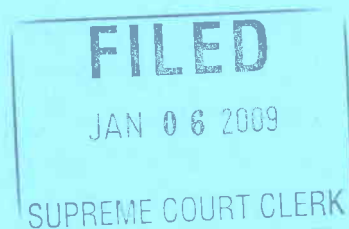


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2008-SC-000244-D



VERONICA JEWELL

APPELLANT

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

KENTUCKY SCHOOL BOARD ASSOCIATION

APPELLEE

**RESPONSE BRIEF OF BEHALF OF
KENTUCKY SCHOOL BOARD ASSOCIATION**

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Appellee's Brief was mailed, via U.S. first class mail, all postage pre-paid, on this 6th day of January, 2009, to the following persons in accordance with CR 76.12(5) and CR 76.12 (6): Clerk of the 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; Hon. W. Patrick Hauser, P.O. Box 1900, Barbourville, Kentucky 40906, Counsel for Appellant; Hon. Denis Nagle, P.O. Box 250, Barbourville, Kentucky 40906, Counsel for Appellant; and on the same date an original and ten (10) copies were hand-delivered to the Clerk of the Kentucky Supreme Court, 209, Capitol Building, 700 Capital Avenue, Frankfort, Kentucky 40601.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John S. Harrison".

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STATEMENT CONCERNING ORAL ARGUMENT

The Appellee, Kentucky School Board Association ("KSBA"), does not believe that oral argument will be helpful to the Court, as a correct decision may be made merely from a review of the record.

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COUNTERSTATEMENT OF THE FACTS

On September 24, 2001, Veronica Jewell, was employed by the Williamsburg Independent School Board as a bus monitor. On that date, while she was a passenger in a school bus driven by Patricia Siler and owned by the Williamsburg Independent School Board, the bus was rear-ended by another vehicle. Jewell sustained injuries to her left knee as a result of the mva.

As Jewell was within the course and scope of her employment at the time of the mva, the workers' compensation carrier (Frank Gates Service Company) paid a total of \$17,734.55 in medical bills and \$784.00 in temporary total disability benefits. In addition, on August 23, 2005, Jewell entered into a settlement with the workers' compensation carrier in which she agreed to relinquish her right to reopen the workers' compensation case¹. In exchange, she received an additional \$25,000.00, of which \$8,037.45 was paid to reimburse Jewell's health insurer in settlement of her medical bills. Furthermore, the workers' compensation carrier assigned to Jewell its **third party subrogation rights**. Specifically, the settlement agreement provides in relevant part as follows:

“As additional consideration for Plaintiff's waiver of payment of past medical expenses related to the left total knee replacement, Defendant and Rawlings Company o/b/o Bluegrass Family Health agree to waive and assign to claimant its **third party subrogation rights**.”

Jewell also settled her claim against the tortfeasor's insurer for the policy limit of \$25,000.00.

¹ The settlement agreement did not include a waiver of medical benefits. The workers' compensation carrier remains liable for all medical benefits related to the work-injury of September 24, 2001.

On May 7, 2003, Jewell submitted an application for PIP benefits to the KSBA². Thereafter, Jewell's counsel submitted a request to McIntyre, Gilligan & Mundt, Inc., the adjusters handling the BRB claim for lost wages. This request was approved by the KSBA and she received BRB in the amount of \$333.45 for lost wages for the time period from April 8 through May 7, 2002, **which were not covered by workers' compensation.** (Letter dated 9/11/03 from McIntyre, Gilligan & Mundt, Inc., is attached as Appendix 1)

On October 7, 2003, Jewell's counsel's office submitted a second claim to McIntyre, Gilligan, Mundt, Inc. for reimbursement of prescription expenses in the amount of \$242.52. By its letter dated October 29, 2003, McIntyre, Gilligan & Mundt, Inc., informed Jewell's counsel's office that they were unable to pay for these prescriptions under PIP coverage. Instead, McIntyre, Gilligan, Mundt, Inc. directed Jewell's counsel's office to submit these prescriptions to Jewell's workers' compensation carrier, **as that coverage is primary.** (Letter dated 10/29/03 from McIntyre, Gilligan & Mundt, Inc., is attached as Appendix 2) The KSBA did not hear from Jewell or her counsel again regarding payment of these prescriptions. Moreover, the KSBA never failed to pay any BRB after Jewell had exhausted her workers' compensation benefits.

On February 11, 2004, Jewell filed suit in a **direct action** against the KSBA to recover UIM benefits to her under the KSBA's insurance trust. Before the trial, the parties stipulated that no mention would be made to the jury of the workers' compensation benefits that Jewell had received. The jury returned a verdict that awarded Jewell \$70,558.77 for medical expenses, \$5,544.00 for lost wages and \$25,000.00 for

² The KSBA administered a liability self-insurance pool on behalf of the Williamsburg Independent School Board and provided UIM and BRB.

pain and suffering, for a total award of \$101,102.77. The trial court offset from this amount the \$25,000.00 Jewell had received in her settlement with the tortfeasor's insurer, and the \$333.45 which she had received in BRB from the KSBA. The final judgment reflecting these offsets was entered on July 14, 2006.

On July 21, 2006, the KSBA timely filed a Motion to Alter or Amend the Judgment, arguing that the workers' compensation payments totaling \$26,826.55 for past medical bills and lost wages, and \$19,666.55 in BRB payable to Jewell under the KSBA's insurance policy, should have also been subtracted from the amount of the judgment. This motion was denied by the trial court on September 5, 2006. The KSBA filed a Notice of Appeal to the Court of Appeals on September 21, 2006.

On December 7, 2007 the Court of Appeals rendered its opinion affirming in part, reversing in part and remanding the case to the trial court for a recalculation of damages to deduct from the jury verdict worker's compensation benefits in the amount of \$26,042.00 for past medical expenses, \$784.55 for lost wages and \$20,000.00 for payable BRB. On December 26, 2007 Jewell filed a Petition for Rehearing. On March 7, 2008, the Court of Appeals granted the petition for rehearing, withdrew its opinion of December 7, 2007 and substituted a revised opinion with the designation that it be published.

ARGUMENT

I. The Court of Appeals was correct to grant the KSBA a credit for workers' compensation benefits previously paid to Jewell.

The Kentucky Supreme Court has already addressed the issue of whether a UIM carrier is entitled to an offset for worker's compensation made on the same elements of damage in the case of Cincinnati Ins. Co. v. Samples, 192 S.W.3d 311 (Ky. 2006). In

Samples, the plaintiff was injured in a two-vehicle accident while he was operating a motor vehicle owned by his employer. The plaintiff filed both a UIM claim and a workers' compensation claim. This Court examined KRS 342.700(1), which states in part:

“Whenever an injury for which compensation is payable under this chapter has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages, the injured employee may either claim compensation or proceed at law by civil action against the other person to recover damages, or proceed both against the employer for compensation and the other person to recover damages, **but he shall not collect from both.**”

The Kentucky Supreme Court ruled that a UIM carrier is liable only for damages for which the insured would have been compensated but for the fact that the tortfeasor was underinsured. To hold otherwise would permit the plaintiff to recover for the same elements of damage twice. Accordingly, the Court of Appeals was correct to grant the KSBA a credit for workers' compensation benefits previously paid to Jewell.

Jewell has attempted to distinguish her situation in that she received an “assignment” from the workers' compensation carrier as part of her settlement. Such an argument is misguided, as it is well-settled under Kentucky law that a workers' compensation carrier's statutory right of subrogation is against the tortfeasor, not the injured employee's auto liability insurance carrier. State Farm Ins. Co. v. Fireman's Fund Ins. Co., 550 S.W.2d 554 (Ky. 1977); see also G&J Pepsi-Cola Bottlers, Inc. v. Fletcher, 229 S.W.3d 915 (Ky.App. 2007)(holding that an employer who had paid workers' compensation benefits had no subrogation claim against UIM carriers for the employer and employee.) The KSBA acknowledges that while the case of Weinberg v. Crenshaw, 896 S.W.2d 22 (Ky.App. 1995) does permit a workers' compensation carrier

to assign its right of subrogation to the injured worker, a workers' compensation carrier cannot assign a subrogation right that it does not possess itself.

II. The Court of Appeals was correct to determine that the rule set forth in AIK Selective Self Insurance Fund v. Minton, 192 S.W.3d 415 (Ky. 2006) has no application to this case.

In her Brief, Jewell argues that the holding of the Minton case eliminates any offset by virtue of KRS 342.700(1). In that case Minton, who was injured at work by a third party tortfeasor, collected workers' compensation benefits, then sued the tortfeasor. AIK, which had paid workers' compensation benefits to Minton on behalf of Minton employer, intervened and claimed its subrogation rights under KRS 342.700(1). The tortfeasor settled with Minton for \$150,000.00. Although AIK had paid Minton \$28,227.11 in workers' compensation benefits, Minton's legal fees and expenses resulting from his claim against the tortfeasor totaled \$68,475.59. The statute KRS 342.700(1) provides that when a compensation award is made and the employer, his insurance carrier, the special fund or the uninsured employer's fund have paid the award or are liable therefore, they may recover "in his or its own name or that of the injured employee from the other person in whom legal liability for damages exists, **not to exceed the indemnity paid and payable to the injured employee, less the employee's legal fees and expense.**" The court held that the statute had no constitutional infirmities and that its meaning was clear, with the result that AIK's entire subrogation claim was swallowed up by Minton's legal fees and expenses.

Jewell argues that because her attorney fees in the amount of \$30,307.72 and her expenses in the amount of \$4,781.73 exceed the total amount of the workers' compensation that she received, the KSBA's right to any offset is entirely eliminated.

However, such argument is without merit, because the limit imposed by the last sentence of KRS 342.700(1) is a limit on the **subrogation right** of an entity which has paid workers' compensation benefits and takes action to recoup what it has paid. In the present case, the Williamsburg Independent School Board's workers' compensation carrier paid Jewell workers' compensation benefits, not the KSBA. The KSBA did not take any action to recoup any of the BRB that it had previously paid, but was itself sued after Jewell had negotiated a settlement with the tortfeasor. **Subrogation is not an issue in this case.** Thus, the Court of Appeals' was correct to determine that Minton has no application here.

The KSBA would remind Jewell that its liability is derived from the insurance contract. To that end, the KSBA's UIM policy expressly excludes "any element of "loss" if a person is entitled to receive payment for the same element of "loss" under any workers' compensation, disability benefits or similar law." (KSBA UIM policy is attached as Appendix 3; see page 2) Thus, it does make sense that a reduction that would be applied to a workers' compensation carrier is not applied to the KSBA, because not only is subrogation not involved, but the KSBA collects premiums with the very understanding that it will be entitled to an offset for any workers' compensation benefits that have been previously paid.³

³ The KSBA policy language is distinguishable from the case of Philadelphia Indemnity Ins. Co. v. Morris, 990 S.W.2d 621 (Ky. 1999) in that the KSBA policy does not call for an offset of the workers' compensation benefits paid against the face coverage of the available UIM benefits. Furthermore, the KSBA would note that in this case, Jewell has recovered from the workers' compensation carrier, the tortfeasor and from the KSBA.

III. The Court of Appeals was correct to determine that the KSBA was entitled to a \$20,000.00 offset for BRB that were “payable to Jewell.

KRS 304.39-060(2)(a) provides in relevant part as follows:

“Tort liability with respect to accidents occurring in this Commonwealth and arising from the ownership, maintenance, or use of a motor vehicle is “abolished” for damages because of bodily injury, sickness or disease to the extent that basic reparation benefits provided in this subtitle are **payable** therefore, or that would be payable but for any deductibe authorized by this subtitle[.]

Due to the presence of the word “payable” in the statute, Kentucky courts have concluded that the full amount of BRB payable may be offset against a claimant’s damages, whether or not the claimant actually received the BRB. Dudas v. Kaczmarek, 652 S.W.2d 868, 870 (Ky.App. 1983); see also Bohl v. Consolidated Freightways Corp. of Delaware, 777 S.W.2d 613, 615 (Ky.App. 1989), quoting Thompson v. Piasta, 662 S.W.2d 223 (Ky.App. 1983)(“The Legislature made no exception to the word ‘payable’ requiring actual payment of the benefits as a condition precedent to the abolishment of tort liability to the extent that the benefits were ‘payable.’”)

In the present case, it is undisputed that the KSBA policy contained \$20,000.00 in payable BRB. Under Kentucky law, basic reparation benefits reimburse a person’s loss not covered by workers’ compensation benefits. Morrison v. Kentucky Central Insurance Co., 731 S.W.2d 822, 824 (Ky.App. 1987). Thus, the Court of Appeals was correct to determine that the KSBA was entitled to offset the full \$20,000.00 that was “payable” in BRB, as the jury awarded Jewell over \$70,000.00 for past medical expenses, an amount over \$20,000.00 in excess of what she received in workers’ compensation benefits.

Jewell has cited the case of Hargett v. Dodson, 597 S.W.2d 151, 153 (Ky.App. 1979) for the proposition that she should be entitled to recover damages within the

maximum payable for BRB. However, Jewell's reliance on Hargett is misplaced as the defendant in Hargett for whatever reason only sought a credit for the amount of BRB that was actually paid. This is not the situation here, as the KSBA is properly seeking a credit for the full amount of BRB that was payable. Thus, Hargett has no application to the facts of this case.

Jewell also puts forth the argument that the Court of Appeals has "missed a critical issue" in that the medical bills for which any PIP payments would have been made after the workers' compensation carrier paid the uncontested medical bills were highly contested in the workers' compensation claim and by the KSBA. (Jewell's Brief, pp. 13-14) Jewell's argument is without merit, as that fact that the KSBA contested medical bills at trial is completely irrelevant because it does not relieve Jewell of her failure to pursue BRB to the maximum payable under the KSBA policy. In Dudas at page 870 the Court of Appeals stated as follows:

"That an individual does not elect to pursue basic reparations benefits to the maximum payable under the Motor Vehicle Reparations Act does not somehow give him an opportunity to obtain the difference between what he has received and the maximum payable in any recovery that he may secure by legal action against a tortfeasor [UIM carrier] because, by the statute, there is no tort liability on the tortfeasor for the \$10,000.00 [\$20,000.00] of damages on those elements included in basic reparations benefits."

Jewell contends that she did pursue her BRB claim and that it was denied by the KSBA. In support of her position, she has referred this Court to only a portion of a letter from an insurance adjuster dated October 29, 2003. The full text of the letter is set forth below:

"This will acknowledge receipt of your letter dated 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 [BRB] coverage.

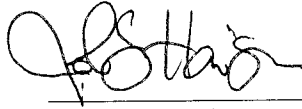
We will be unable to pay for these prescriptions under the PIP coverage. You should submit the prescriptions to Ms. Jewell's workers' compensation carrier, as that coverage is **primary.**"

Jewell's convenient omission of the full text of the October 29, 2003 letter is important because when the letter is read in its entirety, it does not support Jewell's conclusion that her BRB claim was denied. Rather, the KSBA properly directed Jewell to first submit her claim to the workers' compensation carrier. The Court of Appeals agreed with the KSBA and properly noted that **Jewell has provided no evidence that the workers' compensation carrier did not cover those prescriptions, nor has she provided any evidence that the KSBA failed to pay any BRB after she had exhausted her workers' compensation benefits. To the contrary, the evidence establishes that the KSBA did pay BRB of \$333.45 for lost wages which were not covered by workers' compensation.** (Court of Appeal's 3/7/08 Decision, p. 10) Under these facts, the Court of Appeals was correct to determine that the KSBA was entitled to offset the entire \$20,000.00 payable under the BRB policy.

CONCLUSION

For the reasons set forth above, the Appellee, Kentucky School Board Association, respectfully requests that the decision of the Court of Appeals be affirmed in its entirety and that this appeal be dismissed with prejudice.

Respectfully submitted,



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