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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000117-MR

ANGELA G. HILL — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 03-CI-01297

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND TERRY M. JANKOWSKI — APPELLEES

AND NO. 2007-CA-000176-MR

TERRY M. JANKOWSKI — CROSS-APPELLANT

v.

CROSS-APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 03-CI-01297

ANGELA G. HILL AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

MOORE, JUDGE: Angela G. Hill appeals from a judgment of the Hardin Circuit Court after a jury found her to be 45% liable for an automobile accident in which she suffered injuries. On appeal, Hill raises numerous assignments of error. First, she argues that the trial court erred in not granting her motion *in limine* to prohibit the parties in the lawsuit from mentioning in the jury's presence that Hill's insurance company, State Farm Mutual Automobile Insurance Company (State Farm), had a valid subrogation cross-claim against the defendant, Terry M. Jankowski. Second, Hill argues that the trial court erred in denying her motion *in limine* in which she asked permission to inform the jury that State Farm was responsible for Jankowski's remaining in the case. Third, Hill argues that the trial court erred when it denied Jankowski's motion for directed verdict regarding State Farm's subrogation claim against Jankowski. Fourth, Hill argues that the trial court erred when it denied her motion for directed verdict regarding her underinsured motorist (UIM) claim against her insurance company, State Farm. Finally, she argues that the trial court erred when it refused to instruct the jury regarding the sudden emergency doctrine. Furthermore, Jankowski has filed a cross-appeal in this case claiming that the trial court erred when it failed to instruct

[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 KRS 21.580.

the jury that Hill had a duty to keep a reasonable lookout for vehicles ahead of her. Finding no substantial errors requiring reversal, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On a rainy evening in April 2003, Jankowski was driving southbound along Interstate 65 (I-65) in Hardin County when she lost control of her SUV while attempting to pass a tractor-trailer truck. Jankowski's vehicle hydroplaned, left the roadway and crossed the grassy median between the northbound and southbound lanes of I-65. Jankowski's vehicle entered the northbound lanes and struck a white van traveling northbound that was driven by Joe Potts causing Potts' van to come to an immediate halt.[2] Immediately prior to Jankowski's SUV striking Potts' van, Hill was traveling northbound along I-65 approximately four to five car lengths behind Potts' van. Hill noticed that Potts' van had come to a sudden halt. Although she attempted to apply her brakes, she was not able to fully brake before striking the rear of Potts' van. Both Hill and Jankowski suffered injuries and were transported to a local emergency room.[3]

In July 2003, Hill filed a lawsuit against Jankowski claiming negligence.[4] Nearly a year later, in June 2004, Hill amended her complaint to add State Farm as a party. In her amended complaint, Hill asserted that the damages she suffered from the accident exceeded Jankowski's liability coverage. She also

[2] Potts was never a party to this action.

[3] Hill suffered a broken right foot and an injured shoulder.

[4] In her original complaint, Hill also sued Richard S. Jankowski, Terry Jankowski's husband; however, at trial, the Hardin Circuit Court dismissed Richard from the lawsuit.

alleged that she had UIM coverage with State Farm and claimed that State Farm was contractually obligated to pay her for any uncompensated damages recoverable from Jankowski that exceeded Jankowski's coverage. In other words, anticipating a large jury verdict against Jankowski, Hill asserted an UIM claim against her insurer, State Farm.

Hill, Jankowski, Jankowski's insurance company, Allstate, and State Farm entered into settlement negotiations after Hill added her UIM claim. Jankowski agreed to pay Hill $45,000.00.[5] Hill continued to press her UIM claim against State Farm, believing she had suffered damages greater than $45,000.00. To preserve its subrogation claim against Jankowski, State Farm used the procedure set forth in *Coots v. Allstate Insurance Company,* 853 S.W.2d 895 (Ky. 1993), now codified at KRS[6] 304.39-320(4), and paid Hill $45,000.00. Eventually, Hill's remaining UIM claim was set for trial.

One day prior to trial, the trial court held a hearing to resolve numerous motions *in limine* filed by the parties. One of Hill's motions was to prohibit the defendants from revealing to the jury the existence of State Farm's subrogation cross-claim against Jankowski. Hill argued that such a revelation was inappropriate. In response, State Farm argued that it had a valid cross-claim against Jankowski and that claim would not "kick in" unless the jury awarded Hill a judgment in excess of Jankowski's insurance coverage. Additionally, State Farm

[5] Under Jankowski's liability insurance coverage, her policy limit was only $50,000.00.

[6] Kentucky Revised Statutes.

argued that not disclosing its subrogation claim to the jury would perpetrate a legal fiction. Also responding to Hill's motion, Jankowski argued that if the jury was going to learn about part of the case, then it should learn about all of it. In other words, Jankowski contended that the jury should learn about State Farm's subrogation cross-claim against her. At this point, Hill agreed with Jankowski but asserted that the case was really one between the two insurance companies. After Hill and Jankowski argued over this proposition, Hill reiterated that she agreed with Jankowski regarding State Farm's subrogation cross-claim. The trial court acknowledged that Hill had agreed with Jankowski and made no ruling on Hill's motion *in limine*.

The next day, Hill's case proceeded to trial. After hearing the evidence, the jury determined that Jankowski was 55% liable and that Hill was 45% liable for Hill's damages. After taking into consideration the jury's determination regarding liability, the trial court entered a judgment against State Farm awarding Hill $45,000.00. Because Hill's judgment did not exceed Jankowski's insurance coverage, Hill recovered no money pursuant to her UIM claim against State Farm. After the judgment became final, Hill filed an appeal with this Court raising numerous assignments of error. Additionally, Jankowski filed a cross-appeal regarding the jury instructions.

II. ANALYSIS

A. HILL'S APPEAL

1. There was no error regarding Hill's motion *in limine* to prohibit disclosure of State Farm's subrogation cross-claim against Jankowski.

After the trial court entered the judgment, Hill filed a motion pursuant to CR[7] 60.01 to supplement and correct the record because her original motion *in limine*, in which she had sought to prohibit disclosure of State Farm's subrogation claim was not included in the record. At a hearing on the matter, the trial court granted Hill's CR 60.01 motion and ordered the motion *in limine* to be filed in the record. However, Hill also requested the trial court enter an order denying her motion *in limine* because the record did not include a ruling on that motion. The trial court denied this request, explaining that it did not remember whether it had or had not denied the motion *in limine*.

Hill claims that this issue was properly preserved for appellate review. She alleges the trial court tacitly denied her motion *in limine* and argues that the trial court's denial of the motion, which allowed the defendants to inform the jury about the existence of State Farm's subrogation claim against Jankowski, violated the holdings found in *Earle v. Cobb,* 156 S.W.3d 257 (Ky. 2004), and *Hughes v. Lampman,* 197 S.W.3d 566 (Ky. App. 2006).

Despite Hill's insistence to the contrary, this issue is not properly before this Court. While the record reveals that Hill filed a motion *in limine* seeking to prohibit the disclosure of State Farm's subrogation claim to the jury and that she argued that point at a hearing, a review of the videotape of that hearing reveals that, during the course of the exchange between Hill and Jankowski, Hill

[7] Kentucky Rule of Civil Procedure.

ultimately agreed with Jankowski that the jury should know about all pending claims, including State Farm's subrogation claim. By agreeing with Jankowski, Hill waived this issue.

Furthermore, a review of the record reveals that the trial court never ruled on Hill's motion *in limine* nor did Hill insist upon a ruling. When a motion has been made, the moving party must insist that the trial court rule upon the motion or else it will be deemed waived. *Bell v. Commonwealth,* 473 S.W.2d 820, 821 (Ky. 1971); s*ee also Thompson v. Commonwealth,* 147 S.W.3d 22, 40 (Ky. 2004) ("Even when an objection or motion has been made, the burden continues to rest with the movant to insist that the trial court render a ruling; otherwise, the objection is waived."); *Perkins v. Commonwealth,* 237 S.W.3d 215, 223 (Ky. App. 2007) ("Our case law is well established that a failure to press a trial court for a ruling or an admonition on an objection or on a motion for relief operates as a waiver of that issue for purposes of appellate review.") Because this issue was waived, we decline to address its merits.

In the alternative, Hill argues that if we find that this issue was not properly preserved, she insists that the trial court's failure to prohibit disclosure of State Farm's subrogation claim constituted "palpable, plain (Federal) error" pursuant to KRE[8] 103(e). According to Hill, palpable error has not been defined either in the Kentucky Rules of Evidence or Kentucky case law. Due to this lack of a clear definition for palpable error, Hill claims that our concept of palpable

[8] Kentucky Rule of Evidence.

error is more or less equivalent to the federal concept of plain error. Thus, she relies on federal case law, which has defined plain error as error that has seriously affected the fairness of a judicial proceeding. *First National Bank and Trust Company v. Hollingsworth,* 931 F.2d 1295, 1305 (8th Cir. 1991).

Despite Hill's insistence to the contrary, palpable error has been defined by Kentucky courts as an error that "affects the substantial rights of a party" and if not addressed will result in a manifest injustice. *Schoenbachler v. Commonwealth,* 95 S.W.3d 830, 836 (Ky. 2003) (citing RCr[9] 10.26). A manifest injustice has occurred if there is a showing of "probability of a different result or error so fundamental as to threaten a [party's] entitlement to due process of law." *Martin v. Commonwealth,* 207 S.W.3d 1, 3 (Ky. 2006).

In the present case, we find no palpable error. First, as previously discussed, Hill, by agreeing with Jankowski, knowingly waived this issue. Second, Hill failed to show that there was a probability of a different result absent the alleged error or that the alleged error threatened her entitlement to due process of law. Thus, there was no palpable error. Consequently, we decline to address the merits of this issue.

2. The trial court did not err in denying Hill's motion *in limine* to inform the jury that State Farm was responsible for retention of Jankowski as a defendant at trial.

At trial, Hill moved the court to allow her to present evidence that State Farm was responsible for the claims being tried against Jankowski and for

[9] Kentucky Rule of Criminal Procedure.

Jankowski's remaining as a defendant. The trial court denied this motion. Now, on appeal, Hill argues that with the denial of her motion, the trial court perpetuated the legal fiction prohibited by *Earle,* 156 S.W.3d 257, and *Hughes,* 197 S.W.3d 566. Furthermore, she contends that the trial court's ruling denied her the ability to effectively respond to State Farm's subrogation cross-claim against Jankowski. So, she contends that this error was highly prejudicial and manifestly unjust.

First, we turn to the case law upon which Hill relies. In *Earle*, the Supreme Court held that where an UIM carrier has exercised the procedure outlined in *Coots* to preserve its subrogation rights against a tortfeasor and where a plaintiff has filed suit against both the tortfeasor and the UIM carrier, the identity of the UIM carrier must be revealed to the jury to avoid the legal fiction that the tortfeasor is the only defendant involved. In a UIM claim, the UIM carrier is the only real party in interest. *Earle,* 156 S.W.3d at 260-261. In *Hughes*, the Court of Appeals reiterated and applied the holding found in *Earle*. *Hughes,* 197 S.W.3d at 568.

Regarding matters involving a trial court's rulings on evidentiary issues, our standard of review is that of abuse of discretion. *Manus, Inc. v. Terry Maxedon Hauling, Inc.,* 191 S.W.3d 4, 8 (Ky. App. 2006). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson,* 11 S.W.3d 575, 581 (Ky. 2000). Regarding this evidentiary issue, neither the record nor case law supports the notion that the trial court's decision

was arbitrary, unreasonable, unfair or unsupported by sound legal principles. As a result, we affirm the trial court's denial of Hill's motion to present evidence that State Farm was responsible for Jankowski's retention in this case.

3. The trial court did not err in denying Jankowski's motion for directed verdict regarding State Farm's subrogation claim.

During the trial, Jankowski moved for a directed verdict regarding State Farm's subrogation claim, asserting that State Farm had produced no evidence regarding the claim. The trial court denied the motion. Now, on appeal, Hill, not Jankowski, takes issue with this ruling, claiming that she "supported" Jankowski's motion at trial. According to Hill, the trial court erroneously denied Jankowski's motion and if the trial court had granted Jankowski's motion, then, Hill could have argued to the jury that no subrogation cross-claim existed.

A review of the video tape of the trial reveals that Jankowski did, indeed, move for a directed verdict regarding State Farm's subrogation claim and the trial court denied the motion. The question before us is whether Hill has standing to appeal the denial of Jankowski's motion. It is well settled in the Commonwealth that the issue of standing must be decided on the unique facts surrounding each case. *Plaza B.V. v. Stephens,* 913 S.W.2d 319, 322 (Ky. 1996). Moreover, the party who is asserting standing must have more than a mere expectancy in the outcome of the proceeding but must have a present and substantial interest. *Id*. In the present case, a review of the record reveals that Hill did not move for a directed verdict on Jankowski's behalf, did not join in

Jankowski's directed verdict motion, nor did she "support" that motion as she claims in her brief. Furthermore, at trial, Hill did not claim to have any interest in the outcome of Jankowski's motion, nor does she claim on appeal that she had any interest, substantial or otherwise, in Jankowski's motion. Therefore, we conclude that Hill lacked standing to pursue the denial of Jankowski's motion and decline to address this assignment of error.

4. The trial court did not err in denying Hill's motion for directed verdict regarding her UIM claim against State Farm.

At trial, after the presentation of the proof, Hill moved for a directed verdict regarding her UIM claim against the insurance company. According to Hill, State Farm failed to offer any defense to her UIM claim. The trial court denied Hill's motion.

On appeal, Hill argues again that State Farm failed to offer any defense to her UIM claim. Additionally, she argues that if the trial court had granted her motion, then the court would have instructed the jury "that the law of the case was for Hill on her [UIM] claim against, State Farm, (sic) for any damages Hill would be entitled to legally recover from State Farm based on the jury's determination of her damages." According to Hill's brief, she preserved this issue for appeal by moving for directed verdict after the close of her evidence and she cites T.R., Tape, 11/17/06, 4:23:00-4:27:00. She also claims that she preserved the issue by filing a written motion for directed verdict on November 21, 2006.

A review of the video tape of the record at T.R., Tape, 11/17/06, 4:23:00-4:27:00 reveals that Hill did not move for a directed verdict regarding her UIM claim against State Farm. At that time, she was arguing against one of Jankowski's directed verdict motions.

Regarding Hill's written motion, the record reveals that she filed the motion and argued that she was entitled to a directed verdict because State Farm had admitted the existence of her insurance policy with underinsured motorist coverage of $100,000.00. However, the record contains no evidence that the trial court ever ruled on this motion. When a motion has been made, the burden rests on the movant to insist that the trial court rule on the motion. *Thompson,* 147 S.W.3d at 40. If the movant fails to insist on a ruling, then the issue is waived. *Id*.

However, assuming for the sake of argument that this issue was preserved, we will briefly address it. Regarding motions for a directed verdict, the trial court must consider all the evidence that is favorable to the non-moving party as true, and it is prohibited from granting a directed verdict if such a verdict would be palpably or flagrantly against the evidence. *NCAA v. Hornung,* 754 S.W.2d 855, 860 (Ky. 1988).

At trial, Hill testified regarding her policy with State Farm and testified regarding the existence of the UIM provision and, as Hill points out in her brief, State Farm made no attempt to deny coverage. However, the fact that the trial court did not grant Hill's motion is nothing more than harmless error. According to CR 61.01, a judgment will not be reversed due to an alleged error

unless that error prejudiced the substantial rights of a party. *Taylor v. Commonwealth,* 995 S.W.2d 355, 361 (Ky. 1999). "The test for harmless error is whether there is any reasonable possibility that, absent the error, the verdict would have been different." *Id*. In the present case, there was no reasonable possibility of a different outcome because the jury did not award Hill a judgment in excess of Jankowski's insurance coverage limits. Thus, even if this issue had been properly preserved, it would still lack merit.

5. The trial court did not err when it refused to instruct the jury regarding the sudden emergency doctrine.

After the conclusion of the evidence Hill tendered an instruction regarding the sudden emergency doctrine; however, the trial court rejected Hill's proffered instruction. On appeal, Hill claims that under the facts presented at trial she was entitled to a sudden emergency instruction and had the trial court instructed the jury on the doctrine, the jury would not have found Hill to have been 45% liable for the accident.

According to the Supreme Court of Kentucky, the sudden emergency doctrine exists as a guide for juries to evaluate the allegedly negligent conduct of a party who suddenly encounters an emergency that leaves the party with no time to carefully consider the situation. *Regenstreif v. Phelps,* 142 S.W.3d 1, 4 (Ky. 2004). Thus, when a party encounters an emergency or a situation that "he has had no reason to anticipate and has not brought on by his own fault, but which alters the duties he would otherwise have been bound to observe, then the effect of that

circumstance upon these duties must be covered by the instructions." *Harris v. Thompson,* 497 S.W.2d 422, 428 (Ky. 1973). Whether the trial court should qualify a party's duties by including sudden emergency language in its instructions "does not depend upon whether the particular circumstance might be characterized in common parlance as a 'sudden emergency,' but whether it changes or modifies the duties that would have been incumbent upon [the party] in the absence of that circumstance." *Id*. "The proper criterion is whether any of the specific duties set forth in the instruction would be subject to exception by reason of the claimed emergency." *Id*. The sudden emergency doctrine is not an affirmative defense that has to be pled; instead, it concerns what a party's duties are "under each state of facts inferable from the evidence[.]" *Id*. The doctrine does not excuse a party of his fault; nor does it affect a plaintiff's burden of proof. *Regenstreif,* 142 S.W.3d at 4, and *Harris,* 497 S.W.2d at 428. The doctrine attempts to define the conduct that one would expect from a prudent person faced with a similar emergency situation. *Regenstreif,* 142 S.W.3d at 4.

To determine whether the doctrine applies to the present case, we will turn to prior case law in an effort to find those cases most factually similar to the one at hand. One such case is *City of Louisville v. Maresz,* 835 S.W.2d 889 (Ky. App. 1992). The evidence in the trial court in *Maresz* included that Joe Mooney, one of the defendants and a police officer for the City of Louisville, responded to an accident in the westbound lane of Interstate 64, east of the Cochran Tunnel. *Id*. at 890-891. As Mooney approached the tunnel, he was traveling in the left lane.

Id. at 891. Five to six car-lengths directly behind Mooney in the same lane, Maresz was approaching the tunnel as well. *Id*. As Mooney was slowing down to pull onto the left shoulder of the highway, Maresz's vehicle struck the rear of the Mooney's vehicle. *Id*. Maresz filed suit against Mooney and the City of Louisville. *Id*. At trial, an eyewitness testified that he observed Mooney's brake lights activate at least 100 yards before the collision while Maresz's brake lights did not activate until the last instance. *Id*. When the trial court instructed the jury regarding Maresz's duties, it included language regarding the sudden emergency doctrine. *Id*. After deliberations, the jury found Mooney and the City of Louisville 95% liable. *Id*.

Our Court determined that the *Maresz* case did not involve a *sudden emergency*; rather, it involved a *sudden occurrence*. *Id*. According to the evidence, Mooney acted suddenly when he decelerated, but

> there is no evidence whatsoever that appellee . . . when presented with this sudden occurrence, chose a course of conduct which appeared at the time to have been the safest course, which now appears not to have been the best or wisest choice, and which resulted in injury. In short, there is no evidence that appellee . . . in responding to the sudden occurrence acted in such a way that he could be held negligent because of his response, thus he has no need for the sudden emergency instruction. [Appellee] was, however, presented with a sudden occurrence that may have resulted in his inability to avoid the collision with appellant Mooney's vehicle regardless of his previous exercise of ordinary care.

Id. at 893 (citations omitted).[10]

[10] Although the *Maresz* Court held that the trial court erred when it instructed on the sudden emergency doctrine, it ultimately determined that the error was harmless. *Id*. at 894.

Next, we consider *Robinson v. Lansford,* 222 S.W.3d 242 (Ky. App. 2006). In *Robinson*, both appellant and appellee were driving in the same lane along Interstate 65 in Louisville, Kentucky. *Id*. at 244. The vehicle traveling in front of appellant suddenly stopped, and appellant struck the rear of the lead vehicle. *Id*. Because appellant rear-ended the lead vehicle, appellant's vehicle came to a sudden stop as well. *Id*. Appellee, who was traveling three to four car-lengths behind appellant, was unable to stop his vehicle and struck the rear of appellant's car. *Id*. Subsequently, appellant filed suit against appellee. *Id*. The case proceeded to trial, and the jury found in appellee's favor. *Id*.

On appeal to this Court, appellant in *Robinson* argued that the trial court erred when it included language regarding the sudden emergency doctrine in the instruction covering appellee's duties of care. *Id*. Our Court reversed the jury's verdict

and remanded for a new trial, holding that the trial court erred when it instructed the jury on the sudden emergency doctrine. *Id*. at 245-249. First, the *Robinson* Court reasoned that there had not been a *sudden emergency* but a *sudden occurrence* because there was no evidence that appellee took any evasive action due to encountering an emergency. *Id*. at 245. Instead, the sudden occurrence encountered by appellee may have been caused by appellee's inability to avoid the collision even if he had previously exercised ordinary care. *Id*.

Second, the inclusion of the sudden emergency doctrine in the jury instruction created a situation where the jury could possibly excuse appellee's failure to exercise ordinary care prior to the emergency as long as this alleged failure did not cause the emergency. *Id*. at 247. The *Robinson* Court concluded that

> if the "emergency" referred to in the instruction is the incident that caused [appellant] to suddenly stop, instead of her being stopped in the roadway, then [appellee's] duties would have been limited to only how he acted *after* he noticed [appellant] being stopped in the roadway. The effect of such an instruction would relieve [appellee] of his portion of fault for causing the accident if his violating of one of his initial duties . . . contributed to the cause of the accident, *e.g.*, not keeping a lookout.

Id.

Finally, the *Robinson* Court pointed out that the jury could infer that the emergency referred to in the instruction was not the appellant's sudden stop but was the initial incident that caused her to stop. *Id*. at 248. Thus, the Court concluded that the language in the instruction was extremely confusing and placed "the emphasis of the qualification of [appellee's] duty at the wrong point in time." *Id*.

Comparing our present case to these cases, we find striking similarities. We can find no meaningful difference between the facts in *Maresz* and *Robinson* and the facts in the case at hand. Indeed, the facts in *Robinson* are virtually identical to the facts in the present case. Because we cannot distinguish the facts in this case from the facts in *Maresz* and *Robinson*, we find those cases to

be dispositive of this issue. Consequently, we determine that, like in *Maresz* and *Robinson*, Hill faced a sudden occurrence, not a sudden emergency, and was not entitled to an instruction regarding the sudden emergency doctrine.

B. JANKOWSKI'S CROSS-APPEAL

Jankowski cross appeals on the trial court's failure to give a jury instruction on Hill's duty to keep a "lookout." However, having argued this, Jankowski admits that the trial court's refusal to give a lookout instruction was harmless error because even without that language the jury determined that Hill violated at least one of her legal duties, determining that she was 45% liable for the accident. According to Jankowski, the absence of the lookout language is not sufficient to require a retrial. However, if we reverse this case and remand for a new trial, Jankowski asks us to instruct the trial court to include the lookout language in the event of a retrial.

Because we have affirmed the jury's verdict, we decline to address the merits of Jankowski's cross-appeal. Finding no substantial errors that would require reversal, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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