

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001384-MR

KENTUCKY FARM BUREAU MUTUAL  
INSURANCE COMPANY

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE STEVEN D. COMBS, JUDGE  
ACTION NO. 04-CI-00560

SONYA L. ELSWICK, A/K/A SONYA L.  
CHAPMAN, A/K/A SONYA L. HONAKER

APPELLEE

### OPINION VACATING AND REMANDING

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BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

WINE, JUDGE: Kentucky Farm Bureau Mutual Insurance Company (KFB) filed this action against Sonya L. Elswick (Elswick) in Pike Circuit Court, seeking subrogation of basic reparation benefits (BRB) and uninsured motorist (UM) benefits which it paid to its insured. The trial court granted Elswick's motion to dismiss the complaint, concluding that Elswick was a secured person under the

Motor Vehicle Reparations Act (MVRA), and therefore was not liable for subrogation to KFB. KFB argues that there were disputed issues of material fact which should have precluded a judgment in Elswick's favor. We agree, and thus vacate the order of dismissal and remand for additional proceedings.

This action arises from a motor vehicle accident that occurred in Pike County, Kentucky, on May 2, 2002. Elswick's vehicle collided with vehicles driven by Kermit Smith and Darrell Brooks. The police report of the accident lists a Pike County address for Elswick. In addition, the vehicle which Elswick was driving was licensed and registered in Kentucky. At the time of the accident, Elswick stated that she had motor vehicle insurance coverage with "Nationwide Mutual."

Following the accident, Smith's insurer, KFB, sent several subrogation demand letters to Nationwide. According to KFB, Nationwide repeatedly denied that coverage existed for Elswick on the date of the loss. When contacted, Elswick again informed KFB that she had coverage through Nationwide, but she did not provide KFB with any specific information about her policy.

Finally, KFB filed this action against Elswick on April 23, 2004. KFB alleged that it had paid its insured, Smith, a total of \$9,681.47 in Personal Injury Protection (PIP) benefits, and an additional \$20,000.00 in UM benefits. KFB asserted that it was entitled to subrogation of these amounts against Elswick because she is an unsecured person under the MVRA.

After being served, Elswick responded with a motion to dismiss KFB's complaint. In support of her motion, Elswick introduced an automobile insurance policy issued to her under the name of Sonya Chapman by a Nationwide agent in Big Stone Gap, Virginia. (The Nationwide policy lists a Virginia address for Elswick.) Elswick asserted that, since she was in fact a secured person at the time of the accident, KFB was not entitled to seek subrogation against her pursuant to Kentucky Revised Statutes (KRS) 304.39-070(2).

In response, KFB argued that there were factual issues about Elswick's coverage which precluded her motion to dismiss. In the alternative, KFB filed a motion to amend its complaint to assert claims against Nationwide. Upon submission of the motion, the trial court dismissed KFB's subrogation claims against Elswick. The trial court found that Elswick was a secured person and that KFB's subrogation claims against her were barred.

Thereafter, KFB filed a motion to alter, amend, or vacate the judgment, Kentucky Rules of Civil Procedure (CR) 59.05, again arguing that there were factual issues concerning Elswick's coverage with Nationwide. KFB also pointed out that the trial court had not ruled on its motion to file an amended complaint against Nationwide. In an order entered on June 8, 2006, the trial court granted KFB's motion to file an amended complaint, but denied the motion to reinstate KFB's claims against Elswick. KFB's claims against Nationwide are apparently still pending before the trial court. However, KFB appeals from the trial court's order dismissing its claims against Elswick.

Although Elswick filed a motion to dismiss in lieu of an answer, she relied on matters outside of the pleadings. Therefore, her motion must be treated as one for summary judgment pursuant to CR 56. CR 12.02. *See also Cabinet for Human Resources v. Women's Health Services, Inc.*, 878 S.W.2d 806, 807 (Ky. App. 1994). In reviewing a motion for summary judgment, a trial court must consider all evidence of record, including depositions, answers to interrogatories, stipulations and admissions on file. CR 56.03. “[S]ummary judgment is only proper where the movant shows that the adverse party [could] not prevail under any circumstances.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991), *citing Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985). “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.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996), *citing* 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.*, 833 S.W.2d 378, 381 (Ky. 1992).

As an initial matter, the trial court's order prematurely resolved disputed issues of fact. On a motion for summary judgment, “[t]he trial [court] must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists.” *Steelvest*, 807 S.W.2d at 480. Most notably, the trial court found that Elswick was a resident of Virginia on the date of the accident. This finding

conflicts with the evidence presented by KFB that Elswick gave a Kentucky address to the police after the accident. Thus, the trial court clearly erred in deciding a disputed issue of fact on a motion for summary judgment.

The more important question, however, is whether this disputed issue of fact was material. This leads us to the central question in this case: Was Elswick a “secured person” on the date of the accident? KRS 304.39-070(2) provides that a reparation obligor (such as KFB) “which has paid or may become obligated to pay basic reparation benefits shall be subrogated to the extent of its obligations to all of the rights of the person suffering the injury against any person or organization other than a secured person.” But if the injury was caused by a secured person, the injured party’s reparation obligor may obtain BRB reimbursement only from the secured person’s reparation obligor. *City of Louisville v. State Farm Mutual Automobile Insurance, Co.*, 194 S.W.3d 304, 306 (Ky. 2006), *citing* KRS 304.39-070(3).

The trial court found that Elswick “had in full force and effect a motor vehicle insurance policy issued in the State of Virginia by Nationwide Mutual Insurance Company.” Since the court also found that the policy complied with the minimum coverage requirements of the Kentucky MVRA, the trial court found that Elswick was a “secured person” within the meaning of KRS 304.39-070. But given the circumstances of this case, we agree with KFB that such a determination requires more than introducing a copy of a policy which purports to provide such coverage.

Rather, a “secured person” is defined at KRS 304.39-070(1) as “the owner, operator or occupant of a secured motor vehicle, and any other person or organization legally responsible for the acts or omissions of such owner, operator or occupant.” Recently, in *Schmidt v. Leppert*, 214 S.W.3d 309 (Ky. 2007), the Kentucky Supreme Court held that in order to be a secured person, the person must be an owner, operator or occupant of a “secured motor vehicle.” *Id.* at 311, *citing* KRS 304.39-070(1). The Court further held that, in order to have “security” on a motor vehicle, an insured’s policy must include BRB. *Id.* at 311-12.

In *Schmidt*, a Kentucky insurer sought BRB subrogation from an Indiana driver who caused an automobile accident in Kentucky. Although the Indiana driver was insured, his insurance company did not do business in Kentucky. Furthermore, his Indiana policy did not provide coverage for BRB. Thus, the Kentucky Supreme Court concluded that, while the Indiana driver was insured, he was not a “secured person” within the meaning of KRS 304.39-070(1), because the Kentucky insurer could not obtain BRB reimbursement from the Indiana carrier. *Id.*

Unlike in *Schmidt*, Elswick’s Virginia policy with Nationwide provides for the minimum compulsory insurance coverage required by the law of the state where the accident occurs. Assuming that Elswick had coverage under that policy, we agree with the trial court that KFB could seek BRB reimbursement directly from Nationwide, and was not entitled to bring a direct action against Elswick. But while the facts of this case are distinguishable from those in *Schmidt*,

we conclude that there are still disputed issues of fact and law regarding Elswick's coverage.

KFB presented evidence that Nationwide repeatedly denied that Elswick was its insured prior to the filing of this action. In so doing, Nationwide prevented KFB from filing a direct claim against it at an earlier time. And while it appears that Nationwide is now providing Elswick's defense in this action, Nationwide has never formally admitted that it owes coverage for this accident. Indeed, as recently as February 23, 2006, Nationwide issued a reservation-of-rights letter to Elswick, stating that it had not yet made any determination of coverage.

KFB also notes the conflicting evidence about Elswick's residency on the date of the accident. In addition, there is no definitive evidence that Nationwide's Virginia policy is subject to arbitration in Kentucky under KRS 304.39-070(3). These questions all involve disputed issues of fact which were not ripe for resolution on this motion. Moreover, a declaration of rights action, with Nationwide as a party, would be the proper method to adjudicate these issues.

Furthermore, KFB also asserted a claim against Elswick to recover the UM benefits which it paid to Smith. KFB's right to recover these benefits is not governed by KRS 304.39-070, but may be asserted as a subrogation claim under KRS 304.20-020(4). The trial court addressed this claim, but concluded that the claim was prohibited "since the [KFB's] insured could have made a claim for bodily injury damages from [Elswick] for which [Elswick] had liability insurance with Nationwide Mutual Insurance Company at all relevant times." As noted

above, however, Nationwide has repeatedly denied coverage in this case, and still has not admitted that it owes coverage for this accident. Under the circumstances, we conclude that summary judgment was premature on this matter as well.

Accordingly, the order of the Pike Circuit Court dismissing KFB's claims against Elswick is vacated, and this matter is remanded for additional proceedings as set forth in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT  
FOR APPELLEE:

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ORAL ARGUMENT FOR  
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