

Supreme Court of Kentucky

2024-SC-0451-DG

ALLSTATE PROPERTY AND
CASUALTY INSURANCE COMPANY

APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
NO. 2023-CA-0333
OHIO CIRCUIT COURT NO. 19-CI-00254

KENNETH JARNIGAN

APPELLEE

OPINION OF THE COURT BY JUSTICE NICKELL

REVERSING AND REMANDING

We granted discretionary review to determine which party bears the risk of loss when a liability insurance carrier makes a premature payment of subrogation to the basic reparation benefits¹ (“BRB”) carrier in violation of the

¹ “‘Basic reparation benefits’ mean benefits providing reimbursement for net loss suffered through injury arising out of the operation, maintenance, or use of a motor vehicle, subject, where applicable, to the limits, deductibles, exclusions, disqualifications, and other conditions provided in this subtitle.” Kentucky Revised Statutes (“KRS”) 304.39-020. “In legal parlance, they are often called ‘PIP benefits,’ a term which arises from the use of the words ‘Personal Injury Protection’ on insurance policies and forms. Robert D. Monfort, *Ky. Motor Veh. Ins. Law* § 11:1 (2025-2026 ed.); *Stevenson ex rel. Stevenson v. Anthem Cas. Ins. Grp.*, 15 S.W.3d 720, 723 (Ky. 1999) (“Although the correct terminology is, of course, ‘basic reparation benefits,’ that terminology has been used interchangeably with ‘personal injury protection’ (PIP) benefits when describing what are generically known as ‘no fault’ benefits under Kentucky law.”).

“made whole” doctrine set forth in the Kentucky Motor Vehicle Reparations Act (“MVRA”), KRS 304.39-070(4) and KRS 304.39-140(3). Having carefully reviewed the record, law, and arguments, we reverse the decision of the Court of Appeals and remand with directions to reinstate the judgment of the Ohio Circuit Court.

FACTS AND PROCEDURAL HISTORY

Because the underlying matter was decided on a motion for judgment on the pleadings under CR² 12.02(f), the factual record is not fully developed. However, the following facts are not in dispute. On August 15, 2017, Kenneth Jarnigan was injured in a collision with a vehicle driven by Deborah Middleton.³ Following the accident, Jarnigan’s insurer, Allstate Property and Casualty Insurance Co. (“Allstate”), paid \$10,000 in BRB on Jarnigan’s behalf for various medical expenses. Prior to the resolution of Jarnigan’s claims for bodily injury against Middleton,⁴ Allstate demanded subrogation from Middleton’s liability carrier, State Farm Mutual Automobile Insurance Co. (“State Farm”), for its payment of BRB to Jarnigan. At some unspecified time thereafter, while Jarnigan’s claims were still pending, State Farm sent payment to Allstate in the amount of \$9,000.⁵

² Kentucky Rules of Civil Procedure.

³ Jarnigan’s daughter was also involved in the accident, but her claims are not relevant to the present appeal.

⁴ Jarnigan filed suit against Middleton on July 30, 2019.

⁵ This amount represents the full amount Allstate could receive in arbitration. The Kentucky Insurance Arbitration Association (“KIAA”) Plan of Operation, Article 4, Paragraph E specifically provides:

During discovery, State Farm informed Jarnigan that the limits of Middleton's liability policy were \$50,000. On June 7, 2021, Jarnigan received a letter from defense counsel stating:

We have spoken with the adjuster in this case and have received authority to settle your client[s] claims. It appears that due to a lack of contact with your client prior to your representation, State Farm reimbursed [BRB] in the amount of \$9,000 out of the policy leaving \$41,000 in benefits still available under my client's policy. We have received authority to settle Mr. Jarnigan's case for the remaining policy limits of \$41,000.

On July 20, 2021, Jarnigan settled his claim against Middleton for the "remaining" \$41,000 and executed a release which stated in pertinent part:

For the Sole Consideration of Forty-One Thousand Dollars (\$41,000), the receipt and sufficiency whereof is hereby acknowledged, the undersigned, Kenneth Jarnigan, ("Releasor"), hereby releases and forever discharges Deborah Middleton . . . [her] heirs, executors, administrators, agents, assigns . . . (hereinafter all referred to as "Releasees") liable or who might be claimed to be liable, none of whom admit any liability to the undersigned, but all expressly deny any liability from any and all claims . . . which may have resulted . . . as a result an accident which occurred on or about August 15, 2017, at or near Hartford, Ohio County, Kentucky, which is the subject of the lawsuit in Ohio Circuit Court

The undersigned reserves their right to pursue and recover all future medical expenses, health care and related expenses . . . but

In order that there be fair allocation of significant losses, while at the same time eliminating the unnecessary costs in the handling and shifting of insignificant losses, no member shall make application for or be entitled to receive, and no arbitration award shall be made for damages paid or payable to the member reparations obligor for the first \$1,000 in the aggregate of loss so paid arising from a single occurrence without regard to the number of persons to whom basic or added reparations benefits are paid or payable.

(Available at <https://kyinsplans.org/arbitration/>). Subject to the approval of the Commissioner of Insurance, the KIAA is authorized by statute to promulgate such "a plan of operation and any amendments thereto necessary, or suitable to assure the fair, reasonable, and equitable administration of the association." KRS 304.39-290(5).

such reservation does not include the Releasees who are given a full and final release of all claims, including all past, present, and future claims for subrogation . . . arising out of the above referenced accident.

The undersigned agrees to be responsible for, and to satisfy out of the proceeds of this settlement, any and all . . . subrogated interests, for medical treatment, health care and related expenses and attorney's fees, incurred by, or on behalf of, the undersigned, for any injuries arising from the accident[.] This provision does not relate to [BRB]/No Fault benefits paid as this settlement is exclusive of such benefits and undersigned has no obligation to repay any such benefits which have been paid or may be payable.

The trial court entered an agreed order of dismissal on July 23, 2021.

On October 28, 2021, Jarnigan amended his complaint against Middleton to include two separate claims against Allstate: (1) he was entitled to repayment of the \$9,000 Allstate had received from State Farm because Allstate prematurely received subrogation in violation of the priority established by KRS 304.39-070 and KRS 304.39-140(3); and (2) Allstate violated its duty of good faith and fair dealing in contravention of the common law and the Unfair Claims Settlement Practices Act, as set forth in KRS 304.12-230, by failing to inquire whether he intended to pursue a claim for personal injuries prior to demanding subrogation from State Farm. In response, Allstate filed a motion to dismiss for failure to state a claim pursuant to CR 12.02(f).

The trial court initially granted Allstate's motion to dismiss in an order entered on June 2, 2022. Jarnigan filed a timely motion to alter, amend, or vacate, which the trial court granted. On March 2, 2023, the trial court again granted the motion to dismiss, concluding:

While the Court may agree with the overall contention that Allstate should not have received the repayment, the plaintiff's argument was against State Farm, not Allstate.

State Farm chose to pay Allstate for the BRB payments before the right to subrogation arose. It should not have done so. Insurance companies should not be permitted [to] collude with one another to reduce the recovery of injured individuals such as the plaintiff by paying subrogation claims before the resolution of underlying cause of action. The plaintiff possessed a strong argument that State Farm's policy limits had not been reduced by State Farm's premature payment to Allstate. Rather than take the fight to State Farm and require State Farm to pay the full amount under the policy to the plaintiff, Jarnigan decided to settle his claims against Middleton and State Farm, executing a full release of those claims.

As such, the Court finds that there is not a claim against Allstate for which relief may be granted. There is no statute or contractual obligation for Allstate to reimburse Jarnigan for monies it may have received improperly from State Farm.

The trial court based its decision solely on the foregoing analysis and rejected Allstate's argument that repayment of the disputed \$9,000 would result in an improper double payment of BRB.

On direct appeal, the Court of Appeals reversed and remanded for further proceedings. *Jarnigan v. Allstate Prop. & Cas. Ins. Co.*, No. 2023-CA-0333-MR, 2024 WL 3836618 (Ky. App. Aug. 16, 2024). Specifically, the Court of Appeals determined "that an insured party may recover directly from its insurer (reparation obligor) such amount of the improperly received BRB reimbursement that would have been available from a tortfeasor's liability carrier to compensate the insured for his damages" and "[i]n so doing, an insured may claim that its insurer (reparation obligor) breached the implied covenant of good faith and fair dealing in their insurance contract by obtaining reimbursement for paid BRB from a tortfeasor's liability carrier before the

insured is fully compensated for the damages incurred.” *Id.* at *4.

Acknowledging “neither KRS 304.39-070(4) nor KRS 304.39-140(3) specifically sets forth a civil remedy for violation thereof[,]” the Court of Appeals opined an insured could “[a]rguably . . . utiliz[e] KRS 446.070.” *Id.* at n.5. We granted discretionary review.

LAW AND ANALYSIS

A. Standard of Review

As a preliminary matter, the parties dispute the appropriate standard of review. Allstate contends the trial court appropriately applied the standard for judgment on the pleadings under CR 12.02(f) while Jarnigan argues the Court of Appeals properly applied the standard for summary judgment under CR 56.03. We agree the trial court applied the appropriate standard.

Although the Court of Appeals determined the “the [trial] court clearly considered matters outside of the pleadings[,]” it did not specify any particular matters so considered. *Jarnigan*, 2024 WL 3836618 at *3. Generally, when a court considers matters outside the pleadings, a motion to dismiss is converted to a motion for summary judgment. CR 12.02. However, when the documents or exhibits are central to the issues raised in a plaintiff’s complaint and referenced therein, even if not incorporated by reference or attached to the complaint, “the records are subject to consideration without having to convert the motion under review to a summary judgment motion.” *Netherwood v. Fifth Third Bank, Inc.*, 514 S.W.3d 558, 564 (Ky. App. 2017); *see also Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507, 514 (6th Cir. 1999) (document not fully

incorporated by reference or attached to complaint may be considered part of pleadings when referred to in complaint and central to plaintiff's claim). For example, courts may generally "consider matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned without converting the motion into one for summary judgment[.]" Arthur R. Miller and A. Benjamin Spencer, *5B Fed. Prac. & Proc. Civ. (Wright & Miller)* § 1357 (4th ed.)

From our review of the record, we are convinced the trial court limited its consideration to matters within the pleadings, namely: the allegations contained in the amended complaint, which also incorporated by reference the original complaint; the letter from Middleton's counsel, which was included as an exhibit thereto; and the release, a copy of which was attached as an exhibit to the response in opposition to Jarnigan's motion for leave to file an amended complaint, was otherwise included in the record, and was central to Jarnigan's pleading. Therefore, we will review this matter as a dismissal for failure to state a claim under CR 12.02(f).

"A motion to dismiss for failure to state a claim upon which relief may be granted 'admits as true the material facts of the complaint.'" *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (quoting *Upchurch v. Clinton Cnty.*, 330 S.W.2d 428, 429-30 (Ky. 1959)). Such a motion must be denied "unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved[.]" *Id.* (quoting *Pari-Mutuel Clerks' Union of Ky., Local 541, SEIU*,

AFL-CIO v. Kentucky Jockey Club, 551 S.W.2d 801, 803 (Ky. 1977)). In *Fox*, we further explained,

[t]his exacting standard of review eliminates any need by the trial court to make findings of fact; “rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?” Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court’s determination; instead, an appellate court reviews the issue de novo.

Id. (footnotes omitted).

**B. MVRA Subrogation Provisions
Do Not Impose Duty on BRB Carrier
To Ensure Injured Person Takes
Priority of Recovery**

Allstate first argues the Court of Appeals erred by imposing a duty upon a BRB carrier to ensure an injured person is fully compensated before accepting a voluntary payment for subrogation from the liability carrier. We agree.

“Subrogation is the rule of law which allows a party under a legal obligation to satisfy the debt of another and acquire the rights of the creditor against the debtor.” *Wine v. Globe Am. Cas. Co.*, 917 S.W.2d 558, 561 (Ky. 1996). Stated differently, “subrogation is [a] ‘legal operation by which a third person who pays a creditor succeeds to his rights against a debtor.’” Robert D. Monfort, *Ky. Motor Veh. Ins. Law* § 12:6 (2025-2026 ed.) (quoting *Fed. Deposit Ins. Corp. v. Wilhoit*, 180 S.W.2d 72, 76 (Ky. 1943)).

“Because the goal of subrogation is to accomplish justice between the parties, under common law great care is taken to ensure that invoking the

doctrine does not impair one with a superior equitable right.” *Wine*, 917 S.W.2d at 561. Thus, “[u]nder general principles of equity, in the absence of statutory law or valid contractual obligations to the contrary, an insured must be fully compensated for injuries or losses sustained (made whole) before the subrogation rights of an insurance carrier arise.” *Id.* at 562.

“An insured has been ‘made whole’ when the insured has been fully compensated for the total amount of legally recoverable damages, i.e., the total amount of damages the insured could have recovered from the wrongdoer in a lawsuit.” Jeffrey E. Thomas, *13 New Appleman on Insurance Law Library Edition* § 158.06[4][c][ii] (2025). So far as our knowledge extends, the appellate courts of Kentucky have not definitively stated whether a voluntary settlement for less than policy limits amounts to full compensation in the subrogation context. We observe the decisions from other jurisdictions are divided on this point,⁶ and the authorities are likewise split on the issue of “whether the insured has been made whole by proceeds derived from a settlement with a third-party tortfeasor or its insurance carrier is a question of fact” or “whether

⁶ Thomas, *13 New Appleman on Insurance* at § 158.06[4][c][ii] (“If the insured has chosen to settle its claim with the tortfeasor, some jurisdictions hold that the insured has been made whole by the settlement because the insured chose to accept a sum certain to resolve the claim. Other jurisdictions do not automatically consider a settlement to be full compensation.”); William J. Schermer & Irvin E. Schermer, *4 Auto. Liability Ins.* 4th § 26:7 (2026) (“There is authority holding that a settlement should not presumptively be considered to subsume all the insured’s damages. . . . But there is substantial authority which holds that a settlement conclusively establishes made-whole compensation.”); Jordan R. Plitt, Steven Plitt, Daniel Maldonado, & Joshua D. Rogers, *16 Couch on Ins.* § 223:159 (2026) (“The mere fact that an insured settled for less than the tortfeasor’s insurer’s policy limits does not mean that the plaintiffs had been made whole.”).

an insured was made whole for subrogation purposes is a matter of law” for a court to decide without a jury. 46A *C.J.S. Insurance* § 2066 (2026). “Under either view, an injured insured’s settlement of a disputed tort claim does not mean that the insured has been made whole as a matter of law.” *Id.*

We need not wade further into these murky waters today, and simply observe, as a general matter, that the Kentucky approach is “to allow the prejudgment settlement” fixing the amount of damages, “but to require some assessment of the reasonableness of the award.” *Associated Ins. Serv., Inc. v. Garcia*, 307 S.W.3d 58, 69 (Ky. 2010); *O’Bannon v. Aetna Cas. & Sur. Co.*, 678 S.W.2d 390, 393 (Ky. 1984). This rule is consistent with the procedure envisioned by KRS 304.39-070(3), which is quoted in full below and requires a BRB carrier’s subrogation claim to be asserted before a court through intervention in the injured person’s lawsuit or through binding arbitration before the KIAA. For the present purpose of review from a judgment on the pleadings, we accept as true, as we must, Jarnigan’s allegation that he was not made whole by the settlement agreement.⁷

Under the MVRA, “[t]he primary subrogation statute is KRS 304.39-070.” *Monfort, Ky. Motor Veh. Ins. Law* at § 12:9. This statute provides in pertinent part as follows:

⁷ In addition, the question of whether Jarnigan was made whole by settlement or otherwise is distinct from the legal question whether his priority of entitlement to recovery under KRS 304.39-070(4) and KRS 304.39-140(3) was respected and the full limits of State Farm’s policy were properly made available to him. Therefore, we reject the contention that the mere fact of Jarnigan’s settlement and release is dispositive of the present appeal.

(1) “Secured person” means the owner, operator or occupant of a secured motor vehicle, and any other person or organization legally responsible for the acts or omissions of such owner, operator or occupant.

(2) A reparation obligor⁸ which has paid or may become obligated to pay basic reparation benefits shall be subrogated to the extent of its obligations to all of the rights of the person suffering the injury against any person or organization other than a secured person.

(3) A reparation obligor shall have the right to recover basic reparation benefits paid to or for the benefit of a person suffering the injury from the reparation obligor of a secured person as provided in this subsection, except as provided in KRS 304.39-140(3). The reparation obligor shall elect to assert its claim (i) by joining as a party in an action that may be commenced by the person suffering the injury, or (ii) to reimbursement, pursuant to KRS 304.39-030, sixty (60) days after said claim has been presented to the reparation obligor of secured persons. The right to recover basic reparation benefits paid under (ii) shall be limited to those instances established as applicable by the Kentucky Insurance Arbitration Association as provided in KRS 304.39-290.

(4) Any entitlement to recovery for basic or added reparation benefits paid or to be paid by the subrogee shall in no event exceed the limits of automobile bodily injury liability coverage available to the secured party after priority of entitlement as provided in this section and KRS 304.39-140(3) has been satisfied.

(Footnote added). Under KRS 304.39-070(2), “the BRB payor is subrogated to the extent of its BRB payments ‘against any person or organization other than a secured person.’” Monfort, *Ky. Motor Veh. Ins. Law* at § 12:9 (footnote omitted). “That party is normally the tortfeasor’s liability insurer, but could

⁸ “KRS 304.39-020(13) defines a reparation obligor as ‘an insurer, self-insurer, or obligated government providing basic or added reparation benefits under this subtitle.’” *City of Louisville v. State Farm Mut. Auto. Ins. Co.*, 194 S.W.3d 304, 306 (Ky. 2006).

also be an uninsured tortfeasor or a governmental entity that has opted out of purchasing coverage.” *Id.* (footnotes omitted).

KRS 304.39-070(3) “expressly authorizes a reparation obligor . . . to recover basic reparation benefits from the reparation obligor of the secured person.” *State Auto. Mut. Ins. Co. v. Empire Fire & Marine Ins. Co.*, 808 S.W.2d 805, 807 (Ky. 1991). This right to recovery “allows subrogation between basic reparation obligors provided available coverage is not exhausted and that payments to the injured party are not diminished.” *Id.* (citing KRS 304.39-070(4) and KRS 304.39-140(3)). “[T]he BRB carrier may assert its subrogation rights [by] intervention in the tort suit or arbitration.”⁹ *Monfort, Ky. Motor Veh. Ins. Law* at § 12:9. “If arbitration is chosen, it is to be initiated 60 days after the claim has been presented to the reparation obligor of the secured person.” *Id.* (footnote omitted).

As referenced by the phrase, “priority of entitlement,” in KRS 304.39-070(4), KRS 304.39-140(3) establishes the priority of an injured person’s recovery in damages over the right of a reparation obligor to subrogation and states as follows:

If the injured person, or injured persons, is entitled to damages under KRS 304.39-060 from the liability insurer of a second person, a self-insurer or an obligated government, *collection of such damages shall have priority over the rights of the subrogee for its*

⁹ “One factor which may affect the choice is that there is a \$1,000 per occurrence deductible under arbitration, no application may be made to recover the first \$1,000 of BRB.” *Monfort, Ky. Motor Veh. Ins. Law* at § 12:9 (citing KIAA Plan of Operation, Article 4, Paragraph E.).

reimbursement of basic or added reparation benefits paid to or in behalf of such injured person or persons.

(Emphasis added). This provision codifies the “made whole” doctrine. Monfort, *Ky. Motor Veh. Ins. Law* at § 12:9. “The Motor Vehicle Reparations Act clearly subordinates the subrogation rights of a reparation obligor to the rights of a victim of a motor vehicle collision when the tortfeasor is insured.” *Wine*, 917 S.W.2d at 565. “Thus, a reparation obligor’s right to subrogation does not arise until its insured has been fully compensated for the injuries and losses sustained as a result of the negligence of an uninsured motorist.” *Id.* at 565-66.

Moreover, when read together, the function of KRS 304.39-070(4) and KRS 304.39-140(3) is to prevent interference with the rights of injured persons, *Fireman’s Fund Ins. Co. v. Bennett*, 635 S.W.2d 482, 484 (Ky. App. 1981), and “[t]o avoid . . . controversies” over “priority of access to the tortfeasor’s coverage” by “subordinat[ing] the [BRB] insurer’s reimbursement claim to prior satisfaction of the insured’s claim.” Schermer, 4 *Auto. Liability Ins.* 4th at § 64:9. “Thus, even though the tortfeasor’s liability carrier may have made a previous settlement of the [BRB] insurer’s claim, the tortfeasor’s liability limits remain intact for the purpose of satisfying the [BRB] insured’s tort claim.” *Id.* (Emphasis added). In other words, a voluntary subrogation payment, made in violation of the priority established by statute, will not be deemed to reduce the liability limits available to an injured person, and a liability carrier will not be heard to complain that the process of making full compensation to the injured

person impairs the terms of its contract with the tortfeasor. *Id.* “[B]y writing insurance in Kentucky,” a liability carrier “makes itself amendable to the provisions of the Kentucky Law and necessarily assumes the obligations of KRS 304.39-070(3) [and (4)], notwithstanding the provisions of its contract with” the tortfeasor.¹⁰ *Ohio Sec. Ins. Co. v. Drury*, 582 S.W.2d 64, 67 (Ky. App. 1979) (interpreting prior version of KRS 304.39-070); *see also* Schermer, 4 *Auto. Liability Ins.* 4th § 64:9 (“The fact that the liability carrier’s obligation . . . exceeds its liability limits does not create an unconstitutional impairment of its contract with the insured, since the consequences of the dual obligation implicit in the legislation could have been avoided by declining to write the insurance.”).

Applying the foregoing principles and authorities, we discern no statutory, contractual, or quasi-contractual basis to support a cause of action by an injured person against a BRB carrier for reimbursement of a premature subrogation payment and instead hold it is the duty of the liability carrier under KRS 304.39-070(4) and KRS 304.39-140(3) to remain

cognizant of its primary obligation to an injured victim under the no-fault law and, if it volunteers payment to the subrogated carrier before the resolution of the claim of the injured party, it cannot assert any right to reduce the available coverage for that injury by the amount of the payment, and it must absorb the loss caused by its folly.

¹⁰ Thus, we reject Jarnigan’s argument that Allstate’s position will force State Farm to exceed its contractual limits.

Jordan R. Plitt et al., *16 Couch on Ins.* § 225:83 (2026) (citing *Pennsylvania Mfrs' Ass'n Ins. Co. v. Gov't Emp. Ins. Co. (GEICO)*, 136 N.J. Super. 491, 347 A.2d 5, 9-10 (1975), *aff'd*, 72 N.J. 348, 370 A.2d 855 (1977), *called into doubt by statute on other grounds as stated in David v. Gov't Emp. Ins. Co.*, 360 N.J. Super. 127, 141, 821 A.2d 564 (App. Div. 2003)); Schermer, *4 Auto. Liability Ins.* 4th at § 64:9. In such circumstances, “[i]t is fair and equitable” to demand that the liability carrier “bear the loss sustained by” the injured person. *Pennsylvania Mfrs'*, 136 N.J. Super. 491, 347 A.2d at 9; *see also* Schermer, *4 Auto. Liability Ins.* 4th § 64:9 (“[L]iability insurers incautious enough to have made a prior settlement with the [BRB] insurer under these circumstances will probably not be granted . . . relief.”).

Undoubtedly, the liability carrier is best equipped to evaluate the status and extent of probable damages in any open bodily injury claim against its insured of which it “alone ha[s] the right and power to settle.” *Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493, 498 (Ky. 1975). Similarly, the liability carrier is in the best position to seek deferment of arbitration by providing “written notice of the existence of pending claims or suits arising out of the same accident, occurrence or insured event[.]” KIAA Arbitration Rules, Gen. § 8 (available at <https://kyinsplans.org/arbitration/>).

By contrast, the BRB carrier will have no knowledge or dependable method to verify the status of any open bodily injury claim made by the injured person against the tortfeasor unless and until an underinsured motorist claim has been raised. *See* KRS 304.39-320. In addition, we cannot overlook the

fact that Jarnigan was aware of the premature subrogation payment and nevertheless voluntarily chose to settle for less than the tortfeasor's policy limits. He could have insisted that State Farm, as the tortfeasor's carrier, fully compensate him for his injuries and held State Farm to the burden of retrieving the premature subrogation. Therefore, under these circumstances, Jarnigan's remedy, if one there may be,¹¹ lies against State Farm as the liability carrier and not against Allstate.

**C. KRS 446.070 Does Not Support Cause of Action
Against BRB Carrier**

Allstate next argues the Court of Appeals erred by identifying KRS 446.070 as support for Jarnigan's claim for repayment of the premature subrogation. We agree.

KRS 446.070 provides, "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." Importantly, Jarnigan did not plead a cause of action under KRS 446.070 in his amended complaint and has failed to adequately establish the application of this statute in his brief to this Court.¹² These facts are alone sufficient to

¹¹ We express no opinion on the validity of Jarnigan's settlement and release as against State Farm because this matter is not presently before this Court.

¹² Jarnigan's position on KRS 446.070, as set forth in his brief, is equivocal at best. The heading to this argument reads "The Court of Appeals Exceeded Its Jurisdiction When It Suggested That Jarnigan Could Pursue His Claim Through KRS 446.070." He then describes the Court of Appeals' discussion of KRS 446.070 as "mere *dicta*" and refers repeatedly to the claim of bad faith which he pled in the amended complaint. In framing the statutory cause of action issue, Jarnigan further specified the matter "before the court is an amended complaint that states an action against Allstate for bad faith refusal to settle. In the event that this court should

reverse the decision of the Court of Appeals on this issue. *Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846, 852 (Ky. 2016). “The proper role for an appellate court is to review for error—and there can be no error when the issue has not been presented to the trial court for decision.” *Id.* (footnote omitted).

Moreover, an appellate court should not attempt “[t]o rescue [a litigant’s] claim from the trial court’s summary judgment” or order of dismissal by invoking unraised claims and defenses upon its own motion. *Id.*

However, for the sake of completeness, we briefly note that KRS 446.070 cannot impose or create a legal duty: instead, the statute “affirmatively creates *liability* by virtue of the breach of [a pre-existing] duty.” *Collins v. Hudson*, 48 S.W.3d 1, 4 (Ky. 2001) (emphasis added). Because we have concluded KRS 304.39-070(4) and KRS 304.39-140(3) impose the duty on the liability carrier to ensure an injured claimant’s tort recovery is properly prioritized, we disagree with the Court of Appeals’ intimation that KRS 446.070 supports Jarnigan’s claim for repayment against Allstate.

D. Unjust Enrichment Claim Fails as a Matter of Law

For its third contention of error, Allstate argues any claim for unjust enrichment must fail as a matter of law. We agree.

remand the case to the circuit court . . . these bad faith claims are still viable.” Thus, read in context, when Jarnigan later argues his “claim” may proceed under KRS 446.070, he has presumably referred to his bad faith claim and not a cause of action for a per se violation of the priority provisions of KRS 304.39-070(4) and KRS 304.39-140(3).

Although Jarnigan did not assert a claim for unjust enrichment in his amended complaint, “[a] party’s failure to assert the existence of unjust enrichment does not serve to make it nonexistent.” *Davis v. Davis*, 489 S.W.3d 225, 230 (Ky. 2016) (quoting *Rose v. Ackerson*, 374 S.W.3d 339, 343 (Ky. App. 2012)). “As long as the trial court determines that the elements are present, it is not precluded from making the legal conclusion that unjust enrichment exists.” *Id.*

To the extent Jarnigan asserts such theory is fundamental to his claim for repayment, we reject its application here. A claim for unjust enrichment arises when a party receives a sum of money “without consideration, and for which the law implies a duty to repay.” *Salkeld v. Davis*, 247 S.W.2d 517, 520 (Ky. 1952).

For a party to prevail under the theory of unjust enrichment, they must prove three elements: (1) benefit conferred upon defendant at plaintiff’s expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value *Jones v. Sparks*, 297 S.W.3d 73, 78 (Ky. App. 2009). In considering whether a defendant has benefited at the plaintiff’s expense, the plaintiff must be the party who conferred the benefit. *Id.*; see also 42 C.J.S. *Implied Contracts* § 19 (2026) (“To prevail on a claim of unjust enrichment, a plaintiff must demonstrate . . . a benefit conferred by a plaintiff upon a defendant[.]”); 66 *Am. Jur. 2d Restitution & Implied Contracts* § 12 (2026) (“An essential element in recovering under a theory of unjust enrichment is the receipt of a benefit by the

defendant from the plaintiff that would be inequitable to retain without paying for its value.” Additionally, “for a plaintiff to recover on an unjust-enrichment claim, the party from whom the plaintiff seeks recovery must have some connection with the wrongdoing, and the plaintiff must have conferred some benefit on the party.” 66 *Am. Jur. 2d Restitution & Implied Contracts* § 29 (2026) (footnoted omitted). The doctrine of “unjust enrichment is rooted in equity[.]” *Superior Steel, Inc. v. Ascent at Roebling’s Bridge, LLC*, 540 S.W.3d 770, 778 (Ky. 2017).

While this Court is not without sympathy for Jarnigan’s plight, it is a fundamental “tenet that if there is a statute or case precedent or rule going a certain way, a trial court may not depart from it on the basis of equity.” *Bell v. Commonwealth, Cabinet for Health & Fam. Servs., Dep’t for Cmty. Based Servs.*, 423 S.W.3d 742, 747-48 (Ky. 2014). Simply put, “[l]aw trumps equity.” *Id.* at 748. Thus, we decline to imply a duty on a party in equity where the applicable statutes, KRS 304.39-070(4) and KRS 304.39-140(3), impose the same duty and risk of loss upon another.

E. Bad Faith Claims Fail as a Matter of Law

Finally, Allstate argues Jarnigan’s claims for bad faith must fail as a matter of law. We agree.

The elements of common-law and statutory first-party bad faith claims are identical and have been commonly stated as follows:

[A]n insured must prove three elements in order to prevail against an insurance company for alleged refusal in bad faith to pay the insured’s claim: (1) the insurer must be obligated to pay the claim

under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed.

Belt v. Cincinnati Ins. Co., 664 S.W.3d 524, 532 (Ky. 2022) (quoting *Wittmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993)). At common law, “Kentucky courts have recognized the inclusion of an implied covenant of good faith and fair dealing in all insurance contracts.” *Id.* at 530 (footnote omitted). Similarly, “the gravamen of” statutory bad faith claims “is that an insurer is required to deal with the insured or third-party claimant in good faith.” *Id.* at 531. “[A] showing of intentional misconduct or reckless disregard of the rights of an insured is a prerequisite to the submission” of a bad faith claim to the jury.¹³ *Id.* at 531-532.

At the outset, we disagree with the Court of Appeals’ remark that the trial court made a finding of impropriety on the part of Allstate and “even suggested that collusion may have been involved by the companies in reimbursing the BRB payment[.]” *Jarnigan*, 2024 WL 3836618, at *2 n.3. Read in context, we interpret the trial court’s statement, “[i]nsurance companies should not be permitted [to] collude with one another to reduce the recovery of injured individuals such as the plaintiff by paying subrogation claims before the resolution of underlying cause of action[.]” as an expression of the general

¹³ Because the analysis for common law and statutory bad faith claims is identical, “cases decided under the statute should serve as precedent under the common law action, and vice versa.” Monfort, *Ky. Motor Veh. Ins. Law* at § 8:4.

harm at which the protections of the MVRA subrogation priority provisions are directed. While Jarnigan made an *allegation* of bad faith against Allstate, a factual finding of misconduct in the absence of an admission is clearly inappropriate at this preliminary stage of litigation, and we do not read the trial court's order as having intended to resolve this matter.¹⁴ *Fox*, 317 S.W.3d at 7; *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Turning to the merits of whether Jarnigan properly stated his claims for bad faith, we must hold, as he appears to recognize, that these claims fail as a matter of law. On page 13 of his brief, Jarnigan acknowledges he “conceded at the trial court level that the survival of the bad faith claim[s] . . . depended on . . . prevailing on the Issue in Count I [violation of duty under KRS 304.39-070(4) and KRS 304.39-140(3)].” He further states that if Allstate is entitled to dismissal on the statutory duty claim, then “the basis” for the bad faith claims “will disappear.” Similarly, on page 27 of his brief, Jarnigan stated, “[i]n the event that this court should remand the case to the [trial] court for further proceedings, these bad faith claims are still viable.” Our interpretation of KRS 304.39-070(4) and KRS 304.39-140(3) imposes the duty upon the liability carrier, here State Farm, to ensure the injured person takes priority of recovery over any claims for subrogation, and failing this duty, the liability carrier must bear the risk of loss. Therefore, Jarnigan has failed to state a claim for the

¹⁴ We further note that Jarnigan, on pages 17-18 of his brief before this Court, has specifically disclaimed any allegation of the type of misconduct imputed by the Court of Appeals and further clarified that his position is centered simply on Allstate's refusal to repay the premature subrogation.

violation of a statutory or contractual obligation such as would constitute bad faith on the part of Allstate under the *Wittmer* factors. It is axiomatic that the burden of civil liability arising from the breach of a legal duty must be borne by the one breaching the obligation, and none other, particularly where redress is readily and directly available against the one so offending.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is hereby reversed and remanded with directions to reinstate the judgment of the trial court.

All sitting. Lambert, C.J.; Conley, and Keller, JJ., concur. Goodwine, J., concurs in part and dissents in part by separate opinion in which Bisig, J., joins. Thompson, J., concurs in part and dissents in part by separate opinion.

GOODWINE, J., CONCURRING IN PART AND DISSENTING IN PART:

Allstate's motto, "You're in good hands with Allstate," has echoed across the universe for decades, but it did not ring true for Jarnigan when his bodily injury damages from a motor vehicle accident exceeded the tortfeasor's bodily injury liability coverage limits. Despite knowing its insured was not made whole and presumably aware of the mandate in KRS 304.39-140(3), Allstate retained the \$9,000 it received from State Farm, in contravention of the statute.

There is no dispute that KRS 304.39-070 permits a BRB obligor to recover from a liability carrier the BRB payments made on behalf of its insured "except as provided in KRS 304.39-140(3)." It is equally undisputed that KRS 304.39-140(3) codifies the priority of entitlement to payments, giving a person

injured in a motor vehicle accident a superior right to collect damages from the tortfeasor over the BRB obligor's right to collect on its subrogated interest. See *Wine v. Globe Am. Cas. Co.*, 917 S.W.2d 558, 565 (Ky. 1996) (“[KRS 304.39-140(3)] contain[s] an express legislative pronouncement concerning the priority of claims between the victims of motor vehicle collisions and their insurance carriers.”). Despite this unambiguous language, the majority draws a logically untenable and generalized conclusion that BRB obligors have no duty to comply with the rules of priority. For this reason, I must dissent. I respectfully disagree that Allstate had no statutory duty to comply with the priority provision promulgated in KRS 304.39-144(3).

Prior to settling Jarnigan’s bodily injury claim, State Farm improperly and prematurely subrogated funds to Allstate. After doing so, State Farm told Jarnigan it had authority to settle his bodily injury claim for the tortfeasor’s policy limits. State Farm then told Jarnigan that the policy limits were reduced because it had prematurely paid Allstate. State Farm settled with Jarnigan in exchange for a full release. Because Jarnigan was not made whole, he sought to recoup the premature payment from Allstate, but Allstate refused to return the funds. Having released his claims against State Farm, Jarnigan filed suit to recover the premature payment alleging, *inter alia*, that Allstate violated KRS 304.39-140(3) by failing to abide by the statute’s mandatory rule of priority of entitlement.

The majority frames the issue as whether KRS 304.39-070 and KRS 304.39-140(3) impose a duty on the BRB carrier to confirm that its insured is

fully compensated before accepting a subrogated payment from the liability carrier. The majority bases its analysis solely on duties arising from a BRB obligor's acceptance of payment, rather than on the duties imposed on a BRB obligor who retains payments after being informed that the payment violated KRS 304.39-140(3). In doing so, the majority focuses on a duty that, in most circumstances, attaches to the liability carrier as payor.

Yet Jarnigan makes clear that his theory of liability rests on Allstate's knowing decision to retain State Farm's improper payment after becoming aware of the priority violation under KRS 304.39-140(3). Consequently, I believe the more precise question is: Does KRS 304.39-140(3) impose a duty on a BRB obligor to cease interfering with the injured party's superior right to payment upon learning that it accepted payment despite having a subordinate class of priority?

The answer is yes. It begins and ends with the plain language of KRS 304.39-070(4) and KRS 304.39-140(3). As mentioned, KRS 304.39-070(4) provides a BRB obligor a right to reimbursement of paid BRB ***unless doing so violates the injured party's entitlement to payment.*** (Emphasis added). KRS 304.39-140(3) provides: "If the injured person, or injured persons, is entitled to damages under KRS 304.39-060 from the liability insurer . . . ***collection of such damages shall have priority over the rights of the subrogee for its reimbursement of basic or added reparation benefits.*** . . ." (Emphasis added).

This Court must afford unambiguous terms their literal meaning unless to do so would lead to an absurd result. *Bailey v. Reeves*, 662 S.W.2d 832 (Ky. 1984). Our duty is to ascertain and give effect to the intent of the General Assembly. *Beckham v. Bd. of Educ. of Jefferson Cnty.*, 873 S.W.2d 575, 577 (Ky. 1994) (“We are not at liberty to add or subtract from the legislative enactment nor discover mean[ing] not reasonably ascertainable from the language used.”). As applied, Jarnigan was entitled to \$50,000 in damages from State Farm, collection of which *must* take priority over Allstate’s subrogated right to reimbursement.

Under the unambiguous language of KRS 304.39-140(3), Allstate had a duty to comply with the statutory priority scheme by halting its interference with Jarnigan’s right to payment. One way to satisfy this duty would have been to relinquish the premature payment upon learning that retaining it obstructed Jarnigan’s superior entitlement to recovery. Notwithstanding, a liability carrier is also under a duty to issue payments in conformity with KRS 304.39-070(4) and KRS 304.39-140(3). These duties are not mutually exclusive.

Both a BRB obligor and a liability carrier are statutorily obligated to act in a manner that complies with the priority mandates and prevents interference with the rights of injured persons. *See Fireman’s Fund Ins. Co. v. Bennett*, 635 S.W.2d 482, 484 (Ky. App. 1981). The majority construes the statutes in a manner that imposes a duty solely on the liability carrier and effectively allows a BRB obligor to retain a premature payment to the detriment of the injured party with impunity. Such a result directly contravenes not only

the plain language of KRS 304.39-070(4) and KRS 304.39-140(3), but also the legislative purpose underlying the MVRA's enactment. State Farm's failure to defer payment of a claim for BRB reimbursement does not absolve Allstate from its duty to independently comply with the statutory mandates.

Additionally, I cannot lend credence to the proposition that a BRB obligor has no duty simply because a liability carrier possesses superior information necessary to evaluate whether a payment is premature. While a liability carrier may be better suited to evaluate the prematurity of a BRB reimbursement payment, a BRB obligor does not lack the ability or resources to comply with KRS 304.39-140(3) upon notification of a potential priority violation. Assuming the BRB obligor is a first-party carrier, gathering information from its insured may be sufficient to evaluate whether the insured's injuries exceed the tortfeasor's policy limits. In most situations, the insured can provide the status of the bodily injury claim, information concerning the tortfeasor's policy limits, and the severity of injuries.

Although I concur with the majority opinion that Jarnigan failed to plead a cognizable bad-faith cause of action and cannot recover under a theory of unjust enrichment, I take no position on applying KRS 446.070. Whether KRS 446.070 provided a suitable mechanism for Jarnigan to sue Allstate for its alleged breach of KRS 304.39-144(3) is an issue the trial court would have been obligated to parse through upon remand.

In sum, I dissent from the majority opinion on Allstate's duty under KRS 304.39-140(3). Thus, I would affirm the Court of Appeals' reversal of the trial court's dismissal and remand for further proceedings.

Bisig, J., joins.

THOMPSON, J., CONCURRING IN PART AND DISSENTING IN PART: I concur, in part. I agree with the majority opinion that:

[A] voluntary subrogation payment, made in violation of the priority established by statute, will not be deemed to reduce the liability limits available to an injured person, and a liability carrier will not be heard to complain that the process of making full compensation to the injured person impairs the terms of its contract with the tortfeasor.

I also agree that the statutes at issue generally do not permit Kenneth Jarnigan relief and that his bad faith claims fail as a matter of law.

I dissent in part as I strongly disagree with the majority's conclusion that Jarnigan's unjust enrichment claim fails as a matter of law and, accordingly, he is simply "out of luck" and must now go to State Farm and try to get his \$9,000.

It is the settled rule in this state, adopted at an early date and followed by a long line of decisions, that whenever, by a clear or palpable mistake of law or fact essentially bearing upon and affecting the contract, money has been paid without consideration, which in law, honor, or conscience was not due and payable, and which in honor or good conscience ought not to be retained, it may and ought to be recovered.

Supreme Council Cath. Knights of Am. v. Fenwick, 169 Ky. 269, 183 S.W. 906, 910 (1916). Under such circumstances, the doctrine of unjust enrichment creates a quasi-contractual obligation. *Kellum v. Browning's Adm'r*, 231 Ky. 308, 21 S.W.2d 459, 465 (1929).

The majority rejects unjust enrichment on the basis that “[i]n considering whether a defendant has benefited at the plaintiff’s expense, the plaintiff must be the party who conferred the benefit[.]” I interpret this as meaning Jarnigan did not pay the \$9,000 to Allstate and thus has no right to receive this money back from it.

The basic test for unjust enrichment is not so limited. “To recover on a claim of unjust enrichment a plaintiff is required to prove the following three elements: (1) benefit conferred upon defendant *at plaintiff’s expense*; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of that benefit without payment for its value.” *Superior Steel, Inc. v. Ascent at Roebling’s Bridge, LLC*, 540 S.W.3d 770, 777–78 (Ky. 2017) (internal quotation marks, brackets, and attribution omitted) (emphasis added). All of these elements are established if the basic reparation benefits (BRB) carrier has received a voluntary payment from the other insurer, where the insured was denied a full policy payout from the carrier of the at-fault driver based upon the incorrect representation that it could decrease the policy limit payout based upon the incorrect voluntary payment.

Jarnigan suffered injuries which would justify an exhaustion of policy limits by State Farm and, therefore, he was entitled to the full \$50,000 owed by State Farm. Jarnigan was also entitled to \$10,000 in BRB from Allstate in reimbursement for his medical expenses. The incorrect and mistaken payment by State Farm to Allstate of \$9,000 caused Allstate to receive a windfall in that amount. I cannot agree with a resolution which results in Jarnigan receiving

\$51,000 total, rather than the \$60,000 he was legally entitled to receive pursuant to both insurance policies, while Allstate ended up with a reimbursement which reduced its BRB liability to \$1,000.

Accordingly, I concur in part and dissent in part.

COUNSEL FOR APPELLANT:

Brian D. Stempien
Travis Herbert & Stempien, PLLC

COUNSEL FOR APPELLEE:

Russ Wilkey
Wilkey & Wilson, P.S.C.