NOT DESIGNATED FOR PUBLICATION

No. 115,067

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MICHAEL MCCULLOUGH and KENNETH RISLEY,
Appellees,

v.

DEVIN LEE WILSON,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; CONSTANCE M. ALVEY, judge. Opinion filed January 20, 2017. Affirmed.

J. Franklin Hummer, of Shawnee Mission, for appellant.

Stephen W. Nichols, of The Nichols Law Firm, LLC, of Kansas City, Missouri, and *Thomas R. Rehorn, III*, of Tomasic & Rehorn, of Kansas City, Kansas, for appellees.

Before PIERRON, P.J., GREEN and BUSER, JJ.

BUSER, J.: This appeal addresses the question: When an insured involved in a motor vehicle accident is paid Personal Injury Protection (PIP) benefits by his insurance carrier and then files a civil action against the third-party tortfeasor before the expiration of the 2-year statute of limitations for tort actions based in negligence but after the passage of 18 months, is the insured barred from pursuing a claim against the tortfeasor for medical expenses duplicative of the PIP benefits he received from his insurer because of the statutory assignment language in K.S.A. 40-3113a(c)?

As discussed more fully in this opinion, we conclude that K.S.A. 40-3113a(c) does not prohibit an insured from filing a cause of action against a third-party tortfeasor prior to the expiration of the 2-year statute of limitations but after 18 months have passed since the accident to seek the cost of medical expenses previously paid to the insured as PIP benefits under his insurance policy. Accordingly, the district court's decision overruling the third-party tortfeasor's motion for an order granting him judgment on the insured's claim for medical expenses previously paid as PIP benefits by his insurance carrier is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

On April 12, 2012, Michael McCullough and his passenger, Kenneth Risley, were traveling on Leavenworth Road in Wyandotte County when another motorist, Devin Wilson, collided with the rear-end of McCullough's automobile. As a result, McCullough and Risley sustained personal injuries.

At the time of the collision, McCullough and Risley were each covered by automobile insurance policies, which provided PIP benefits under the Kansas Automobile Injury Reparations Act (KAIRA), K.S.A. 40-3101 *et seq*. McCullough filed a claim for medical expenses with his insurer, the Farmers Insurance Company, Inc. (Farmers), and Risley filed a similar claim with his insurer, the Automobile Club Inter-Insurance Exchange (AAA). Farmers paid McCullough $3,416.95 in PIP benefits, and AAA paid Risley $3,081 in PIP benefits.

Subsequently, Farmers made a demand on Wilson's insurance carrier, the Key Insurance Company (Key), for reimbursement of the PIP benefits it had advanced on McCullough's behalf, and Key reimbursed Farmers for the full amount. Of importance to this appeal, although Risley's insurance carrier paid its insured PIP benefits, AAA did not seek reimbursement from Wilson or Wilson's insurance carrier, Key.

On April 11, 2014, 1 day prior to the expiration of the 2-year statute of limitations for tort actions based in negligence, McCullough and Risley (plaintiffs) filed a personal injury lawsuit against Wilson. See K.S.A. 60-513(a)(4). Prior to trial, Wilson filed a motion for partial summary judgment, alleging that he was entitled to judgment as a matter of law on plaintiffs' claims for medical expenses because McCullough and Risley had already recovered these expenses in the form of PIP benefits and "[o]ne of the purposes of [K.S.A. 40-3113a was] to prevent any double recovery" by an accident victim.

With regard to McCullough, Wilson argued that he was prohibited from receiving an award for medical expenses because Wilson's insurance carrier, Key, had reimbursed McCullough's insurance carrier, Farmers, for the cost of the medical expenses. In response, McCullough conceded that he could not collect damages for his medical expenses because Farmers paid the expenses in the form of PIP benefits and Key had already fully reimbursed Farmers.

With regard to Risley, Wilson acknowledged that Risley's insurance carrier, AAA, had not made a demand upon Key for reimbursement, filed a subrogation action, or attempted to intervene in the litigation to recoup the PIP benefits it had paid Risley. As a result, Wilson claimed that Risley could not recover the monies he had already received in the form of PIP benefits because, by operation of law, any cause of action in tort that Risley may have had against Wilson was statutorily assigned to AAA.

In support of his argument, Wilson cited K.S.A. 40-3113a(c) which authorizes a PIP carrier to bring an independent subrogation action against the tortfeasor in either its own name or the name of the insured "for the purpose and to the extent of recovery of damages which are duplicative of [PIP] benefits" if the insured fails to commence an action against the tortfeasor within 18 months after the date of the accident. Wilson argued that Risley's failure to commence his personal injury lawsuit within 18 months

triggered K.S.A. 40-3113a(c). Moreover, Wilson asserted that Risley's insurance carrier, AAA, no longer had any right to recoup PIP benefits from him because, based on the date of the accident, the 2-year statute of limitations had expired.

Risley, on the other hand, contested Wilson's assertion that he was not entitled to collect damages for his medical expenses. Relying primarily upon *Foveaux v. Smith*, 17 Kan. App. 2d 685, 843 P.2d 283 (1992), Risley argued that he remained the real party in interest and retained full and complete control over his cause of action for medical damages regardless of when, within the 2-year limitations period, he filed his lawsuit.

Risley asserted that K.S.A. 40-3113a(c) merely provides PIP carriers with the right to file a subrogation action against the tortfeasor for reimbursement if the insured fails to commence his or her own civil action within 18 months of the injury. Risley also contended that although AAA had not yet acted, its ability to enforce its statutory lien in the future was not governed by the 2-year statute of limitations applicable to tort actions based in negligence. Finally, Risley noted that while he expected AAA would pursue subrogation if he recovered damages duplicative of PIP benefits, if, for some reason, AAA chose not to act upon its subrogation rights, he would not be receiving a double recovery because he paid a premium for his PIP insurance.

After a hearing on Wilson's motion for partial summary judgment, the district court took the matter under advisement and proceeded to jury trial because Wilson conceded that the plaintiffs were entitled to present evidence to the jury about their medical expenses for the purpose of proving the extent of their personal injuries. The jury returned verdicts in favor of the plaintiffs and awarded each of them damages for medical expenses. Shortly thereafter, AAA sent Risley's attorney a letter which stated: "Auto Club Insurance (AAA) is not pursuing recovery against its insured Kenneth Risley, for any PIP benefits paid under this claim for medical treatment arising from this accident."

After the entry of the verdicts, Wilson renewed his motion for partial summary judgment. McCullough again acknowledged that Wilson was entitled to a setoff in an amount equal to that which Key paid Farmers in settlement of its subrogation claim. Risley, however, maintained that he was entitled to recoup damages for his medical expenses.

The district court sustained Wilson's motion for a setoff against McCullough's judgment in an amount equivalent to the PIP reimbursement payment Key made to Farmers, but it denied Wilson's request for a setoff against Risley's judgment. The district court explained:

> "The court would specifically refer to *Foveaux v. Smith* and . . . *Chamberlain v. Farm Bureau* [*Mut. Ins. Co.*, 36 Kan. App. 2d 163, 172, 137 P.3d 1081 (2006),] which talks about PIP benefits and how they are paid and what the statutory assignment means and what limitations are placed on it.
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> "The Court is going to deny [Wilson]'s motion and order [Wilson to] pay the verdict as submitted by the jury. It is [Risley]'s burden to get with AAA for those PIP benefits, not [Wilson]'s.
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> . . . .
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> "While the Court understands that the statutory assignment of recovery of damages is for duplication of PIP benefits only, the Court is going to find that [Wilson] is not entitled to the windfall as a result of [Risley]'s insurance company not subrogating on the issue, and the Court is going to give that benefit to [Risley] based on the limitation of receiving duplication if there is a subrogation by the PIP carrier. Otherwise, [Wilson] has to pay the judgments entered by the jury. Otherwise, the windfall goes to the defendant insurance company.
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> . . . .
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> "Well, there is no other reason why the statutory assignment would take place unless there's duplication. The purpose is the duplication of PIP benefits, but the Court does not believe that the legislature intended to give a windfall. The purpose of the statute was to avoid a windfall by the plaintiff, but it says nothing about a windfall by the insurance company that [the] verdict is entered against. And so the Court doesn't believe

that the purpose was to give a windfall to the defendant insurance company when it's not the original PIP carrier—or paid the PIP in the first place."

Wilson filed this timely appeal.

WAS RISLEY ENTITLED TO RECOUP DAMAGES DUPLICATIVE OF THE PIP BENEFITS HE RECEIVED?

On appeal, Wilson contends the district court erred as a matter of law when it ruled that Risley was entitled to recover damages duplicative of the PIP benefits he received from his insurance carrier, AAA. Risley counters that we should affirm the district court's decision because he filed his cause of action against Wilson within the 2-year statutory limitations period and, thus, he was entitled to recover all of his damages, including any medical expenses paid by his PIP carrier.

The material facts of this case are not in dispute. In order to resolve this question, we must interpret and apply various provisions of the KAIRA, in particular, K.S.A. 40-3113a(c). Interpretation of a statute is a question of law over which we exercise unlimited review. *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 918, 349 P.3d 469 (2015).

Before addressing the merits of the parties' arguments, it is helpful to begin with a brief discussion of the KAIRA. In our mobile society, automobile accidents are, unfortunately, a rather common occurrence. Recognizing this fact, our legislature enacted the KAIRA, Kansas' no-fault insurance law, as a means for reducing personal injury litigation by promptly compensating accident victims for "bodily injury arising out of the ownership, operation, maintenance or use of motor vehicles in lieu of liability for damages to the extent provided [by the KAIRA]." K.S.A. 40-3102; see *Chamberlain v. Farm Bureau Mut. Ins. Co.*, 36 Kan. App. 2d 163, 172, 137 P.3d 1081 (2006). The KAIRA accomplishes this goal by requiring every owner of a vehicle registered in Kansas, with some unrelated exceptions, to purchase first party insurance that includes

PIP benefits, *i.e.*, disability benefits, medical and rehabilitation expenses, funeral expenses, and substitution and survivor benefits, which are payable by the owner's insurance company regardless of fault. See K.S.A. 40-3103(q); K.S.A. 2015 Supp. 40-3104; K.S.A. 40-3107(f); *Chamberlain*, 36 Kan. App. 2d at 172; *Jackson v. Browning*, 21 Kan. App. 2d 845, 849, 908 P.2d 641 (1995).

Additionally, the KAIRA protects the insured's right to sue the tortfeasor for damages, including those for which the insured received PIP benefits. K.S.A. 40-3113a(a). An insured may, without limitation, seek damages for pecuniary losses such as medical expenses or lost wages. *Key v. Clegg*, 4 Kan. App. 2d 267, 270, 604 P.2d 1212 (1980). But nonpecuniary losses—pain, suffering, mental anguish, and inconvenience—are only collectible if the insured has medical expenses of at least $2,000 or " the injury consists in whole or in part of permanent disfigurement, a fracture to a weightbearing bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, [or] permanent loss of a bodily function or death." K.S.A. 40-3117.

To prevent double recovery by accident victims, the KAIRA confers subrogation rights upon PIP carriers. See *Chamberlain*, 36 Kan. App. 2d at 172-73; *Hall v. State Farm Mut. Auto. Ins. Co.*, 8 Kan. App. 2d 475, 478, 661 P.2d 402 (1983). In particular, whenever the insured reaches a settlement with, or obtains a judgment against, the tortfeasor, the insurer "shall be subrogated to the extent of duplicative [PIP] benefits provided to date of such recovery and shall have a lien therefor against such recovery and the insurer . . . may intervene in any action to protect and enforce such lien." K.S.A. 40-3113a(b).

Moreover, if the insured obtains a settlement or judgment against the tortfeasor prior to the completion of PIP benefits, "the amount of such judgment, settlement or recovery . . . which is in excess of the amount of [PIP] benefits paid to the date of

recovery of such judgment, settlement or recovery . . . shall be credited against future payments of such [PIP] benefits." K.S.A. 40-3113a(b). But the KAIRA does place some limitations upon a PIP carrier's subrogation right, as its recovery of duplicative PIP benefits must be reduced by the percentage of negligence attributable to the insured and the insured is entitled to recover a proportionate share of his or her attorney fees. K.S.A. 40-3113a(d), (e).

A PIP carrier's subrogation right is not contingent upon the insured's decision to file a legal action against the tortfeasor. Under K.S.A. 40-3113a(c), a PIP carrier is entitled to bring an independent subrogation action against the tortfeasor in either its own name or the name of the insured:

> "*In the event an injured person*, such person's dependents or personal representative *fails to commence an action against such tortfeasor within 18 months after the date of the accident resulting in the injury, such failure shall operate as an assignment to the insurer or self-insurer of any cause of action in tort which the injured person*, the dependents of such person or personal representatives of such person *may have against such tortfeasor for the purpose and to the extent of recovery of damages which are duplicative of* [*PIP*] *benefits*. Such insurer or self-insurer may enforce same in such person's own name or in the name of the injured person, representative or dependents of the injured person for their benefit as their interest may appear by proper action in any court of competent jurisdiction." (Emphasis added.)

The central focus of this appeal is on the meaning and application of K.S.A. 40-3113a(c). Specifically, the parties dispute whether the subrogation-assignment provision fully divests the insured of the right to pursue any cause of action which includes damages duplicative of PIP benefits after the passage of 18 months or whether the statute merely facilitates enforcement of the PIP carrier's subrogation rights. At its essence, this appeal presents the question: When the insured commences a civil action against the tortfeasor before the expiration of the 2-year statute of limitations for tort actions based in

negligence but after the passage of 18 months, is the insured barred from pursuing claims duplicative of PIP benefits because of the statutory assignment language contained within K.S.A. 40-3113a(c)?

Wilson contends that K.S.A. 40-3113a(c) deprives an insured of "all rights and standing to sue after the eighteenth month expire[s] and [makes] the PIP carrier the real party in interest." According to Wilson, interpreting K.S.A. 40-3113a(c) in any other manner would not only be at variance with one of the primary purposes of the statute—to prevent the double recovery by a PIP recipient—it would directly conflict with general assignment law which holds that "'[w]here the injured party assigns all of his rights to a third party, the assignee becomes the real party in interest and the assignor can no longer pursue a claim on his own behalf.'" Wilson claims that Risley's failure to file his lawsuit within 18 months of the automobile accident triggered the statutory assignment provision and divested him of the right to pursue his cause of action for medical expenses paid via PIP benefits.

Risley, on the other hand, argues that Wilson's claim that K.S.A. 40-3113a(c) effectively reduces the 2-year statute of limitations for tort actions to 18 months is nonsensical because the statutory assignment scheme merely provides PIP carriers with a means to enforce their subrogation rights and does not limit the insured's ability to recover all of the insured's damages, including those which are duplicative of PIP benefits, provided the insured has timely commenced a civil action against the tortfeasor within the 2-year limitations period. According to Risley, the KAIRA seeks to prevent a double recovery by the accident victim to protect the PIP carrier, rather than the tortfeasor, and, in a manner similar to the collateral source rule, the KAIRA does not grant the tortfeasor the "right to enforce th[e] subrogation right of the PIP carrier, or to benefit from the PIP carrier's waiver of any such right."

As the district court found, this court's decision in *Foveaux* provides important guidance to resolve the issue on appeal. In *Foveaux*, Carol L. Foveaux and Cassandra L. Smith were involved in an automobile accident, and as a result, the Colonial Insurance Company of California (Colonial) paid their insured, Foveaux, PIP benefits. Foveaux did not sue Smith within 18 months of the accident, so under K.S.A. 1991 Supp. 40-3113a(c), Colonial filed a lawsuit against Smith to recover the PIP benefits it had paid its insured. When Smith's insurance carrier requested that the claim be submitted to arbitration, however, Colonial dismissed the case without prejudice. Foveaux then filed a lawsuit against Smith, prior to the expiration of the statute of limitations. When Colonial sought to intervene in the case, the district court granted its request with several limitations, including a prohibition against active participation at trial.

After the jury entered a verdict generally in favor of Foveaux, Colonial appealed. Relevant to this appeal, Colonial claimed that "because K.S.A. 1991 Supp. 40-3113a [made] an absolute assignment to it of Foveaux's cause of action in tort once 18 months after the date of the automobile accident had expired without commencement of any action by Foveaux, it must be allowed to fully participate in the court proceedings." 17 Kan. App. 2d at 687.

At the outset of its analysis, this court agreed with Colonial's contention that K.S.A. 1991 Supp. 40-3113a is similar to the assignment language contained within the Workers Compensation Act, K.S.A. 1991 Supp. 44-504. 17 Kan. App. 2d at 689-90; see *Jerby v. Truck Insurance Exchange*, 36 Kan. App. 2d 199, 205-06, 138 P.3d 359 (2006) ("K.S.A. 40-3113a has provisions strikingly similar to those found under our workers compensation law in K.S.A. 44-504. In fact, they are identical in certain respects. . . . These similarities are no accident. The KAIRA and the Workers Compensation Act are based upon a common public policy consideration[.] . . . These similarities compel us to consider the cases under the KAIRA for guidance in resolving the current dispute.").

At the time, K.S.A. 1991 Supp. 44-504 granted employers subrogation rights in circumstances where the injured worker's injuries were "caused under circumstances creating a legal liability against some person other than the employer or any person in the same employ to pay damages." Similar to K.S.A. 1991 Supp. 40-3113a(c), K.S.A. 1991 Supp. 44-504(c) provided:

> "*Failure on the part of the injured worker, or the dependents or personal representatives of a deceased worker to bring such action within the time specified by this section, shall operate as an assignment to the employer of any cause of action in tort which the worker* or the dependents or personal representatives of a deceased worker *may have against any other party for such injury or death, and such employer may enforce the cause of action in the employer's name or in the name of the worker, dependents or personal representatives for their benefit as their interest may appear* by proper action in any court of competent jurisdiction. The court shall fix the attorneys' fees which shall be paid proportionately by the employer and employee in the amounts determined by the court." (Emphasis added.)

Our court, however, found that despite Colonial's assertion to the contrary, K.S.A. 1991 Supp. 44-504 did not deprive an injured worker of the right to sue the tortfeasor if the worker failed to file his or her lawsuit within the specified timeframes because the legislature never intended to make a "true assignment to the employer or insurer." 17 Kan. App. 2d at 691-92. This court explained:

> "It was never intended that the two-year period in which a cause of action could be brought should be shortened by the employer's right to recover compensation payments paid to an employee when a third-party action is brought. [Citation omitted.] The one-year limitation is 'precautionary and intended as additional security to the employer who has acquired subrogation rights.' [Citations omitted.]" 17 Kan. App. 2d at 692.

Our court found that similar to K.S.A. 1991 Supp. 44-504, K.S.A. 1991 Supp. 40-3113a(c) does not divest an accident victim of the right to sue the tortfeasor for damages duplicative of PIP benefits:

> "Because the injured person has the absolute right to bring suit against a third-party tortfeasor within the limitations period, we hold that, although the right of intervention of a PIP carrier does exist, the primary right to control the litigation lies with the injured party. The injured party's rights are not eliminated by the statutory assignment, pursuant to K.S.A. 1991 Supp. 40-3113a(c), of an insured's cause of action in tort to the insurer to the extent of duplicative PIP benefits paid when the insured fails to commence an action against the tortfeasor within 18 months after the date of the accident. The injured party remains in full and complete control of the cause of action no matter when, within the period of limitations, the injured party files suit." 17 Kan. App. 2d at 694-95.

As a result, our court denied Colonial's attempt to "obtain a blanket rule of full participation in every case," and it found that the district court did not abuse its discretion when it placed limitations upon Colonial's ability to participate. 17 Kan. App. 2d at 695.

As Risley asserts and the district court found, the manner in which the *Foveaux* court interpreted K.S.A. 40-3113a(c) demonstrates that the legislature did not create a new statute of limitations for claims involving damages duplicative of PIP benefits when it enacted the statutory assignment scheme. Instead, the legislature simply provided additional security to PIP carriers by enacting a means for facilitating the enforcement of their subrogation rights when the insured has failed to act within 18 months of the accident date.

Wilson, however, insists the *Foveaux* court's discussion of K.S.A. 40-3113a(c) is "purely dictum, is not binding, and cannot govern the interpretation of this unambiguous statute" because the issue in *Foveaux* involved the extent to which a PIP carrier may

participate at trial, rather than the insured's ability to recover damages duplicative of PIP benefits after the passage of 18 months.

Dictum is, in legal parlance, "a statement of law in a court's opinion unnecessary to a decision of the matter in controversy." *Rodriguez v. Cascade Laundry Co.*, 185 Kan. 766, 770, 347 P.2d 455 (1959). "Dicta in a court opinion is not binding, even on the court itself, because the court should consider the issue in light of the briefs and arguments of counsel when the question is squarely presented for decision." *Law v. Law Company Building Assocs.*, 295 Kan. 551, Syl. ¶ 1, 289 P.3d 1066 (2012). Despite Wilson's assertion to the contrary, we are persuaded the *Foveaux* court's interpretation of K.S.A. 40-3113a(c) does not qualify as dicta because that court referred to K.S.A. 1991 Supp. 40-3113a as "[t]he statute at issue" and it noted that "Colonial's argument . . . [brought] into question the interpretation of subsection (c)." 17 Kan. App. 2d at 688-89. In short, our court's interpretation of K.S.A. 40-3113a(c) in *Foveaux*, although in a different factual context, was still a statement of law central to the court's decision.

Moreover, *Foveaux*'s interpretation of K.S.A. 40-3113a(c) is consonant with our Supreme Court's decision in *Potts v. Goss*, 233 Kan. 116, 660 P.2d 555 (1983), wherein the court briefly discussed the statutory assignment language and its impact upon the insured's ability to recover damages duplicative of PIP benefits after 18 months.

In *Potts*, Cathleen Potts filed a personal injury lawsuit against Imogene and Christopher Goss for damages arising from an automobile accident. Although Imogene was served, Christopher was not. Potts received PIP benefits from her insurance carrier, Farm Bureau Mutual Insurance Co., Inc. (Farm Bureau). Although Potts' attorney kept Farm Bureau apprised of the progress of the case, Farm Bureau opted not to intervene in the litigation. Ultimately, the parties settled the lawsuit, and under the terms of the settlement, Potts issued a general release of liability to Imogene and Christopher. Although the settlement check the Goss' insurance carrier issued would have totally

satisfied its PIP reimbursement claim, Farm Bureau refused to endorse the check. Instead, Farm Bureau filed a lawsuit against Christopher seeking recovery of these benefits which the district court dismissed because a full settlement had been reached in the Potts-Goss litigation. 233 Kan. at 117.

Farm Bureau appealed, alleging, among other arguments, that due to K.S.A. 40-3113a(c), Potts' failure to "obtain service upon Christopher Goss within 18 months of the accident rendered her legally incapable of entering into a settlement with the Goss insurer." 233 Kan. at 119. Our Supreme Court disagreed:

> "Imogene and Christopher Goss were the named defendants. The Goss vehicle was insured by one Farmers Insurance policy. Ms. Potts' action reached one defendant and the all-important insurance carrier. The proposition that Ms. Potts, by operation of law, assigned to Farm Bureau part of her cause of action during the pendency of litigation upon the passage of 18 months after the accident, simply by being unable to serve one of the defendants, is patently absurd and deserves no further attention. It should also be noted that Farm Bureau did not contend there was an assignment until five months after the alleged statutory assignment had occurred and after full recovery of Farm Bureau's lien had been made but rejected by Farm Bureau.
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> "In any event, Farm Bureau could not have prevailed in its action against the tortfeasor as, at most, it stood in the shoes of Ms. Potts, who had already released the tortfeasor. See *Shelman v. Western Casualty & Surety Co.*, 1 Kan. App. 2d 44, Syl. ¶ 5, 562 P.2d 453, *rev. denied* 225 Kan. 845 (1977)." 233 Kan. at 119-20.

Although *Potts*' discussion of K.S.A. 40-3113a(c) is conclusory, the fact that our Supreme Court rejected the notion that K.S.A. 40-3113a(c) operates as a true assignment lends credence to the *Foveaux* court's determination that the statute simply establishes a mechanism for enforcement of subrogation.

Accordingly, we find that K.S.A. 40-3113a(c) does not divest the insured of causes of action which are duplicative of PIP benefits after 18 months; instead, the statute

provides PIP carriers with a mechanism for enforcing their subrogation rights should the insured opt not to pursue damages from the third-party tortfeasor. Moreover, interpreting K.S.A. 40-3113a(c) as a security mechanism rather than a true assignment will not harm the interests of PIP carriers because the intervention and statutory lien provisions of the statute fully protect the carriers' subrogation rights in the event the insured opts to sue the tortfeasor after the 18 months has elapsed but before the 2-year statute of limitations has expired.

We view Wilson's proposed interpretation of the statute as unreasonable because we doubt the legislature intended to create a procedure whereby two causes of action must be filed against the tortfeasor in order to hold him or her fully responsible. As our court's decision in *O'Donnell v. Fletcher*, 9 Kan. App. 2d 491, 493, 681 P.2d 1074 (1984), illustrates, such a procedure would directly conflict with the KAIRA's goal of reducing the incidents of personal injury litigation because it would encourage the filing of multiple lawsuits against the tortfeasor when, in actuality, only one such cause of action exists.

In *O'Donnell*, the lawsuit at issue was "filed on behalf of a personal injury protection (PIP) insurer in the name of the injured party, Rodney K. O'Donnell, to recover payments for medical expenses and lost wages pursuant to K.S.A. 40-3113a(c)." 9 Kan. App. 2d at 491. When the district court entered a judgment in favor of the tortfeasor based upon its finding that the statute of limitations had run and O'Donnell was not the real party in interest, the plaintiff appealed. Relevant to this appeal, the plaintiff challenged the district court's determination that he was not entitled to relief because he was not the real party in interest.

Our court began its analysis with a brief discussion of the real party in interest rule:

> "The real party in interest is the person who possesses the right sought to be enforced, and is not necessarily the person who ultimately benefits from the recovery. [Citation omitted.] [The real party in interest rule seeks] to protect the defendant from being repeatedly harassed by a multiplicity of suits for the same cause of action. [Citation omitted.]" 9 Kan. App. 2d at 492.

Our court then explained that at first glance, the injured party, O'Donnell, was the real party in interest because he allegedly sustained damages in excess of the amount paid by his PIP carrier and, pursuant to general subrogation principles, he was entitled to sue the tortfeasor for the entire loss with the understanding that he would hold in trust any recovery duplicative of the PIP benefits he received. 9 Kan. App. 2d at 492. The court noted, however, that K.S.A. 40-3113a "alters this general rule." 9 Kan. App. 2d at 493. But despite this alteration, the court found that K.S.A. 40-3113a(c) does not operate in a manner similar to a true assignment because "[o]nly one cause of action exists against the tortfeasor. [Citation omitted.]" 9 Kan. App. 2d at 493. K.S.A. 40-3113a(c) simply facilitates enforcement of the insurer's subrogation right by authorizing the insurer to bring an action in its own name when the insured fails to act for 18 months. 9 Kan. App. 2d at 493.

Our court in *O'Donnell*, then went on to consider the district court's determination that the PIP carrier was the real party in interest because the actual damages sought by the petition only amounted to those duplicative of PIP benefits paid. Ultimately, our court found that the district court erred, regardless of whether the lawsuit was actually initiated on behalf of the real party in interest, because the district court raised this issue *sua sponte* and such a defect must be raised by the defendant in a timely fashion or the defect may be deemed waived. 9 Kan. App. 2d at 493-95.

Foveaux, *Potts*, and *O'Donnell* establish that K.S.A. 40-3113a(c) did not eliminate Risley's right to sue Wilson for *all* of his damages. Risley timely filed his lawsuit within the 2-year limitations period; therefore, he was fully entitled to seek damages for his

entire loss with the understanding that any recovery duplicative of PIP benefits would be held in trust for AAA.

A wrinkle in this case, however, is that Risley's insurance carrier, AAA, indicated that it would not pursue its subrogation rights against its insured. As a result, as Wilson argues, Risley is receiving a double recovery because he is receiving damages for medical expenses that were previously paid by AAA. Nevertheless, while the KAIRA seeks to prevent such a double recovery via the subrogation and reimbursement provisions set forth in K.S.A. 40-3113a, we find that these provisions were intended to benefit the PIP carrier rather than the third-party tortfeasor.

Significantly, in *Mommens v. Ottley*, 948 F. Supp. 57 (D. Kan. 1996), the United States District Court for the District of Kansas rejected a third-party tortfeasor's attempt to avoid paying damages for medical expenses under the authority of the KAIRA's prohibition on double recoveries. Kathie Mommens brought a diversity action against Leo Ottley for damages she allegedly sustained when Ottley's vehicle collided with her vehicle. The jury found Mommens 49% at fault for the accident and Ottley 51% at fault, and it awarded Mommens $1,500 for her medical expenses and $1,500 for her disability, pain, and suffering. Under K.S.A. 40-3117, Mommens could not recover damages for her disability, pain, and suffering because the jury did not award her medical expenses of at least $2,000. 948 F. Supp. at 58-59. Although Ottley contended that Mommens should recover nothing, the parties agreed that "based upon the jury's verdict and the substantive law of Kansas, the absolute most that [Mommens] could recover (exclusive of costs) was $765," and the federal district court entered a judgment in this amount. 948 F. Supp. at 59.

In response, Ottley filed a motion for relief from judgment, alleging that because Mommens had already received $765 in medical expenses from her PIP carrier and her PIP carrier was not entitled to subrogation from the proceeds of the judgment based upon

rulings of the Kansas Commissioner of Insurance, the KAIRA—in particular K.S.A. 40-3113a—precluded Mommens from obtaining a double recovery. In response, Mommens countered that "the 'Kansas courts have interpreted K.S.A. 40-3113a to mean that the statutory provisions for subrogation (of PIP benefits paid) are intended to prevent double recovery as it relates to *the plaintiff and plaintiff's own insurance carrier*." 948 F. Supp. at 59. Mommens insisted that it would be contrary to public policy to reward the wrongdoer for the plaintiff's insurance coverage.

After noting that every case cited by Ottley involved a dispute between the insured and the insured's PIP carrier and that the precedent did not address whether K.S.A. 40-3113a impacted the obligations of a third-party tortfeasor, the district court denied Ottley's motion for relief from judgment:

> "Frankly, the court doubts that the Kansas legislature intended to allow a tortfeasor such as Ottley to benefit from the double recovery bar he cites and to use that shield to deny Mommens the meager victory she obtained. While it is conceivable that Mommens may ultimately enjoy a double recovery of $765, the court does not believe that possibility serves as a basis to set aside the judgment against Ottley." 948 F. Supp. at 60.

While the *Mommens* analysis is brief, it provides some insight that the KAIRA's prohibition on the receipt of a double recovery is designed to assist the PIP carrier, rather than benefit the tortfeasor.

Based upon the obvious purpose of the KAIRA, which was noted by the federal district court in *Mommens*, we find the district court did not err in its legal conclusion that KAIRA's subrogation-assignment procedure prevents an insured from receiving a double recovery to the detriment of the PIP carrier, not the tortfeasor.

In conclusion, we hold that Risley was entitled to recoup all of his damages, including those duplicative of PIP benefits, because K.S.A. 40-3113a(c) does not operate as a true assignment. Whether AAA seeks subrogation from the judgment is a matter between Risley and his insurance carrier.

Affirmed.