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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002183-MR

AMERICAN COMMERCE INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 05-CI-00282

GENELL HALL, INDIVIDUALLY; GENELL HALL, AS GUARDIAN OF HEAVEN HALL; BETTY PATTON, AS GUARDIAN OF NICOLE MOORE; BILLY PATTON, AS GUARDIAN OF MISTY PATTON — APPELLEES

OPINION AFFIRMING IN PART AND REVERSING IN PART AND REMANDING

** ** ** ** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: American Commerce Insurance Company appeals from a judgment of the Floyd Circuit Court entered following a jury verdict awarding the appellees damages on their underinsured motorist benefits and Unfair Claims Settlement Practices Act (UCSPA) claims. Because the damages award on the underinsured motorist award claim was in excess of the amount American Commerce was obligated to

[1] Senior Judge David C. Buckingham 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.

pay under the policy, we reverse the judgment in part and remand. In all other respects, we affirm the judgment.

On September 13, 2003, a vehicle driven by Jarred Hagens collided with a vehicle occupied by Crystal Collins and appellees Genell Hall, Heaven Hall, Misty Patton, and Nicole Moore. Hagens was at fault, and his insurance company paid the liability limits of his insurance policy.[2] The occupants of the second vehicle then sought coverage under the underinsured motorist provisions of the American Commerce policy. However, no settlement was reached with the appellees.[3]

On March 16, 2005, the appellees filed a civil complaint against American Commerce in the Floyd Circuit Court. In their complaint, the appellees sought damages for injuries sustained in the accident under the underinsured motorist provision of the American Commerce insurance policy. The appellees also asserted a bad faith claim under the UCSPA.

American Commerce was properly served with the complaint, but it failed to answer it. No answer having been filed, the appellees moved for a default judgment. On June 20, 2005, the trial court entered an order granting the appellees a default judgment on the issue of liability and setting a trial date on the issue of damages. *See* Kentucky Rule of Civil Procedure (CR) 55.01.

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[2] It appears that Hagens's limits were the statutory minimum of $25,000.

[3] American Commerce apparently settled with Crystal Collins and paid her $30,000 in underinsured motorist benefits. Collins is not a party to this action.

A jury trial on the issue of damages was held on September 21, 2005. American Commerce did not appear.[4] The trial of the issues of damages under the underinsured motorist claim and damages under the bad faith claim was not bifurcated, and the issues were tried together. At the conclusion of the trial, the jury returned a verdict making the following awards:[5]

1. Genell Hall - $1,812.83 for past hospital and medical expenses; $4,000 for future medical expenses; $2,000 for past pain and suffering, including disfigurement; $4,000 for future pain and suffering, including scarring and disfigurement; for a total award of $11,812.83

2. Heaven Hall - $1,747.85 for past hospital and medical expenses; $25,000 for future medical expenses; $5,000 for past pain and suffering, including disfigurement; $10,000 for future pain and suffering, including scarring and disfigurement; for a total award of $41,747.85.

3. Misty Patton - $4,766.50 for past hospital and medical expenses; $50,000 for future medical expenses; $12,500 for past pain and suffering, including disfigurement; $12,500 for future pain and suffering, including disfigurement; for a total award of $79,766.50.

4. Nicole Moore - $5,032.55 for past hospital and medical expenses; $4,500 for future medical expenses; $2,500 for past pain and suffering, including disfigurement; $4,500 for future pain and suffering, including scarring and disfigurement; for a total award of $16,532.55.

5. The appellees were "jointly and severally" awarded punitive damages of $150,000 on the UCSPA claim.

After the judgment was entered and American Commerce received notice of it, American Commerce entered the case and filed a motion to alter, amend, or vacate and/or for a new trial on the issue of damages. *See* CR 59.01 and CR 59.05. The motion

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[4] It was not given notice of the damages hearing.

[5] The jury verdict forms reflect that all damages awards except for the punitive damages award were for personal injuries sustained in the automobile accident.

did not challenge the default judgment on the issue of liability. Rather, it challenged only the damages awards.

Following a hearing, on October 14, 2005, the trial court entered an order reducing the damages awards by $3,454.23 as to Genell Hall, $824.25 as to Heaven Hall, $1,415 as to Misty Patton, and $4,168.55 as to Nicole Moore. The reductions reflected personal injury protection (PIP) benefits that had been paid but had not been taken into consideration in the jury verdicts for past medical expenses. The order denied American Commerce's motion insofar as it requested additional relief. This appeal by American Commerce followed.

American Commerce argues that the trial court erred in not setting aside the default judgment entered against it. CR 55.02 provides that "for good cause shown the court may set aside a judgment by default in accordance CR 60.02." The problem with this argument is that American Commerce did not move the trial court to set the judgment aside.[6] Rather, its motion following the jury verdict and judgment was one to alter, amend, or vacate the damages awards and for a new trial on damages pursuant to CR 59. Therefore, as American Commerce did not preserve any error in this regard, we decline to address the issue. *See Bingham v. Davis*, 444 S.W.2d 123,124 (Ky. 1969).

The appellees argue that American Commerce has no standing to contest the judgment because American Commerce was in default.[7] However, the civil rules

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[6] At the oral argument of this case, counsel for American Commerce stated that American Commerce did not move the trial court to set aside the default judgment when it filed its motion to alter, amend, or vacate because it did not have at that time a supporting affidavit from a company representative.

[7] American Commerce has not argued that it had a right to participate in the damages hearing even though it was in default.

provide that a court may consider a palpable error that affects the substantial rights of a party "even though [the error was] insufficiently raised or preserved for review." *See* CR 61.02. Nevertheless, the palpable error must result from action taken by the court rather than an act or omission by attorneys or litigants. *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997). Since American Commerce was in default, we conclude that it may contest the judgment only to the extent of palpable error.[8]

American Commerce argues that the trial court erred by failing to bifurcate the underinsured motorist claim from the UCSPA claim pursuant to *Wittmer v. Jones,* 864 S.W.2d 885 (Ky. 1993). In that case, the tort victim in an automobile accident sued the tortfeasor for property damage. In the same suit she also sued the tortfeasor's insurance company, charging a violation of the UCSPA. At trial, the tort claim and the UCSPA claim were not bifurcated. As relevant to the issue before us, the *Wittmer* decision stated as follows:

> . . . State Farm argues that the trial court erred in failing to bifurcate the trial of the negligence action against Jones and try it separately from the claim of bad faith against State Farm. Turning once more to the Dissenting Opinion in Federal Kemper [711 S.W.2d 844 (Ky. 1986) *overruled by* Curry v. Fireman's Fund Ins. Co., 784 S.W.2d 176 (Ky. Dec 21, 1989)] that was incorporated by reference into the Majority Opinion in Curry: "A bifurcated procedure was the proper way to try the present case." 711 S.W.2d at 849. This procedure "better protect[s] the rights" of the two different defendants because it keeps out of the first trial "evidence which was relevant to the issue of bad faith but unnecessary and possibly prejudicial. . . in the trial of the preliminary question of liability." Id. While we see no impediment to joinder of the claims in a single action, at trial the underlying negligence claim should first be adjudicated. Only then

[8] Neither party cited any authority addressing this issue.

> should the direct action against the insurer be presented. Liability insurance should not be interjected needlessly into the trial of a negligence case. Here failure to bifurcate was prejudicial error but for the fact that no actual prejudice resulted. If we were going to reverse this case for a new trial, we would order bifurcation.

Id. at 891.

Regardless of whether the issue of damages to be awarded under the underinsured provision of the policy and the issue of bad faith should have been bifurcated for trial, the issue before us is whether the court's failure to do so was palpable error. As we have stated, in order that we may grant relief for palpable error, the error must result from action taken by the court rather than an act or oversight by attorneys or litigants. *Burns, supra*. Under the facts of this case, we cannot say that the court's failure to bifurcate the trial of the issues was palpable error.

American Commerce argues next that the award of punitive damages should be set aside because counsel for the appellees made incorrect and misleading statements to the jury that American Commerce had not paid any of the appellees' medical bills. While this is true, there were bills that had not been paid by the company for which the jury determined the company was obligated to pay. Further, to the extent American Commerce had paid bills, the trial court credited such payments and reduced the damages awards pursuant to the company's motion to alter, amend, or vacate following the trial. In short, we find no palpable error in connection with this argument.

American Commerce argues that appellees' counsel improperly advised the jury of settlement negotiations and that such statements likely aroused passion and

prejudice against it in the minds of the jury. They cite Kentucky Rule of Evidence (KRE) 408(2), which states that such evidence is inadmissible, to support their argument. American Commerce also cites to the affidavit of a company representative to the effect that the company negotiated in good faith. This affidavit was not before the jury, and it may not be used to rebut the evidence presented at trial.[9] Although there was likely error in the presentation of the claim to the jury, we decline to find that the error was a palpable one.

The next issue is whether the court committed palpable error in not reducing the award for underinsured motorist benefits to $70,000. Because the policy limits were $100,000 and American Commerce had paid Collins $30,000 to settle her claim, the maximum judgment that should have been awarded under the policy was $70,000. We conclude that the failure of the court to so limit the damages was palpable error. Thus, we reverse and remand in this regard with directions to the trial court to so limit the damages.[10]

The remaining issue is whether there was palpable error by the court in allowing the jury to award future medical expenses in the absence of evidence as to the amount and expert medical testimony as to the necessity of such expenses. The jury awarded the four appellees a total of $83,500 in future medical expenses.

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[9] We note, at any rate, that American Commerce has not contested the portion of the judgment determining it liable for bad faith.

[10] The damages award under the underinsured motorist claim far exceeded $70,000, even after subtracting the $25,000 paid by the tortfeasor's insurer and the payment of PIP benefits.

The appellees respond by stating that it was unnecessary and financially impossible for them to have hired a medical expert to testify concerning the type and cost of future medical treatment. They further state that the jury saw their injuries and their scarring and heard testimony about the future treatment their doctors had recommended.

In addition to awarding amounts for future medical expenses, the jury awarded amounts for past medical expenses and past and future pain and suffering. The total for those awards exceeded $66,000. Considering the evidence that future medical expenses were necessary, we cannot say, under the unique circumstances before us, considering the $70,000 limit on the award, that it amounts to palpable error for the judgment to include the amounts awarded for future medical expenses.

The judgment of the Floyd Circuit Court is affirmed in part and reversed in part and remanded.

ALL CONCUR.

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