

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000384-MR

ALLSTATE INSURANCE COMPANY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN MERSHON, JUDGE
ACTION NO. 95-CI-003485

MARIA JAGGERS;
TIM DAVENPORT; AND
OMNI INSURANCE COMPANY

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND MCANULTY, JUDGES.

GUIDUGLI, JUDGE. Allstate Insurance Company (Allstate) appeals from an order of dismissal and judgment entered January 7, 1999, by the Jefferson Circuit Court which dismissed its claims against Maria Jaggars (Jaggars), Tim Davenport (Davenport), and Omni Insurance Company (Omni). We affirm.

On October 19, 1994, Jaggars was struck by a vehicle driven by Davenport while walking on the Outer Loop in Jefferson County. At the time of the accident, Davenport was insured by

Omni and Jagggers maintained underinsured motorist coverage (UIM) through a policy issued by Allstate.

On June 22, 1995, Jagggers filed suit against Davenport and Omni seeking compensation for injuries received as a result of the accident. Prior to trial, Omni offered to settle with Jagggers for \$25,000, the policy limits of Davenport's policy, in exchange for a release of all claims against it and Davenport. Jagggers notified Allstate of the pending settlement. Faced with the pending settlement and potential loss of its subrogation rights, Allstate opted to advance Jagggers \$25,000, a sum equal to the Omni policy limits, in order to preserve its subrogation rights as UIM insurer as to any judgment obtained by Jagggers against Davenport pursuant to Coots v. Allstate Insurance Company, Ky., 853 S.W.2d 895 (1993).

After advancing \$25,000 to Jagggers, Allstate filed a motion to intervene in Jagger's lawsuit on April 30, 1997. Allstate's motion was granted by order of the trial court entered May 5, 1997, and its intervening complaint against Jagggers, Davenport and Omni was filed the same day.

On July 29, 1998, Jagggers's attorney filed a motion with the trial court seeking leave to withdraw as counsel for Jagggers. The motion was granted. Following withdrawal of counsel, Jagggers failed to respond to discovery requests, did not respond to the trial court's pre-trial order, and did not disclose the identity of medical experts expected to testify as to the causation of her injuries.

On the first day of trial, Jagers appeared pro se. As Jagers had failed to respond to discovery requests, counsel for Omni and Davenport asked the trial court to compel Jagers to make a proffer of proof as to whether she had expert testimony to prove causation. When Jagers admitted that she was not planning to offer expert testimony on the issue of causation, the trial court dismissed her claim.

On January 7, 1999, the trial court reduced its dismissal of Jagers's claim to writing in an order of dismissal and judgment which also dismissed Allstate's intervening claim. In so ruling, the trial court addressed Allstate's argument that Jagers's conduct resulted in an inequitable dismissal of its claims against Davenport and Omni as follows:

[U]nder Nationwide Insurance Co. v. State Farm Automobile Insurance Co., Ky., 973 S.W.2d 56 (1998) Allstate is not entitled to receive judgment against Plaintiff for the money provided to Plaintiff under the requirements of [Coots], nor is Allstate entitled to its claims against Davenport and Omni[.]

This appeal followed.

Allstate maintains that Coots is unconstitutional because: (1) it abrogates the jury system; (2) it violates the "open access to the courts" provisions contained in sections 14, 54, and 21 of Kentucky's Constitution; (3) it is a violation of due process for a UIM insurer to be forced to pay absent a fair and impartial fact finding; (4) it violates the jural rights doctrine; and (5) it impairs the obligations of contract which are protected by both the United States and Kentucky Constitutions. Based on these arguments, Allstate contends that

we should overturn Coots and its progeny.¹ We would remind Allstate that pursuant to SCR 1.030(8)(a) we are bound by and required to follow all applicable precedents "established in the opinions of the Supreme Court and its predecessor court." Even if we were convinced by Allstate's argument that Kentucky's scheme of resolving UIM subrogation is, in fact, unconstitutional, we are still bound by the precedent established in Coots, Nationwide, and USAA Casualty because they are Kentucky Supreme Court cases. As any change in this area must come from the Kentucky Supreme Court, we will not address these issues on appeal.

Allstate would also have us find that the Coots scheme for advancing money to preserve subrogation rights is virtually unworkable in many common situations. The problem with this argument is that none of the scenarios raised by Allstate in this argument is the one presently before this Court. Thus, for us to issue an opinion in regard to this argument would be tantamount to issuing an advisory opinion, which we are not permitted to do. Curry v. Coyne, Ky. App., 992 S.W.2d 858, 860 (1998).

Finally, Allstate would have us reverse the trial court's judgment. This we decline to do as we believe that the outcome resulting from the trial court's judgment is mandated by USAA Casualty. Although that case is somewhat different from the

¹Apparently the Coots progeny consists of Nationwide, supra, and USAA Casualty Insurance Co. v. Kramer, Ky., 987 S.W.2d 779 (1999). Constitutional arguments similar to those raised by Allstate were presented to the Kentucky Supreme Court in Nationwide, but the Court refused to address them because they had not been preserved before the trial court or Court of Appeals. Nationwide, 973 S.W.2d at 58-59.

case at hand in that it involved a situation where a jury returned a verdict absolving the tortfeasor from liability after the UIM insurer advanced the policy limits of the tortfeasor's policy, we believe the same reasoning applies:

[O]ur recent decision in [Nationwide] controls. In that case . . . we held: [T]he UIM carrier must determine its own destiny: if it chooses to substitute payment based on the risk evaluation of the liability carrier, it is bound by that assessment. . . ." [Nationwide, 973 S.W.2d at 58]. Although Nationwide dealt with a situation in which the jury awarded the plaintiff an amount less than the amount the plaintiff's UIM carrier had advanced to preserve its subrogation rights, the rational applies equally to a situation in which the jury awards the plaintiff nothing. The bottom line is that the UIM bears the risk when it chooses to thwart a proposed settlement between the plaintiff and the alleged tortfeasor by substituting payment of the settlement amount. For this reason, USAA is not entitled to reimbursement[.]

USAA Casualty, 987 S.W.2d at 783.

Having considered the parties' arguments on appeal, the order of dismissal and judgment entered by the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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