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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
No. 2013-SC-000425-D

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TAMMY DILLARD

APPELLANT

On Review from the Court of Appeals
No. 2011-CA-001917-DG
Jefferson Circuit Court
No. 11-XX-00017
Hon. Frederic Cowan, Judge

v.

COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY BRIEF FOR APPELLANT, TAMMY DILLARD

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Certificate of Service

This is to certify that a copy of the foregoing was mailed, first class postage prepaid, to Hon. Frederic Cowan, Judge, Jefferson Circuit Court, Division 13, Jefferson County Judicial Center, Louisville, KY 40202, to Hon. Jennifer B. Wilcox, Judge, Jefferson District Court, Division 101, Jefferson County Judicial Center, Louisville, KY 40202, and to Hon. David A. Sexton, Special Assistant Attorney General, Assistant County Attorney, Fiscal Court Building, 531 Court Place, Suite 1001, Louisville KY 40202, and served electronically, by agreement, on Hon. Dorislee Gilbert, Assistant Commonwealth's Attorney, 514 West Liberty Street, Louisville, KY 40202, at dgilbert@louisvilleprosecutor.com, on November 25, 2014. I further certify that the record on appeal was not removed from the office of the Clerk of this Court.

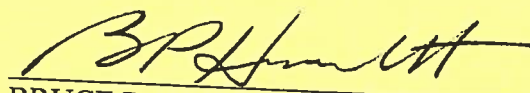

BRUCE P. HACKETT

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PURPOSE OF THE BRIEF

This brief is filed in order to reply to arguments made by the Commonwealth in its brief. The offense of driving without insurance is not a crime that, in and of itself, causes monetary damages to a victim. Therefore, restitution cannot be imposed unless a different criminal offense results in monetary damages to a victim.

STATEMENT OF THE CASE

On page 1 of the Counterstatement of the Case, the Commonwealth accurately states that Tammy Dillard admitted in Jefferson Circuit Court that the officer who investigated the accident determined that Ms. Dillard was at fault.” It is true that the officer concluded that Ms. Dillard was at fault. But while the Commonwealth maintained that Ms. Dillard was at fault for the accident, Ms. Dillard maintained that there was another vehicle involved in the accident, which left the scene, and the driver of that vehicle was the person who actually caused the accident. (AR, 1/7/11, 01:04, 03:00). The officer who responded to the scene of the accident and wrote the report was not an eyewitness to the accident. The issue of liability was never resolved by any court.

ARGUMENT

- I. **The Jefferson Circuit Court had jurisdiction to hear the merits of Ms. Dillard’s appeal from her conditional plea of guilty taken pursuant to RCr 8.09 from a judgment imposing a conditionally discharged sentence.**

The parties are in agreement that Ms. Dillard’s appeal was proper under RCr 8.09. (Brief for the Commonwealth, pp. 5-7). Both the circuit court and the Court of Appeals had jurisdiction to address the merits of the issue of law reserved for appellate review by the conditional plea of guilty under RCr 8.09.

II. The district court erred when it ruled that restitution payments may be imposed upon a person based upon the fact that the person is charged with failure of owner to maintain required insurance under KRS 304.39-080(5) and KRS 304.99-060.

The Commonwealth says that “[t]he compulsory automobile insurance law in this Commonwealth addresses ‘the evil’ of financially irresponsible persons operating motor vehicles on the public roads and highways of the state. [Citations omitted].” (Brief for the Commonwealth, p. 7). The Commonwealth argues that “the Jefferson District Court was required by law to consider whether any persons who suffered economic loss as a result of that failure to obtain insurance should be provided restitution by the Appellant.” *Id.*

But Ms. Dillard’s violation of the compulsory insurance law was not “a substantial factor in causing the accident” that resulted in the damage to Ms. Halk’s vehicle. *See Rentschler v. Lewis*, 33 S.W.3d 518, 519 (Ky. 2000). In *Rentschler*, the defendant believed that he had a valid operator’s license at the time of an accident. But the defendant’s license had been suspended. *Id.* This Court explained that the violation of the licensing law was irrelevant and inadmissible in a trial to determine causation and liability for damages. *Id.* The Commonwealth’s assertion that Ms. Dillard must be required to pay restitution because “[t]he compulsory automobile insurance law in this Commonwealth addresses ‘the evil’ of financially irresponsible persons operating motor vehicles on the public roads and highways of the state” is not a sound argument. The law requiring drivers to be properly licensed addresses “the evil” of unqualified and incompetent drivers “operating motor vehicles on the public roads and highways of the state,” but as seen in *Rentschler*, a violation of that law cannot be the basis for imposing

liability and damages on the violator. The same is true for the violator of the compulsory insurance law.

Kentucky Revised Statute (KRS) 304.39-080(5) simply states that any owner or operator of a motor vehicle shall provide security “for the payment of basic reparation benefits” and “for payment of tort liabilities.” Criminal penalties for violation of this statute are addressed in KRS 304.99-060. The mandatory insurance statute identifies no mental state. It is a strict liability criminal statute. See KRS 501.030 and 501.050. It was no defense that Ms. Dillard thought she was covered by insurance on the day of the accident. But under KRS 501.060(1), “Conduct is the cause of a result when it is an antecedent without which the result in question would not have occurred.” Ms. Dillard’s conduct of driving without insurance did not cause the result of damage to Ms. Halk’s car. Contrary to the Commonwealth’s argument on page 8 of its brief, the property damage to Ms. Halk’s car was not “property damage and other expenses suffered by a victim because of [the] criminal act” of failure to maintain insurance. KRS 532.350(1)(a).

As the Commonwealth states on page 8 of its brief, the Commonwealth continues to rely upon *Fields v. Commonwealth*, 123 S.W.3d 914 (Ky. App. 2003), for the proposition that “KRS 532.032 (and the statutes incorporated therein) is now the generally applicable criminal restitution statute.” [*Fields, supra*, 123 S.W.3d at 916]. (Brief for the Commonwealth, p. 8). This quote from *Fields* was, in context, a declaration by the Court that KRS 532.032 is generally applicable in restitution cases and that the other restitution statute, KRS 431.200, was now merely “an alternative procedure for a post-sentencing restitution order.” *Fields, supra*, 123 S.W.3d at 916.

The problem with the Court of Appeals declaration that KRS 431.200 is a mere “alternative procedure” for imposing restitution is that KRS 532.032, 532.033, 532.034 and 533.030 do not address at all the procedure by which a criminal court goes about determining if restitution should be imposed and, if so, how much restitution should be ordered. On the other hand, KRS 431.200 specifically sets out the procedure by which the sentencing court makes the necessary determinations of fact (trial by jury) before imposing restitution. The restitution statutes must be read together and harmonized, giving effect to both. *See Mitchell v. University of Kentucky*, 366 S.W.3d 895, 900 (Ky. 2012).

On page 9 of its brief, the Commonwealth argues that since Ms. Dillard’s sentence was conditionally discharged, KRS 532.032(3) “expressly mandates” that “restitution shall be a condition of the sentence.” The Commonwealth says that KRS 533.030(3) also authorizes restitution for crime victims when probation or conditional discharge is imposed. (Brief for the Commonwealth, p. 9). Specifically, the Commonwealth says, “KRS 533.030(3) expressly requires restitution ‘where a victim of crime has suffered monetary damage as a result of the crime, ...’”. (Brief for the Commonwealth, p. 9). But in this case, the damage to Ms. Halk’s car was not caused by the crime of driving without insurance. Rather, it was caused by a collision with another vehicle in an accident not attributed to the commission of a crime. The facts here are in sharp contrast to the facts in the case cited by the Commonwealth on page 13 of its brief, *Hearn v. Commonwealth*, 80 S.W.3d 432 (Ky. 2002). In *Hearn*, the two defendants engaged in a scheme that allowed them to steal \$300,000 from the Jefferson County school system. In *Hearn*, the crimes directly caused the loss.

The Commonwealth next relies upon the definition of “restitution” found in KRS 532.350. “KRS 532.350(1)(a) defines restitution as ‘any form of compensation paid by a convicted person to a victim for counseling, medical expenses, lost wages due to injury, or property damage and other expenses suffered by a victim because of a criminal act.’” (Brief for the Commonwealth, p. 9). Once again, the language of the statute demonstrates the flaw in the Commonwealth’s argument. Here, Ms. Halk’s “property damage” was not suffered by Ms. Halk “because of [the] criminal act [of driving without insurance].” The property damage was inflicted, not by the criminal act, but by a collision occurring during a motor vehicle accident that may or may not have been caused by negligence.

If the Commonwealth is correct that a conviction for the crime of driving without insurance, in and of itself, requires the mandatory imposition of restitution for damages that occurred during a motor vehicle accident involving the uninsured motorist, then fault and liability for the accident and the resulting damages are all irrelevant. The uninsured motorist would be on the hook for all damages whether the other motorists actually negligently caused the accident or not. In a two-vehicle collision involving two uninsured motorists, the district court would be required, by operation of law, to enter orders requiring each motorist pay for the damages suffered by the other.

Another way of looking at what happened in this case is that Ms. Halk made the personal decision to assume the risk that she would suffer monetary damages if she ever collided with a vehicle that was not covered by insurance. She assumed that risk by deciding to forego purchasing full coverage or comprehensive insurance. In fact, one of

the other motorists involved in the collision in this case, Ms. Napper, had elected to place comprehensive insurance on her vehicle, thus she made no claim for restitution.¹

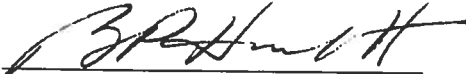
On page 13 of its brief, the Commonwealth says, “Further, it ought to be pointed out that the Appellant’s claim she is entitled to a trial by jury in this case would seemingly strike down the ability of courts to take up restitution at sentencing in all criminal cases.” But that is simply not true. The lack of a direct relationship between the crime committed and the damage resulting from a car accident and the need to apply the tort principles of fault, liability, proximate cause and damages combine to render the criminal proceeding a poor choice of forum to resolve the issues. With regard to motor vehicle accidents, the Motor Vehicles Reparation Act (MVRA) and the civil courts provide the victims with a forum designed to address the factual and legal issues that must be resolved. *See McGrew v. Stone*, 998 S.W.2d 5 (Ky. 1999) and *Kentucky Farm Bureau Mutual Ins. Co. v. Shelter Mutual Ins. Co.*, 326 S.W.3d 803 (Ky. 2010).

In contrast, in a typical criminal case, like *Hearn v. Commonwealth*, 80 S.W.3d 432 (Ky. 2002), wherein the defendants pleaded guilty to crimes (theft) that directly caused the damages to the victim, there is no reason why the criminal court cannot determine the amount of damages and order restitution. A ruling by this Court that an uninsured motorist involved in a collision cannot be ordered to pay restitution by a court that finds her guilty of driving without insurance, absent the existence of a separate criminal offense that directly caused damage to a victim, would not “strike down the ability of courts to take up restitution at sentencing in all criminal cases.”

¹ “The Commonwealth explained that Ms. Napper had full coverage on her automobile and that the Commonwealth would not be seeking restitution for damages to the Napper car should the Appellant be ultimately convicted. (CD 1-7-11, 1:40).” (Brief for the Commonwealth, p. 2).

CONCLUSION

For the foregoing reasons, the movant, Tammy Dillard, respectfully requests that this Court reverse the Opinion of the Court of Appeals, the Opinion and Order of the Jefferson Circuit Court and the Judgment of the Jefferson District Court.



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