

RENDERED: July 2, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-1714-MR
and NO. 97-CA-1715-MR

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

APPELLANT

v. CONSOLIDATED APPEALS FROM SHELBY CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NOS. 95-CI-51 AND 95-CI-52

BOURBON C. JOHNSTON; and
JEWEL VANDERHOEF, Executrix
of the Estate of Bourbon C. Johnston

APPELLEES

OPINION
AFFIRMING

* * *

BEFORE: GUIDUGLI, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: These are consolidated appeals by an auto insurance carrier from the trial court's denial of its motion to intervene in a suit to preserve its subrogation rights of underinsured coverage. The trial court ruled that the carrier's cause of action was time barred for failure to timely revive the action after the tortfeasor died. We agree and therefore affirm.

This case arose out of an automobile accident that occurred on January 31, 1991, in Shelby County, Kentucky between

a vehicle driven by Sharron Jones, in which Brenda Sipes was a passenger, and a vehicle driven by Bourbon Johnston. Ms. Jones and Ms. Sipes (plaintiffs) were injured in this accident and filed separate but similar suits against Bourbon Johnston (Johnston) on January 27, 1995. The plaintiffs' vehicle was covered by State Farm Mutual Automobile Insurance Company (State Farm), including underinsured coverage, and Johnston's vehicle was covered by Castle Insurance Company (Castle).

Johnston died on October 27, 1995, of causes unrelated to the accident. On February 15, 1996, Johnston's liability carrier, Castle, tendered its \$50,000 policy limits, \$25,000 each to the two plaintiffs. On March 28, 1996, the plaintiffs' underinsured motorist and personal injury protection carrier, State Farm, advanced the plaintiffs \$50,000 (\$25,000 each) to protect its subrogation rights against Johnston's estate pursuant to Coots v. Allstate Ins. Co., Ky., 853 S.W.2d 895 (1993). The plaintiffs took no further action in the filed cases, but State Farm attempted to engage in settlement negotiations with defense counsel through much of 1996. In both May and October, 1996, State Farm offered to forego pursuing a subrogation claim against Johnston's estate if Castle would reimburse it for the amount it advanced the plaintiffs. Defense counsel responded on December 17, 1996, by claiming that the one-year revival statute barred all claims.

State Farm sought to intervene in both suits on March 18, 1997 in order to assert its subrogation claim against

Johnston's estate; to recover from Castle \$15,088.55 in basic reparation benefits it paid the plaintiffs; and to substitute as party defendant, Jewel Vanderhoef, as executrix of the estate of Johnston, who was appointed executrix on November 27, 1995.

Johnston's estate objected to State Farm's motions and filed a motion to dismiss the plaintiffs' claims on the grounds that the plaintiffs failed to revive their actions within one year after Johnston's death as required by statute (KRS 411.140, KRS 395.278 and CR 25.01, collectively). The Shelby Circuit Court denied State Farm's motions and granted the estate's motion to dismiss as to it.

State Farm filed appeals in the two cases and the appeals have been consolidated. Castle is not named as an appellee in the notices of appeal, nor are the plaintiffs named as appellees. No appeals were filed by the plaintiffs, Ms. Jones or Ms. Sipes. This fight is strictly between State Farm and Johnston's estate.

On appeal, State Farm argues that the one-year revival statute, KRS 395.278, applies to the plaintiffs' actions against the estate, but not to a subrogation claim not yet filed against the estate, that its claim did not arise until after Johnston's death because his insurance company tendered its liability limits after his death, and that revival implies a claim at the time of Johnston's death. State Farm characterizes its attempt at intervention as its own action in the nature of an underinsured motorist subrogation claim against the personal representative of

the estate, subject to the time limits of KRS 396.011 (claims against an estate).

KRS 396.011 deals with "[a]ll claims against a decedent's estate which arose before the death of the decedent," id. at section 1, and establishes a six-month statute of limitation where a personal representative is appointed, except in the cases where there is insurance and the purpose of the action is to establish liability of the decedent which is covered by insurance. Id. at section 2.

In February 1996, when Castle offered the policy limits to the plaintiffs, it was the plaintiffs who had a cause of action against the deceased, not State Farm. The offer of policy limits would create a derivative action for State Farm through its policy's contractual provisions that gave State Farm subrogation rights, but State Farm still did not have a direct tort action or direct contract action against Johnston's estate. State Auto. Mutual Ins. Co. v. Empire Fire & Marine Ins. Co., Ky., 808 S.W.2d 805 (1991). Therefore, State Farm cannot claim a separate cause of action after the decedent's death. Johnston's entire liability, if any, arose out of the accident of January 31, 1991, as a tortfeasor. State Farm's subrogation rights come from a contractual transfer of the plaintiffs' claims. See Coots v. Allstate Ins. Co., Ky., 853 S.W.2d 895 (1993). Therefore, State Farm only has those rights that the plaintiffs had, no more.

KRS 395.278 provides:

When party may revive action and limitation. - An application to revive an action in the name of the representative or successor of a plaintiff, or against the representative or successor of a defendant, shall be made within one (1) year after the death of a deceased party.

In the case sub judice, plaintiffs have already filed suit, so KRS 396.011 does not apply to them. Clearly KRS 395.278 and CR 25.01 apply to plaintiffs if they want to continue their tort actions against the estate of the tortfeasor. Since State Farm's subrogation rights are derivative of the plaintiffs' rights, State Farm can have no greater rights than the plaintiffs who have to revive their actions in order to maintain their causes of action. See State Auto Mutual Ins. Co. v. Empire Fire & Marine Ins. Co., supra; Snyder v. Snyder, Ky. App., 769 S.W.2d 70 (1989); Coots v. Allstate Ins. Co., supra; and Nationwide Mutual Insurance Company v. State Farm Automobile Insurance Company, Ky., _____ S.W.2d _____ (1998) (96-SC-558-DG, rendered May 21, 1998).

KRS 304.39-070 applies to State Farm's request to recover the \$15,0088.55 paid in basic reparation benefits. Under Beckner v. Palmore, Ky. App., 719 S.W.2d 288 (1986), State Farm's subrogation claim for basic reparation benefits is against the tortfeasor's basic reparation benefits carrier and not the tortfeasor. See also State Auto. Mut. Ins. Co. v. Empire Fire & Marine Ins. Co., supra. Therefore, Castle should have been joined and named in the notice of appeal. Grange Mutual Cas. Co. v. McDavid, Ky., 664 S.W.2d 931 (1984) and Anderson v. National

Sec. Fire & Casualty Co., Ky. App., 870 S.W.2d 432 (1993).

Castle was not named, so we do not have the subrogation claim for basic reparation benefits before us.

For the foregoing reasons, the judgment of the Shelby Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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