

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001002-MR

GLEN FALLS INSURANCE COMPANY

APPELLANT

V. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 92-CI-0417

JUDY CARNES and MELISSA EARLS

APPELLEES

OPINION
AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART

** ** * * * * *

BEFORE: COMBS, KNOFF, and KNOX, Judges.

COMBS, JUDGE: The appellant Glen Falls Insurance Company (Glen Falls) appeals from the judgment of the Whitley Circuit Court following a jury verdict awarding damages to the appellee, Judy Carnes (Carnes). Among the several issues raised on appeal, Glen Falls primarily argues that the court improperly denied it the opportunity to substitute payment. Having examined the record, we agree with Glen Falls that its subrogation rights were improperly abrogated.

This action arises from an automobile accident involving Judy Carnes and Melissa Earls (Earls) which occurred on August 9, 1991, in Whitley County, Kentucky. In July 1992, Carnes filed a complaint against Earls to recover damages for bodily injuries, lost wages or income, and mental pain and suffering which she had sustained as a result of the accident. Subsequently, in September 1993, Carnes amended her complaint to join as a defendant her own automobile insurance carrier, Commercial Insurance Company (Commercial), asserting a claim for underinsured motorist protection (UIM) as provided in her policy with Commercial. Shortly after Carnes amended her complaint, Glen Falls Insurance Company filed a motion to intervene as a plaintiff based upon the grounds that it had provided Carnes with insurance at the time of the accident. The court granted the motion, and Glen Falls filed an intervening complaint seeking to recover benefits from Earls that it had already paid to Carnes and any amount that it might be obligated to pay to Carnes in the future. In November 1993, the court entered an agreed order substituting Glen Falls as defendant in place of Commercial and deemed all references to Commercial to refer to Glen Falls, the substituted defendant.¹

¹The reason for the substitution and the relationship between Glen Falls and Commercial is not explained in either the court's order or the parties' briefs and motions. Thus, Glen Falls was both a defendant and an intervening plaintiff in the underlying action.

As the case developed, the parties engaged in pre-trial discovery and began negotiations. In November 1996, the court entered an order setting the trial for February 4, 1997. In a letter dated January 24, 1997, Carnes offered to settle the case with both Glen Falls and Earls for \$100,000 to be divided between them in any way they agreed. From this point forward, the parties presented differing versions as to the events that transpired with regard to the settlement offer.

Carnes alleges that on January 28, 1997, she was contacted by Earls, who, concerned about her exposure to a judgment in excess of her policy limits, disclosed to Carnes that Glen Falls was unwilling to contribute any amount toward a settlement. Carnes told Earls that she would accept \$100,000 (Earls's policy limits) and that she would proceed against Glen Falls at trial. The following day, Carnes called Earls to inquire as to whether Earls's insurer was willing to settle for her policy limits. During the parties' conversation, Earls made two counter-offers for amounts lower than her policy limits; Carnes rejected these offers, and Earls finally offered her policy limits. Carnes accepted the offer and requested a letter from Earls confirming the settlement.

On January 29, 1997, Carnes received Earls's confirmation letter, and she immediately faxed a copy of the confirmation letter to Glen Falls to notify it of the settlement and to allow it the opportunity to substitute payment. She also demanded an additional \$100,000 in settlement from Glen Falls.

In response to the faxed letter, Glen Falls called Carnes that evening. In a three-way call involving all the parties, Carnes informed Glen Falls that Earls had made several counter-offers in response to her settlement offer of January 24, 1997; Carnes maintained that her previous offer for \$100,000 (to be divided between Carnes and Glen Falls) had been withdrawn by the letter that she had faxed that day to Glen Falls demanding an additional \$100,000. After the conference call, Carnes received a letter from Glen Falls attempting to accept the offer of January 24, 1997. Carnes stated that she had no further communication with Glen Falls until the day of the trial. Earls adopted Carnes's statement of facts as her own, stating that it was "essentially accurate."

Conversely, Glen Falls maintains that, in conjunction with Earls, it had accepted the offer extended by Carnes on January 24, 1997, agreeing to contribute \$2,000 with Earls to contribute \$98,000 toward the settlement amount of \$100,000. Upon notifying Carnes that it had accepted her offer of January 24, 1997, Glen Falls claims that she rejected the acceptance and claimed that she had negotiated a separate agreement with Earls. On the day of trial, Glen Falls sought to enforce the alleged settlement agreement. The court found that there was not a binding agreement between the parties, and Glen Falls at that point attempted to substitute payment to protect its right of subrogation. The court overruled its motion to substitute payment; Glen Falls then filed a motion to amend its complaint to

assert a claim against Earls, a motion which the court overruled as well.

Significantly, Earls was not present the day of the trial. The case proceeded to trial solely against Glen Falls; the jury returned a verdict in favor of Carnes, awarding her \$300,000 in damages. The court reduced the judgment of \$300,000 by \$100,000 -- the amount for which Carnes had settled with Earls -- and entered a judgment of \$200,000 on February 12, 1997.

On February 21, 1997, Glen Falls filed a motion for a judgment notwithstanding the verdict, for a new trial, and to alter, amend, or vacate the judgment. On March 14, 1997, the court entered an agreed order dismissing all of the claims against Earls with prejudice as settled. It appears from the briefs of both Carnes and Glen Falls that, while the post-trial motions were pending, they had discussed the possibility of Glen Falls's substituting payment. The record shows that on March 24, 1997, Glen Falls filed a notice of substitution and a motion to set aside the agreed order dismissing Earls from the action. It appears from the motion to set aside the agreed order that Glen Falls and Carnes had discussed substituting payment after the trial. However, Glen Falls did not notify Carnes of its decision to substitute payment by the deadline that she had imposed -- that of March 7, 1997. On April 9, 1997, the court entered an order denying all post-trial motions of Glen Falls. This appeal followed.

Glen Falls first argues on appeal that the court erred in failing to enforce the settlement agreement which it alleges existed between the parties. It contends that Carnes had not withdrawn her offer nor had the parties rejected the offer or proposed any counter-offers prior to Glen Falls's acceptance of the offer of January 24, 1997. Thus, Glen Falls asserts that the agreement became binding when it communicated its acceptance of the offer to Carnes and that she breached the settlement by improperly refusing to accept the \$100,000.

Pursuant to CR 52, appellate review is limited to an examination of whether the trial court's determinations are clearly erroneous due to an absence of substantial supporting evidence. Schott v. Citizens Fidelity Bank & Trust, Ky. App., 692 S.W.2d 810 (1985). The court found that Glen Falls, Carnes, and Earls had not entered into a settlement. The parties did not agree as to the sequence of events following Carnes's offer of settlement on January 24, 1997, and continuing on up to the day of the trial. Both Glen Falls and Carnes offer conflicting evidence in support of their respective versions of the events. It is within the exclusive province of the trier of fact to determine the credibility and weight of the evidence presented. "Due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ironton Fire Brick Company v. Burchett, Ky., 288 S.W.2d 47 (1956). After examining the record, we find that substantial evidence existed to support the trial court's determination that there was not an enforceable

settlement agreement between Glen Falls, Carnes, and Earls. The court did not abuse its discretion in denying the motion of Glen Falls to enforce the alleged settlement.

Glen Falls next challenges the court's refusal to allow it to substitute payment for the \$100,000 settlement that had been reached between Carnes and Earls. It contends that it had the legal right to substitute payment in order to protect its subrogation rights against Earls.

Both Carnes and Earls argue that the court properly denied Glen Falls's motions to substitute payment for its failure to act to protect its subrogation rights within a reasonable time period. Glen Falls was notified of tentative settlement between Earls and Carnes on January 31, 1997, and the parties gave Glen Falls until February 2, 1997, (two days before the trial) to elect to substitute payment. However, Glen Falls did not elect to substitute payment until the court had determined that there was not a binding settlement as to all the parties. We hold that it was error for the court to refuse to allow Glen Falls to substitute payment.

Pursuant to KRS 304.39-029, UIM coverage is defined as:

[C]overage that the insurance company agrees to pay its own insured 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 policy limits thereon, to the extent of the underinsurance policy limits on the vehicle of the party recovering.

To seek benefits under his or her UIM policy, the insured is not required first to obtain a judgment against the tortfeasor before

making a claim for benefits. Coots v. Allstate Insurance Company, Ky., 853 S.W.2d 895 (1993). The UIM carrier retains a contractual and common law subrogation claim for indemnity against the tortfeasor upon whose negligence the damages were based. However, the UIM carrier's subrogation right is to be disregarded to the extent that it conflicts with the insured's superior right to accept a settlement with the tortfeasor for the policy limits. If the insured chooses to settle with the tortfeasor and his carrier for the policy limits of liability, the insured must notify the UIM carrier of his intent to do so in order to provide the carrier an opportunity to protect its right of subrogation. Id. at 900. Upon notification of a tentative settlement between the UIM insured and the tortfeasor, the UIM carrier may elect to substitute its payment to the insured in an amount equal to the tentative settlement, thus protecting its subrogation rights to the extent of the payment. Id. at 902. By substituting payment, the UIM carrier has the option to keep the tortfeasor in the case by naming him as a third-party defendant whom it may pursue for any further sums which it becomes legally obligated to pay to its insured under the UIM policy. Id. at 903.

In this case, the record indicates that all the parties engaged in negotiations to attempt to settle the action before the trial. Glen Falls maintains that it believed that the parties had a binding agreement to settle the case for \$100,000, which was to be divided between the defendants. When it sought

to enforce this settlement on the day of trial, the court found that an agreement did not exist. Upon the refusal of the court to enforce the putative settlement agreement, Glen Falls moved to protect its subrogation rights by substituting payment. We hold that Glen Falls was entitled to an opportunity to substitute payment which was not given after the court ruled that no settlement agreement existed between Glen Falls and Carnes. The absence of Earls could have been remedied by continuing the trial; it was clear error for the court to dismiss Earls in derogation of the subrogation right of Glen Falls. Therefore, we vacate and remand the judgment of the court and order that Glen Fall be allowed to substitute payment.

Glen Falls next contends that Carnes forfeited her right to underinsured motorist benefits by failing to comply with the conditions of her policy. It alleges that Carnes's UIM policy prohibited her from settling her claims without its written consent. Glen Falls also contends that Carnes acted in a manner which interfered with its subrogation rights in contravention of her policy. Specifically, Carnes objected to Glen Fall's substitution of payment and to its motion to amend its pleadings in order to assert a claim against Earls. Carnes maintains that she did not violate the conditions of her policy and that she did not interfere with Glen Fall's subrogation rights.

As we are vacating and remanding the judgment of the court to allow Glen Falls the opportunity to protect its

subrogation rights, we refrain from addressing these last two issues for mootness. Upon remand, Glen Falls will have the opportunity to pursue its contractual right of subrogation. With regard to the issue that Carnes forfeited her right to UIM coverage by failing to comply with the requirements of her policy (by not obtaining Glen Falls's signature prior to settlement), we disagree and note that Coots clearly held that a UIM carrier's subrogation rights should be "disregarded only to the extent it is in conflict with the UIM insured's superior right to accept the tortfeasor's policy limits when offered, when to do so requires a release and indemnity agreement." Coots, supra at 902.

As to Glen Falls's contention that the trial court should have reduced the judgment by the amounts it had already paid in benefits to Carnes, we leave resolution of this issue to the province of the trial court upon remand as part and parcel of the new trial.

In summary, we find that the court's determination that a settlement did not exist as to all the parties was not clearly erroneous. However, the court did err in failing to allow Glen Falls to substitute payment to protect its right of subrogation. We therefore vacate and remand a new trial with Earls as a defendant in order for Glen Falls to litigate its legitimate subrogation claim.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR
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BRIEF AND ORAL ARGUMENT FOR
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