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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000257-MR

PAULA AL JAWHAR — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 15-CI-006490

LIBERTY MUTUAL INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Paula Al Jawhar appeals from the Jefferson Circuit Court's order granting summary judgment which dismissed her underinsured motorist (UIM) claim against her insurer, Liberty Mutual Insurance Company, with prejudice for failure to provide the requisite notice of settlement with her tortfeasor as required by Kentucky Revised Statutes (KRS) 304.39-320(3).

Al Jawhar argues that she had no opportunity to provide notice to Liberty Mutual because the settlement offer was a "take it or leave it" offer, denying her the opportunity to settle under these circumstances is contrary to the purposes for which the Motor Vehicles Reparation Act (MVRA) was enacted and, consequentially, she should still have a UIM claim against Liberty Mutual because she has not been fully compensated. Al Jawhar also argues that it was futile for her to provide notice to Liberty Mutual because it would not have offered to tender to her the settlement amount which greatly exceeded its UIM limits and any right of subrogation against her tortfeasor was illusory.

On January 17, 2011, Al Jawhar was injured in a two-vehicle motor vehicle accident caused by Meredith McCauley. At the end of 2012, Al Jawhar filed a civil suit against McCauley. Trial was scheduled to be held on August 12, 2014. Just before jury selection was to commence, McCauley, through her insurer, offered Al Jawhar a settlement of $125,000, which was half of McCauley's liability policy coverage.

Al Jawhar accepted the offer, with Al Jawhar formally releasing McCauley on May 8, 2015, from "any and all claims, demands, actions, or causes of action of any kind" from the 2011 accident and Al Jawhar further agreed to hold harmless and indemnify McCauley from "any and all claims in subrogation." On

May 19, 2015, in accordance with the release, the circuit court entered an order dismissing the negligence action against McCauley with prejudice.

On December 23, 2015, Al Jawhar filed suit against Liberty Mutual seeking UIM benefits for the 2011 accident. It is undisputed that Al Jawhar never provided Liberty Mutual with any written notice of her proposed settlement with McCauley.

Liberty Mutual filed a motion for summary judgment on the basis that Al Jawhar's claim was precluded for failure to give it notice of the settlement as required by KRS 304.39-320. The circuit court agreed and granted summary judgment to Liberty Mutual.

"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). Summary judgment "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

In *Coots v. Allstate Insurance Co.*, 853 S.W.2d 895, 900 (Ky. 1993), the Kentucky Supreme Court held that the MVRA "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[.]"

In 1998 the Kentucky General Assembly revised KRS 304.39-320 to codify the so called "*Coots* notice" requirement. KRS 304.39-320 provides in relevant part as follows:

> (3) If an injured person or, in the case of death, the personal representative 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, or in the case of death, the personal representative, 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.

> (4) If an underinsured motorist insurer chooses to preserve its subrogation rights by refusing to consent to settle, the underinsured motorist insurer must, within thirty (30) days after receipt of the notice of the proposed settlement, pay to the injured party the amount of the written offer from the underinsured motorist's liability insurer. Thereafter, upon final resolution of the underinsured motorist claim, the underinsured motorist insurer is entitled to seek subrogation against the liability insurer to the extent of its limits of liability insurance, and the underinsured motorist for the amounts paid to the injured party.

KRS 304.39-320 is mandatory and compliance with its unambiguous language is required. *Malone v. Kentucky Farm Bureau Mut. Ins. Co.*, 287 S.W.3d 656, 659 (Ky. 2009). If a *Coots* notice is defective, summary judgment may properly be granted to the UIM insurance carrier relieving it of its obligation to pay UIM benefits. *Kentucky Farm Bureau Mut. Ins. Co. v. Young*, 317 S.W.3d 43, 49 (Ky. 2010). This is appropriate because, if an UIM insurance carrier does not have notice of an intended settlement agreement it has no opportunity to protect its subrogation rights. *Liberty Mut. Fire Ins. Co. v. Massarone*, 326 F.3d 813, 816 (6th Cir. 2003).

KRS 304.39-320 does not provide any exceptions based on last minute settlement offers, nor does it appear that Al Jawhar could not agree to settle and then submit a *Coots* notice where the settlement was not finalized for months.

> In the context of KRS 304.39-320, the settlement between the injured party, on the one hand, and the other motorist and his carrier, on the other, is necessarily

> "proposed" as opposed to fully consummated because the underinsured carrier . . . has a statutory right, after receipt of proper notice, to "consent to the settlement or retention of subrogation rights."

Malone, 287 S.W.3d at 659. However, "to invoke KRS 304.39-320 . . . [the insured must] 'agree to settle' with the other motorist and his liability carrier." *Id.*

Al Jawhar did not attempt to notify Liberty Mutual that she had accepted a settlement agreement. We agree with the Sixth Circuit's interpretation in *Massarone*, 326 F.3d at 816, that because Al Jawhar "[has] failed to comply with the statutorily required notice prior to finalizing the settlement, [she] may not now pursue [her] underinsured motorist claim with Liberty Mutual."

Accordingly, we affirm the Jefferson Circuit Court's order granting Liberty Mutual's motion for summary judgment and dismissing Al Jawhar's UIM claim with prejudice.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Grover S. Cox Louisville, Kentucky	Leah M. Rayfield Louisville, Kentucky