RENDERED: DECEMBER 6, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000050-MR

SOJOURNA MCKENZIE APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 17-CI-004637

LM GENERAL INSURANCE COMPANY
AND JANICE HERR APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Sojourna McKenzie appeals from the Jefferson Circuit Court's order, which granted summary judgment to LM General Insurance Company (Liberty Mutual) and dismissed McKenzie's claims against it.

McKenzie had motor vehicle coverage through Liberty Mutual, including underinsured motorist coverage (UIM).

On September 23, 2015, McKenzie was driving her mother's vehicle when it was rear-ended by the vehicle Janice Herr was driving. McKenzie's mother's vehicle was insured by Kentucky Farm Bureau (KFB) and this insurance policy included UIM coverage. The vehicle Janice Herr was driving had liability insurance through GEICO.

McKenzie made a claim for damages from GEICO. On June 11, 2016, GEICO offered to pay its policy maximum, $25,000, to McKenzie.

On June 15, 2016, McKenzie sent a *Coots* notice to KFB advising it of a proposed settlement with GEICO. The letter stated in part:

> I am writing this letter to provide notice under KRS[1] 304.39-320 and *Coots v. All State Insurance Company*, 853 S.W.2d 895 (Ky. 1993). My client has been offered a policy limits offer and is accepting this offer. You have thirty (30) days from your receipt of this letter to consent to this settlement or to preserve your subrogation rights by following the provisions of KRS 304.39-329.

McKenzie did not send a *Coots* notice to Liberty Mutual.

On June 28, 2016, KFB advised McKenzie that it would waive its subrogation rights and allow McKenzie to settle with GEICO.

[1] Kentucky Revised Statutes.

On July 11, 2016, GEICO adjustor Sheila Turner called McKenzie's counsel and confirmed an offer of GEICO's $25,000-per-person policy limit. Later that day, Turner received a call from McKenzie's counsel indicating that counsel and McKenzie were accepting that offer in exchange for a release of Herr. According to Turner, McKenzie's counsel indicated that the underinsured motorist carriers had waived their subrogation rights.

On September 8, 2016, McKenzie requested two checks from Turner in consummation of the settlement: one check was to go to McKenzie and McKenzie's counsel at the law firm and a second check was to go to Humana, who provided McKenzie's health insurance, for medical treatment costs incurred from the accident. That same day, GEICO issued one check in the amount of $24,782.66 made payable to McKenzie and the law firm and a second check in the amount of $217.34 to Humana. On September 15, 2016, McKenzie and her counsel endorsed their check and deposited it in counsel's IOLTA account.

There is no evidence in the record as to whether the funds in counsel's IOLTA account were disbursed to McKenzie and counsel.

On October 7, 2016, GEICO sent a release agreement to McKenzie. This release was never signed.

On November 30, 2016, McKenzie first advised Liberty Mutual of her claim against Herr and GEICO. On December 26, 2016, Liberty Mutual learned

about the settlement with GEICO and the UIM settlement with KFB.[2] On July 10, 2017, Liberty Mutual denied the availability of UIM coverage on the basis that McKenzie failed to provide it with appropriate notice prior to settling with both GEICO and KFB.

On July 25, 2017, McKenzie sent a *Coots* letter to Liberty Mutual. That same day McKenzie's counsel emailed Liberty Mutual and indicated that McKenzie did not recall receiving a settlement check from GEICO but would double check and follow up with GEICO. McKenzie's counsel sent a check in the amount of $25,000 to GEICO.[3]

On August 4, 2017, Liberty Mutual responded to McKenzie's *Coots* letter, indicating that it could not consent to a settlement or preserve its subrogation rights by substituting payment as the settlement had already been consummated

[2] Although Liberty Mutual references such a settlement and McKenzie does not deny that such a settlement took place, we do not know any of the particulars of this settlement and whether this simply means that KFB agreed to allow the GEICO settlement to take place or if KFB settled the UIM claim against it.

[3] One of Liberty Mutual's exhibits was a copy of the voided check from McKenzie's attorney to GEICO for $25,000 which was dated June 19, 2017. In the memo line it states the GEICO claim number, provides the reference check number (to the check from GEICO to McKenzie) and states "Name does not match our client's name." Just above and behind the check is the date August 7, 2017. It is unclear who Liberty Mutual received this copy from and whether it was only the copy which was voided or whether the actual check was voided as well. It may be a ledger copy from McKenzie's attorney's records. There is no copy of the back of the check to indicate whether it was negotiated. Neither Liberty Mutual nor McKenzie indicates whether the actual check was cashed by GEICO, voided by GEICO or is still being held by GEICO. In another exhibit, an email from McKenzie's attorney to GEICO's counsel, McKenzie's attorney states, "I also suppose Ms. Turner did not tell you that the money GEICO sent with the wrong name on it was returned to them and they accepted it back because there was no settlement."

with GEICO with the check from GEICO being cashed without prior notice to Liberty Mutual.

On August 10, 2017, McKenzie's counsel sent an email to Liberty Mutual claiming that no settlement had been effectuated with GEICO. Despite ongoing discussions, the parties were not able to agree on whether McKenzie had waived her UIM rights.

On September 4, 2017, McKenzie filed a personal injury complaint against Herr[4] and Liberty Mutual. McKenzie brought both a UIM claim and a bad faith claim against Liberty Mutual.

Liberty Mutual immediately responded with a motion to dismiss to which it attached several supporting exhibits.[5] It argued McKenzie consummated a

[4] McKenzie claimed Herr was negligent. Herr was served by certified mail. Herr neither entered an appearance nor filed an answer before the case was appealed.

[5] McKenzie did not challenge the veracity of these exhibits or the factual statements within them. These exhibits consisted of: (1) the June 15, 2016 *Coots* notice to KFB; (2) the June 28, 2016 waiver by KFB of its subrogation rights; (3) an affidavit by Turner detailing her conversations with McKenzie's counsel and attaching the canceled check from GEICO to McKenzie, which was signed by her and deposited on September 15, 2016; (4) the July 25, 2017 *Coots* notice to Liberty Mutual; (5) an email exchange between McKenzie's counsel and Liberty Mutual's counsel in which McKenzie's counsel acknowledged GEICO paid its $25,000 policy limit to McKenzie on September 6, 2016 in exchange for a fully executed release but claimed not to have received a settlement check; (6) a voided check for $25,000 to GEICO from McKenzie's counsel; (7) a letter from Liberty Mutual's counsel which denied UIM coverage because the settlement was consummated when GEICO's check was deposited; (8) an email from McKenzie's counsel indicating that because there was no signed release and they returned GEICO settlement money, there was no settlement; and (9) an email from Liberty Mutual's counsel to McKenzie's counsel stating that the copy of the check it received from GEICO indicated that McKenzie endorsed and deposited a check from GEICO on September 15, 2016, and that it could not advance money that had already been paid.

settlement with Herr and her insurer GEICO without giving notice of the proposed settlement to Liberty Mutual as required by KRS 304.39-320 and *Coots*, thereby waiving her right to receive UIM coverage from Liberty Mutual. Liberty Mutual argued McKenzie's agreement to settle with GEICO was consummated on July 11, 2016, with a call to Turner accepting the GEICO policy limit and McKenzie should have sent both it and KFB a *Coots* notice before agreeing to settle to preserve her UIM rights. Liberty Mutual argued McKenzie then consummated the settlement agreement by accepting, endorsing, and depositing the check and could not later rectify the situation by sending a late *Coots* notice and returning the money to GEICO.[6]

McKenzie argued she was entitled to UIM coverage from Liberty Mutual because she only tentatively accepted a policy limits settlement from GEICO, GEICO sent a check with the wrong spelling of her name,[7] this check was deposited into counsel's IOLTA account and then sent back to GEICO, and the *Coots* notice was timely because she never signed a release with GEICO. McKenzie argued she did not release Herr because she never signed a full release and, consequently, the settlement with GEICO was never finalized. McKenzie

[6] Liberty Mutual also argued that counsel's check could not undo the settlement because this was not the same money, noting that Humana also received and negotiated a check from GEICO and McKenzie could not return money that was not paid to her.

[7] The check was made out to "Sojourna Mackenzie" and her counsel's law firm, thus misspelling her last name by adding an "a" to her last name and failing to capitalize the "k."

attached her affidavit which stated that she accepted a policy limits settlement from GEICO but had not signed a release for GEICO.

In the circuit court's order, it treated Liberty Mutual's motion to dismiss as a motion for summary judgment and then ruled as follows:

> While there is no statutorily mandated timeframe, Kentucky law clearly anticipates prompt notice to all involved UIM carriers when a settlement agreement is reached, not when the settlement is finalized and a release is executed. In this instance, McKenzie reached a policy-limit settlement months before she had even notified her own insurance carrier of the claim. It took almost a year for Liberty Mutual to become aware of all the proposed underlying settlements. Statutorily required notices are not to be treated as afterthoughts and cured by returning the settlement funds a year later, especially after the check had been cashed. To allow an injured person to accept a settlement, and then undo it months later, prevents timely resolution of claims for all parties. By not complying with KRS 304.39-320 and *Coots*, McKenzie has waived her right to a UIM claim against Liberty Mutual.

The circuit court dismissed McKenzie's claims against Liberty Mutual and included the finality language required by Kentucky Rule of Civil Procedure (CR) 54.02(1).

Because Liberty Mutual introduced and the circuit court relied upon matters outside of the pleadings, pursuant to CR 12.02, the circuit court properly considered Liberty Mutual's motion as one for 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." *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*, 853 S.W.2d at 900, the Kentucky Supreme Court held that the Motor Vehicle Reparations Act (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 . . . agrees to settle a claim with a liability insurer and its insured, and the settlement would not fully satisfy the claim for personal injuries . . . 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. . . . 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).

"An agreement to settle connotes not ongoing negotiations, not consideration of an outstanding offer but rather actual acceptance on the part of the injured party." *Id.* at 658. The only reason that the settlement is only "proposed" as opposed to fully consummated at this point is because the UIM carrier "has a statutory right, after receipt of proper notice, to 'consent to the settlement or

retention of subrogation rights.'" *Id.* at 659 (quoting KRS 304.39-320(3)). "Thus, the statute contemplates a binding agreement between the injured party and the underinsured motorist and his carrier which will be finalized unless the injured party's underinsured carrier exercises its right to withhold consent and substitute its own money in exchange for preserving all subrogation rights against the underinsured motorist and his carrier." *Id.* "[T]he central underpinning of KRS 304.39-320" is that before a *Coots* notice is provided to the UIM carrier and the thirty-day clock on it deciding to agree or retain its subrogation rights begins, there must be "a binding agreement to settle between [the insured] and the underinsured motorist and his liability carrier." *Id*.

Of course, there is no absolute requirement that the proposed settlement be consummated after a *Coots* notice is sent. *See Kentucky Farm Bureau Mut. Ins. Co. v. Young*, 317 S.W.3d 43, 48 (Ky. 2010) (noting that the *Coots* notice must only reflect the settlement amount agreed upon at the time notice was provided even if the final settlement is for a different amount).

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. *Id*. This is appropriate because if a 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).

The question before us is whether, as a matter of law, the proposed settlement from GEICO became an actual settlement before the *Coots* notice was sent to Liberty Mutual. McKenzie interprets KRS 304.39-320 as only allowing the forfeit of a UIM claim in two circumstances: a release is signed without thirty days' prior notice to the UIM carrier or the expiration of the statute of limitations. She argues that the circuit court erred by artificially shortening her statute of limitations by incorporating a "prompt notice" requirement rather than simply enforcing the requirement that the notice be timely filed so that the insurer can protect its potential subrogation right. McKenzie also argues that because no release was ever signed by her, Liberty Mutual's right of subrogation is not impaired.

Liberty Mutual argues that McKenzie's *Coots* notice was untimely and inaccurate as McKenzie advised it that she planned to settle with GEICO when in fact she had already accepted the offer from GEICO, received the settlement funds, and negotiated the check. Liberty Mutual claims that all the elements of an enforceable contract were present which GEICO could enforce.

"It has long been the law of this Commonwealth that the fact that a compromise agreement is verbal and not yet reduced to writing does not make it

any less binding." *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 445 (Ky. 1997), *as modified* (Feb. 18, 1999). A settlement can still be binding and enforceable if orally agreed upon, even if the settlement agreements are never signed and the check never cashed. *See Clark v. Burden*, 917 S.W.2d 574, 577 (Ky. 1996) (determining that if a client granted her attorney express or actual authority to settle the case for the specified amount, or if the other party detrimentally relied on the purported settlement, the settlement should be enforced even though the settlement documents were never executed); *Hall v. City of Williamsburg*, 768 Fed. App'x 366, 379 (6th Cir. 2019) (holding that there was a binding settlement agreement under Kentucky law where "all the necessary elements of contract formation were met, even if [the victim] never cashed the check and signed the release").

Generally, cashing of a check indicates that a settlement has been reached. *See Skaggs v. Wood Mosaic Corp.*, 428 S.W.2d 617, 619 (Ky. 1968); *Commonwealth v. Breslin Const. Co.*, 291 Ky. 772, 165 S.W.2d 809, 812 (1942). However, cashing a check for personal use is very different from client funds being placed in an attorney's IOLTA account. *See* Rules of the Kentucky Supreme Court (SCR) 3.830 (discussing IOLTA accounts); SCR 3.130(1.15)(a) and (b) (requiring lawyers to hold "property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property[,]" to

promptly notify clients "[u]pon receiving funds or other property in which a client has an interest," and to "promptly deliver to the client any funds or other property that the client is entitled to receive").

Although *Massarone*, 326 F.3d at 816, speaks in terms of UIM benefits being waived "once the wrongdoer is released without restriction" because at that point the "underinsured motorist carrier's subrogation rights are prejudiced[,]" we do not interpret this characterization (which would not be binding on us in any event) as stating that until a release is signed, a *Coots* notice may properly be submitted at any time until the statute of limitations runs. In *Massarone*, the signed release was certainly evidence that the *Coots* notice was untimely, but there is no reason that it could not be untimely at an earlier juncture.

By sending a *Coots* notice to KFB, McKenzie indicated that she "[was] accepting this offer." From Liberty Mutual's perspective, after McKenzie agreed to the GEICO policy maximum settlement offer (after KFB consented), specified how the checks were to be made payable, received and endorsed her check, and her counsel deposited the check in counsel's IOLTA account, as a matter of law, there was a binding and enforceable contract which impaired Liberty Mutual's subrogation rights. However, from McKenzie's perspective, no final and irrevocable action took place on her part because the funds were only contingently

hers and never became hers because no written settlement agreement was entered and the funds were returned.

Unfortunately, the record is insufficiently developed to determine which party's position is correct, and it is unclear whether there are contested issues of fact relating to these issues which would make summary judgment inappropriate once the record is developed. We do not know whether McKenzie and her counsel received their distributions from the settlement with GEICO. We also do not know whether KFB settled with McKenzie after KFB consented to McKenzie's settlement with GEICO and, if so, whether a settlement agreement was signed and the funds disbursed from any settlement received. Therefore, it is appropriate to reverse as summary judgment was premature on this record and to remand for proof on these issues and any other collateral evidence which may be relevant to establish the intent of the parties.[8]

Accordingly, we reverse the Jefferson Circuit Court's order, which granted summary judgment to Liberty Mutual, and remand for further proof as to whether summary judgement was appropriate.

ALL CONCUR.

[8] There may be an issue as to whether McKenzie's attorney acted with apparent or actual authority in any actions taken regarding settlement funds received.

BRIEFS FOR APPELLANT:

Aaron Michael Murphy
Louisville, Kentucky

BRIEF FOR APPELLEE LM GENERAL INSURANCE COMPANY:

Aida Almasalkhi
Charles H. Cassis
Aaron J. Silletto
Prospect, Kentucky