FILED
JAN 2 1 2009
SUPREME COURT CLERK

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2008-SC-000244-D

VERONICA JEWELL APPELLANT

VS.

APPEAL FROM OF DECISION OF THE COURT OF APPEALS,
ACTION NO. 2006-CA-001995-MR AND
WHITLEY CIRCUIT COURT 04-CI-00106

KENTUCKY SCHOOL BOARD ASSOCIATION APPELLEE

APPELLANT'S REPLY BRIEF

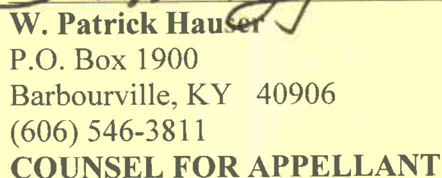
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Appellant's Reply Brief was mailed, via U.S. first class mail, all postage pre-paid, on this the 20 day of January 2009, to the following persons in accordance with CR 76.12 (5) and CR 76.12(6): Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Paul E. Braden, Judge, Whitley Circuit Court, 1019 Cumberland Falls Hwy., P.O. Box 535, Corbin, Kentucky 40701; and, Hon. John S. Harrison, L. Forgy & Associates, PLLC, 83 C. Michael Davenport Blvd., Ste. #3, Frankfort, Kentucky 40601, Attorney for Appellee; Hon. Jeanie Owen Miller, Counsel for Amicus Curiae, Kentucky Justice Association, 214 West 3rd Street, P.O. Box 712, Owensboro, KY 42302-0712; and on the same date an original and ten true and exact copies were transmitted via registered U.S. mail, all postage pre-paid, to the Clerk of the Kentucky Supreme Court, 209 Capitol Building, 700 Capital Avenue, Frankfort, Kentucky 40601.

Respectfully submitted,

Dennis Nagle
John E. Anderson
Cole, Cole, Anderson & Nagle
P.O. Box 250
Barbourville, KY 40906
(606) 546-3116

And



W. Patrick Hauser
P.O. Box 1900
Barbourville, KY 40906
(606) 546-3811
COUNSEL FOR APPELLANT

i. An Underinsured Insurance Carrier should not be afforded a defense to payment which is not available to a tortfeasor.

The Appellee, KSBA, argues that the Court of Appeals correctly determined that it was entitled to receive a credit for the workers' compensation benefits paid to Veronica Jewell. In making this determination the Court of Appeals relied upon KRS 342.700 (1) and _Cincinnati Ins. Co. v. Samples,_ 192 S.W.3d 311 (Ky. 2006). In the case before this Court, the Court of Appeals allowed the KSBA to take an offset which, in effect, placed the rights of the underinsured carrier in a superior position to those of the tortfeasor, the workers' compensation carrier and Veronica Jewell.

Samples turned upon the application of KRS 342.700 which set forth the process whereby an injured worker can proceed in a workers' compensation claim and a civil action against the tortfeasor. KRS 342.700 states, in part, that the injured worker cannot recover from both workers' compensation and the third party and it creates a right of subrogation for the compensation carrier to prevent such a result.

Veronica Jewell pursued her workers' compensation claim which culminated in a compromised settlement of a disputed claim. At settlement, Veronica Jewell gave up her right to reopen, waiver of payment of past medical expenses related to the left total knee replacement[1], and vocational training **in exchange for the waiver and assignment by the workers' compensation carrier and Bluegrass Family Health of their subrogation rights.** Armed with this waiver and assignment Veronica Jewell settled her case against the tortfeasor for its liability limits of $25,000 and proceeded to trial in the Whitley Circuit Court and obtained a judgment in the sum of $ 75,769.32

[1] Although the workers' compensation disputed the relatedness of this treatment, the jury found that the total knee replacement was related to her injury of September 24, 2001.

against KSBA for damages payable under its underinsured motorist benefits. To allow the KSBA an offset against this judgment is erroneous and violates the very basic principle of making the injured party whole.

This Court has acknowledged that in certain instances, the rule set forth in KRS 342.700 is inapplicable. In _Weinberg vs. Crenshaw,_ 896 S.W.2d, 22 (Ky. App., 1995), the Court held that a workers' compensation carrier may assign its subrogation rights to an injured party, and the tortfeasor may not then use workers' compensation benefits paid to reduce the judgment, even for identical items of damage. In _AIK Selective Self Insurance Fund vs. Mary E. Minton_, 192 S.W.3d 415, (Ky. 2006), the workers' compensation carrier's subrogation rights were eliminated because of the attorney's fees and costs of the injured worker exceeded the amount of the subrogation lien.

In this case, the Court of Appeals has extended the _Samples_ holding to include those cases where the injured worker holds a valid assignment as in _Weinberg._ The notable difference between _Samples_ and this case is the fact that Veronica Jewell obtained an assignment and release from the workers' compensation carrier as to any recovery she might obtain in her civil action. As previously stated, he validity of these assignments has been previously recognized by this Court. _Krahwinkel vs. Commonwealth Aluminum Corp.,_ 183 S.W.3d, 154, (Ky. 2005) and _Weinberg, supra._ The underinsured motorist carrier stands in the shoes of the tortfeasor for the sole purpose of making the injured party whole. To allow KSBA an offset against Jewell's judgment defeats that principle.

It is simply wrong that a negligent wrongdoer or an entity that stands in their shoes should benefit from collateral source payments made to an injured plaintiff.

O'Bryan v. Hedgespeth, 892 S.W.2d 571 (Ky. 1995). Further, this court has held that if there is any "windfall", as a result of a double recovery, that windfall should not inure to the culpable wrongdoer (or one who stands in the shoes of the wrongdoer). Baptist Healthcare Systems, Inc., v. Miller, 177 S.W.3d 676 (Ky. 2005).

II. The Court of Appeals erred in refusing to apply the rule set forth in the case of *AIK Selective Self Insurance Fund v. Mary E. Minton, 192 S.W.3d 415, (Ky. 2006)* to this appeal.

The KSBA argues that its liability for underinsured coverage is derived from the insurance contract. However, the case of AIK Selective Self Insurance Fund v. Mary E. Minton, 192 S.W.3d 415, (Ky. 2006) eliminates any offset in this matter by virtue of K.R.S. 342.700 (1). This is the same statute relied on in Cincinnati Insurance Company v. Samples, 192 S.W.3d 311 (Ky. 2006). KSBA's argument must fail.

The Minton case, while stating the clarity of KRS 342.700, holds that the amount of any workers' compensation subrogation claimed, due to paid benefits, must be reduced by the plaintiff's legal fees and expenses even if it totally eliminates the subrogation claim.

This language applies equally to a UIM carrier such as KSBA. The Samples case, relied on by KSBA, turns entirely on application of KRS 342.700. In Samples it is specifically noted that the language in KRS 342.700 is applicable in any subrogation claim.

When the attorney's fees from the contract which Veronica Jewell has with her attorneys and the incurred expenses are deducted from the amount claimed by the KSBA, the workers' compensation offset is eliminated.

Veronica Jewell disagrees with the Court's reading of the statute. The statute, KRS 342.700 (1), must be read as a whole. It is not right and makes no sense to reduce the workers' compensation carrier's claim, a party who has actually paid medical bills etc., and not apply the reduction to an underinsured carrier, who has paid nothing.

III. The Court of Appeals erred in granting KSBA a $20,000 offset as BRB benefits against judgment for Veronica Jewell.

The Court of Appeals in this decision held that the cases of Slone v. Caudill, 734 S.W.2d 480 (Ky. App. 1987), and Henson vs. Fletcher, 957 S.W.2d 281 (Ky. App. 1997)[2], are not available to Veronica Jewell because there was "insufficient evidence" that her BRB claim was denied. Ms. Jewell requested payment of certain prescriptions for medication, for which she had personally paid, from the BRB carrier's representative.

This request for payment was denied on the basis that Ms. Jewell's workers' compensation carrier was primary for this insurance coverage.

The Court of Appeals deduced from the October 29, 2003 letter from Ms. Rita A. Spalding, Adjuster for McIntyre, Gilligan & Mundt, Inc., refusing to reimburse Veronica Jewell for prescription costs, that there was "insufficient evidence" that her BRB claim was denied. The language from that letter is as follows:

> "This will acknowledge receipt of your letter of October 27, 2003, with which you enclosed an itemized print-out of prescriptions purchased by Veronica Jewell. You requested that we reimburse Ms. Jewell $242.52 under the PIP coverage.
>
> We will be unable to pay for these prescriptions under the PIP coverage. You should submit the prescriptions to Ms. Jewell's workers' compensation carrier, as that coverage is primary.

[2] The Slone and Henson, supra, cases are cases in which the plaintiff's award was reduced only by the amount of the basic reparation benefits that were actually paid.

This language is an unmistakable, although polite, denial to pay for Veronica Jewell's prescription medications under the PIP portion of the insurance policy in question. The KSBA erroneously infers that when the letter denying payment of the prescription expense is read it its entirety it does not state that her BRB claim was denied. The letter from adjuster was unambiguous and contained no qualifying language whatsoever in support of the refusal to pay for certain prescriptions as requested by Ms. Jewell.

Veronica Jewell applied to the BRB carrier for every element of damage to which she was entitled. The very fact that further claims were not made to the BRB carrier for medical expenses or wage loss is unique to her fact situation. Because she had accrued or were donated paid personal days by virtue of her employment, she incurred no further wage loss.

It is a windfall to KSBA to be credited for BRB benefits it did not pay and, which under the circumstances of this case, would not be called on to pay. The end result and holding in this case is that Veronica Jewell was penalized because the workers' compensation carrier was responsible for payment of her medical expenses even though part of her medical expenses were paid by her private health insurance carrier, Bluegrass Family Health because the workers' compensation carrier contested compensability.

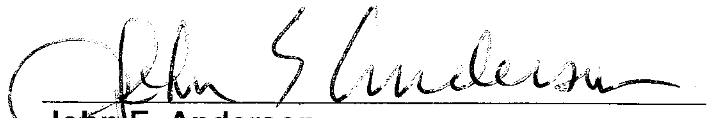
CONCLUSION

For all of the reasons set forth above the Appellant, Veronica Jewell, respectfully requests this Court to reverse the opinion of the Court of Appeals entered on March 7, 2008 with directions to reinstate the Judgment of the Whitley Circuit Court on July 14, 2006 or in the alternative to remand this matter to the Whitley Circuit Court for further factual determinations of the issues herein.

Respectfully submitted,

W. Patrick Hauser
P.O. Box 1900
Barbourville, KY 40906
(606) 546-3811

And



John E. Anderson
Dennis Nagle
Cole, Cole, Anderson & Nagle
P.O. Box 250
Barbourville, KY 40906
COUNSEL FOR APPELLANT