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IN THE
COURT OF APPEALS OF INDIANA

KENNETH COLE FULLMER,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A02-0905-CV-470
	)	
ALLSTATE PROPERTY AND CASUALTY INSURANCE,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM THREE
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0506-PL-24874

September 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Plaintiff, Kenneth Cole Fullmer (Fullmer), appeals the trial court's judgment in favor of Appellee-Defendant, Allstate Property and Casualty Insurance Company (Allstate).

We affirm.

ISSUE

Fullmer raises one issue, which we restate as: Whether the trial court erred by refusing to instruct the jury that an insured-claimant who has a claim against an uninsured motorist may file an action against his insurance company without joining the uninsured motorist as a party.

FACTS AND PROCEDURAL HISTORY

On December 10, 2003, Fullmer was walking across a street in a marked pedestrian crosswalk in Indianapolis, Indiana. He began walking across the street when a signal indicated that there was three to five seconds left for him to cross. The traffic light changed before he made it across the street, and a taxi began pulling forward and struck Fullmer. The taxi was driven by Ebenezer Akinribade (Akinribade), an uninsured driver. As a result of the accident, Fullmer suffered significant medical injuries and expenses. He brought suit against Allstate for compensation under his uninsured motorist coverage. Fullmer did not name Akinribade as a defendant in the action. Allstate responded that Fullmer's own negligence was the cause of the accident, paid the maximum $5,000 medical coverage, but refused to pay anything further in spite of Fullmer's coverage of $50,000 for uninsured motorists.

On January 29, 2009, the trial court conducted a jury trial. At the close of evidence, the trial court reviewed the previously submitted proposed final jury instructions which contained the following proposed instruction from Fullmer:

> An insured-claimant who has a claim against an Uninsured Motorist may file an action directly against his insurance company without joining the uninsured motorist as a party defendant and litigate all of the issues of liability and damages in that one action.

(Appellant's App. p. 60). However, Fullmer withdrew this proposed instruction, referred to as "Plaintiff's 2" during the trial.[1]

During closing arguments, Fullmer informed the jury that he would have pursued a claim against Akinribade's insurance had he been an insured driver. Thereafter, Allstate argued that Akinribade was a disinterested witness because "[h]e's not been sued. He's not going to feel the repercussions." (Tr. p. 19). Fullmer "has a vested interest in telling you it wasn't his own fault, and he's the only person that does have that interest." (Tr. p. 19).

At the close of Allstate's argument, Fullmer addressed the trial court requesting to:

> [W]ithdraw my consent to removal of this instruction regarding our ability to file a claim directly against an uninsured motorist. I don't know if it was intentionally or not intentionally, but counsel during closing did suggest to the Jury that we didn't sue him, and that somehow it was improper. I think this instruction now is necessary to clarify for the Jury that he properly brought this lawsuit against Allstate and we did not have to sue Ebenezer directly. I think that's incredibly prejudicial that that came in, especially since there was not testimony given prior to closing about who we can and cannot sue.

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[1] None of the proposed final jury instructions included in the Appellant's Appendix have been numbered, but the Transcript refers to the withdrawn instruction as "Plaintiff's 2." (Transcript p. 2). Fullmer's brief writes out the instruction listed on page 60 of his Appendix as the relevant instruction to this appeal, which is the instruction that comes second in sequential order of the proposed instructions. (Appellant's App. pp. 57-60). Therefore, we will assume that "Plaintiff's 2" is the proposed instruction on page 60 of the Appellant's Appendix.

(Tr. p. 22). The trial court gave Fullmer permission to address the jury about the issue, but did not add "Plaintiff's 2" to the final instructions for the jury. Accordingly, Fullmer stated to the jury during his time for rebuttal:

> You've heard counsel reference our decision not to sue Mr. Akinribade directly in this case. I want to make sure that you are all clear that a plaintiff in an action for uninsured motorists claim has the option to sue an insurance company directly, without bringing in and actually naming the uninsured motorist, when the issue is the dispute of the claim being filed with the insurance company. So I wanted to make sure that you were all clear that the procedure that [Fullmer] followed in this case was proper and that his claim is properly brought.

(Tr. p. 23).

The jury deliberated, and returned a verdict apportioning 51% of the fault to Fullmer and 49% to Akinribade. The trial court entered a judgment in favor of Allstate accordingly.

Fullmer now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Fullmer argues that the trial court erred by not instructing the jury on the propriety of his decision to sue Allstate alone. Specifically, Fullmer contends that "once the issue regarding the propriety of suing Allstate rather than the uninsured motorists was raised by the defense in an effort to question the credibility of the witnesses in the minds of the jury, it became reversible error for the trial court to not issue the tendered instruction." (Appellant's Br. p. 5). Allstate responds by arguing that Fullmer waived his claim by withdrawing the proposed instruction at the close of evidence. Alternatively, Allstate contends that, if Fullmer has not waived consideration of the refusal to give the jury instruction, Fullmer's

substantial rights were not adversely affected by the trial court's refusal to give that instruction.

"The giving of jury instructions lies within the trial court's sound discretion, and we review the court's refusal to give a tendered instruction for an abuse of that discretion." *Elmer Buchta Trucking, Inc., v. Stanley*, 744 N.E.2d 939, 944 (Ind. 2001). In determining whether a trial court erred by refusing a tendered instruction, we consider (1) whether the instruction correctly states the law; (2) whether there is evidence in the record supporting the instruction; and (3) whether the substance of the instruction is covered by other instructions. *Id*. Moreover, a party seeking a new trial on the basis of improper jury instruction must show a reasonable probability that her substantial rights have been adversely affected. *Id.* There is no dispute that the proposed jury instruction was a correct statement of law, was supported by the record, and the substance of the instruction was not covered by other instructions. Therefore, we are left to consider whether Fullmer waived his claim and, if not waived, whether his substantial rights were adversely affected.

Addressing Allstate's claim of waiver first, we note that Indiana Trial Rule 51(C) permits parties to "file written requests that the court instruct the jury on the law as set forth in the requests." However, these requests are to be made "[a]t the close of evidence and before argument." T.R. 51(C). No error can be predicated upon the refusal to give an instruction which was not tendered to the trial court until after the closing arguments begin. *Klitzke v. Smith*, 59 Ind.App. 461, 109 N.E. 412, 413 (1915).

Fullmer initially submitted "Plaintiff's 2" with all the instructions which it intended to offer to the trial court, but when considered by the trial court, Fullmer expressly withdrew the instruction. Therefore, we conclude that Fullmer did not tender "Plaintiff's 2" before closing arguments began. Fullmer contends that his failure to do so should be excused because he withdrew the instruction "based on the representations of opposing counsel," but "later sought to have the instruction issued to correct a misleading implication raised by their opponents." (Appellant's Reply Br. p. 5). It may be possible that misleading statements by opposing counsel during closing argument would justify a curative instruction by the trial court; however, we disagree with the latter portion of Fullmer's contention here.

Initially, we note that Fullmer began the presentation of closing arguments and addressed the procedural decision to not sue Akinribade before Allstate had any chance to present closing arguments. More importantly, we do not interpret any statement from Allstate during closing arguments as alleging that Fullmer improperly failed to name Akinribade as a defendant. Fullmer bases his contention of "misleading implication" upon the portion of Allstate's argument where it stated as follows:

> You know, it's interesting—in a lot of cases that I try, we're not so lucky to have independent witnesses, because often times people don't want to be inconvenienced. They don't want to have to get drug into court five, six years after it happens and testify about what they saw. Ruby Bacon and Sean Finley have absolutely no interest in the outcome of this case. None. Ebenezer [Akinribade]—no interest in the outcome of this case. He's not been sued. He's not going to feel the repercussions. They could have sued him. They didn't. The interested party in this case is the Plaintiff himself. [] He has a vested interest in telling you it wasn't his own fault, and he's the only person that does have that interest.

(Tr. p. 19). This argument by Allstate carries no contention impugning the propriety of the procedural decision of naming Allstate alone as a defendant, but rather encouraged the jury to consider the interests of the witnesses who had testified when determining their credibility. "The jury must evaluate the credibility of the witnesses in reaching their verdict," and, therefore, credibility "is a legitimate area for counsel to cover in final arguments." *Lyda v. State*, 272 Ind. 15, 395 N.E.2d 776, 780 (Ind. 1979). Moreover, although the proposed jury instruction was a proper statement of law, we fail to see how it would counter Allstate's legitimate argument that the jury could consider the fact that Akinribade had no stake in the outcome of the litigation when judging his credibility. Therefore, we find no reason that would excuse Fullmer's waiver of his request to have the jury instructed on the propriety of the procedural decision to only name Allstate as a defendant.

Additionally, since Allstate made a proper argument which the proposed jury instruction did not address, we fail to see how Fullmer's substantive rights could have been adversely affected by the trial court's refusal to give the proposed jury instruction. Furthermore, Fullmer explained twice during oral arguments that he had appropriately named only Allstate as a defendant. Therefore, Fullmer has failed to demonstrate a reasonable probability that his substantive rights were adversely affected.

CONCLUSION

Based on the foregoing, we conclude that Fullmer waived his opportunity to have the jury instructed that it was proper to name only Allstate as a defendant, and even if the trial

court had erred by refusing to give that instruction, Fullmer has failed to demonstrate a reasonable probability that his substantive rights were adversely affected.

Affirmed.

BAKER, C.J., and FRIEDLANDER, J., concur.