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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000637-MR

BELINDA K. RYAN, KEVIN J. KRUER,
AND MARY JO LESAK, CO-EXECUTORS OF
THE ESTATES OF LAWRENCE J. KRUER AND
MILDRED L. KRUER APPELLANTS

APPEAL FROM SHELBY CIRCUIT COURT
v. HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NO. 00-CI-00269

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: BARBER, COMBS, AND KNOPF, JUDGES.

KNOPF, JUDGE: Belinda K. Ryan, Kevin J. Kruer, and Mary Jo Lesak, as co-executors of the estates of Lawrence J. Kruer and Mildred L. Kruer (the estate), appeal from a judgment of the Shelby Circuit Court which dismissed an uninsured motorist (UM) claim and awarded a partial recovery on an underinsured motorist (UIM) claim against Kentucky Farm Bureau Mutual Insurance Company (KFB). The estate primarily argues that the trial court erred by instructing the jury to apportion fault between the

settling tortfeasor and an unknown defendant who had been constructively joined as a party. We agree with the estate that KRS 411.182 does not permit apportionment of fault against a nominal party who is not subject to personal liability or has not settled with the plaintiff. Hence, we vacate the judgment, and we remand for entry of a new judgment.

The essential facts of this action are not in dispute. On May 21, 1998, at approximately 12:30 p.m., Mildred and Lawrence Kruer were driving east on Interstate 64 near Shelbyville, Kentucky. Charles Ashby was traveling in the westbound lane. As Ashby was attempting to pass a truck, a motorcycle veered in front of him. Ashby lost control of his vehicle and crossed the median into the eastbound lane, where his car collided with the Kruer vehicle. The Kruers were killed instantly. The motorcyclist continued westbound on Interstate 64 and has never been identified.

The estate settled with the insurer of the Ashby vehicle for the limits of the policy. The estate then filed this action against KFB for UIM coverage provided under the policy with the Kruers. In its answer, KFB alleged that the accident was caused in whole or part by the unknown motorcyclist and asserted that it was entitled to apportion fault to the unknown individual. Subsequently, the trial court allowed KFB to file a third-party complaint against this "unknown

motorcyclist", who was constructively served via warning order attorney. In response to the third-party complaint, the estate amended its complaint to claim UM coverage from KFB based on the actions of the motorcyclist. KFB argued that the estate's UM claim should be dismissed because its policy required actual contact with a "hit and run" vehicle.

The matter proceeded to a jury trial on November 26, 2001. At the close of evidence, the trial court dismissed the estate's UM claim against KFB, finding that there was no evidence of physical contact with the motorcyclist. Over the estate's objection, the trial court instructed the jury to apportion fault between Ashby and the motorcyclist. The jury apportioned 50% of the fault to Ashby and 50% to the motorcyclist. The jury then determined total damages of $360,668.00 for Lawrence Kruer and $107,322.00 for Mildred Kruer. After apportioning these damages equally, and reducing the damages by the amount already received from Ashby's liability carrier, the trial court entered a judgment for $78,334.00.[1] In a motion to alter, amend, or vacate the

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[1] This amount represents Ashby's liability for the damages related to Lawrence Kruer's death in excess of Ashby's coverage. Because Ashby's liability for damages related to Mildred Kruer's death did not exceed Ashby's per-person liability coverage, the trial court found that Ashby was not underinsured for her claims.

judgment,[2] the estate renewed its objection to the apportionment and to the directed verdict on the UM claim. The trial court denied the motion and this appeal followed.

The estate first argues that the trial court erred by allowing the jury to apportion fault to an unknown defendant. It points out that KRS 411.182 allows allocation of fault to only two classes of tortfeasors: parties to the action, including third-party defendants, and persons who have been released from liability through an agreement with the claimant.[3] The estate further argues that an "unknown motorcyclist" cannot be made a party to the action for purposes of apportioning fault.

In response, KFB first argues that the apportionment statute, KRS 411.182, expressly applies only to tort claims. Because the estate's claim against KFB was a contract action for UIM coverage due under its policy with the Kruers, KFB contends that KRS 411.182 does not apply. We find this argument to be without merit.

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[2] CR 59.05.

[3] *See also* Owens Corning Fiberglas Corp. v. Parrish, Ky., 58 S.W.3d 467, 482 (2001); Baker v. Webb, Ky. App., 883 S.W.2d 898 (1994); and Bass v. Williams, Ky. App., 839 S.W.2d 559, 563 (1992).

We agree with KFB that its liability for UIM coverage is contractual in nature.[4] However, the measure of KFB's contractual liability sounds in tort law. The UIM provision of the Kruers' policy obligates KFB "to pay its own insured for such uncompensated damages as he may recover on account of injury due to a motor vehicle accident because the judgment recovered against the owner of the other vehicle exceeds the liability policy limits thereon, to the extent of the underinsurance policy limits on the vehicle of the party recovering."[5] In other words, KFB's contractual obligation to pay UIM coverage to the estate is contingent upon Ashby's tort liability. Consequently, we conclude that KRS 411.182 was applicable to this case.[6]

Under KRS 411.182, a court may instruct a jury to apportion fault among the parties, including third-party defendants and persons who have been released from liability by

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[4] Philadelphia Indemnity Insurance Co. v. Morris, Ky., 990 S.W.2d 621, 625 (1999).

[5] KRS 304.39-320(2).

[6] In its reply brief, the estate correctly points out that KFB has never challenged the applicability of KRS 411.182. KFB consistently argued to the trial court that it was entitled to an apportionment instruction under that statute. *See* "Memorandum in Support of Apportionment of Against Unknown Motorcyclist" Record on Appeal (ROA) at v. III, pp. 331-335. Because KFB specifically requested an apportionment instruction while before the trial court, it will not be heard to complain in this appeal that KRS 411.182 is inapplicable.

settlement.[7] However, the jury may not apportion fault to persons who are neither parties to the action nor settling non-

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[7] The full text of KRS 411.182 provides as follows:

> (1) In all tort actions, including products liability actions, involving fault of more than one party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:
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> (a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
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> (b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.
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> (2) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.
>
> (3) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under subsection (4) of this section, and shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.
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> (4) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable, shall discharge that person from all liability for contribution, but it shall not be considered to discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other

parties.[8] "When the statute states that the trier-of-fact shall consider the conduct of 'each party at fault,' such phrase means those parties complying with the statute as named parties to the litigation and those who have settled prior to litigation, not the world at large."[9]

KFB primarily contends that the trial court properly allowed apportionment because the unknown motorcyclist was named as a party to the action in its third-party complaint. CR 4.15 allows an action to be filed against an unknown defendant. CR 4.05 also provides that an unknown defendant shall be the subject of constructive service of process. KFB asserts that joinder via these rules warranted apportionment of fault against the unknown motorcyclist as a named party to the action.

However, KRS 454.165 provides that the court cannot achieve *in personam* jurisdiction over persons who are the subject of constructive service of process.[10] Furthermore,

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> persons shall be reduced by the amount of the released persons' equitable share of the obligation, determined in accordance with the provisions of this section.

[8] Owens Corning Fiberglas Corp. v. Parrish, supra at 482; and Baker v. Webb, Ky. App., 883 S.W.2d 898 (1994).

[9] Jefferson County Commonwealth Attorney's Office v. Kaplan, Ky., 65 S.W.3d 916, 922 (2001) *quoting* Baker v. Webb, *supra* at 900.

[10] Richmond v. Louisville and Jefferson County Metropolitan Sewer Dist., Ky. App., 572 S.W.2d 601, 605 (1977).

constructive service is sufficient merely to confer jurisdiction *quasi in rem*.[11] Since the unknown motorcyclist never appeared in the action, he or she could not be bound by the jury's verdict.[12]

In support of its position, KFB also relies heavily on Barnes v. Owens-Corning Fiberglas Corp.,[13] and Adam v. J.B. Hunt Transport, Inc.[14] In both cases, the trial courts allowed apportionment against nonsettling nonparties, and against third-party defendants who were dismissed prior to trial. The Sixth Circuit, applying KRS 411.182, held that the dismissal of third-party defendants does not preclude their being included in the jury instructions on apportionment.[15] KFB asserts that these cases support its argument for allowing apportionment against the unknown motorcyclist.

But in both cases, the third-party defendants were dismissed due to the lack of any evidence that they could be liable to the third-party plaintiff. The Barnes and Adam courts held that if there has ever been an active assertion of a claim against the third party — in other words, if the third party has

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[11] Field v. Evans, Ky. App., 675 S.W.2d 3, 5 (1983).

[12] Cann v. Howard, Ky. App., 850 S.W.2d 57, 62 (1993).

[13] 201 F.3d 815 (6th Cir., 2000).

[14] 130 F.3d 219 (6th Cir., 1997).

[15] Barnes at 826-827; Adam at 228.

been impleaded by the original defendant — then liability can be apportioned to the third-party defendant notwithstanding a dismissal prior to trial.[16] Thus, while the third-party defendants had been dismissed, they had "actively" asserted defensive claims in the action, and therefore apportionment was proper. Both courts further noted that if a third-party plaintiff's claim is dismissed, the plaintiff may ordinarily amend his complaint to name the ex-third-party defendant as a first-party defendant.[17] In contrast, the unknown motorcyclist in this case has never appeared nor actively asserted any defensive claims.

Moreover, the court in Barnes specifically noted that "[t]he Kentucky case law interpreting and applying section 411.182 uniformly rejects the inclusion of nonsettling nonparties in the jury's apportionment instructions."[18] The court in Adam declined to address the issue because the jury in that case did not assign any fault to the unknown defendant – thus rendering the issue moot.[19] Consequently, the situations

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[16] Barnes at 825-26; Adam at 228.

[17] Barnes at 826; Adam at 228, *citing* Kevin Tucker & Associates, Inc. v. Scott & Ritter, Inc., Ky. App., 842 S.W.2d 873, 874, n. 5 (1992).

[18] Barnes at 825.

[19] Adam at 227.

addressed in Barnes and Adam are distinguishable from the facts of the present case.

Thus, we return to the central question in this case, which is one of first impression: does KRS 411.182 permit a jury to apportion fault against an unknown tortfeasor who, while nominally a party to the action, is neither before the court nor subject to personal liability? We conclude that the trial court erred in allowing apportionment against the unknown motorcyclist. KRS 411.182 does not expressly define the term "party." But when viewed in its entirety, that statute limits allocation of fault to those who actively assert claims, offensively or defensively, as parties in the litigation or who have settled by release or agreement.[20]

Similarly, the cases interpreting KRS 411.182 have consistently held that apportionment is proper only against parties who are subject to liability or against settling non-parties.[21] Allowing apportionment against a nominal party such

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[20] Baker v. Webb, 883 S.W.2d at 900.

[21] In Kaplan, *supra,* n. 9, the plaintiff brought a legal negligence claim against his former defense attorney in a criminal matter. The attorney filed a third-party complaint naming two prosecutors and a state police chemist. However, the trial court found that the prosecutors were absolutely immune from suit, and it dismissed the chemist based upon statutory immunity and lack of any duty owed to the plaintiff. The Kentucky Supreme Court held that the attorney was not entitled to an apportionment instruction. *See also* Baker v. Webb, supra. In both Owens Corning Fiberglas Corp. v. Parrish, Ky., 58 S.W.3d

as the unknown motorcyclist would circumvent the express provisions of KRS 411.182. Furthermore, it opens the door to all of the problems which accompany apportionment of fault to an empty chair. Indeed, an empty chair almost always creates an unreliable and unjust verdict. It is in the defendant's best interest to shift as much of the fault as possible to a third-party defendant who is not liable to anyone and who does not actively defend the case. Furthermore, defendants could be encouraged to bring in anyone as a third-party defendant regardless of the merits of the claim. This is precisely the situation which KRS 411.182 was designed to avoid.

Therefore, we hold that the unknown motorcyclist cannot be deemed a party to the action for purposes of apportionment and that the trial court erred in so instructing the jury. Because there is no dispute concerning the amount of damages, the jury found Ashby at fault and there were no other parties who were subject to liability, the estate is entitled to recover the entire amount of its UIM claim against KFB. Furthermore, since no fault can be apportioned against the

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467 (2001), and in Dix & Associates Pipeline Contractors, Inc. v. Key, Ky., 799 S.W.2d 24 (1990), the Supreme Court allowed apportionment against employers who were statutorily immune from liability under the Workers' Compensation Act. However, the Court held that the employers could be deemed settling non-parties for purposes of KRS 411.182.

unknown motorcyclist, we need not address the trial court's dismissal of the estate's UM claim.[22]

Accordingly, the judgment of the Shelby Circuit Court is vacated, and this matter is remanded for entry of a new judgment consistent with this opinion.

ALL CONCUR.

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[22] We note, however, that the Kentucky Supreme Court has repeatedly upheld policy provisions requiring direct, physical contact with the uninsured vehicle as a prerequisite to UM coverage. Masler v. State Farm Mutual Automobile Insurance Co., Ky., 894 S.W.2d 633 (1995); Belcher v. Travelers Indemnity Co., Ky., 740 S.W.2d 952 (1987); State Farm Mutual Automobile Insurance Company v. Mitchell, Ky., 553 S.W.2d 691 (1977); and Jett v. Doe, Ky., 551 S.W.2d 221 (1977).

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