

RENDERED: AUGUST 15, 2008; 2:00 P.M.
 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001979-MR

UNDERWRITERS INSURANCE
COMPANY

APPELLANT

v.
APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 04-CI-01701

THE WELLS GROUP, LLC, RODNEY
FLEMING AND JAMES MULLINS

APPELLEES

OPINION
AFFIRMING

*** * * * *

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: James Mullins was employed by Stanley Setup. He was injured at work when Rodney Fleming, who was employed by Wells Group, LLC dropped a steel ladder on Mullins' head. Stanley was insured by

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(b) of the Kentucky Constitution and KRS 21.580.

Underwriters Insurance Company for workers' compensation claims. Mullins sought relief through a workers' compensation claim as well as pursuing a civil action against Fleming and Wells. Underwriters moved to intervene in the civil action as the workers' compensation carrier. Mullins, Fleming, Wells and Underwriters undertook an attempt to resolve all issues at mediation. Mullins settled his claims with Fleming and Wells prior to trial. As part of those settlements, Mullins was required to indemnify both Wells and Fleming from any claims by Underwriters.

This appeal arose when Mullins, on his own behalf and as indemnitor of Wells and Fleming, was granted summary judgment against Underwriters. Underwriters argues the trial court erred when it granted summary judgment before discovery was complete and that there were material issues of fact between the parties, precluding summary judgment. After a complete review of the record and the applicable law, we disagree and affirm the decision of the Pike County Circuit Court.

Underwriters first argues that summary judgment was inappropriate because discovery was not complete. “[S]ummary judgment is only proper after a party has been given ample opportunity to complete discovery, and then fails to offer controverting evidence.” *Pendleton Bros. Vending Inc. v. Commonwealth Finance & Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988). Underwriters incorrectly summarizes the holding in that case to mean that until discovery is complete, there cannot be summary judgment.

On September 22, 2005, Underwriters moved to intervene as the workers' compensation carrier. It filed an intervening complaint against Wells and Fleming on October 5, 2005. An answer was filed and a trial date of May 8, 2006 was established. Five days before the scheduled trial date, Underwriters moved for a continuance, which was granted over Mullins' objection. Prior to that motion, the trial court had ordered that witness lists be filed by March 19, 2006 and that discovery be completed by April 18, 2006 in preparation for the May 8 trial date. Underwriters failed to timely respond to those orders. Finally, on May 19, 2006, Underwriters served Interrogatories and Requests for Production of Documents on Mullins.

Mullins sought a protective order stating the requests were entirely duplicative of discovery materials already exchanged by all parties prior to the settlement of the claims with Wells and Fleming. That motion was overruled on June 16, 2006. Mullins then moved for reconsideration. The trial court re-examined the record and on July 21, 2006 granted the motion for reconsideration, and sustained Mullins' motion for summary judgment.

Underwriters did nothing to further its claims for over seven months and then only filed discovery requests for materials that had already been provided. Underwriters was provided "ample opportunity to complete discovery." *Id.* Even more importantly however, Mullins' affidavit in support of summary judgment clearly delineated the lack of any issue and the appropriateness of summary judgment.

Kentucky Revised Statutes (KRS) 342.700(1) provides that in situations where the employee acts to indemnify the workers' compensation insurance carrier, that indemnification shall not "exceed the indemnity paid and payable to the injured employee, less the employee's legal fees and expense." Mullins' affidavit indicates he expended \$176,192.08 on legal expenses. Underwriters' claim was \$152,540.25. Mullins' expenses exceeded the entire claim by over \$23,000.

The Kentucky Supreme Court has interpreted KRS 342.700(1) and determined that the entire sum of legal expenses shall "be deducted from the employer's or insurer's portion of any recovery." *AIK Selective Self Insurance Fund v. Bush*, 74 S.W.3d 251, 257 (Ky. 2002). When the worker's legal fees and expenses exceed the total amount paid by the insurer, the insurer is entitled to no subrogation recovery pursuant to KRS 342.700(1). *AIK Selective Self Insurance Fund v. Minton*, 192 S.W.3d 415 (Ky. 2006). Underwriters disagreed with Mullins' calculations pertaining to his fees and expenses, but the record establishes clearly that Mullins' legal expenses exceeded Underwriters' claim. Summary judgment on that issue was appropriate.

Underwriters next suggests that a material issue of fact does exist and for that reason summary judgment was improper. This argument rests on the finding that Mullins will be entitled to recover future medical expenses as part of his ongoing treatment. It is incumbent on a party to provide some evidence to rebut an allegation of an absence of material facts. *Neal v. Welker*, 426 S.W.2d

476 (Ky. 1968). Here, although the potential exists for an additional claim to arise between the parties, Underwriters offered no concrete evidence to support its position that an actual controversy exists. While it is possible that Mullins' future medical expenses may exceed the \$23,000 overage already accumulated, it is also possible that such a claim may never arise. We may not speculate on the issue. Summary judgment was appropriate.

Finally, we note that in his brief, Mullins raises issues of damages and costs pursuant to Kentucky Rules of Civil Procedure (CR) 73.02(4). Those same issues were previously presented to this Court by motion and relief was denied at that time. We will not revisit a matter already determined.

The judgment of the Pike County Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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