RENDERED: APRIL 26, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000411-MR

HUMANA HEALTH CARE PLANS
OF KENTUCKY, INC. APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 97-CI-00242

MISTI JO BENGE
AND KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY APPELLEES

OPINION
AFFIRMING
** ** ** ** **

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

BARBER, JUDGE: The Appellant, Humana, Inc.,("Humana") seeks review of a judgment of the Letcher Circuit Court, which held that the damage claim of the Appellee, Misty Jo Benge ("Benge") had priority over Humana's subrogation claim. Finding no error, we affirm.

The facts are not in dispute. This case arose out of a May 19, 1997 motor vehicle accident involving Benge and Nedra Wheeler, the driver of the other vehicle. Kentucky Farm Bureau provided PIP coverage for Benge's vehicle. Wheeler was insured through California Casualty. Benge filed a complaint against

Nedra Wheeler and her husband, Raymond Wheeler. Humana, which had paid $52,274.98 in medical expenses on behalf of Benge, intervened to protect its subrogation interest, as did Kentucky Farm Bureau. Benge joined Nedra Wheeler's employer, Kentucky Valley Educational Cooperative ("KVEC"), as a defendant, because Nedra Wheeler was allegedly working at the time of the accident. On or about December 16, 1999, Nedra Wheeler filed a voluntary petition for bankruptcy under Chapter 7. [By order of the US Bankruptcy Court for the Western District of Virginia, dated March 31, 2000, Benge's motion for relief from the automatic stay was granted, allowing her to pursue her non-bankruptcy claim against Nedra Wheeler].

On January 20, 2000, Benge settled with KVEC for $201,962.02. Humana's subrogation claim was reserved and was excluded from the release. On February 4, 2000, the trial court entered an agreed order, dismissing Benge's claims and first amended complaint against KVEC "with prejudice as settled."

On August 29, 2000, the trial court entered an order concluding that:

> Benge has priority under the law on her claims and payment thereon over the claims of Humana . . . in that the plaintiff must be made whole by any payment before Humana . . . can receive any payment on its claims herein.
>
> Upon motion of the defendant, Raymond Wheeler, for summary judgment, the court sustains said motion as to said defendant, Raymond Wheeler, as too remote for liability, and hereby dismisses the plaintiff's Complaint, as amended, against Raymond Wheeler.
> Thereupon, [the] attorney . . . for Nedra Wheeler and her insurance carrier, California Casualty . . . offered and committed the

> insurance carrier to pay into court immediately its $100,000.[00] liability insurance limits.

On December 29, 2000, the trial court entered an order finding Benge's damages to be $952,110.43 (including $82,811.43 for past medicals, and $50,000 for future medicals). The court found that Benge's damages "other than and in addition to past medicals far exceed the settlement amount with KVEC and the $100,000.[00] deposited with the court." The court determined that:

> [T]he plaintiff has priority under the law on payment of her damages over the claims of Humana in that the plaintiff's [sic] must be made whole by such payments before Humana can receive any payment on its damages herein. The court finds that the consideration of the medical evidence shows that the plaintiff's damages exceed the settlement with KVEC and the $100,000.[00] do not make her whole, and she is entitled under the law to be made whole before Humana can receive any part of said amounts.
>
> It is therefore, **ORDERED** and **ADJUDGED** by the court that the $100,000.[00] shall be paid over to the plaintiff as payment on her damages . . . .

By order entered January 24, 2001, Humana's motion to alter, amend, or vacate was denied. On February 23, 2001, Humana filed a notice of appeal, naming Benge, Nedra Wheeler, Raymond Wheeler, KVEC, California Casualty and Kentucky Farm Bureau as appellees. By order of this Court entered September 10, 2001, Nedra Wheeler, Raymond Wheeler, California Casualty and KVEC were dismissed as parties to the appeal.

On appeal, Humana argues that: (1) the trial court erred in holding that Benge had to be made whole before Humana's

subrogation interest arose; and (2) that the trial court erred by failing to consider the policy limits of KVEC's coverage. We will address these arguments in reverse order. Humana provides no authority in support of its second argument. Thus, there is nothing for us to consider upon appeal. It is not our function to practice cases for litigants, nor research issues for parties "who do not consider their case of sufficient importance to give the court assistance in reaching a proper decision." Allen v. Murphy, Ky., 255 S.W.2d 23, 25 (1953).

Humana contends that the "made whole provision" does not apply where there is a contractually-mandated obligation on the part of an insured to reimburse an insurer, citing Wine v. Globe American Casualty Company, Ky., 917 S.W.2d 558 (1996), and Great American Insurance Companies v. Witt, Ky. App., 964 S.W.2d 428 (1998). [1]

Wine explains the doctrine of subrogation, and when it arises. "The issue before us is not whether the right of subrogation exists, rather it is when does this right arise? In a world of limited resources, who has priority in its claim, ..."

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[1] Witt applied the "made whole" rule to claims under Kentucky's workers' compensation subrogation statute, KRS 342.700(1); however, the Supreme Court has held that the "made whole" rule is a common law rule, grounded in equity, that does not apply to statutory rights, such as those created by KRS 342.700(1). The workers' compensation subrogation statute "specifies the rights and limitations of both the subrogor and the subrogee and tailors those rights and limitations to the peculiar nature of workers' compensation." "IK Selective Self-Insurance Fund v. Bush, Ky., ____S.W.3d _____ (2002). The court explained that the statute expresses a legislative purpose that the employer/insurer is entitled to recoup from the third-party tortfeasor the benefits it paid to the injured worker. Thus, the common law made "whole rule" cannot be applied to preclude that recovery. To that extent, Bush overruled Witt.

In Williston on Contracts, Section 1269, (Third Ed. 1967) the author states:

> The surety's right of subrogation does not arise ordinarily until the debt is paid in full. A partial payment of the debt, even though it may be the full amount for which the surety has bound himself, will not entitle him to subrogation to the creditor's rights and securities.

And at Section 1273:

> There is no equity on which to base the deprivation of the creditor of any of his legal rights for the benefit of the surety until he has been paid in full. **In the absence of relevant statutory law or contractual obligations between the parties, the answer to when the right of subrogation arises is rooted in equity.** In order to achieve "natural justice" we look to the purpose of subrogation and the relationship between the insurer and its insured.
>
> The doctrine of subrogation has a long and rich tradition of benevolence and fairness, [citation omitted] and is irrevocably anchored in principles of natural justice.[citation omitted]. It was an invention of equity, designed to prevent unjust enrichment by requiring those who benefitted from another paying their debt to ultimately pay it themselves. It was often called the rule of substitution because one legally required to pay the obligation of another became legally entitled to be substituted in the place of the creditor. [Citations omitted.]
>
> **Because the goal of subrogation is to accomplish justice between the parties, under common law great care is taken to ensure that invoking the doctrine does not impair one with a superior equitable right.** Accordingly, the doctrine is applied only after considering the rights of all parties and "where an injustice will be wrought" the doctrine will not be applied. [Citation omitted.] These principles underlying the common law doctrine of subrogation must also

> underlie the determination of when the right to subrogation arises. Under common law, it has generally been held that no subrogation rights exist (or the right does not arise) until the insured has first recovered the full amount of loss sustained. In Couch on Insurance 2d, Section 61:64 (Rev. Ed. 1983), the author states:
>
> > The insurer may in a given case have made the full payment required of it by its contract of insurance but this amount is not adequate to indemnify the insured in full. In such an instance, it has been held, in absence of waiver to the contrary, that no right of subrogation against the insured exists upon the part of the insurer where the insured's actual loss exceeds the amount recovered from both the insurer and the wrongdoer, after deducting costs and expenses. In other words, the insurer has no right as against the insured where the compensation received by the insured is less than his loss . . . .
> >
> > . . . .
>
> Under general principles of equity, in the absence of statutory law or valid contractual obligations to the contrary, an insured must be fully compensated for injuries or losses sustained (made whole) before the subrogation rights of an insurance carrier arise.

Id. at 561-562. (Emphasis added.)

Thus, absent statutory law or a valid contractual obligation to the contract, Benge is entitled to be made whole,

before Humana's subrogation right arises. Humana does not contend that any statutory law controls. We turn to the insurance contract to determine if it gives Humana priority over Benge. We have examined the relevant provisions of the policy, set forth in both Humana's and Benge's briefs. The policy language provides Humana with the right to recover sums paid, "where circumstances warrant the assertion of . . . [Humana's] rights, to the fullest extent allowed by the applicable laws of the jurisdiction involved." The policy language does not express an intent to invest Humana with a priority over its less than fully compensated insured. Id. at 564. The trial court did not err in applying the "made whole" rule to the facts of this case. We affirm.

ALL CONCUR.

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