RENDERED: SEPTEMBER 6, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001443-MR

OCCIDENTAL FIRE AND CASUALTY COMPANY — APPELLANT

v.

APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 09-CI-00234

ROBERT MOORE; ALISHA SLONE;
AND STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Occidental Fire and Casualty Company appeals from a jury verdict awarding $24,844.06 to Robert Moore. The damages were awarded pursuant to an underinsured motorists insurance policy issued to Moore. We find no error and affirm.

This cause of action arose after a two vehicle accident which occurred in Lincoln County on December 1, 2006. Moore testified at trial that on the evening of the accident, he attempted to make a left hand turn at an intersection when he was struck on his vehicle's driver's side door by a vehicle driven by Alisha Slone. Moore was insured by Occidental and Slone was insured by State Farm Mutual Automobile Insurance Company. Slone's automobile liability insurance policy limits were in the amount of $25,000.

On May 8, 2009, Moore filed suit against Slone for injuries he sustained in the accident. On February 12, 2010, Occidental, who had paid basic reparation benefits (BRB) on behalf of Moore and insured Moore for underinsured motorist benefits (UIM), was allowed to file an intervening complaint. Occidental intervened in order to recover from State Farm any BRB paid or payable to Moore.

In July of 2010, Slone filed for bankruptcy. The bankruptcy court entered an automatic stay of all state court proceedings against Slone. This stay was later lifted in part by court order. The order stated:

> Upon Motion of Robert Moore, creditor, for Relief from automatic stay imposed in this action to proceed with his tort claim against the Debtor, Alisha A. Slone's, automobile liability carrier and his automobile carrier for underinsured motorist coverage, and the parties being in agreement, and the Court being duly and sufficiently advised,
>
> IT IS HEREBY ORDERED that the automatic stay be lifted but only so as to allow the creditor to proceed against insurance proceeds that cover any alleged negligence attributed to the Debtor, Alisha A. Slone.

Due to the lift of the stay, Slone remained a party to the litigation in all respects except that no judgment could be entered against her in excess of her policy limits. In addition, Moore also amended his complaint to add Occidental as a defendant in order to recover UIM benefits.

Prior to trial, Moore settled with Slone and State Farm in the amount of $16,000. Moore notified Occidental of this settlement and Occidental advised Moore that they would substitute payment of the settlement funds pursuant to KRS[1] 304.39-320, thereby ensuring its rights to subrogation against Slone for any UIM benefits paid to Moore. KRS 304.39-320 states in relevant part:

> (3) If an injured person or, in the case of death, the personal representative agrees to settle a claim with a liability insurer and its insured, and the settlement would not fully satisfy the claim for personal injuries or wrongful death so as to create an underinsured motorist claim, then written notice of the proposed settlement must be submitted by certified or registered mail to all underinsured motorist insurers that provide coverage. The underinsured motorist insurer then has a period of thirty (30) days to consent to the settlement or retention of subrogation rights. An injured person, or in the case of death, the personal representative, may agree to settle a claim with a liability insurer and its insured for less than the underinsured motorist's full liability policy limits. If an underinsured motorist insurer consents to settlement or fails to respond as required by subsection (4) of this section to the settlement request within the thirty (30) day period, the injured party may proceed to execute a full release in favor of the underinsured motorist's liability insurer and its insured and finalize the proposed settlement without prejudice to any underinsured motorist claim.

[1] Kentucky Revised Statute.

> (4) If an underinsured motorist insurer chooses to preserve its subrogation rights by refusing to consent to settle, the underinsured motorist insurer must, within thirty (30) days after receipt of the notice of the proposed settlement, pay to the injured party the amount of the written offer from the underinsured motorist's liability insurer. Thereafter, upon final resolution of the underinsured motorist claim, the underinsured motorist insurer is entitled to seek subrogation against the liability insurer to the extent of its limits of liability insurance, and the underinsured motorist for the amounts paid to the injured party.

Occidental thereafter paid Moore $16,000 and moved to file a cross-claim against Slone for recovery of the $16,000 and any additional amounts it would have to pay in UIM coverage. The trial court granted the motion to file a cross-claim, but limited Occidental's recovery to $16,000. The court also dismissed Slone from the case "with respect to all claims asserted, or which could be asserted[.]" The dismissal of Slone was due to the settlement and the fact that the bankruptcy stay was lifted only to the extent there was liability insurance to cover Slone.

On August 20, 2011, Moore moved for partial summary judgment on the issue of Slone's liability for the accident. For reasons which will be discussed *infra*, the trial court granted summary judgment as to this issue.

On May 1, 2012, the matter proceeded to trial on the UIM claim and damages only. After the presentation of evidence, the trial court granted a directed verdict to Moore on his claim for past medical expenses in the amount of $8,104.57. The jury then awarded Moore $11,242 for future medical expenses,

$18,548 for pain and suffering, and $18,548 for impairment of power to earn money. The jury award was then reduced by $25,000 representing the liability carrier's policy limits. Moore was also awarded costs pursuant to CR 54.04 in the amount of $1,546.06. Occidental then filed a motion for a new trial, which was denied. This appeal followed.

The first argument to be addressed on appeal is Occidental's claim that the trial court erred in granting summary judgment as to the issue of liability prior to trial. Occidental claims that there remained a question of fact as to liability that should have been reserved for the jury. In essence, Occidental claims that Moore could have been responsible for the accident. We disagree and find that summary judgment was proper as to this issue.

> The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. . . . "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest,* 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . . ." *Huddleston v. Hughes,* 843 S.W.2d 901, 903 (Ky. App. 1992)[.]

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). In this instance, Moore testified during his deposition that he had a green light as he approached the intersection and that Slone caused the accident. Further, during a part of her bankruptcy proceedings, she testified under oath that the accident was her fault. Finally, Slone's husband testified during his deposition that he has heard his wife admit that the accident was her fault.

"[A] party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992), *citing Steelvest*, *supra*. In the case at hand, Moore, Slone, and Slone's husband provided evidence that Slone caused the accident; therefore, no genuine issue of material fact remained as it pertained to liability.

Occidental also argues that it is entitled to a new trial because the trial court erroneously dismissed Slone from the trial. Occidental's argument is based on KRS 304.39-320. Occidental claims that once a UIM carrier substitutes payment of the proposed settlement between a tortfeasor and a claimant, the UIM carrier has successfully preserved its subrogation rights and the tortfeasor remains a party to the action. While this is normally true, Slone's bankruptcy necessitated her dismissal from the case.

The bankruptcy stay was only lifted as to Moore's claim against Slone's insurance carrier. Occidental did not move to lift the stay as to its recovery of UIM

benefits paid to Moore. Slone was protected by her bankruptcy action and Occidental could not exercise its subrogation rights against Slone for any UIM benefits it paid to Moore. *See Auto Owners Ins. Co. v. Omni Indem. Co.*, 298 S.W.3d 457 (Ky. 2009).

Furthermore, the case of *Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797, 801 (Ky. 2005), states:

> "[A] 'suit to recover UIM coverage is a direct action' against the UIM carrier and 'the [UIM] carrier alone is the real party in interest ....' " While a UIM insurer's liability to its insured is fault-based to the extent the claimant has any comparative fault, there is no requirement that any other tortfeasor be named and/or served as a party in the action. In fact, Kentucky courts have refused to enforce insurance policy provisions requiring an insured to obtain a judgment or even sue the uninsured/underinsured motorist in order to determine liability under the contract. As this Court has stated with regard to UM coverage, it is first party contractual insurance that "must be honored even if the tort-feasor cannot be identified." (citations omitted).

Occidental followed the parameters of KRS 304.39-320, but because Slone's bankruptcy precluded Occidental from recovering a judgment against her and summary judgment decided her liability, she was properly dismissed from the case.

Occidental next argues that the trial court erred in allowing Moore to introduce medical records into evidence without foundation or testimony. We find no error. The medical records introduced by Moore were those showing the treatment he received following the car accident. KRE[2] 803(6) states:

> Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any

[2] Kentucky Rules of Evidence

> form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
>
> (A) Foundation exemptions. A custodian or other qualified witness, as required above, is unnecessary when the evidence offered under this provision consists of medical charts or records of a hospital that has elected to proceed under the provisions of KRS 422.300 to 422.330, business records which satisfy the requirements of KRE 902(11), or some other record which is subject to a statutory exemption from normal foundation requirements.
>
> (B) Opinion. No evidence in the form of an opinion is admissible under this paragraph unless such opinion would be admissible under Article VII of these rules if the person whose opinion is recorded were to testify to the opinion directly.

In this case, the medical records were authenticated using KRS 422.300(2) and KRS 422.305(2) which allows for the custodian of the medical records to certify that the copies provided are authentic by signing a certification and having the certification notarized. The medical records were properly admitted into evidence.

Occidental next argues that the award of future medical expenses should have been limited to $5,000. After the close of proof, counsel for Occidental requested that the trial court limit the possible award for future medical benefits to

$5,000 because only one doctor, Dr. Heilig, testified as to the need of future medical expenses. Dr. Heilig testified that Moore would need $5,000 in future medical benefits. Counsel for Moore indicated he would be seeking an additional $6,242 in future medical expenses. This additional amount came from the medical records from Dr. Wheeler which were introduced into evidence. Those records included orders for two more MRI's and physical therapy.[3] The medical records introduced also included past bills showing the cost of the MRI's and physical therapy. The trial court did not limit the future medical expenses award.

"Evidence of future medical expenses must be 'positive and satisfactory.' " *Ellison v. Kentucky Farm Bureau Mut. Ins. Co.*, 2010 WL 2696289, 5 (Ky. App. 2010), *quoting Howard v. Barr,* 114 F.Supp. 48, 50 (W.D. Ky. 1953).[4] Here, we have the medical records of Dr. Wheeler which ordered two MRI's and physical therapy. Specific orders for these future medical expenses are "positive and satisfactory" evidence. In addition, Occidental did not introduce evidence demonstrating they were not medically necessary. We find no error.

Occidental's next claim on appeal is that the jury's award of future impairment of power to earn money was erroneous. We disagree.

> [E]vidence of permanent injury alone is sufficient for an instruction on permanent impairment of earning power, and … the jury can through their common knowledge and experience make the determination if there has been a permanent impairment of earning power, the extent of

[3] Moore did not follow through with those orders because he could not afford the cost, hence why it was presented as future medical expenses.
[4] This case is cited pursuant to Kentucky Civil Rule (CR) 76.28(4)(c).

> such impairment, and the amount of damages for such impairment.

Reece v. Nationwide Mut. Ins. Co., 217 S.W.3d 226, 229 (Ky. 2007). Dr. Heilig testified that Moore suffered a permanent impairment due to the injuries he received in the accident. Dr. Heilig testified that Moore sustained a 12% permanent whole body impairment. Dr. Heilig utilized the AMA Guide to the Evaluation of Permanent Impairment to come to this conclusion. This evidence of permanent injury was sufficient to make this an issue for the jury.

Occidental's final argument on appeal is that the trial court's award of costs was excessive. The trial court awarded Moore $1,546.06 in costs. This was the amount requested by Moore's trial counsel. Moore's trial counsel submitted a bill of costs to the trial court, itemizing each cost. Occidental takes issue with the $772.35 in costs for depositions and the $447.92 in costs for trial exhibits.

The award of costs to the prevailing party is within the discretion of the trial court. *Lewis v. Charolais Corp.*, 19 S.W.3d 671 (Ky. App. 1999). CR 54.04(2) states:

> A party entitled to recover costs shall prepare and serve upon the party liable therefor a bill itemizing the costs incurred by him in the action, including filing fees, fees incident to service of process and summoning of witnesses, jury fees, warning order attorney, and guardian ad litem fees, costs of the originals of any depositions (whether taken stenographically or by other than stenographic means), fees for extraordinary services ordered to be paid by the court, and such other costs as are ordinarily recoverable by the successful party. If within five days after such service no exceptions to the bill are served on the prevailing party, the clerk shall

> endorse on the face of the judgment the total amount of costs recoverable as a part of the judgment. Exceptions shall be heard and resolved by the trial court in the form of a supplemental judgment.

Occidental's argument related to the cost of depositions is that the amount requested is more than the amount proven. Occidental claims that the cost of the depositions should have been $591.95. We find that the amount the trial court awarded for the depositions was appropriate. The receipts provided by Moore's counsel show $352.35 for the deposition of Dr. Heilig, $142.30 for the deposition of Slone, $97.30 for the deposition of Mr. Slone, and $350 for the video deposition of Dr. Heilig. Costs are recoverable for depositions "whether taken stenographically or by other than stenographic means." This means the costs for the original written and videotaped depositions are recoverable. Moore's counsel only requested $772.35 for deposition costs. The costs set out above reveal a total of $941.95. This is more than requested by Moore's counsel; therefore, there is no abuse of discretion or error as to the deposition costs.

Occidental also claims that Moore's counsel is not entitled to recover the costs for trial exhibits. KRS 453.050 states in relevant part:

> The bill of costs of the successful party shall include, in addition to other costs taxed, the tax on law process and official seals, all fees of officers with which the party is chargeable in the case, postage on depositions, the cost of copy of any pleading or exhibit obtained, the cost of any copies made exhibits and the allowance to witnesses, which the court may by order confine to not more than two (2) witnesses to any one (1) point.

This statute specifically allows for the recovery of the costs related to exhibits; therefore, there is no abuse of discretion or error.

Based on the foregoing, we affirm the judgment of the Lincoln Circuit Court.

ALL CONCUR.

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