RENDERED: DECEMBER 4, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001575-MR

OCCIDENTAL FIRE & CASUALTY COMPANY — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 05-CI-00118

RONDAL WAYNE HARMON
AND PAUL B. STEELE — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

CLAYTON, JUDGE: Occidental Fire & Casualty Company (Occidental) appeals from the June 30, 2008, judgment that followed a jury verdict in favor of the plaintiff, Rondal Harmon, and awarded him $250,448.14 in damages. As a result

[1] Senior Judge Joseph E. Lambert 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.

of the judgment, Occidental, as Harmon's contract provider of underinsured motorist (UIM) benefits, was held responsible for $120,000. Occidental also appeals the circuit court August 8, 2008, order overruling Occidental motion to alter, amend, or vacate the verdict or, in the alternative a new trial. For the reasons stated below, we reverse and remand for a new trial.

On March 4, 2003, Harmon and Steele were driving vehicles that collided. Steele's car hit Harmon's car because, according to Steele, he was blinded by the sun. The evidence showed that both vehicles were moving at a speed of approximately five to ten miles per hour. No ambulance was called as both parties appeared unharmed and were able to drive their vehicles away from the accident scene. Harmon, however, was later diagnosed with whiplash as a result of the accident.

Harmon initially filed suit against Steele, and later filed suit against his own insurance carrier, Occidental, pursuant to his UIM coverage. Steel was insured by State Farm Mutual Insurance Company (State Farm) with liability policy limits of $25,000. Harmon had $120,000 UIM coverage with Occidental. Thereafter, on July 27, 2007, Steele filed a motion to exclude the existence of the UIM coverage and Occidental, the UIM insurance provider, joined in Steele's motion. Occidental did not want to be identified and participate in the trial. Nevertheless, in an order, entered on August 9, 2007, the circuit court overruled Steele's motion to exclude mention of Occidental. Occidental was ordered to

participate at trial despite its objection and even though the underlying tortfeasor never offered to settle within its policy limits.

A trial was held on May 22, 2008, and the jury returned a verdict in favor of Harmon. In the judgment, the jury found Steele 100 percent liable for the accident. A judgment was entered in accordance with the verdict. The judgment directed that Harmon recover $260,448.14 less $10,000, for the set off of No-Fault Personal Injury Protection coverage, for a total judgment of $250,448.14. Further, the judgment ordered that the intervening plaintiff, Occidental, would not recover from the intervening defendant, State Farm on its intervening complaint for subrogation of No-Fault Personal Injury Protection payments. Finally, the judgment stated that Harmon receive $120,000 from Occidental under his contract with them for UIM benefits. On August 8, 2008, the trial court, without explanation, denied Occidental's Kentucky Rules of Civil Procedure (CR) 59.01 and 59.05 motion to alter, amend or vacate or in the alternative grant a new trial. This appeal follows.

After the verdict was rendered, State Farm, on behalf of Steele, entered into settlement negotiations with Harmon and agreed to pay $110,000 in settlement, a sum that exceeds its liability limits of $25,000. (This settlement remains pending as the Court of Appeals on January 20, 2009, denied Harmon's motion to enforce the settlement under KRS 304.39-320.)

Occidental argues, as it did throughout the proceedings, that the circuit court erred when it allowed Occidental to be named as a party defendant in

this action based on its contractual relationship with Harmon to provide UIM benefits. Second, Occidental contends that, notwithstanding resolution of the first issue, the jury returned an excessive verdict including future medical treatment and future impairment of the power to earn money that did not comport with the evidence presented at trial. Given our decision in this case, it will not be necessary for us to address the issue concerning whether the verdict was excessive with regards to its assessment of damages.

In *Earle v. Cobb*, 156 S.W.3d 257 (Ky. 2004), the Kentucky Supreme Court required the identification of the UIM carrier at trial, but only in situations where the UIM carrier had protected its subrogation rights with a *Coots* procedure. The Court felt that it was fundamentally misleading to the jury to conceal the carrier's involvement under the circumstances of that case. A *Coots* settlement is a procedure wherein the UIM carrier substitutes its liability for that of the tortfeasor in order to preserve its subrogation rights against the tortfeasor. *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895 (Ky. 1993). The *Coots* procedure essentially provides that when settlement with the liability carrier occurs, and when such settlement reaches the policy limits of the liability carrier, the UIM carrier may elect to substitute its money for that of the liability carrier. In so doing, the UIM carrier retains a subrogation right against the tortfeasor.

When a *Coots* settlement procedure is used, *Earle* requires that the UIM carrier be identified. The rationale is that, under such circumstances, the UIM carrier becomes the only real party in interest at the trial when it substitutes

its payment for that of the liability insurance carrier. By substituting its payment for the liability insurance carrier, the UIM carrier retains its subrogation rights against the tortfeasor. *Earle,* 156 S.W.3d. at 258. As held by the *Earle* Court:

> . . . UIM carrier should be so identified as a party [at trial] 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.

Id.

Therefore, according to *Earle*, a UIM carrier must be identified at trial when it chooses to preserve its subrogation rights by means of a *Coots* settlement procedure. The *Earle* Court felt that it is improper to maintain a legal fiction that would allow the tortfeasor to defend at trial and have the UIM carrier to either participate or sit idly by and allow the tortfeasor to defend at trial. If the UIM carrier chose to not participate, it effectively hid the identity of a bona fide party. Indeed, as noted in *True v. Raines*, 99 S.W.3d 439, 448 (Ky. 2003), when an UIM carrier has reached a *Coots* settlement, the tortfeasor is "released from any further liability to the injured party[.]" And this "legal fiction" of substituting the name of the tortfeasor for the UIM carrier is particularly problematic when the tortfeasor's liability to the plaintiff is totally extinguished by a *Coots* procedure. But *Earle* did not address the fact pattern wherein an UIM carrier does enter into a *Coots* procedure. The question remains as to whether an UIM carrier must be named as a party without a *Coots* agreement.

In *Mattingly v. Stinson*, 281 S.W.3d 796 (Ky. 2009), the Kentucky Supreme Court specifically addressed whether the rule, set forth in *Earle,* 156 S.W.3d 257, which requires identification at trial of a plaintiff's underinsured motorist carrier, applies when there has been no *Coots* settlement between the UIM carrier and the alleged tortfeasor. The *Mattingly* facts were similar to our case because, prior to the trial, no *Coots* settlement was entered into between the tortfeasor and the UIM carrier. The Kentucky Supreme Court held in *Mattingly* that under those circumstances, the UIM carrier did not have to be identified at the trial:

> Thus, we decline to extend the holding in *Earle* to situations where the UIM carrier has not utilized the *Coots* settlement procedure and, therefore, has not substituted its liability for that of the defendant.

Id at 798.

The *Mattingly* court went on to explain its holding:

> When the UIM carrier has not reached a *Coots* settlement with the tortfeasor, the tortfeasor remains primarily liable to the plaintiff. The UIM carrier is only potentially liable, contingent upon a judgment in excess of the tortfeasor's own liability coverage. Because the tortfeasor remains a real party in interest, no legal fiction is created for the jury. The jury considers an actual case in tort between the injured party and the tortfeasor and decides liability and damages. Any liability of the UIM carrier to the tortfeasor or the injured party is ancillary to the jury's determinations in this regard, and then any such liability exists in contract.

Id.

Therefore, without a *Coots* settlement, the UIM carrier is not a real party in interest but is only potentially liable by contract if the tortfeasor is found liable.

Similarly, in our case, the "legal fiction" that was present in the *Earle* case does not exist because no *Coots* procedure was used. Steele, the defendant, was the real party interest and necessary to the action. Hence, Occidental, as a nonessential and non-named party, if liability and damages are established, will be contractually bound to Harmon. Therefore, Harmon's arguments concerning CR 17.01 language, which says that "[e]very action shall be prosecuted in the name of the real party in interest," are not relevant. Occidental is not a real party in interest.

Having determined that under Kentucky caselaw it was not necessary to name Occidental as a party to the action, we must now decide whether the trial court's decision to name Occidental as a named party was an abuse of discretion. Abuse of discretion occurs when a decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008) (internal citations omitted). Accordingly, we shall review the issue presented by the parties in light of the aforementioned abuse of discretion standard.

For sound policy reasons, Kentucky courts have long adopted the rule that liability insurance is not to be mentioned at trial for such a matter. The basis for this policy decision is the inherent prejudice resulting from a jury's knowledge

of the existence of liability insurance. UIM benefits, notwithstanding the plaintiff's procurement of the coverage, are based on the liability of a tortfeasor, and therefore, are considered liability insurance. KRS 304.39-320.

Here, the trial court's decision to allow mention of UIM insurance coverage ignored the statutory and caselaw prohibition against introduction of liability insurance in a personal liability lawsuit. The trial court did so to the detriment of Occidental. First, the jury's knowledge that Harmon had UIM cover put Occidental is in an untenable position. There was no jury instruction to find duty on the part of Occidental or to assess fault by Occidental. And at the time of the trial, no contract between the plaintiff and his UIM carrier needed enforcement. Moreover, Occidental argues that it was highly prejudicial for it to be named a party as it allowed the jury to know not only that Steele was insured but also that he was not insured in an amount sufficient to recompense Harmon.

A trial court abuses its discretion when it makes a decision that is unsupported by sound legal principles. Here, because Occidental was not a real party in interest, it was legally unsound for the trial court to deny Steele's motion to exclude from the jury the information that Harmon had UIM benefits. Given the prejudicial effects of giving the jury knowledge of insurance, we believe that it was an abuse of discretion for the judge to give notice to the jury that Harmon had an UIM benefit coverage provider, Occidental. Hence, in light of the caselaw set forth above, and for the reasons set forth in the preceding analysis, we reverse and

remand this case to the Knox Circuit Court for a new trial on the issues of damages.

ALL CONCUR.

BRIEFS FOR APPELLANT:

R. Craig Reinhardt
Katherine J. Hornback
Lexington, Kentucky

BRIEF FOR APPELLEE RONALD WAYNE HARMON:

Bruce R. Bentley
London, Kentucky

NO BRIEF FILED FOR APPELLEE PAUL B STEELE.