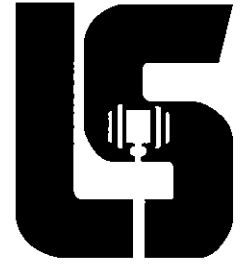




THE LANDRUM & SHOUSE REPORT



Summer 2009

Welcome to the Landrum & Shouse Report, a newsletter designed to keep you informed on current events and legal issues. Landrum & Shouse, LLP, traces its history from pre-World War II legal service. For nearly 40 years following military service, the late Weldon Shouse and Charles Landrum, Jr., together with their firms practiced law throughout Kentucky before merging in 1984 to become what is now known as Landrum & Shouse, LLP. The resulting firm is built upon the well-deserved reputations of its founders as experienced, knowledgeable, and hard working trial lawyers.

SUPREME COURT SAYS NO TO RECOVERY FOR PRE-IMPACT FRIGHT

By: Douglas L. Hoots

Plaintiffs typically include claims for emotional distress as a component of their damages in personal injury actions involving claims of negligent misconduct. An action exists for mental anguish or distress when there is any physical contact or injury, regardless of how slight or insignificant the contact. *Deutsh v. Shein*, 597 S.W.2d 141, 145-46 (Ky. 1980). Consequently, a claim can be made for post impact fright or fear in practically any situation involving any physical injury or contact.

In *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920 (Ky. 2007), our Supreme Court addressed the recoverability of damages for emotional distress for pre-impact fear or fright. In *Congleton* a tractor-trailer was hauling large steel coils on the roadway in Henry County, Kentucky. An unidentified driver stopped in the path of the tractor-trailer which caused the driver of the tractor-trailer to brake suddenly. Two of the chains securing the large steel coils broke and a steel coil fell directly into the path of an oncoming vehicle. The steel coil crushed the driver's side of the oncoming vehicle and the driver of that vehicle died at the scene.

Eventually, the case against the company operating the tractor-trailer went to the trial and the jury award totaled damages of \$3,767,267. The total jury award included \$100,000 of damages for pre-impact fear sustained by the deceased driver. One of the issues on appeal was whether the jury should have been allowed to award damages for pre-impact fear or fright. Ultimately, the Supreme Court reversed this portion of the jury award because it believed ". . . wrongful death actions such as this are not susceptible to the sort of proof that might counsel in favor of altering or abandoning the impact rule." *Id.* at 930. In other words, the Court did not believe the proof was adequate to justify abandonment of the "impact" requirement to support a recovery for damages for emotional distress or fright. The Court left open the possibility of altering the "impact" rule in the future if there is demonstrable evidence of pre-impact mental distress proven through reliable witness accounts and expert testimony.

Supreme Court Limits Identification of UIM Insurer

By: Jeff Taylor

The Kentucky Supreme Court recently ruled in the long-awaited decision of *Mattingly v. Stinson* (2009 WL 1108099) that the UIM carrier will not be identified at trial when there has been no *Coots* settlement between the carrier and the alleged tortfeasor and the UIM carrier does not participate at trial.

Historically, it has been the general policy of the courts that the existence or amount of insurance coverage has no bearing on issues of liability and damages and such evidence should not be considered by a jury. This general rule that the existence (or nonexistence) of insurance should not affect issues of liability and damages often becomes difficult to apply when an insurer is a party. When an insurance company is a named party, the dynamics of the trial change. There are obvious reasons why defense counsel would want to limit what can be said about the existence of insurance to as close to nothing as possible.

A brief examination of *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895 (Ky. 1993) and *Earle v. Cobb*, 156 S.W.3d 257 (Ky. 2004) is important to understand the historical background of UIM substitution and UIM identification at trial and the significance of the *Mattingly v. Stinson* decision.

Pursuant to *Coots v. Allstate Ins. Co.*, the plaintiff, in order to preserve his or her UIM claim, must provide written notice to the UIM insurer of the settlement with the alleged tortfeasor. Upon receiving proper notice of the proposed settlement, the UIM insurer has thirty (30) days to front or substitute the settlement amount in order to preserve the right to subrogate against the alleged tortfeasor. If the UIM carrier substituted or fronted the settlement amount under *Coots*, the existence of the UIM carrier and liability insurance were not revealed at trial. Only the alleged tortfeasor remained the named party in the case.

This general policy/procedure was modified (or clarified) in 2004 with the Kentucky Supreme Court decision in *Earle v. Cobb*. The decision in *Earle* required the identification of the UIM carrier at trial when the carrier uses the *Coots* procedure and substitutes payment of the underlying parties' settlement amount. The major policy reason behind the *Earle* rule-the avoidance of charades at trial- is satisfied by the disclosure of the UIM carrier as a party defendant.

With the *Earle* decision, two main things happen when the UIM carrier is identified at trial: the jury learns (1) that the alleged tortfeasor is covered by some level of liability insurance and (2) that whatever damages are awarded to the plaintiff will be covered by either or both of the insurance companies involved (plaintiff's and defendant's). This likely drives up the damage award and gives a tactical advantage to the plaintiff to join the UIM carrier in the suit.

While the holding of the *Earle* decision seems clear-a plaintiff's UIM carrier that is properly joined as a party defendant must be precisely identified at trial-the opinion does not adequately address whether the UIM carrier will be identified at trial when there is no *Coots* settlement between the claimant and adverse driver. For several years this failure led to inconsistent decisions by trial judges to identify (or not identify) UIM carriers at trial when there has been no *Coots* settlement. However, the Kentucky Supreme Court resolved this troubling issue with its long-awaited decision in *Mattingly v. Stinson* in April 2009.

In *Mattingly*, the UIM carrier was joined as a party defendant. The underlying parties did not settle. The UIM carrier successfully argued to the trial court that UIM carrier identification was not required because it was not participating at trial and because there had been no *Coots* settlement. On appeal, the Court of Appeals reversed and remanded for a new trial, finding that pursuant to *Earle v. Cobb* the trial court erred in prohibiting reference to UIM coverage.

The Kentucky Supreme Court granted discretionary review and reversed the Court of Appeals. The Supreme Court declined to extend the holding in *Earle* "to situations where the UIM carrier has not utilized the *Coots* settlement procedure and, therefore, has not substituted its liability for that of the defendant." Therefore, the UIM carrier will not be identified at trial when the alleged tortfeasor remains primarily liable to the plaintiff. This decision makes good sense as the UIM carrier is only potentially liable, contingent upon a judgment in excess of the tortfeasor's liability coverage and the applicable PIP coverage. As such, there is no charade or veil being pulled over the jury's eyes.

In short, *Earle v. Cobb* requires identification of the UIM carrier at trial when it substitutes payment under *Coots*. The UIM carrier will not, however, be identified at trial pursuant to *Mattingly v. Stinson* when the UIM carrier has not availed itself of the *Coots* procedure and there remains a real controversy between the underlying parties.

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ENFORCEABILITY OF INDEMNIFICATION PROVISIONS

By: Douglas L. Hoots

Indemnification provisions are often directed toward requiring another person or entity to defend and indemnify a party against its own negligence. Recently, I had the opportunity to litigate two cases through the appellate courts regarding the enforceability of this type of contractual indemnification provision.

In *Community Trust Bancorp, Inc. v. Mussetter*, 242 S.W.2d 690 (Ky. App. 2007), a commercial lessee's employee fell on some water in a common area of a building owned by the lessor/bank. The injured person sued the bank for its negligence. The lease agreement between the bank and the lessee, in part, stated:

The lessee shall hold the lessor harmless at all times from any liability or damage on account of injury to employees, or to customers, or to the general public and/or growing out of the occupancy of said premises by the lessee, its repair or alteration, or through any defect in said premises caused by lessee, its agents or employees. Id. at 694.

The court acknowledged that an indemnity contract may be used to indemnify a party against its own negligence. These types of provisions are not always against public policy. See, *Fosson v. Ashland Oil and Refining Co.*, 309 S.W.2d 776 (Ky. 1957). However, our courts will look very closely at indemnification provisions and, if there is any ambiguity, the provisions will be unenforceable as against public policy. Here, the court focused on the use of the term "and/or" in the last sentence of the indemnification clause. Read literally, the clause could have required the lessee to indemnify the lessor from any cause in any location of the bank building regardless of whether the injury or damages arose from the actual occupancy of the leased office space. Therefore, the Court invalidated the indemnity clause as being overly broad and against public policy. *Supra* at 694.

In *Speedway Superamerica, LLC v. Erwin*, 250 S.W.3d 339 (Ky. App. 2008), a general contractor who was working for a convenience store owner sustained injuries while loading a freezer onto a truck at one of the owner's stores. The contractor filed suit against the convenience store to recover monetary damages for his injuries.

The contractor was a 55 year old man with an eighth grade education. The convenience store completed its own pre-printed contract which the contractor was required to sign before he performed any work. In part, the contract stated:

5. Indemnification: You agree to protect, indemnify, hold harmless and defend us, our officers, directors, and employees, against all actions, claims, damages, demands, suits or other liabilities, including attorneys fees and other expenses of litigation arising out of, in whole or part, you or your employees, agents and subcontractor's breach of any term of this contract, or any act or omission in the performance of this contract.
6. Insurance: You will secure the following: (1) general liability insurance in the amount of Three Hundred Thousand Dollars (\$300,000) which lists us as an additional insured. Id. at 341 and 342.

Based on this language, the convenience store filed a counterclaim seeking enforcement of the indemnity provision. The convenience store argued that the general contractor (and by extension its liability insurer) was required to defend and indemnify the convenience store from any claims asserted against it by the injured general contractor. The Court again acknowledged that there may be situations where an "indemnification" provision, wherein one party attempts to transfer responsibility for its own negligence to another by contract, could be valid in certain situations per authority of *Fosson v. Ashland Oil and Refining Co.*, 309 S.W.2d 176 (Ky. 1957). However, the convenience store could not enforce the indemnification provision in this case. The general rule is that agreements to indemnify against an indemnitee's own negligence are not valid. Any doubt as to the meaning of such an indemnity clause should be against the contention that the contract was intended to indemnify against an indemnitee's own negligence. The Court understandably thought it was improbable that the general contractor intended to undertake such broad indemnification duties. Therefore, the provision was held invalid and unenforceable as against public policy. Id. at 345.

The bottom line is that these contractual indemnification provisions need to be carefully drafted. Even then, our courts will analyze the provisions on a case by case basis and will critically review contractual provisions which purport to indemnify an individual or entity against his or its own negligence.

To Substitute or Not Substitute

A key question for UIM insurers is when should it substitute payment. Obviously, if the UIM carrier does not substitute payment, it loses subrogation rights and will be the only named defendant at trial. On the other hand, if the UIM carrier substitutes payment, it not only preserves subrogation but also keeps an individual defendant named at trial.

Obviously, a key consideration is whether there is a chance of recovery against the tortfeasor for UIM benefits paid. However, another key consideration is the character of the tortfeasor. If the tortfeasor is a life-long, well-respected and well-liked member of the community and would appear sympathetic in the eyes of the jury, then the carrier may want to substitute. However, if the tortfeasor is of questionable character, then the UIM carrier may want to distance itself from the tortfeasor. Additionally, the UIM carrier should consider the venue of the case and the tortfeasor's attorney's ability to try cases in its decision on whether to substitute payment.

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