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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000433-MR

GEORGE PSIHOUNTAKIS AND
LINDA PSIHOUNTAKIS APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND, II, JUDGE
ACTION NO. 07-CI-02544

COURTNEY MOORE AND
AUTO-OWNERS INSURANCE COMPANY APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: The issue in this appeal concerns whether an underinsured motorists (UIM) carrier was sufficiently identified at trial and whether the participation of the UIM carrier and the alleged tortfeasor at trial was so prejudicial that a new trial is required. We affirm.

On November 16, 2006, George Psihountakis was operating a vehicle when it collided with a vehicle operated by Courtney A. Moore. George, his son Kosta, who was a passenger in George's vehicle, and George's wife filed a complaint on November 15, 2007, and an amended complaint on February 10, 2009, naming Moore and George's UIM carrier, Auto-Owners Insurance Company, as defendants. Auto-Owners answered and filed a cross-claim against Moore for recovery of any amount it might be required to pay. Kosta's claims against Moore and Auto-Owners were settled and dismissed with prejudice.

On March 5, 2010, the liability insurance carrier for Moore tendered its liability limits in settlement of the remaining claims against her. On March 16, 2010, Auto-Owners substituted those liability limits pursuant to Kentucky Revised Statutes (KRS) 304.39-320 and preserved its subrogation rights against Moore.

The Psihountakis filed a motion to realign the parties and to dismiss their claims against Moore. Specifically, they requested that the court "realign the parties so that it is clear Plaintiffs have sued Auto-Owners and Auto-Owners is bringing its claim against Courtney A. Moore." However, the Psihountakis withdrew that portion of their motion requesting the dismissal of Moore. Auto-Owners responded to the motion and subsequently filed a motion in limine to prohibit evidence, reference, testimony, or argument regarding Auto-Owners and/or insurance at trial except that Auto-Owners be introduced at trial as a defendant.

Prior to trial, the trial court restyled the case caption as "George and Linda Psihountakis, Plaintiffs v. Auto-Owners Insurance Company, the underinsured motorist carrier of George and Linda Psihountakis and Courtney Moore, Defendants." However, except for general *voir dire* questions regarding insurance, the Court ruled that evidence or argument pertaining to UIM coverage would not be permitted.

A jury trial was commenced and the court identified Auto-Owners as the UIM carrier and as a defendant. Further, in *voir dire*, the Psihountakis' counsel informed the jury that damages where sought against Auto-Owners when he stated:

> This is going to be a lawsuit in which George is suing his own insurance company, Auto-Owners. Do any of you for any reason have some feeling one way or the other about whether or not somebody should be able to collect on their insurance policies?

Despite the trial court's ruling, in opening statement, the Psihountakis' counsel, stated:

> We believe that when you have heard all the evidence, we believe you'll believe as we do that the Defendant Auto-Owners is simply trying to deny George the compensation he deserves.[1]

In addition to the above references to Auto-Owners, Auto-Owners's attorney stated in *voir dire* and opening statement that he represented Auto-Owners and he actively participated in the trial.

[1] Auto-Owners objected to counsel's statement and a bench conference occurred. Although it is difficult to hear the trial court's ruling, it did not give a specific admonition regarding counsel's statement.

The jury found the Psihountakis did not prove Moore was negligent and that her negligence was a substantial factor in causing the accident. The Psihountakis' motion for a new trial was denied and this appeal followed.

The settlement of the Psihountakis' claim against Moore and her insurance carrier was entered into using a procedure set forth in *Coots v. Allstate Ins. Co*., 853 S.W.2d 895 (Ky. 1993), and later codified by KRS 304.39-320. "When an injured party intends to settle with a tortfeasor and the tortfeasor's liability insurance carrier, the *Coots* procedure allows the UIM carrier to preserve its subrogation rights against the tortfeasor by paying the injured party the policy amount." *Mattingly v. Stinson*, 281 S.W.3d 796, 798 (Ky. 2009).

In *Earle v. Cobb*, 156 S.W.3d 257 (Ky. 2004), the Court considered whether a UIM carrier that used the *Coots* procedure must be identified at trial. Although the Court recognized the rule that evidence of liability insurance to show culpability is inadmissible, it concluded that when a direct action is pursued against a UIM carrier and the alleged tortfeasor, the UIM carrier must be identified to the jury. *Id*. at 262. When the *Coots* procedure is used, the tortfeasor is released from liability to the plaintiff and only remains liable to the UIM carrier and, therefore, the UIM carrier becomes the only real party with potential liability to the plaintiff. *Id*. In those circumstances, it is "improper to maintain the legal fiction of permitting the UIM carrier to either participate or sit idly by and allow the tortfeasor to defend at trial, thereby hiding the identity of a bona fide party." *Id*. at 261.

Earle stands only for the proposition that when the *Coots* procedure is used, the UIM carrier that participates at trial must be indentified to the jury. In this case, Auto-Owners's identity was clearly revealed to the jury by the court and counsel for all parties. It was identified as the Psihountakis' UIM carrier and as a defendant and the Psihountakis' counsel was permitted to expressly inform the jury that this was a case against Auto-Owners. There was no legal fiction such as in *Earle*. The jury was not left to speculate as to the parties' identities or the interest represented by counsel participating in the trial. *Id*. at 260. Nevertheless, the Psihountakis assert that the mere identity of Auto-Owners was insufficient.

Although not specific regarding what evidence or argument was improperly prohibited by the trial court's ruling, they argue that references to insurance should have been permitted as well as an instruction to the jury that Moore's liability was extinguished and only damages were to be decided. Not only does this assertion go beyond *Earle*'s holding, it is a misstatement of the law.

The Psihountakis' claim against Auto-Owners was based on contract. However, the issues at trial were Moore's negligence and damages. This was precisely the holding in *Kentucky National Insurance Co. v. Lester*, 998 S.W.2d 499, 504 (Ky.App. 1999), where the Court expressly rejected the contention that a *Coots* settlement precluded the UIM carrier from contesting the issue of fault. The Court held that the liability of the tortfeasor and the amount of damages are elements that must be established before determining the UIM carrier's obligation. Proof of fault is essential to be entitled to recover from a UIM carrier in a lawsuit

against that carrier. *Id*. Here, the existence of UIM coverage was not in dispute and the only issues of fact were fault and damages. References to or evidence concerning Auto-Owners other than its identity as the Psihountakis' UIM carrier and as a defendant would serve only to confuse and prejudice the jury.

The Psihountakis contend that Moore should not have been permitted to participate in the trial because the participation of Moore and Auto-Owners unfairly denied them a fair trial. This argument strikes this Court as disingenuous in light of the Psihountakis' withdrawal of their motion to dismiss Moore as a party. Moreover, we can find no authority that would preclude Moore, a defendant and responsible to pay Auto-Owners in subrogation if the jury found against her, from participating in the trial.

Based on the foregoing, the judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

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