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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000337-MR

WILLIAM E. STINSON — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 02-CI-00432

WILLIAM MATTINGLY;
TRADITIONAL MASONRY, INC.;
TRADITIONAL MASONRY, LLC; AND
KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ABRAMSON AND DIXON, JUDGES; EMBERTON,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: On April 1, 2000, automobiles operated by William Stinson and William Mattingly collided at the intersection of Kentucky Highway 220 (Rineyville-Big Springs Road) and Deckard School Road near Rineyville in Hardin County. Both drivers were injured, Stinson severely. His injuries included numerous broken bones, optic nerve

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5) (b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

damage, and permanent brain damage. His medical expenses alone are alleged to have exceeded $500,000.00. In March 2002, Mattingly filed suit against Stinson, and in May 2002 Stinson counterclaimed. Stinson also brought third-party complaints against Mattingly's employer, in tort, and against his own insurer, Kentucky Farm Bureau Insurance Co. (KFB), pursuant to his underinsured motorist coverage (UIM). The parties settled Mattingly's claim, and in November 2005 Stinson's counterclaim was presented to a Hardin County jury, which returned a verdict in favor of Mattingly. In accord with that verdict, the Hardin Circuit Court entered judgment on November 10, 2005, dismissing Stinson's counterclaim and by implication his third-party complaints. Appealing from that judgment, Stinson contends that the trial court erred by, in effect, severing his insurance claim from the tort action and ordering the case to "be tried without there being any reference to liability insurance or Underinsured Motorist Insurance coverage." Stinson maintains that this ruling runs afoul of our Supreme Court's recent decision in *Earle v. Cobb,* 156 S.W.3d 257 (Ky. 2004). We agree that Kentucky law now requires that a UIM carrier named as a party be identified to the jury and so must reverse and remand for a new trial.

At trial, Stinson testified that he had no recollection of the accident. He sought, however, through expert testimony, to show that Mattingly, who was westbound on Highway 220, the superior road, approached the Deckard School Road intersection at an excessive speed, between 50 and 56 mph, in disregard of a 35 mph advisory speed limit and flashing yellow warning lights. Stinson's claim was that Mattingly's allegedly unsafe speed caused the accident.

Mattingly countered with evidence that the speed limit was 55 mph and that, notwithstanding the advisory limit, traffic tended to move along highway 220 at the legal limit. He testified that as he approached the Deckard School Road intersection his speed was between 50 and 55 mph and that he observed Stinson's vehicle stopped there apparently waiting for him to pass. When he was only about 50 feet from the intersection, however, Stinson's vehicle pulled out in front of him. He was unable at that point to avoid the collision. Accident reconstructionists for both parties tended to confirm Mattingly's testimony, at least to the extent that both experts testified that Mattingly's vehicle would have been visible from Stinson's vehicle before Stinson's vehicle pulled into the intersection. As noted above, the jury accepted Mattingly's account of the accident and attributed liability solely to Stinson.

Prior to trial, Mattingly successfully moved to exclude any reference to insurance. Stinson contends that, by suppressing the fact that KFB was a party, the trial court engaged in the sort of "legal fiction" our Supreme Court denounced in *Earle v. Cobb, supra. Earle,* like this case, involved a two car accident and the claim of one of the drivers against both her UIM carrier and the other driver. Unlike Stinson's claim, however, the claim against the tortfeasor driver was settled for that driver's liability policy limits. The UIM carrier then duly preserved its subrogation rights against the other driver by means of the so-called *Coots* procedure. *Coots v. Allstate, Ins. Co.,* 853 S.W.2d 895 (Ky. 1993), now codified at KRS 304.39-320. At the time of trial, therefore, the plaintiff's sole remaining claim was the one against her UIM carrier. The UIM carrier, in turn, had a subrogation claim against the tortfeasor. Nevertheless, the matter

was tried as though it were simply one driver against the other, with no mention of or participation by the UIM insurer. Criticizing that procedure as a "legal fiction" and a "charade," our Supreme Court held "that the failure to identify to the jury a named party defendant at trial that is also the plaintiff's UIM carrier [is] reversible error." *Earle v. Cobb,* 156 S.W.3d at 261.

The question before us is whether this same rule requiring the identification of the defendant UIM carrier applies when, as in this case, there has been no settlement with the alleged tortfeasor, who thus remains a principal party to the plaintiff's suit. In one scenario the answer is clear. Even if there has been no settlement, if the insurer participates at trial, *Wheeler v. Creekmore,* 469 S.W.2d 559 (Ky. 1971), holds that its attorney must introduce herself to the jury and identify the party she represents. Here, however, KFB did not participate at trial, and Mattingly and KFB argue that in these circumstances—no settlement and no participation at trial by the UIM carrier defendant—the long-standing policy of our courts to exclude from tort actions all reference to liability insurance precludes identification of the UIM carrier or mention of the plaintiff's UIM claim. *Turpin v. Scrivner,* 297 Ky. 365, 178 S.W.2d 971 (1944). Otherwise, they insist, *Earle's* exception to that policy will swallow the rule, for in many, if not most, motor vehicle accident cases, even cases not likely to be settled, the plaintiff will be able to add a UIM claim. If those claims must be presented to the jury, the argument runs, then in all those cases the jury not only knows of the UIM coverage, but will also readily infer the existence of liability insurance on the part of the defendant driver.

Although there is some force to this argument, and although, as KFB and Mattingly point out, the *Earle* opinion sometimes emphasizes the fact that that case involved a *Coots* settlement,[2] neither its holding, as we have noted, nor the rationale for its holding is limited by that fact. Rather, the Supreme Court acknowledged the policy against mention of liability insurance, but emphasized our judicial system's even more fundamental policy of openness to the public and to juries. In light of that policy, it noted that when, by virtue of its contract, an insurance company is a real party in interest contesting its obligation to provide UIM benefits, its position "is no different from that of any insurer that is sued directly for breach of its policy or from that of any apparently 'deep pocket' corporation that is sued for breach of contract by its promisee." *Id.* at 260 (quoting from *King v. State Farm Mut. Auto. Ins. Co.,* 850 A.2d 428, 435 (Md. 2004), internal quotation marks omitted). Concealing the insurance company party, the Court observed, constitutes an unwarranted "legal fiction," and violates the policy of full disclosure, which, the Court insisted, "outweighs any prejudice that [the insurer] might experience." *Id.* at 261.

These concerns apply no less in this case than they did in *Earle.* KFB did not participate in the trial of this case, but the UIM carrier in *Earle* did not participate in that trial and, nevertheless, our Supreme Court held that it was reversible error not to identify the UIM carrier to the jury. Admittedly, there was no *Coots* settlement in this

[2] For example, the Court introduces and summarizes its opinion as follows: "We conclude that the UIM carrier should be so identified as a party because it was named as a party by virtue of its contract and because it chose to retain its subrogation rights by substitution of its payment for that of the liability insurance carrier. . . . As stated hereinabove, when Indiana Insurance invoked the *Coots* procedure it should have been identified as a party to the jury." *Earle v. Cobb,* 156 S.W.3d at 258 and 262.

case, as there was in *Earle,* but the lack of a settlement meant only that Mattingly remained potentially liable to Stinson along with KFB. KFB was no less a party than the UIM carrier in *Earle.* Like that carrier, KFB was potentially liable to the plaintiff for UIM benefits, and also like that carrier it retained a potential subrogation claim against the alleged tortfeasor for any benefits it was obliged to pay. KFB, in other words, was a bona fide real party in interest, and under *Earle* the trial court erred by failing to allow the jury to hear that Stinson's UIM carrier was a party.

Even if the trial court erred, Mattingly argues, the error was harmless given the fact that the jury found Stinson solely responsible for the accident. That defense verdict, Mattingly insists, rendered KFB's interest in the litigation null and thus rendered the trial court's failure to identify KFB to the jury harmless. We certainly agree with Mattingly that the existence of insurance, liability or UIM, had no relevance whatsoever to the jury's liability determination. However, we are not writing on a clean slate with respect to this issue.

In *Hughes v. Lampman,* 197 S.W.3d 566 (Ky.App. 2006), this Court, relying on *Earle,* reversed a judgment confirming a defense verdict and held that the failure to identify a party UIM carrier was, in effect, an error of such magnitude that harmless error analysis did not apply. The *Hughes* court noted that in *Earle* our Supreme Court relied on a Florida case which rejected the proposition that it was "harmless error" to fail to identify to the jury a properly joined UIM carrier.[3] *Earle* and *Hughes* compel a reversal in this case. The fact that Stinson had his day in court and could not prove

[3]Indeed *Earle* referenced favorably *Medina v. Peralta,* 724 So. 2d 1188 (Fla. 1999), wherein the Florida Supreme Court deemed such failure a "per se reversible error." 156 S.W.2d at 261.

liability is not dispositive. Reversal is required, according to *Earle* and *Hughes,* to ensure that our court system is not tainted by "deception" or "subterfuge." *Hughes,* 197 S.W.3d at 568.

It is true, of course, as Mattingly and KFB point out, that under this post-*Earle* approach trials may also be tainted by gratuitous references to insurance when insurance should have absolutely no bearing on the jury's findings as to liability and damages. If *Earle* is truly, as it appears to be, the harbinger of a new era of disclosure regarding insurance in our courts, then to guard against this countervailing taint, trial judges may increasingly find it necessary to admonish the jury that they must completely disregard insurance when determining whether liability and damages have been proven. Such admonitions, perhaps, will remind the jury that they are fact finders and should not be swayed by who will pay the bill.

Finally, noting that the expert testimony indicated that Mattingly's speed could have been as great as 56 mph, one mile-per-hour above the legal limit, Stinson contends that he was entitled to a preemptory instruction declaring Mattingly negligent as a matter of law for having violated various traffic safety statutes. He also contends that written reports by two of the testifying experts should have been admitted as evidence and provided to the jury during its deliberation. As Mattingly correctly points out, Stinson did not include these issues in his prehearing statement to this Court, and so under CR 76.03(4)(h) and CR 76.03(8) he is precluded from raising them except by special motion. *Sallee v. Sallee,* 142 S.W.3d 697 (Ky.App. 2004). No motion having been filed, we decline to address them.

In sum, in *Earle v. Cobb,* our Supreme Court ruled that it is reversible error not to inform the jury that a plaintiff's UIM carrier is a named defendant to the plaintiff's suit. Although this case does not involve a *Coots* settlement with the alleged tortfeasor, as did *Earle,* that difference does not allow for a different result given the rule and rationale *Earle* announced. Under *Earle,* the trial court's failure to apprise the jury of Stinson's claim against his UIM carrier, Kentucky Farm Bureau, was an error, and under *Earle* and *Hughes v. Lampman* that error requires reversal for a new trial because the error cannot be deemed harmless, despite a defense verdict. Accordingly, we reverse the November 10, 2005, judgment of the Hardin Circuit Court, and remand for a new trial consistent with this opinion.

ALL CONCUR.

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