need to settle a claim against a tortfeasor, and at the same time, preserve the UIM carrier's right to subrogation. The UIM carrier has two options. First, if it believes the tortfeasor to have little in assets beyond that of the policy limits, then the settlement and release of the tortfeasor would have the effect of nullifying only an illusory right. However, in those instances where the subrogation right has significant value, the UIM carrier can advance its insured the amount equal to the settlement proposed and protect its subrogation rights. Id. at 902. The Coots case provides a means of protecting the competing

interest of the insured and the UIM carrier, and the effect of the holding is:

> . . .to encourage both the tortfeasor's liability insurer to provide prompt settlement where the situation calls for it, and to provide incentive for the UIM carrier to do likewise, thus accommodating the policy and purpose of the MVRA. The UIM carrier cannot refuse to negotiate a one million dollar claim until the UIM insured can process a claim against the tortfeasor covered by a $25,000 limit liability policy to judgment.

There is no dispute that Kentucky National was notified of the proposed settlement and that Bryner notified it of her intention to file a UIM claim. Kentucky National had a reasonable time to either advance the $25,000 to Bryner, or suffer the consequences of the release. Of course, Kentucky National did not advance the amount and filed the present action. Under Coots, supra, it is bound by the release.

Kentucky National makes the argument that the "pay or sacrifice" alternative demanded by Coots, supra, is unconstitutional. Its subrogation right, it contends, is a significant property interest which cannot be denied without due process. Due process, it argues, requires the right to establish the damages the insured has incurred. The right to subrogation, however, exists only after it is established that the insured has been fully compensated. Wine v. Globe American Cas. Co., Ky., 917 S.W.2d 558 (1996). Obviously, if the insured is made whole by the payment from the tortfeasor's policy limits, subrogation

is not an issue. If not, then the UIM insurer is required to make the decision as outlined in Coots based on its internal criteria.

Kentucky National cites this court to other jurisdictions which have resolved this issue contrary to Coots, supra, and to our opinion. See State Farm Mutual Automobile Ins. Co. v. Hassen, 650 So.2d 128 (Fla. 2d DCA 1995). But see Butera v. State Farm Fire and Casualty Company, 698 So.2d 348 (Fla. 2d DCA 1991) (suggesting that Hassen, supra, was overruled in Hassen v. State Farm Mutual Automobile Ins. Co., 674 So.2d 106 (Fla. 1996). This court, however, is bound by our highest court's decision, and until it rules to the contrary, Coots, supra, is controlling.

The order is affirmed.

ALL CONCUR.

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