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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000402-MR

COLLIN ELAM — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO SCORSONE, JUDGE
ACTION NO. 07-CI-05160

ALFRED SMITH; LISA FRANZ;
HARCO NATIONAL INSURANCE COMPANY;
KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Collin Elam appeals from four rulings entered by the Fayette Circuit Court in a motor vehicle accident (MVA) case involving one plaintiff, two tortfeasors, two underinsured motorist carriers, and three liability insurance carriers. Elam challenges the judgment entered on January 30, 2012; an order

denying his motion for partial summary judgment entered on February 3, 2012; an order denying his motion to vacate the jury verdict entered on February 20, 2012; and, an order overruling his motion to vacate and amend the order denying partial summary judgment entered on February 20, 2012. Having reviewed the briefs, the law and the record, we affirm.

FACTS

On November 5, 2005, Lisa Franz[1] test drove a car owned by Audi of Lexington. Elam, a salesman for the dealership, accompanied her as a front seat passenger. As Franz attempted to merge onto I-75 at Winchester Road in Lexington, Kentucky, she was rear-ended by a car driven by Alfred Smith.[2] Although Elam did not go to the hospital and returned to work within hours of the MVA, injuries he claimed he sustained to his lower back and extremities during the MVA prompted him to file suit against Franz, Smith and Harco National Insurance Company, the dealership's liability and underinsured motorist (UIM) carrier. Elam alleged negligence and ultimately sought nearly $405,000.00 in medical expenses[3] and lost wages.

[1] Initially, Franz was identified as Fraz. She filed a notice correcting the spelling of her name on January 24, 2011. On June 6, 2011, an agreed order was entered allowing Elam to file an amended complaint correcting the spelling of Franz's name.

[2] Lexington-Fayette Urban County Police Officer Scott Perrine witnessed the MVA. He cited Smith for following Franz's vehicle too closely.

[3] There was much debate about the cause of Elam's injuries. He first received treatment for back pain in 1988 following a high school football injury. In 2004, he was diagnosed with a moderate-sized disc herniation, a left-sided disc bulge and facet joint arthritis. In the months prior to the MVA, he took significant amounts of hydrocodone, received multiple steroid

Harco wrote the fleet policy for Audi of Lexington covering Franz[4] as the driver of the vehicle and Elam as the dealership's employee. Elam sought to recover UIM and basic reparation/personal injury protection (BRB/PIP) benefits from Harco.

Elam subsequently named Kentucky Farm Bureau (KFB) as a defendant because it privately insured both Elam and his wife. Elam sought to recover UIM and BRB/PIP benefits from KFB.

Progressive Insurance, Smith's liability carrier, offered Elam policy limits of $25,000.00, which he accepted long before trial. Applying *Coots v. Allstate Ins. Co*., 853 S.W.2d 895 (Ky. 1993), Harco substituted for Progressive to protect its subrogation rights. Thus, Progressive was never named a defendant in this action and Smith remained a party defendant for purposes of establishing causation and the amount of damages owed.

Before trial, the trial court determined Harco was primarily liable for Elam's UIM and BRB/PIP coverage and KFB was secondarily liable. During a pretrial conference, to avoid juror confusion, the trial court *sua sponte* bifurcated Elam's tort claims against Franz and Smith from the contractual claims[5] he brought against Harco and KFB. Elam opposed this unrequested separation of claims,

epidural injections, and a transforaminal discectomy at the L4/5 and L5/S1 level was considered.

[4] Although not a named party, Metropolitan Life privately insured Franz.

[5] UIM coverage, like uninsured motorist (UM) coverage, is a contractual obligation. *Coots,* 853 S.W.2d at 899.

arguing that once Harco substituted policy limits for Smith and Progressive, Harco became the real party in interest and it was a legal fiction not to identify Harco as a UIM carrier to the jury. Like Elam, Franz objected to exclusion of the UIM carriers from trial.

A jury trial commenced on December 19, 2011. While attorneys for Harco and KFB were present in the courtroom, they did not sit at counsel table and did not participate in the trial although they had been active until the trial court severed the contract claims and ordered the tort claims to be tried first. Their pre-bifurcation participation in video depositions of two medical experts was redacted before being played for the jury.

Most of the trial testimony focused on the condition of Elam's back before and after the MVA and whether the spinal fusion surgery he underwent in March of 2009 was a result of the MVA or due to pre-existing degenerative disk disease. Video depositions of Dr. Harry Lockstadt, Elam's treating board certified orthopedic surgeon, and Dr. Chris Stephens, an evaluating board certified orthopedic surgeon hired by Smith, reached vastly different interpretations of an MRI[6] taken thirteen months *before* the MVA and another MRI taken a few days *after* the collision. Dr. Lockstadt was positive the MVA worsened Elam's pre-existing back issues and necessitated the surgery he performed on March 25, 2009. With equal vigor, Dr. Stephens was convinced the MVA was merely one of several

[6] Magnetic Resonance Image.

events that exacerbated Elam's pre-existing degenerative disk disease, but did not require surgery and did not alter the course of Elam's treatment (pain medication and steroid epidural injections), which was the same before and after the collision.

Because the MVA happened during the scope of Elam's work as a car salesman, there was a separate workers' compensation claim that is not part of this action. Four doctors prepared five independent medical evaluations (IME) as part of the workers' compensation action and two of them, both neurosurgeons, markedly disagreed with Dr. Stephens' interpretation of the MRIs. During Dr. Stephens' video deposition, Elam sought to impeach him with the reports of Drs. Guarnaschelli and Kriss and questioned him about them. However, when Smith moved to exclude the reports of the IMEs, the trial court sustained the motion because Dr. Stephens was never asked whether he routinely relies on IME reports in forming his own opinion and the IME reports were not introduced into evidence at trial. Jurors did hear Dr. Stephens testify that he read, but disregarded, about 70% of the material provided to him. The trial court suggested Elam could introduce the desired reports by calling the authors, although that would subject them to cross-examination. Jurors never learned about the contradictory IME reports.

After two days of trial, with Franz and Smith as the sole defendants, jurors assigned all fault for the MVA to Smith,[7] and awarded Elam $845.00 in past

[7] During opening argument, Smith's counsel acknowledged Smith was temporarily distracted by a commotion on the roadway at the time of the collision and his inattention caused the MVA.

medical expenses and $350.00 in lost wages for a total of $1,195.00. Jurors awarded zero damages for future medical expenses and zero damages for past, present and future pain and suffering. It appears the jury was unconvinced the spinal fusion Elam underwent in 2009 was necessitated by the 2005 MVA. This appeal followed.

CONSTRUCTION OF BRIEFS

We begin by commenting on the construction of appellate briefs. Elam has raised four issues, none of which comply with CR 76.12(4)(c)(v) which requires each argument to begin with "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." We also note that the same rule requires "ample supportive references to the record[.]" While Elam's brief contains *some* references to the record, we cannot characterize them as *ample.* Nonadherence to the rules of appellate procedure hinders our review. None of the appellees has argued these deficiencies. Nevertheless, due to noncompliance with the rule, we could strike Elam's brief or review his arguments under the manifest injustice standard. CR 76.12(8)(a); *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990). In light of our treatment of the issues, we choose to do neither.

ANALYSIS

Elam's initial claim is that a new trial is mandatory because he was not allowed to identify the UIM carriers at trial. We disagree for various reasons. First, we will reverse a trial court's denial of a new trial motion only if we conclude the trial court abused its discretion. In other words, its decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Second, CR[8] 42.02 specifies:

> [i]f the court determines that separate trials will be in furtherance of convenience or will avoid prejudice, or will be conducive to expedition and economy, it shall order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims or issues.

Here, the trial court commented more than once on the confusing and complicated nature of the case and specifically stated it was bifurcating the trial to avoid jury confusion. Whether to order separate trials is left to the trial court's discretion under CR 42.02. *Island Creek Coal Co. v. Rodgers,* 644 S.W.2d 339, 349 (Ky. App. 1982). However, once a trial court determines severance of claims would be helpful, severance is mandatory. Based upon the record before us, we have no reason to deem the trial court's decision to bifurcate the tort and contract claims an abuse of discretion. This is especially true since Kentucky follows a long-standing prohibition on the mention of insurance at trial. *Mattingly v. Stinson,* 281 S.W.3d

[8] Kentucky Rules of Civil Procedure.

796, 799 (Ky. 2009); *Turpin v. Scrivner,* 297 Ky. 365, 178 S.W.2d 971 (1944); KRE[9] 411. Had the court allowed Elam to introduce the UIM carriers, it would have unnecessarily introduced the element of insurance and prejudiced Franz.

Elam strongly argues that *Coots* and *Earle v. Cobb,* 156 S.W.3d 257 (Ky. 2004) are the controlling cases on this question, but we deem them to be distinguishable due to the sheer number of parties involved in this litigation. As argued by all four defendants on appeal, the *Coots* formula works well when there is one tortfeasor and one UIM carrier—once the carrier substitutes policy limits for the tortfeasor, the UIM carrier becomes the sole remaining party in interest. That is not the scenario before us. While one tortfeasor, Smith, offered policy limits and admitted liability at trial, the other tortfeasor, Franz, did not. Thus, it appears *Coots* and *Earle* must be refined to create a procedure for dealing with multiple tortfeasors, UIM carriers and liability carriers.

We believe the trial court, on its own initiative, correctly bifurcated the contract claims from the issue of tort liability. Neither Harco nor KFB caused the MVA; no action they took directly injured Elam or worsened his pre-existing back condition. Harco and KFB assumed active roles in this litigation only after a decision about causation had been made and the focus turned to who was going to pay the damages awarded. As expressed in *Coots,*

[9] Kentucky Rules of Evidence.

> [t]he UIM insurer is a primary obligor for the UIM insured's loss by contractual obligation just as the tortfeasor is a primary obligor by reason of his tort obligation. Insofar as its UIM obligation is concerned, . . . the existence of the tortfeasor, and the amount of damages caused by the tortfeasor, and the tortfeasor's insurance or lack thereof, are only relevant to measure the loss under the policy.

Coots, 853 S.W.2d at 902. Under the facts of this case, we see no error in bifurcating the tort and contract claims. Furthermore, due to the antagonistic claims of the tortfeasors, it was critical that the issue of tort liability be resolved before considering the issue of liability for payment. Thus, there was no "legal charade" or "legal fiction" created by not revealing the identities of the UIM carriers. *Mattingly,* 281 S.W.3d at 798. The battle over causation was between Smith and Franz. Who should pay damages did not become an issue until the jury had awarded some amount of damages. Thus, we have no basis for reversal.

Elam's second claim is that he was erroneously prohibited from showing the jury his cross-examination of Dr. Stephens about reports prepared by two IMEs—Drs. Guarnaschelli and Kriss—in the workers' compensation action. Dr. Stephens was adamant that the MVA only temporarily exacerbated Elam's pre-existing chronic back pain and did not cause a permanent change to his spine whereas Drs. Guarnaschelli and Kriss both attributed a permanent harmful change in the condition of Elam's back to the MVA.

Dr. Stephens evaluated Elam at Smith's request and gave a video deposition. He was provided the IME reports prior to being deposed. During the taping of the deposition, Elam questioned Dr. Stephens about the IME reports but that series of questions was redacted on Smith's motion before the deposition was played for the jury. Drs. Guarnaschelli and Kriss did not testify at trial and their reports were not admitted into evidence.

Citing *Buckler v. Commonwealth,* 541 S.W.2d 935 (Ky. 1976), Elam admits the reports prepared by Drs. Guarnaschelli and Kriss are hearsay but argues that does not make them inadmissible because an expert may rely upon hearsay to form his opinion. The problem with his argument is we have not been cited to any point at which Dr. Stephens states he relied on these specific IME reports in forming his opinion. Furthermore, based on the tenor of his testimony, Dr. Stephens makes his own clinical decisions and draws his own conclusions after personally evaluating MRIs, x-rays and other objective data. While he testified the work of other medical professionals is helpful to him in developing the full picture of a person, he ultimately generates his own interpretation based on what he personally sees. He also stated he reviewed all the medical records provided to him in his quest to establish Elam's pattern of treatment, but disregarded about 70 percent of them because they were not germane to the particular task at hand.

Since the IMEs were not involved in Elam's treatment, it is plausible that Dr. Stephens did not put much stock in their reports.

Under *Foster v. Commonwealth,* 827 S.W.2d 670, 678-79 (Ky. 1991) (quoting 31 Am.Jur.2d Expert and Opinion Evidence § 92), a party may:

> cross-examine an expert about the type of evidence which he or she normally uses in formulating an opinion, as long as the questioning and evidence sought to be admitted is relevant. "The data on which expert witnesses rest their specific opinions, as distinguished from the knowledge which qualifies them to offer opinions at all, may be fully inquired into on cross-examination."

Our result would be different had Dr. Stephens stated the reports of Drs. Guarnaschelli and Kriss were the type of evidence he normally relies on in forming his opinion—but we have not been shown that he made such a statement. Without such testimony, we see no error in the trial court's exclusion of the cross-examination. Moreover, if Elam deemed the reports of Drs. Guarnaschelli and Kriss critical to his case, he had the option of calling them as witnesses and introducing their reports which would have avoided the hearsay issue. We see no error in the trial court's redaction of the cross-examination of Dr. Stephens.

Elam's third claim is that the trial court should have granted his motion for partial summary judgment against Harco for lost wages due to his 2009 back surgery. This issue is not properly before us. Denial of a summary judgment

motion is interlocutory in nature and therefore not subject to appellate review. *Roman Catholic Bishop of Louisville v. Burden,* 168 S.W.3d 414, 419 (Ky. App. 2004). Furthermore, the jury's ultimate verdict indicates it did not believe the spinal fusion surgery Elam underwent in 2009 was necessitated by the MVA. Thus, it would have been inappropriate for the trial court to award payment for wages lost while recovering from that surgery. However, we note that Harco would be well-served to adopt a procedure whereby it provides a "claimant prompt written notification" of the denial of a BRB/PIP claim, specifying the reason for the rejection, as required by KRS[10] 304.39-210(5). Harco twice failed to comply with this statutory requirement.

Elam's last argument is that the jury's award of damages was inadequate. This argument was made to the trial court under CR 59.01(d) and (f) which allows for the grant of a new trial when it appears damages were awarded "in disregard of the evidence" or the "verdict is not sustained by sufficient evidence[.]"

Jurors awarded Elam a total of $1,195.00. He argues this amount was clearly inadequate because the cost of the MRI he underwent a few days after the MVA cost $1,400.00 and there was no evidence it was unrelated to the MVA. He also argues the jury awarded medical expenses without awarding damages for pain

[10] Kentucky Revised Statutes.

and suffering. We review the trial court's denial of Elam's new trial motion for clear error. *Bayless v. Boyer,* 180 S.W.3d 439, 444 (Ky. 2005); *Miller v. Swift,* 42 S.W.3d 599, 600-01 (Ky. 2001).

Questions of witness credibility and evidentiary weight are within the unique province of the jury. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991); *Carrier v. Commonwealth,* 356 S.W.2d 752, 754 (Ky. 1962). Here, testimony about the reason for ordering the MRI was not as clear-cut as Elam portrays. Dr. Lockstadt's testimony was equivocal. He stated that when he met with Elam on November 7, 2005, Elam told him he had been in a car accident, his lower back pain was worse and he thought he needed more treatment. "And based on the increased pain that he had, and the increased symptoms, I'd recommended that he get another MRI study performed." From that response, one could conclude the 2005 MRI was ordered not because Elam had been in a car wreck but because his pre-existing back pain and symptoms had worsened. Later, Dr. Lockstadt testified, "[b]ased on his pain, which was still quite severe prior to the motor vehicle accident, I think it's worthwhile going ahead and updating the MRI scan." Dr. Lockstadt also testified the treatment he provided to Elam after November 5, 2005, which could include the MRI, was all related to the MVA. Based on his equivocal testimony, jurors could have concluded, and apparently did conclude, the 2005 MRI was ordered because Elam's pain from his pre-existing

degenerative disk disease had increased, rather than as a direct result of the MVA. Thus, jurors did not have to award Elam the cost of the 2005 MRI.

Additionally, Elam argues jurors had to award him something for pain and suffering because it awarded him $845.00 in medical expenses. Elam's argument is contrary to *Bayless* wherein the Supreme Court of Kentucky stated,

> we recently rejected the notion that a jury verdict of zero for pain and suffering is inadequate as a matter of law in cases where a jury also awards damages for medical expenses. In *Miller v. Swift*, 42 S.W.3d 599 (Ky. 2001), we held, "[t]he law in Kentucky . . . does not require a jury to award damages for pain and suffering in every case in which it awards medical expenses." *Id*. at 601. Relying heavily on [*Turfway Park Racing Ass'n v. Griffin*, 834 S.W.2d 667, 669 (Ky. 1992)], we reiterated that "[o]ur review . . . is limited to whether the trial court's denial of [the motion for retrial] was clearly erroneous." *Id*. Although not specifically argued in this case, we must also note that the general principle advanced in *Miller*—that a zero verdict for pain and suffering may sometimes be appropriate—is not constrained to the facts of that case.

Id. at 444-45. In this case, the medical testimony was contradictory. That the jury was not convinced by Elam's evidence, including that of himself, his wife and Dr. Lockstadt about the level of his pain, does not make the jury's verdict wrong. For example, Elam did not complain of pain at the scene of the collision or seek medical treatment immediately after the MVA. Furthermore, he returned to work within hours of the collision. Moreover, Elam had already been living with pain

from his degenerative disk disease for seventeen years before the MVA. As was its role, the jury weighed the evidence and calculated an award based on the evidence. We discern no clear error and therefore, no basis for reversal.

For the foregoing reasons, we affirm the rulings of the Fayette Circuit Court.

MOORE, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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