

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-002055-MR

ALITA GAIL POPE

APPELLANT

v. APPEAL FROM McCracken Circuit Court  
HONORABLE CRAIG Z. CLYMER, JUDGE  
ACTION NO. 01-CI-01181

ALLSTATE INSURANCE COMPANY

APPELLEE

OPINION

AFFIRMING

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BEFORE: BUCKINGHAM, GUIDUGLI AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Alita Gail Pope (hereinafter "Pope") has appealed from the McCracken Circuit Court's September 10, 2002, order granting Allstate Insurance Company's (hereinafter "Allstate") motion for summary judgment and dismissing her complaint. Pope was seeking underinsured motorist (hereinafter "UIM") benefits from Allstate, her UIM carrier. We affirm.

On September 19, 1998, Pope was involved in a motor vehicle accident with Lisa McGuillion (hereinafter

"McGuillion"). There is no dispute that McGuillion was at fault in the accident and that her carelessness and negligence caused Pope to incur injury. At the time of the accident, McGuillion was insured under a policy issued by Shelter Insurance Company (hereinafter "Shelter"). Likewise, Pope was insured under a policy by Allstate, which policy provided Pope with UIM coverage. Pope settled her claim against McGuillion and Shelter, the liability carrier, for the sum of \$17,000, and signed a release discharging McGuillion, Shelter, and any other person, firm or corporation on August 28, 2001.

On November 16, 2001, Pope filed a complaint in McCracken Circuit Court, demanding a judgment against Allstate for UIM benefits in an amount that would fairly and reasonably compensate her for the damages incurred in the accident with McGuillion. Allstate filed an answer on December 11, 2001, arguing that Pope's complaint should be dismissed due to her failure to comply with KRS 304.39-320 and provide it with notice of the proposed settlement with the liability carrier. Although not reflected in the certified record, some discovery apparently took place. On June 24, 2002, Allstate filed a motion for summary judgment, arguing that Pope failed to comply with the requirements of KRS 304.39-320 and provide it with notice of the proposed settlement with Shelter and McGuillion. Pope filed a response to Allstate's motion, arguing that the purpose of the

statute in question was to give notice to the UIM carrier so that it may protect its subrogation rights and that Allstate had failed to provide a certified copy of its policy to establish its right to subrogation. Further, Pope argued that Allstate failed to show substantial prejudice from the delay in notice. Allstate filed a reply to Pope's response, pointing out that Pope did not provide the circuit court with any reason to deny the motion for summary judgment because she did not contest the fact that no notice was given to Allstate of the proposed settlement.

On September 10, 2002, the circuit court entered an order granting Allstate's motion for summary judgment as follows:

The Defendant Allstate Insurance Company's Motion for Summary Judgment having come on for consideration and the Court being sufficiently advised and being of the opinion that because of the Plaintiff's failure to give notice to Allstate Insurance Company of his proposed settlement with the tort feisor, Lisa McGuillion, and the Plaintiff nevertheless having fully released all claims against tort feisor, Lisa McGuillion, Plaintiff is not entitled to recover from or against Allstate Insurance Company any of the relief for un[der]insured motorist coverage as claimed in the Complaint.

The Plaintiff's Complaint against Allstate Insurance Company is hereby dismissed fully, with prejudice. This is a final and appealable judgment and there is no just cause for delay.

This appeal followed.

Prior to addressing the merits of the appeal, we must first address a procedural matter regarding documents Pope attached as exhibits to her brief. Pope attached three letters regarding the settlement between herself and Shelter, the last being an August 24, 2001, letter from Pope's counsel to Ms. Nicole M. Mignone of Allstate regarding the proposed \$17,000 settlement. Pursuant to CR 76.12(4)(c)(vii), only materials or documents included in the certified record on appeal may be included in the appendix to a brief. The three documents were not introduced in the circuit court nor were they included in the certified record on appeal, and therefore should not have been included as exhibits to Pope's brief. Accordingly, we shall disregard the letters dated August 17, 2001, August 21, 2001, and August 24, 2001, as well as any citations to the documents in Pope's brief. Croley v. Alsip, Ky., 602 S.W.2d 418 (1980).

As to the merits of the appeal, Pope argues that Allstate failed to show that it had been prejudiced by a delay in notice of the proposed settlement.<sup>1</sup> She also argues that KRS 304.39-320 does not make the notice requirement mandatory due to

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<sup>1</sup> In her brief, Pope asserts for the first time that that she notified Allstate of the settlement offer by first class mail on August 24, 2001, prior to completing the settlement with Shelter. This assertion was never brought before the circuit court, and cannot, therefore, be raised before this Court on appeal.

the Legislature's use of the word "must" rather than "shall" in the applicable portion of the statute. Additionally, Pope asserts that she should not be forced to forfeit her rights to UIM benefits without Allstate having to show actual prejudice, and that Allstate failed to establish its right to subrogation. On the other hand, Allstate argues that even if notice is assumed, Pope failed to follow the mandatory dictates of KRS 304.39-320, which provides the underinsured carrier with thirty days from the receipt of notice of a proposed settlement to choose whether to preserve its subrogation rights. Additionally, Allstate argues that although it is not required to show prejudice, the loss of the right to preserve its subrogation claim is obviously prejudicial, and the cases Pope cited in her brief are unrelated to the issue she presented.

In Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996), this Court addressed the standard of review to be applied in an appeal from a summary judgment:

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992). "The record must be viewed in a light most favorable to the party

opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, 807 S.W.2d at 480, citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . ." Huddleston v. Hughes, Ky.App., 843 S.W.2d 901, 903 (1992), citing Steelvest, supra (citations omitted).

With this standard in mind, we shall review the circuit court's summary judgment in favor of Allstate.

In Coots v. Allstate Insurance Company, Ky., 853 S.W.2d 895 (1993), the Supreme Court of Kentucky reviewed KRS 304.39-320 and held that "it does not abrogate UIM coverage to settle with the tortfeasor and his carrier for the policy limits in his liability coverage, so long as the UIM insured notifies his UIM carrier of his intent to do so and provides the carrier an opportunity to protect its subrogation." Id. at 900. In response, the General Assembly codified this ruling in the amended version of KRS 304.39-320(3) as follows:

If an injured person . . . agrees to settle a claim with a liability insurer and its insured, and the settlement would not fully satisfy the claim for personal injuries or wrongful death so as to create an underinsured motorist claim, then written notice of the proposed settlement must be submitted by certified or registered mail to

all underinsured motorist insurers that provide coverage. The underinsured motorist insurer then has a period of thirty (30) days to consent to the settlement or retention of subrogation rights. An injured person . . . may agree to settle a claim with a liability insurer and its insured for less than the underinsured motorist's full liability policy limits. If an underinsured motorist insurer consents to settlement or fails to respond as required by subsection (4) of this section to the settlement request within the thirty (30) day period, the injured party may proceed to execute a full release in favor of the underinsured motorist's liability insurer and its insured and finalize the proposed settlement without prejudice to any underinsured motorist claim.

In reviewing the record before us, it is clear that Pope did not comply with the terms of KRS 304.39-320 by providing notice to her UIM carrier of the proposed settlement with Shelter. There is nothing in the certified record to establish that Pope provided Allstate with the requisite notice. She is therefore precluded from claiming any UIM benefits from Allstate. We disagree with Pope's contention that the terms of the statute are not mandatory because of the use of the term "must" rather than "shall". While we agree that an injured party is not required to provide the notice to his UIM carrier of a proposed settlement with a liability carrier, the failure to do so forfeits the injured party's right to claim or recover any UIM benefits from his or her UIM carrier. Here, Pope's failure to properly notify Allstate of the proposed settlement

with Shelter abrogates her right to collect UIM benefits from her carrier.

Even if we assume that Pope provided the requisite notice of the proposed settlement, the notice was insufficient for two reasons. First, she did not send the written notice by the proper method. KRS 304.39-320(3) requires the notice to be submitted by either certified or registered mail; Pope sent her alleged notice by first-class mail. Second, the alleged notice was dated August 24, 2001, while the release with Shelter and McGuillion was signed only four days later on August 28, 2001. The statute allows the UIM carrier thirty days from receipt of the notice to decide whether to preserve its subrogation rights; Pope only waited four days from sending the alleged notice before completing the proposed settlement and signing the release.

As to Pope's argument that Allstate must show prejudice before it can rely upon lack of notice as a defense, we agree with Allstate that Pope's citations to Gordon v. Kentucky Farm Bureau Insurance Co., Ky., 914 S.W.2d 331 (1996), and to Jones v. Bituminous Casualty Corp., Ky., 821 S.W.2d 791 (798), have no relevance to the issue before us. Both Gordon and Jones deal with delayed notification of accidents to carriers, and provide that the carrier must show prejudice before being entitled to use such a delay to negate coverage.

Here, Pope clearly did not follow the statutory requirements, in effect waiving her right to claim UIM benefits from her carrier.

The circuit court properly granted Allstate's motion for summary judgment as there were no genuine issues of material fact to be decided, and Allstate was entitled to a judgment as a matter of law.

For the foregoing reasons, the order of the McCracken Circuit Court granting summary judgment and dismissing Pope's complaint is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Leslie J. Shekell  
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BRIEF FOR APPELLEE:

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