RENDERED: NOVEMBER 5, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000743-MR

KAREN OWENS; JOHN OWENS;
AND WILMA OWENS APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 06-CI-007891

DANIEL WURFEL AND
WEST AMERICAN INSURANCE
COMPANY APPELLEES

AND NO. 2009-CA-000798-MR

DANIEL WURFEL CROSS-APPELLANT

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 06-CI-007891

KAREN OWENS CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON AND THOMPSON, JUDGES.

CLAYTON, JUDGE: This is an appeal of a jury verdict which found no liability against the tortfeasor defendant.

BACKGROUND INFORMATION

On the evening of January 17, 2006, appellant, Karen Owens, was involved in a motor vehicle accident with appellee Daniel Wurfel. Karen and her father, John Owens, were co-owners of the vehicle. Karen's mother, Wilma Owens, was a policyholder with John of the vehicle. Karen Owens was operating her vehicle and Zachary Roesch was her passenger. Both Owens and Roesch were injured and her vehicle was totaled by her insurance company.

Wurfel was insured by Progressive Insurance Company (Progressive). Owens had a contract of insurance with appellee West American Insurance Company (West American). Progressive offered the $50,000.00 policy limits of Wurfel's policy, which Owens accepted. When West American was given notice pursuant to Kentucky Revised Statutes (KRS) 304.39-320(3) of the proposed settlement, it opted to preserve its subrogation rights pursuant to KRS 304.39-320(4).

On August 11, 2006, Owens made a demand on West American under her underinsured motorist coverage (UIM). West American asserted that the

original $50,000.00 paid by Progressive was the maximum amount Owens's claim was worth and declined to pay an additional amount under the UIM provision of the policy.

On September 8, 2006, Owens, John Owens and Wilma Owens instituted an action in Jefferson Circuit Court against Wurfel and Ohio Casualty Group. On February 7, 2007, Ohio Casualty was dismissed as an improperly named defendant. An agreed order was entered into in February of 2007 substituting West American for Ohio Casualty. Owens appealed the dismissal as well as the Kentucky Rules of Civil Procedure (CR) 11 sanctions which were entered against her counsel. Those issues are not part of this appeal.

A jury trial was conducted in March of 2009 with the jury finding that Wurfel had encountered a sudden emergency and was not liable for Owens's damages. The jury did award $6,400.00 in damages to Owens for damages to her vehicle. After deducting $500.00 for her deductible under her insurance policy, the trial court entered a judgment against West American in the amount of $5,900.00. The Owenses then brought this appeal.

STANDARD OF REVIEW

Appeals of errors regarding the admission or exclusion of evidence by the trial court are reviewed under an abuse of discretion standard. *Goodyear Tire and Rubber Co. v. Thompson,* 11 S.W.3d 575, 577 (Ky. 2000). A trial court has abused its discretion when its "decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Id.* at 581 (citing *Com. v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

"Errors alleged regarding jury instructions are considered questions of law and are to be reviewed on appeal under a de novo standard of review." *Peters v. Wooten,* 297 S.W.3d 55, 64 (Ky. App. 2009). With these standards in mind, we examine the merits of appellants' alleged trial errors.

DISCUSSION

Appellants first contend that the trial court erred in ruling that they would not be allowed to depose Zachary Roesch. As set forth above, Roesch was a passenger in Owens's vehicle at the time of the accident. Appellants contend that Roesch's ability to exit the vehicle and examine the accident scene immediately after impact was crucial to rebut Wurfel's testimony regarding the accident scene.

Appellants' counsel requested time to depose Roesch outside the pretrial deadline. At the time of the request, Roesch was in jail in Pima County, Arizona, and unable to appear at trial as a result of his incarceration. The trial court found that allowing the deposition to take place would be prejudicial to the

appellees due to time, expense and preparation issues for their counsel. The court did authorize that the deposition could be taken telephonically.

Appellants rely on the case of *Gish v. Hale*, 283 S.W.2d 202 (Ky. 1955), in support of their position. In *Gish*, the court held that suppression of a deposition due to its being filed after the pretrial deadline was discretionary with the court. *Id.* at 203. It further held that:

> In the absence of bad faith or prejudice to the rights of the adverse party such a deposition should not be suppressed. Upon motion to suppress, the admission of a deposition is discretionary with the trial court and its ruling will not be disturbed except for abuse of discretion or because substantial rights have been prejudiced. (Internal citations omitted).

Id.

The appellees argue that Roesch was not the only witness and that the police officer and/or EMS workers who appeared at the scene shortly after the accident would have been witnesses who were able to testify regarding the climate issues as well as the general scene at the time of the accident.

Gish, supra, may be distinguished from the current facts in that the deposition at issue therein was completed in time, but was not tendered to the court in a timely fashion. In the present case, it is important to note that the trial judge took into consideration the expense and time for the parties that would be involved in taking a deposition in Arizona. Given these issues as well as the lateness in the taking of the deposition and the availability of other witnesses, we find the trial

court did not abuse its discretion in denying the appellants' motion to take Roesch's deposition.

The appellants' second alleged error is that the trial court committed reversible error in including a "sudden emergency" exception instruction. They assert that the appropriate standard to be applied was a general duty standard. In *Regenstreif v. Phelps*, 142 S.W.3d 1, 4 (Ky. 2004), the Supreme Court of Kentucky established the following rule regarding "sudden emergencies":

> [W]hen a defendant is confronted with a condition he has had no reason to anticipate and has not brought on by his own fault, but which alters the duties he would have been bound to observe, then the effect of that circumstance upon these duties must be covered by the instructions.

This doctrine was recently reaffirmed by the Supreme Court of Kentucky in *Henson v. Klein,* ____S.W.3d____, 2010 WL 3374243 (Ky. 2010). Appellants contend that Wurfel should have been aware of the road conditions on the day of the accident and that, therefore, the above does not apply since he had "reason to anticipate" issues with snow and ice. Wurfel testified that he had been driving that day and conditions appeared to be normal, that he observed no accumulation on the road, but that he slid on what he assumed was a patch of ice since he could not see it. While Owens testified that she believed he was travelling between fifty and fifty-five miles per hour, Wurfel testified that his speed was between thirty and forty-five miles per hour.

We believe the trial court correctly gave a "sudden emergency" instruction to the jury. There was testimony from Wurfel from which, if believed by the jury, the conclusion could be drawn that he encountered a sudden emergency and that it was through no fault of his own that he collided with Owens's vehicle. Thus, we affirm the trial court's decision to include the "sudden emergency" instruction.

Appellants also contend that the trial court erroneously created a single jury instruction for separate property damage claims and that it erred when it refused to allow the appellants to show proof of appropriate future medical expenses such as the probability of two future knee replacements. We believe the trial court did allow such evidence in the form of deposition testimony from Dr. Dripchek. In fact, on cross-appeal, cross-appellant Wurfel argues that the trial court erred in allowing the evidence of Owens's future medical expenses.

The appellants were allowed to call two orthopedic surgeons as witnesses for expert analysis as well as the playing of a video deposition of a third. We believe this was sufficient opportunity for the appellants to present evidence regarding the possibility of future medical damages. Also, given that there was no liability assessed to the alleged tortfeasor, the trial court did not err in failing to give an instruction as to future medicals.

Finally, the appellants argue that the trial court erred when it refused to allow identification of the parties and claims. They contend that while West American was superficially identified as a party, the underinsured motorist (UIM)

claim and the property damage claims against it were restricted to being referred to as a contract claim and a property damage claim.

In *Earle v. Cobb*, 156 S.W.3d 257, 259 (Ky. 2004), the court found that evidence of liability insurance was excluded in showing culpability. The court went on to hold that "where a direct contractual relationship exists between a plaintiff and a defendant insurance company no such policy is warranted." In *Wheeler v Creekmore*, 469 S.W.2d 559 (Ky. 1971), the court found that a jury should know who the parties are that are involved in the case before them. Thus, when there is a UIM carrier and they participate in the trial, the court found that the jury should know who they are.

In this case, the trial judge ruled that the jury should be told by counsel for the parties that there was a contract claim by Owens against her insurance company. She also informed the jury that there was a property damage claim against Wurfel. We find this to be in keeping with the holdings in *Earle* and *Wheeler*. The trial judge made the claims clear and easy for the jury to follow.

Wurfel's cross-appeal deals with several alleged trial errors. Given that Wurfel received a jury verdict that he was not liable to the appellants for the accident and given that we are affirming the trial court's decision, we find Wurfel's claims to be moot. Consequently, we find no need to address the issues raised in his cross-appeal.

Finding no error, we affirm the decision of the trial court.

ALL CONCUR.

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