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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000121-MR

TONY SHACKELTON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 15-CI-03192

ESTATE OF JOHN P. FRIES AND
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ACREE, KRAMER, AND K. THOMPSON, JUDGES.

ACREE, JUDGE: Tony Shackelton appeals the Fayette Circuit Court's October 20, 2016 order dismissing his complaint and amended complaint finding no grounds "which would support and/or authorize relation back [of the amended

complaint to the filing date of the original complaint] under CR[1] 15.03." We affirm in part, reverse in part, and remand for additional proceedings as explained herein.

FACTS AND PROCEDURE

On April 28, 2013, John Fries rear-ended Shackelton's vehicle at a red light in Lexington, Kentucky. Shackelton sustained an assortment of injuries, including four cracked/broken teeth requiring a root canal, anterior and inferior posterior labral injury requiring left shoulder arthroscopy and acromioclavicular joint repair, left wrist surgery, neck and back pain, and headaches. He incurred $54,113.13 in medical expenses.

Fries maintained a policy of insurance with Cincinnati Insurance Company. His liability policy limit is not revealed by the record.

Shackelton's vehicle was insured by State Farm Mutual Automobile Insurance Company. His policy included underinsured motorist (UIM) coverage.

Shackelton exhausted his basic reparations benefits (BRB)[2] on August 29, 2013. In October 2014, Shackelton informed Cincinnati Insurance of his legal representation. Cincinnati Insurance acknowledged representation in December 2014.

[1] Kentucky Rules of Civil Procedure.

[2] Also known as personal injury protection (PIP).

Fries died on February 5, 2015.

The next month, Shackelton's counsel engaged in an extended conversation with Cincinnati Insurance's adjuster, Robert Pearman. Counsel informed Pearman he would be sending a comprehensive demand package. Pearman made no mention of Fries' passing to counsel.

Shackelton submitted his demand package to Cincinnati Insurance in June 2015. The next month, Pearman requested additional records; he again did not address Fries' death. Shackelton received no further response from Cincinnati Insurance. Accordingly, on August 27, 2015, Shackelton filed a negligence action against Fries accompanied by a claim against State Farm for UIM benefits. State Farm filed a subrogation cross-claim against Fries for any payments it is required to make for UIM benefits under Shackelton's insurance policy.

Cincinnati Insurance contacted Shackelton in November 2015 via telephone and issued an opening settlement offer which Shackelton rejected. Fries' death was not mentioned.

Shackelton learned of Fries' passing on December 2, 2015, through diligent efforts to effect service of his complaint. No estate had been opened in Fries' county of residence, Campbell County.

Unable to locate a relative willing and/or able to serve as an estate representative, Shackelton filed a petition to open an estate and appoint a public

administrator for the Estate of Fries. Cincinnati Insurance was included on the certificate of service. While Shackelton navigated the probate courts of Campbell County, Cincinnati Insurance continued to offer written and verbal settlement amounts on behalf of its insured, John Fries.

In August 2016, Shackelton moved for leave to file an amended complaint substituting the Estate of John P. Fries as a named defendant. In all other respects the complaint remained unchanged. The circuit court granted Shackelton's motion, but reserved for future ruling the issue of whether the amended complaint related back to the filing date of the original complaint.

The Estate quickly moved to dismiss all claims on grounds that the amended complaint did not relate back to the original complaint under CR 15.03 and, therefore, was filed outside the applicable two-year statute of limitations.[3] State Farm filed a similar motion, joining the Estate's argument that Shackelton's amended complaint did not relate back under CR 15.03. It also argued that Shackelton's UIM claim should be dismissed because it was impossible for Shackelton to establish liability on the part of the Estate of Fries.

[3] Kentucky Motor Vehicle Reparations Act (MVRA) requires "[a]n action for tort liability not abolished by KRS 304.39-060 . . . be commenced not later than two (2) years after the injury, or the death, or the date of issuance of the last basic or added reparation payment made by any reparation obligor, whichever later occurs." KRS 304.39-230(6).

The circuit court granted both motions, finding "no controlling statutes or case law which would support and/or authorize relation back under CR 15.03." (R. 127). It also found the UIM claim to be dependent upon the underlying negligence claim against Fries, ruling that if the claim against Fries is not legally viable, it also impacts the UIM claim. Shackelton appealed.

STANDARD OF REVIEW

It is unclear if the circuit court dismissed this matter under CR 12.02(f) or CR 56. The Estate filed its motion pursuant to CR 12.02(f), but State Farm filed its motion pursuant to CR 12.02(f) and CR 56. Shackelton refers this Court to the summary judgment standard in his briefs. The Appellees make no mention of the proper review standard.

CR 12.02(f) authorizes judgment in favor of a defendant on the basis of the plaintiff's "failure to state a claim upon which relief can be granted[.]" CR 12.02(f). However, CR 12.02 goes on to explicitly state that:

> If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

CR 12.02. Shackelton attached to his response numerous items beyond the pleadings. Because the circuit court did not exclude these non-pleadings items, we undertake review of the circuit court's order as one granting summary judgment.

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Likewise, whether an action is time-barred is a legal, not factual, inquiry. *Ragland v. DiGiuro*, 352 S.W.3d 908, 912 (Ky. App. 2010). Our review proceeds *de novo*. *Id.*; *Mitchell v. University of Kentucky*, 366 S.W.3d 895, 898 (Ky. 2012).

ANALYSIS

Shackelton addresses his appeal to two issues. The first is whether the circuit court erred in finding the amended complaint did not relate back under CR 15.03. The second is whether the circuit court erred by dismissing the UIM claim.

A. CR 15.03 Relation Back

Shackelton first contends the circuit court erred in finding his amended complaint seeking to substitute the Estate of Fries for Fries, individually, did not relate back to the filing of his original complaint under CR 15.03. We agree with the circuit court.

CR 15.03 governs the relation back of amendments to pleadings. It provides, in pertinent part:

> (1) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.
>
> (2) An amendment changing the party against whom a claim is asserted relates back if the condition of paragraph (1) is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

CR 15.03(1), (2). If an amended complaint relates back to the date of the filing of the original complaint, the amended complaint is treated, for statute of limitations purposes, as if it had been filed at that time.

There is no question, and the parties agree, that the claims in the original and amended complaints arise out of the same occurrence – the auto accident between Fries and Shackelton. This satisfies CR 15.03(1). Our focus then is on CR 15.03(2).

The question is whether the Estate had sufficient notice of the claim that it would not be prejudiced in its defense. To satisfy CR 15.03(2), we must be able to conclude that before expiration of "the period provided by law for

commencing the action [under the MVRA], the [Estate] . . . (a) has received such notice of the institution of the action that [it] will not be prejudiced in maintaining [its] defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against [it]." CR 15.03(2).

Shackelton argues that two separate lines of cases have emerged, each premised upon CR 15.03(2): the first is *Clark v. Young*, 692 S.W.2d 285 (Ky. App. 1985) and its progeny; and the second is *Nolph v. Scott*, 725 S.W.2d 860 (Ky. 1987) and its progeny. Shackelton argues the answer to the relation back question depends on which of these two lines of jurisprudence prevails, and that depends on the presence or absence of special circumstances he claims are present.

By contrast, Appellees argue that a straightforward application of CR 15.03(2) shows the Estate did not, and could not, have notice of the action as it did not even exist when Shackelton filed the original complaint. They further contend that *Clark, supra*, is an anomaly and should be overruled to the extent that it permits imputed notice outside the limitations period.

We start with *Clark*. In that case, the plaintiff (Young) was injured while loading pipes onto a truck. The plaintiff's employer had entered into a contract with a common carrier to deliver the pipes to a customer. Plaintiff filed suit against the common carrier within the limitations period. Plaintiff later

learned – after the limitations period expired – that the common carrier had leased the truck and a driver from another person (Clark). The circuit court granted leave to plaintiff to file an amended complaint adding Clark and the truck driver as party defendants. *Clark*, 692 S.W.2d at 286-87.

On appeal, this Court held under CR 15.03 that plaintiff's amended complaint related back to the filing date of his original complaint, thus saving his claims against Clark and the truck driver from dismissal by application of the applicable limitations statute. The Court focused on whether the notice to Clark was sufficient and whether, but for the plaintiff's mistake in identity, he would have been a party to the lawsuit. CR 15.03(2). We embraced in *Clark* what has become known as the "identity of interest" exception to the notice requirement:

> Regarding [CR 15.03] section (2), in view of the identical business interest between [the common carrier] and Clark arising from the lease agreement imposing responsibility upon [the common carrier] for tortious acts of Clark, it is inconceivable that Clark had not received actual or constructive notice of the subject litigation. In fact, there is authority that actual notice is not required under CR 15.03(2). *See Kirk v. Cronvich*, 629 F.2d 404 (5th Cir. 1980). Nor, in view of the agreement, can we understand how Clark can be prejudiced in the slightest. Any delay in marshaling a defense was undoubtedly cured by [the common carrier] who knew of the suit and defended as the party who ultimately stood to lose under the lease agreement. Further, it is obvious that Young, as a Robintech employee, could not reasonably have been expected to know that [the common carrier] had leased the driver and equipment from Clark, nor, for that matter, if it was leased—from whom. All indicia, including a

> nameplate of sorts on the vehicle, were that the operation and equipment were [the common carrier's]. Undoubtedly, Clark knew that he was a proper defendant and that Young was mistaken or without knowledge of his presence in the operation. *Cf. Pelphrey v. Cochran*, Ky., 454 S.W.2d 675 (1970). Finally, we note that initially, both [the common carrier] and Clark were represented by the same counsel. This alone strongly supports our view of compliance with section (2). *See Morrison v. Lefevre*, 592 F. Supp. 1052 (S.D.N.Y.1984).

Clark, 692 S.W.2d at 288-89 (footnote omitted).

We re-visited this issue the very next year in *Funk v. Wagner Machinery*, 710 S.W.2d 860 (Ky. App. 1986). In *Funk*, the plaintiff, injured by an allegedly defective product, filed suit against the sales corporation instead of the product manufacturer. He then attempted to amend his complaint outside the limitations period to add the product manufacturer. Applying *Clark*, we found CR 15.03 authorized relation back of the plaintiff's amended complaint, reasoning:

> Further, while it is inconceivable to us that a sales representative who has been sued because of the defect in a product of a manufacturer it represents or its insurer would not immediately notify the manufacturer of such an event, the ongoing business relationship of the agent and the manufacturer, which encompasses the very item alleged to be defective, is sufficient to satisfy section (2) of the rule if such actual notice is, as here, denied by the party added to the suit. *See Clark*, *supra*, and *Kirk v. Cronvich*, 629 F.2d 404 (5th Cir. 1980), cited therein. Other factors which we believe militate the application of CR 15.03 in this case include the similarity in names between the manufacturer and its sales representatives and the minor delay (less than a month) between the

> initial filing of the complaint and the date Elgin Sweeper alleged it had actual knowledge of the suit.

Funk, 710 S.W.2d at 861-62; *see also Halderman v. Sanderson Forklifts Co., Ltd.*, 818 S.W.2d 270, 273 (Ky. App. 1991) ("[H]olding that where there is a sufficient identity of interest between the old and new defendants, the notice requirement of CR 15.03(2) is satisfied whenever the intended defendant receives notice, be it actual, informal, imputed, constructive or a combination thereof, within the limitations period.").

Two years after *Clark*, our Supreme Court decided *Nolph v. Scott*, 725 S.W.2d 860 (Ky. 1987). *Nolph* was a medical malpractice action filed within the limitations period against a hospital, two named physicians, and "other unknown defendants." The plaintiff obtained warning order service on the unknown defendants during the limitations period. She later learned the identity of an unknown defendant and attempted to amend her complaint – outside the limitations period – to name that person as a party defendant. *Nolph* held that the amended complaint did not relate back to the date of the original complaint because there was no evidence that the new defendant had actual notice of the lawsuit within the limitations period. *Id.* at 861-62. The Supreme Court ruled that constructive notice by way of a warning order attorney was insufficient to satisfy CR 15.03(2)(b)'s notice requirement. *Id.* at 861. "The linchpin is notice, and notice

within the limitations period." *Id.* at 862 (quoting *Schiavone v. Fortune aka Time, Inc.*, 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986)).

For years Kentucky's courts have grappled with CR 15.03 and the cases interpreting it, as there appeared to be a disconnect between *Clark* allowing imputed or constructive notice and *Nolph* requiring actual notice. *See Underhill v. Stephenson*, 756 S.W.2d 459, 460-61 (Ky. 1988); *Munday v. Mayfair Diagnostic Laboratory*, 831 S.W.2d 912, 913 (Ky. 1992); *Halderman*, 818 S.W.2d at 273. Fortunately, our Supreme Court reconciled *Clark* and *Nolph*, and their respective progeny, in *Schwindel v. Meade County*, 113 S.W.3d 159 (Ky. 2003).

The Court in *Schwindel* held that *Clark's* "identity of interest" exception to CR 15.03(2)(b)'s notice requirement only applies when there is a "mistake" as to the identity of the proper party. The Court explained that "the implied (not constructive) 'should have known' notice referred to in CR 15.03(2)(b), which gave rise to the 'identity of interest' exception [found in *Clark*], applies only when the plaintiff has *mistakenly* sued the wrong party and the right party 'knew or should have known' of that fact." *Id.* at 170. "Mistake appears to have been the case in *Clark*, 692 S.W.2d at 286-87 (action filed against corporate lessee of truck and driver instead of lessor where driver/tortfeasor was employee of lessor, not lessee), *Funk*, 710 S.W.2d at 861 (action filed against sales corporation instead of product manufacturer), and *Halderman*, 818 S.W.2d at 271 (action filed

against subsidiary corporation instead of parent corporation)." *Schwindel*, 113 S.W.3d at 170.

Simply put, "[a]bsent mistake, the 'identity of interest' exception to the requirement of actual notice does not apply." *Id.* This is what distinguishes the *Clark* line of cases from the *Nolph* line. In *Nolph*, the plaintiff was not mistaken as to the identity of the unnamed defendant. Instead, the defendant's identity was simply unknown until after the limitations period expired. Similarly, in *Schwindel*, the plaintiff knew the named defendant's "servants, agents, and employees" allegedly caused the negligence, but the plaintiff chose not to name those persons.[4]

What, then, qualifies as a "mistake" under CR 15.03? The mistake must be one concerning identity: a misnomer or a misidentification. The mere failure to identify or name a potential defendant is *not* a mistake as contemplated by the rule. *Reese v. General American Door Co*., 6 S.W.3d 380, 383-84 (Ky. App. 1998). A "mistake" also does not occur when the plaintiff is fully aware of the potential defendant's identity, but not of its responsibility for the harm alleged. *Phelps v. Wehr Constructors, Inc.*, 168 S.W.3d 395, 398 (Ky. App. 2004) (citation omitted). And mistake is not synonymous with lack of knowledge. *Id.* "For

[4] We decline the Appellees' invitation to overturn *Clark* and its progeny. First, reversing this Court's precedent requires *en banc* consideration of the question. *Taylor v. King*, 345 S.W.3d 237, 242 (Ky. App. 2010) (citing Supreme Court Rule (SCR) 1.030(7)(d)). Second, the Supreme Court had ample opportunity to overrule *Clark* in *Schwindel*, but it did not. If the Supreme Court did not see fit to overrule *Clark*, this Court will not presume to do so.

purposes of CR 15.03(2)(b), ignorance does not equate to misnomer or misidentification." *Id.* As aptly explained by the United States District Court for the Eastern District of Kentucky, relation back "applies only where there has been an error [a mistake] concerning the identity of the proper party rather than where, as here, there is a lack of knowledge of the proper party[.]" *Ford v. Hill*, 874 F. Supp. 149, 154 (E.D. Ky. 1995).

We agree with Shackelton that he made a reasonable mistake as to the identity of the proper party under CR 15.03(2)(b). The naming of the decedent, rather than the decedent's estate, was but a technical "misnomer" in pleading. In our opinion, the original complaint did not name the *wrong party* as a defendant. Rather, the correct party was designated, but the designation amounted to a misnomer only because the named defendant (Fries) was already deceased. Shackelton simply failed to name the proper successor defendant. Fries' death alone does not extinguish every claim or potential against him. Legal responsibility for Fries' conduct continued but simply shifted to Fries' Estate to answer for it. The subsequent substitution of the Estate did not result in a new cause of action and did not involve an entire change in any of the parties. The amendment simply substituted the decedent's legal successor. The Estate stands in the shoes of Fries in defending against liability for his alleged torts.

We also see no prejudice to the Estate. CR 15.03(2)(b). We refuse to ignore the reality of the situation – Cincinnati Insurance, Fries' insurance company, is the entity defending this case regardless of whether the defendant is Fries or his Estate. As in *Clark*, both Fries and his Estate were represented by the same counsel. *Clark*, 692 S.W.2d at 288-89. "This alone strongly supports our view of compliance with" CR 15.03(2)(b). *Id.* at 289. And, "[a]mong the types of amendments which are not prejudicial are those . . . which more correctly designate the capacity in which a party is suing." *Richardson v. Dodson*, 832 S.W.2d 888, 890 (Ky. 1992). This logic applies with equal force when the plaintiff is merely changing the capacity in which the defendant is being sued.

Nevertheless, our Supreme Court has provided clear authority on this issue in *Gailor v. Alsabi*¸ 990 S.W.2d 597 (Ky. 1999). Because of *Gailor*, and notwithstanding our appreciation of Shackelton's logic, we still cannot say that the Estate received sufficient notice as required by CR 15.03(2)(a). In *Gailor*, as in this case, the plaintiff and the decedent were involved in an automobile accident, and the plaintiff filed suit against the deceased tortfeasor shortly before the statute of limitations expired. Upon learning of the tortfeasor's death, the plaintiff moved for the appointment of a public administrator, after which plaintiff filed, outside the limitations period, an amended complaint seeking to substitute the public administrator as a party defendant in place of the decedent.

The Supreme Court declined to relate the amended complaint back to the filing of the original complaint. It found the decedent had been deceased for almost two years before the plaintiff filed suit and the decedent's estate did not exist as a legal entity until more than nine months after the limitations period expired. *Gailor*, 990 S.W.2d at 601. In rejecting the relation-back argument, the Supreme Court reasoned that the plaintiff "did not sue the proper defendant; and the proper defendant (the administrator) could not have had notice within the period of limitations, because he had not yet been appointed." *Id.*

The facts of the instant case are nearly identical to *Gailor*. As in *Gailor*, Fries died prior to the filing of the original complaint. His Estate did not exist until months after the expiration of the statute of limitations. It is impossible for the Estate then to have had notice of the claims or lawsuit within the limitations period because it did not even exist within the limitations period. *See id.*

Shackelton attacks *Gailor* as an anomaly, an outlier, that has not been cited by any Kentucky court after nearly two decades with respect to its CR 15.03 analysis. Be that as it may, we cannot disregard binding Supreme Court authority. SCR 1.030(8)(a) ("The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court."). And despite Shackelton's attempt to persuade us otherwise, *Gailor* is materially indistinguishable from this case. We are bound by its reasoning.

Nevertheless, we question whether the principles in *Gailor* adequately suit cases such as this one in which the deceased's insurance carrier, in a practical sense, is the real party in interest. The carrier had notice of Shackelton's claims before the limitations period ended and can claim no prejudice for lack of notice.

On the other hand, the carrier knew or had reason to know of the death of its insured, Fries. Before Fries died and almost a year before the limitations period expired, Shackelton opened communications with Cincinnati Insurance. Shackelton's and Fries' representatives discussed the claim, engaged in settlement negotiations, and had a good faith, open dialogue about all relevant matters, except Fries' death. Fries' representatives would have been the first to know Shackelton mistakenly sued Fries while believing he was still alive.

Between Fries' death and the appointment of his estate's personal representative, neither Fries nor the Estate existed. So, it could not be said the carrier was then the agent of either. Whose interest was the carrier representing? If a new principle is to be woven into our jurisprudence identifying the carrier's role during this period of its insured's juridical/metaphysical period of non-existence, the Supreme Court must be the weaver.

Despite our misgivings, we are bound by *Gailor*. Accordingly, we find the circuit court correctly found Shackelton's amended complaint did not relate back to the filing of his original complaint. On this issue, we affirm.

B. Underinsured Motorist Claim

Shackelton next argues the circuit court erred in finding his UIM claim against State Farm hinged on the viability of his negligence claim against Fries. State Farm argued throughout, and the circuit court found, that UIM coverage is only available where the insured is "legally entitled to recover against the" tortfeasor.[5] Absent this, State Farm argues, Shackelton cannot prove an "essential element" of his negligence claim. It asserts that, because Shackelton's claims against the Estate are time-barred and do not relate back, it is "literally impossible" for Shackelton to establish legal liability. State Farm is mistaken.

UIM coverage is designed to protect auto-accident victims from underinsured motorists who cannot adequately compensate them for their injuries. *See State Farm Mut. Auto. Ins. Co. v. Marley*, 151 S.W.3d 33, 36 (Ky. 2004); KRS 304.39-320(1). Standard UIM coverage requires the insurance company "to pay its own insured for such uncompensated damages as he may recover on account of injury due to a motor vehicle accident because the judgment recovered against the owner of the other vehicle exceeds the liability policy limits thereon[.]" KRS 304.39-320(2). Simply put, a motorist is underinsured if his damages are greater than the tortfeasor's policy limit.

[5] State Farm frequently refers to the "tortfeasor" in this case as the Estate of Fries. It is mistaken. The tortfeasor is John Fries. His death does not change this fact.

"[A] 'suit to recover UIM coverage is a direct action' against the UIM carrier and 'the [UIM] carrier alone is the real party in interest[.]'" *Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797, 801 (Ky. 2005) (citation omitted). This means the insurer – here, State Farm – has a "contractual obligation directly to the insured[,]" – Shackelton. *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895, 898 (Ky. 1993). However, "proof the offending motorist is a tortfeasor and proof of the amount of damages caused by the offending motorist are . . . essential facts that must be proved before the insured can recover judgment in a lawsuit against" an insurer on a UIM claim. *Id.* at 899.

This does *not* mean, however, that the plaintiff must obtain a recoverable judgment against the tortfeasor to trigger UIM benefits. *Puckett v. Liberty Mut. Ins. Co.*, 477 S.W.2d 811, 814 (Ky. 1971) ("[A]n action may be maintained against the insurance company without judgment's previously having been obtained against the uninsured [or underinsured] motorist."). The plaintiff need not even file suit against the tortfeasor at all. *Coots* makes this very clear.

> [The UIM carrier] may be sued without first obtaining a judgment against the un[der]insured motorist, or without the un[der]insured motorist being a party to the suit . . . . With both UM and UIM coverage there must be a tortfeasor, and in the case of UIM coverage, the damages inflicted must exceed the tortfeasor's liability insurance. But these factors do *not* make the tortfeasor a party to the insurance contract. UM coverage exists without regard to whether the obligation of the tortfeasor can be reduced

> to judgment, and there is no logical way to explain UIM coverage differently.

Coots, 853 S.W.2d at 898. Stated another way, all that is required to recover UIM benefits is that the insured prove the tortfeasor's fault and the extent of the damages caused by that driver. *Nationwide Mut. Ins. Co. v. Hatfield*, 122 S.W.3d 36, 41 (Ky. 2003). This can be accomplished in the suit against the insurance company. The victim's inability to locate, identify, or maintain a separate lawsuit against the tortfeasor is immaterial. *See id.*; *Coots*, 853 S.W.2d at 898.

Our Supreme Court recently touched on this very issue in *State Farm Bureau Mutual Automobile Insurance Company v. Riggs*, 484 S.W.3d 724 (Ky. 2016). In *Riggs*, the Court emphasized that the insurer must honor its contractual obligation "even if the tortfeasor cannot be identified." *Id.* at 727 (quoting *Coots*, 853 S.W.2d at 898). "The tortfeasor is not required to be a party to the action, and the UIM carrier may be sued before the insured has even obtained a judgment against the tortfeasor." *Id.* (footnote omitted). The Supreme Court thought this principle so profound that it bore "repeating here that the tortfeasor is not an indispensable party in an action between an insured and his UIM carrier, nor does the insured need first obtain a judgment against the tortfeasor before filing suit against his UIM carrier[.]" *Id.* at 729. "The bottom line is this: an insured's UIM claim does not spring to life only after a judgment against the tortfeasor. The

insured is always in possession of the UIM claim because *his contractual rights are independent of the tort judgment*." *Id.* (emphasis added).

These authorities lead us to conclude, in this case, that the circuit court erred in finding Shackelton's UIM claim hinged on the legal viability of his tort lawsuit against Fries. Appellees are correct that UIM benefits are not available if the plaintiff cannot prove the tortfeasor's fault. *Id.* ("[A]n insured must prove the extent of the tortfeasor's liability in order to claim UIM benefits.") (footnote omitted). But we see nothing preventing Shackelton from doing so in this case. Establishing "legal liability" does not require Shackelton to obtain a judgment against Fries. It does not even require Shackelton to file a lawsuit against Fries. The UIM case stands on its own. The dismissal of Shackelton's negligence action against Fries does not prevent him from proving Fries' legal liability, *i.e.*, fault and damages, in the UIM action against State Farm.

State Farm asserts the effect of our decision would allow a plaintiff through malfeasance, neglect, or even design to destroy the UIM carrier's subrogation rights. It argues those rights existed at common law and are firmly embedded in our insurance jurisprudence. Generally speaking, State Farm is correct. But it fails to recognize that "insurance against un[der]insured motorists owes its existence to the probable and usual worthlessness of a claim against an

un[der]insured tortfeasor. The policy of our statute places the insured party's right to sue in this state above the dubious value of the insurer's right of subrogation." *Coots*, 853 S.W.2d at 899 (citation omitted). To the extent a plaintiff fails or chooses not to name or file suit against the tortfeasor, thereby possibly interfering with the insurance company's subrogation rights, it simply "appears to be an unavoidable consequence" in this type of case. *Id.*

State Farm also argues that the underlying case does not appear to have a "value" that would approach Fries' liability policy limit. It poses the rhetorical question, "what purpose would be served to waste valuable resources on discovery, proof, and a trial when the likely outcome would be a verdict well within the liability policy limit?" But the law does not play percentages. It does not prevent a person from filing a lawsuit even if it appears to have little chance of success. Interestingly, in *Riggs*, Justice Noble emphasized in her concurrence that State Farm, the UIM carrier in that case, "sees value in being involved in a case in which it is at least *potentially* liable from the beginning of the action, even if that liability cannot be fully measured and established until later." 484 S.W.3d at 733 (Noble, J., concurring). "[I]t is reasonable to see why State Farm is willing to waive any prematurity of the claim against it in order to defend itself from any liability throughout discovery and motion practice on the tort liability and damages claim." *Id.*

The Supreme Court emphasized that even when it is unclear if the plaintiff's damages will exceed the tortfeasor's policy limits, thereby making the plaintiff entitled to UIM benefits, the plaintiff is free to "proceed against his UIM carrier before he proceeds against the tortfeasor or, the overwhelmingly more likely and popular option, proceed against both simultaneously." *Id.* at 729-30 (footnote omitted). "Examples of this process have not been viewed with any degree of disfavor by any court, including this one." *Id.* at 730. State Farm's argument here is without merit.

CONCLUSION

We affirm the Fayette Circuit Court's October 20, 2016 order to the extent it dismissed Shackelton's negligence claim against the Estate of Fries on grounds that Shackelton's amended complaint did not relate back to the filing of his original complaint under CR 15.03. However, we reverse the dismissal of Shackelton's UIM claim against State Farm for the reasons explained herein.

KRAMER, JUDGE, CONCURS.

THOMPSON, K., JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES SEPARATE OPINION.

THOMPSON, K., JUDGE, CONCURRING IN PART AND DISSENTING IN PART: While I agree that it is appropriate for Tony Shackelton to be able to continue his lawsuit against State Farm for underinsured motorist

coverage, I disagree that the dismissal of his litigation against the Estate of John P. Fries should be affirmed.

While I understand we are bound by the ruling in *Gailor v. Alsabi*, 990 S.W.2d 597, 601 (Ky. 1999), that the complaint filed against Fries could not relate back to the Estate as it did not exist as a legal entity until after the expiration of the statute of limitations, I believe the trial court's decision dismissing Shackelton's suit was premature. Shackelton requested the opportunity to engage in limited discovery on the issue of whether the Cincinnati Insurance Company which insured Fries was aware of his death and knowingly made misrepresentations regarding this material fact to prevent Shackelton from timely suing the Estate.

As explained in *Gailor*, estoppel is a possible remedy in this type of a case, but to establish it, "there must be proof not only of an intent to induce inaction on the party to be estopped, but also of reasonable reliance by the party claiming the estoppel." *Id.* at 604. Without engaging in limited discovery, Shackelton does not know whether there is a basis to estop Cincinnati Insurance from claiming the statute of limitation as a defense to collecting on the automobile insurance policy that Fries purchased. Therefore, I would reverse and remand on this issue to allow Shackelton to engage in such limited discovery. The trial court

should have delayed ruling on the motion for summary judgment until after such discovery took place and Shackelton could adequately respond.

In not being allowed to recover against the Estate to the extent of Cincinnati Insurance's coverage if Fries was liable, Shackelton is made to suffer while Cincinnati Insurance receives a windfall. This goes against the public policy goal that Kentucky's Motor Vehicle Reparations Act was meant to address: "to insure continuous liability insurance coverage in order to protect the *victims* of motor vehicle accidents and to insure that one who suffers a loss as the result of an automobile accident would have a source and means of recovery." *National Ins. Ass'n v. Peach*, 926 S.W.2d 859, 861 (Ky.App. 1996). Therefore, I believe the relation back doctrine works a grave injustice when applied to motor vehicle insurance coverage in this manner.

Accordingly, I concur in part and dissent in part.

BRIEFS FOR APPELLANT:

Christopher W. Goode
Kenneth C. Human
Lexington, Kentucky

BRIEF FOR APPELLEE, ESTATE OF JOHN P. FRIES:

Ronald L. Green
Zachary F. Mattioni
Lexington, Kentucky

BRIEF FOR APPELLEE, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY:

Douglas L. Hoots
James W. Lacy III
Lexington, Kentucky