SUPREME COURT OF KENTUCKY

2007-SC-0046-DG
(2005-CA-1290-MR)

JAMES B. TENNILL, SR. — MOVANT

JEFFERSON CIRCUIT COURT
2004-CI-3573

V.

CYRUS M. TALAI — RESPONDENT

BRIEF FOR MOVANT, JAMES B. TENNILL, SR.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I certify that a copy of this response has been served by mail, this 30 day of November, 2007, upon David A. Shearer, Jr., David W. Zahniser, James Cawood, III, Freund, Freeze & Arnold, Fourth & Walnut Centre, 105 East Fourth Street, Suite 1400, Cincinnati, Ohio 45202; Honorable Stephen K. Mershon, Judge, Jefferson Circuit Court, Div. 9, 700 West Jefferson Street, Louisville, Kentucky 40202; and Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601.

LEE E. SITLINGER

INTRODUCTION

This is a personal injury case arising out of a motor vehicle accident where the Court of Appeals reversed the Trial Court's judgment in favor of an injured victim against a defaulting party by extending this Court's opinions in Fratzke v. Murphy, 12 S.W.3d 269 (Ky. 1999) and LaFleur v. Shoney's Inc., 83 S.W.3d 474 (Ky. 2002).

STATEMENT CONCERNING ORAL ARGUMENT

Movant, James B. Tennill, Sr., desires oral argument in this matter as he believes it would facilitate this Court's understanding of the issues and arguments of the parties.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This personal injury action arose out of a motor vehicle accident that occurred on May 2, 2002 on Shelbyville Road in Jefferson County, Kentucky, involving a motor vehicle operated by Plaintiff/Movant, James Tennill (hereinafter "Tennill"), and a motor vehicle operated by Defendant/Respondent, Cyrus Talai (hereinafter "Talai"). Liability for the occurrence of the motor vehicle accident was clear and rested solely with Talai.

(a) Talai's carrier knew from the outset that Tennill was seeking damages in excess of its minimal $25,000 liability coverage limits.

At the time of the motor vehicle accident, Talai was insured under a policy of automobile liability insurance issued by Safe Auto Insurance Company, with minimal liability coverage limits of $25,000. Although Tennill's personal injury claim had a value in excess of $25,000, Tennill expressed a willingness to accept that amount in settlement prior to suit, rather than pursuing Talai personally. Safe Auto's only objection that it voiced to this proposed resolution was its concern about a potential "Medicare lien", a concern that did not and does not, in fact, exist[1]. (T.R., p. 28; Attachment A).

It was imminently clear from the outset that Tennill would only accept Talai's minimal $25,000 liability coverage limits in settlement and that if Talai's carrier was unwilling to pay these limits in settlement that Tennill would be seeking damages in excess of these limits.

Safe Auto's representative repeatedly failed to respond to Tennill's counsel's request for a response to this settlement proposal and therefore this lawsuit was filed, service was effected upon Talai, and judgment pro confesso was thereafter obtained against him due to his failure to file an Answer (T.R., p. 36; Attachment B).

[1] Tennill's medical expenses were paid by his no-fault insurance carrier and not by Medicare.

(b) Talai was inexcusably in default in failing to timely respond to Tennill's lawsuit.

Safe Auto employed counsel to seek to set aside that judgment pro confesso, relying upon CR 60.02. That motion was denied by the Trial Court, whose decision in this regard was affirmed by the Court of Appeals. Both the Trial Court and the Court of Appeals found no "excusable neglect" or other permissible basis for setting aside that judgment pro confesso under the facts and circumstances presented, since both Talai and his carrier, Safe Auto, were aware of the fact that Talai had been properly served with process by a Special Bailiff and had failed to timely file an Answer. Included in the undisputed factual record in this case is the following:

(1) By letter dated March 29, 2004 (T.R., p. 28; Attachment A), Tennill's counsel informed Safe Auto of his intention to proceed with the filing of a lawsuit due to Safe Auto's failure to respond to Tennill's demand for payment of Safe Auto's minimal $25,000 policy limits.

(2) Having received no response from Safe Auto, Tennill's counsel proceeded with the filing of a lawsuit and sent a courtesy copy of that lawsuit to Safe Auto via the attached April 28, 2004 letter (T.R., p. 29; Attachment C), even though such additional notice was not required.

(3) Talai was personally served by a Special Bailiff on July 19, 2004 (T.R., p. 30; Attachment D). No dispute exists regarding the fact that service was properly affected on Talai on this date.

(4) By letter dated July 21, 2004 (T.R., p. 31; Attachment E), Tennill's counsel informed Safe Auto that its insured had been served with process and even provided Safe Auto with a copy of that summons return.

(5) Still having received no response from Safe Auto, Tennill's counsel proceeded with the filing of a motion for judgment pro confesso. Although not required by the rules of

procedure, Tennill's counsel sent Safe Auto a copy of that motion. In addition, a copy was mailed to Talai (T.R., pps. 32-35; Attachment F).

(c) Talai was provided substantial discovery and permitted to fully participate in the evidentiary hearing assessing Tennill's damages.

Despite being in default, Talai's counsel was permitted to participate in a hearing held for the purpose of assessing damages before the Trial Court on March 7, 2005 and cross-examine witnesses and introduce evidence, both testimonial and documentary.

In addition, Talai's counsel obtained a lengthy and detailed deposition of Tennill on November 8, 2004 and was voluntarily provided with a medical authorization authorizing him to obtain copies of Tennill's medical/hospital records from any provider he desired. In fact, Talai's counsel utilized that authorization and obtained medical and hospital records from virtually all of Mr. Tennill's healthcare providers including;

Dr. Bryan Murphy;
Associates in Internal Medicine;
Harry C. Stephenson, M.D.;
Dr. William Hoagland;
Baptist Hospital East;
Jewish Hospital;
Family Allergy and Asthma; and
Fox and Simon, P.S.C.

In spite of being provided with the foregoing opportunity to fully evaluate this case, Safe Auto continued to refuse to pay its minimal $25,000 liability coverage limits in settlement. Therefore, no possibility of settlement existed since Talai's counsel and carrier were always aware of the fact that Tennill felt his claim warranted payment of Safe Auto's maximum $25,000 liability coverage limits, and Safe Auto continually refused to pay that settlement demand. There

was, therefore, never any "surprise" that Tennill was seeking damages in excess of Safe Auto's $25,000 policy limits.

Although Talai's counsel orally complained at the commencement of the evidentiary hearing that he never received written answers to interrogatories[2] which had been propounded prior to the date of Tennill's deposition, a telephone conversation occurred between the offices of counsel for Tennill and Talai regarding the fact that those discovery requests had either not been sent or not received in Tennill's counsel's office. A deposition of Tennill was thereupon scheduled for November 8, 2004. At the time of the deposition, Talai's counsel was given unlimited opportunity to inquire of Tennill of any discoverable information. As the deposition of Tennill will reflect, virtually all information requested in the written discovery was inquired of and provided in Tennill's responses to those deposition questions. Talai's counsel never made a request for any additional discovery, nor ever filed any motion to compel additional discovery or obtain additional information prior to the evidentiary hearing.

(d) Talai's carrier was provided specific itemization of Tennill's claimed damages, both special and unliquidated, at least thirty (30) days prior to the Trial Court's Findings of Fact yet that information did not alter Talai's carrier's settlement position.

Although not required by any pretrial order, Tennill's counsel advised the Trial Court and Talai's counsel of the specific monetary damages which were being requested **prior** to the commencement of the evidentiary hearing.

Immediately prior to the commencement of the evidentiary hearing before the Trial Court, Talai's counsel verbally requested that the Court not assess damages for unliquidated damages relying upon CR 8.01(2). This argument was considered and denied by the Trial Court

[2] Copies of these Interrogatories apparently did not appear in the Court record in this case.

on three separate occasions, (1) during the March 7, 2005 evidentiary hearing on damages, (2) in subsequently filed trial memoranda, and (3) in considering Talai's CR 59.05 motion. The trial court properly rejected that argument, concluding that Fratzke v. Murphy, 12 S.W.3d 269 (Ky. 1999) and LaFleur v. Shoney's, Inc., 83 S.W.3d 474 (Ky. 2002) do not apply to a hearing to assess damages in a default judgment proceeding. That decision, however, was supportable on other grounds based on the facts and circumstances presented.

The Trial Court thereupon proceeded with conducting an evidentiary hearing for the purpose of assessing Tennill's damages. However, the Trial Court did not render its Findings of Fact until thirty (30) days later. In addition, the Trial Court advised Talai's counsel that it would grant him additional time to supplement the evidence if he so desired. Talai's carrier therefore had complete CR 8.01(2) information for at least thirty (30) days prior to any verdict yet it did not alter or change its evaluation or settlement position in any manner. Talai's carrier continued to refuse to offer its $25,000 policy limits in settlement. This further demonstrates the immateriality of CR 8.01(2) information at an earlier date under the facts and circumstances presented in this case. Following the evidentiary hearing, the parties were permitted to file extensive post-trial briefs. Thereafter, by Findings of Fact, Conclusions of Law and Judgment thereafter entered on April 6, 2005 (T.R., pps. 404-411; Attachment G), the trial court assessed Tennill's damages in the amount of $45,076 and entered judgment accordingly.

A motion to amend, alter or vacate those Findings of Fact, Conclusions of Law and Judgment on behalf of Talai was denied by Order entered May 23, 2005 (T.R., p. 436; Attachment H).

By Opinion rendered December 15, 2005, a panel of the Kentucky Court of Appeals affirmed the trial court's granting of a default judgment to Tennill against Talai under the facts

and circumstances presented. However, that Court of Appeals panel concluded that Tennill should not have been entitled to recover any damages against a defaulting party unreasonably extending the Court's holdings in Fratzke and LaFleur (Attachment I), to a factual situation involving a defaulting party and circumstances where such information clearly served no useful purpose.

On September 12, 2007, the Supreme Court of Kentucky entered an Order granting discretionary review of that Court of Appeals' Opinion. (Attachment J).

ARGUMENT

As previously stated, Talai's carrier was always aware of the fact that Tennill's claimed damages exceeded Talai's minimum $25,000.00 policy limits. Tennill had clearly indicated that no amount less than the available liability coverage limits would be acceptable in settlement. This information was known to Talai's carrier prior to the institution and throughout the pendency of this lawsuit. Talai and his carrier cannot claim any "surprise" of this fact.

The motor vehicle accident giving rise to this lawsuit occurred on May 2, 2002. The within lawsuit was not filed until April 28, 2004 almost two years after the date of that accident. By the time of the filing of this lawsuit, Tennill had concluded all medical treatment related to injuries from this motor vehicle accident and, therefore, Talai and his carrier had available to them all necessary information within which to promptly evaluate this claim. In spite of the availability of that information, Talai's carrier never evaluated Tennill's claim at or near Talai's $25,000 policy limits.

A default judgment was entered against Talai on August 25, 2004. Thereafter, a motion filed on behalf of Talai to set aside that default judgment and permit the filing of an Answer was denied on October 11, 2004. A hearing for the purpose of assessing Tennill's damages was not conducted until March 7, 2005[3].

On November 8, 2004, Talai's counsel obtained a lengthy and detailed deposition of Tennill. Although Talai's counsel complained that he never received written answers to those interrogatories (including a CR 8.01 interrogatory) which had allegedly been propounded prior to the date of Tennill's deposition, a telephone conversation occurred between the offices of counsel for Tennill and Talai regarding the fact that those discovery requests had either not been sent or not received in Tennill's counsel's office. Tennill's deposition proceeded on November 8, 2004. During that deposition, Talai's counsel was given unlimited opportunity to inquire of Tennill any discoverable information. As the deposition of Tennill will reflect, virtually all information requested in the written discovery was inquired of and provided in Tennill's responses to those deposition questions. Talai's counsel never made any additional request for discovery nor ever filed any motion to compel discovery pursuant to CR 26 prior to the evidentiary hearing.

Although not required by any pre-trial order, Tennill's counsel advised the Trial Court and Talai's counsel of the specific monetary damages which were being requested **prior** to the commencement of the evidentiary hearing. Talai's counsel was informed that Tennill would be seeking damages totaling $100,000.00 consisting of $75,000.00 for pain and suffering and $25,000.00 for lost income.

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[3] The original date of the hearing was postponed so that Talai's counsel would have the opportunity to obtain Tennill's deposition and copies of his complete medical records both before and after the accident date. Talai's counsel was even voluntarily provided an executed medical authorization from which he could and in fact did obtain complete copies of Tennill's medical records from virtually every health care provider who had ever treated him for any medical condition both before and after the date of the MVA.

Prior to the rendering of any damage award, the Trial Court permitted the parties to file post hearing briefs. Tennill again advised Talai in his post hearing brief that his claimed damages consisted of $25,000.00 lost income and $75,000.00 pain and suffering.

Findings of Fact and Conclusions of Law were not rendered by the Court until April 6, 2005, an entire month after the evidentiary hearing. It is therefore impossible for Talai to contend that he was harmed or prejudiced in any manner by not being provided with Tennill's specific monetary demands at any earlier date.

I. A defaulting party is not entitled to prevent assessment of damages against him under Fratzke v. Murphy, 12 S.W.3d 269 (Ky. 1999) and LaFleur v. Shoney's Inc., 83 S.W.3d 474 (Ky. 2002).

The Supreme Court's rulings in Fratzke v. Murphy, Ky., 12 S.W.3d 269 (2000) and LaFleur v. Shoney's Inc., Ky., 83 S.W.3d 474 (2002) should not be extended to provide a defaulting party with immunity from his tortious conduct on a technicality.

Talai's reliance upon Fratzke and LaFleur is misplaced. Those cases deal with the rights and obligations between parties who have timely and properly entered their appearance into an action. In the present action, however, Talai is in default and was unsuccessful in persuading the trial court to permit him to set aside that Default Judgment and file an Answer to Tennill's Complaint. Under such circumstances, Talai should have no right to rely on Fratzke and LaFleur and completely avoid his liability to an innocent motor vehicle accident victim. It is questionable whether he was even entitled to notice of the evidentiary hearing under the facts and circumstances presented. Green Seed Company, Inc. v. Harrison Tobacco Storage Warehouse Inc., Ky.App., 663 S.W.2d 755 (1984); Pound Mill Coal Company v. Pennington, Ky., 309 S.W.2d 772 (1958); Smith v. Gadd, Ky., 380 S.W.2d 495 (1955).

"... CR 55.01, however, requires notice only when the party has made an appearance before the Court..." Green Seed Company at p. 758.

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"We find no merit in Appellant's second contention.[4] Appellants had failed to "appear" in the action, and in such cases it is not necessary to serve written notice of the application under CR 55.01, and this section does not require a written motion for judgment to be filed during the course of a trial." Pound Mill Coal Company at p. 773.

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"No question is raised concerning Defendants' default, and if such default was excusable and they have a meritorious defense to the action, they are not precluded from proceeding under CR 60.02, as authorized by CR 55.02. We, of course, do not venture any suggestion that such proceeding would or would not be successful." Smith at p. 498.

In the present action, of course, Talai unsuccessfully attempted to persuade the trial court to set aside Tennill's judgment by default in accordance with CR 60.02. That motion was denied.

This argument was considered and denied by the trial court on three separate occasions, (1) during the March 7, 2005 evidentiary hearing on damages, (2) in subsequently filed trial memoranda, and (3) in considering Talai's CR 59.05 motion. The trial court properly rejected same;

"... the Court agrees with the Plaintiff that CR 8.01 and the line of cases beginning with Fratzke v. Murphy, Ky., 12 S.W.3d 269 (2000), do not apply here. The Defendant is in default. He has no right to compel discovery and, in fact, had no right to notice of this evidentiary hearing."

Talai's reliance upon Howard v. Fountain, Ky. App., 749 S.W.2d 690 (1988) is misplaced. Contrary to Talai's contentions, he was afforded a fair opportunity to participate in

[4] Appellant contended that the Default Judgment was not taken in accordance with the provisions of CR 55.01.

the evidentiary hearing, cross-examine witnesses and introduce evidence both testimonial and documentary.

In spite of his inexcusable default, Talai was permitted to obtain extensive discovery in order to aid his carrier in evaluating Tennill's claims. Talai's counsel obtained a lengthy and detailed deposition of Tennill on November 8, 2004 and was voluntarily provided with a medical authorization authorizing him to obtain copies of Tennill's medical/hospital records from any provider he desired. In fact, Talai's counsel utilized that authorization and obtained medical and hospital records from virtually all of Mr. Tennill's health care providers including Dr. Brian Murphy, Associates in Internal Medicine, Harry C. Stephenson, M.D., Dr. William Hoagland, Baptist Hospital East, Jewish Hospital, Family Allergy & Asthma, and Fox & Simon, P.S.C.

Talai's counsel's complaint that he never received written answers to Interrogatories which had been propounded in October 2004 prior to the date of Tennill's deposition is disingenuous. Although not reflected in the court record, a telephone conversation occurred shortly before Tennill's deposition between the offices of counsel for Tennill and Talai regarding the fact that those discovery requests had apparently either not been sent or not received in the undersigned's office. The deposition of Tennill was thereupon taken on November 8, 2004. At the time of the deposition, Talai's counsel was given unlimited opportunity to inquire of Tennill any discoverable information. As the deposition of Tennill will reflect, virtually all information requested in the written discovery was inquired of and provided in Tennill's responses to those deposition questions. Talai's counsel never made an additional request for discovery, nor ever filed any motion to compel discovery prior to the evidentiary hearing. In particular, there was never any request for CR 8.01 information thereafter until the date of the evidentiary hearing.

It is significant to note that the purpose in providing CR 8.01 information is not present in a default proceeding. That fact is clearly evidenced in the present case. Both Talai's counsel and his carrier were always well-aware of the fact that Tennill was seeking damages in excess of Talai's available $25,000.00 policy limits. Repeated communications to Talai's carrier prior to litigation and repeated communications to Talai's counsel and carrier after litigation clearly conveyed Tennill's position that while he was willing to accept Talai's available $25,000.00 liability coverage limits in settlement, a larger amount of damages was being sought if a settlement was not effected. Talai's counsel fails to inform us as to what reasonable purpose additional information in this regard would have served.

The unjust and illogical result of the strict application of CR 8.01 to insulate a defaulting party from his tortious conduct is vividly demonstrated in this case. (a) Liability for the occurrence of the underlying motor vehicle accident clearly rested solely with Talai. Tennill was an innocent victim of that MVA. (b) Tennill was injured as a result of that MVA. (c) Talai only had minimal $25,000 liability coverage limits to satisfy Tennill's claim. (d) Talai's carrier and his counsel were always well-aware of the fact both before and throughout the pendency of this lawsuit that Tennill was seeking damages in excess of Talai's liability coverage limits. (e) Talai's counsel was advised prior to the commencement of the evidentiary hearing of the precise amount of monetary damages for both special and general damages which Tennill was asking the Trial Court to award him. (f) Talai's counsel and carrier had an additional thirty (30) days after the evidentiary hearing to utilize that information if they so desired yet it never altered their evaluation of Tennill's claims in any manner. Most importantly, (g) Talai was inexcusably in default. In spite of his status as a defaulting party he was afforded all rights to discovery afforded to non-defaulting parties and even voluntarily provided medical authorizations to obtain

complete copies of Tennill's pre-accident and post-accident health history, none of which altered Talai's carrier's evaluation of this case. In addition, he was allowed to fully participate in the evidentiary hearing assessing Tennill's damages, extended an offer by the Trial Court for additional time to add additional evidence if desired, and permitted to file an extensive post-hearing brief prior to the Trial Court's rendering of its Findings of Fact. To allow a tortious party who is inexcusably in default and who has injured an innocent citizen of our Commonwealth to totally escape civil liability under such facts is clearly unjust and unnecessary.

In sum, it is respectfully submitted that the Trial Court properly permitted Tennill to introduce evidence of unliquidated damages at the damage assessment hearing under the facts and circumstances presented and for that additional reason the Trial Court's judgment should be affirmed.

II. An appellate court should not be permitted to reverse a determination by the Trial Court that the facts and circumstances did not warrant the application of Fratzke and LaFleur absent a conclusion that the Trial Court abused its discretion in making that determination.

At the outset, it is submitted that a defaulting party should not be entitled to the same rights with regard to sanctions for non-compliance with discovery procedural rules as a party who has properly and timely appeared to defend an action against him. In any event, a Trial Court should be afforded discretionary authority to determine whether a violation has occurred and whether any sanction is appropriate under the facts and circumstances presented. The Trial Court, of course, is in the best position to make that determination and our procedural rules allow the Trial Court that discretionary authority in all matters arising out of discovery issues. It is respectfully submitted that that discretionary authority should extend to claims arising out of alleged non-compliance with CR 8.01 as well.

In its Opinion herein, the Court of Appeals failed to consider all underlying factors presented to the Trial Court for its consideration as to whether Talai was entitled to any remedy for Tennill's alleged failure to respond to his Interrogatories (including a CR 8.01 Interrogatory)[5]. The Trial Court, of course, was in the best position to consider all such factors and balance the total equities presented by the specific situation. This Court of Appeals panel, however, concluded that the Trial Court had no discretion in this regard,

> "... The language of the rule is mandatory and gives a trial court no discretion as to its application. ..." (Opinion, pps. 10-11.)

The unjust result which can occur as a result of an appellate court not affording a trial court discretionary authority in such matters is evident in the present case. As previously stated, Talai's Interrogatories had allegedly been sent to Tennill's counsel in advance of the date of Tennill's deposition. Although any telephone conversation between Talai and Tennill's counsel regarding non-receipt of these interrogatories is not reflected in the record, it is clear from the record that the deposition of Tennill proceeded without these interrogatories ever being answered and that Talai's counsel was permitted to and did inquire during Tennill's deposition into every area of inquiry contained within these Interrogatories. In addition, Talai's counsel was given an unlimited authorization from Tennill to enable him to obtain records pertaining to Tennill from any health care provider or other source desired. There was simply no significant purpose to be served in responding to these Interrogatories after Tennill's deposition since Talai's counsel had been provided with substantially all information requested in these Interrogatories from Tennill's deposition and authorization. The fact that Talai never made a motion to compel answers to

[5] In addition to being a defaulting party, Talai was advised of the total damages claimed prior to the commencement of the evidentiary hearing and possessed that information for thirty (30) days after the hearing and prior to the date of the Trial Court's rendering of its Findings. In addition, Talai's carrier and counsel were well-aware of Tennill's claims for damages in excess of Talai's policy limits before and throughout the pendency of the lawsuit. Therefore, clearly no harm resulted from Tennill's alleged failure to respond to Talai Interrogatories. Lastly, Talai never requested any order from the Court compelling Tennill to respond to his Interrogatories.

these Interrogatories or any request for additional information after Tennill's deposition and prior to the commencement of the hearing is evidence of that fact.

The foregoing events were within the Trial Court's knowledge and were part of the information which he utilized in considering his discretionary authority on Talai's motion to exclude Tennill's unliquidated damages.

The Court of Appeals failed to acknowledge other information within the Trial Court's knowledge which supported its discretionary authority in this case including the fact that Talai and his carrier and counsel were always well-aware of the fact that Tennill was seeking damages in excess of Talai's $25,000 policy limits both before and throughout the pendency of the lawsuit, that Talai was provided with the specific amount of claimed damages prior to the commencement of the evidentiary hearing and at least thirty (30) days prior the date of the Trial Court's Findings of Fact. Under such circumstances, it can hardly be stated that the Trial Court abused its discretion in denying a defaulting party's motion to exclude Tennill's claims for unliquidated damages.

In its Opinion, this Court of Appeals' panel also makes the following criticism of Tennill's counsel's conduct in this matter,

> "... Tennill failed to move for leave to answer such requests...."
> (Opinion, p. 13).

This statement further demonstrates why such matters should be left to the sound discretion of the Trial Court and subject to review only in situations reflecting an abuse of that discretion. Talai verbally requested that the Trial Court exclude Tennill's unliquidated claims at the commencement of the evidentiary hearing. By that time, Talai's counsel had been provided with the specific amounts of total damages which would be claimed by Tennill during the hearing. The Trial Court further extended an offer to Talai's counsel for additional time to

supplement the evidentiary record after the actual hearing if he so desire. In addition, the Trial Court did not render its verdict until thirty (30) days after the evidentiary hearing. CR 8.01(2) information at an earlier date would clearly not have served any useful purpose. Such a motion as suggested by the Court of Appeals would have served no useful purpose to either party. This statement by the Court of Appeals, however, demonstrates why the Trial Court should be granted discretionary authority since the Trial Court has available to it all such knowledge and information upon which to base a sound and just determination.

It is respectfully submitted that the Trial Court did possess such discretionary authority in this case and the fact that this Court of Appeals' panel concluded that no such discretionary authority existed warrants a reversal of that Court's decision in this case.

Contrary to the Court of Appeals' holding in this case, another panel of the Court of Appeals clearly recognized the Trial Court's discretion in allowing a plaintiff to provide CR 8.01 information even during the course of the trial,

> While we agree with the trial court that *Fratzke* held CR 8.01(2) to be mandatory and that CR 8.01(2) eliminates the discretion of the trial court when applying that rule, we disagree with the trial court's interpretation of *Fratzke* as it was applied to Prater's motion for leave to file belated answers to the interrogatories. *Fratzke* and *LaFleur* both hold that the trial court retains the discretion to consider a motion for leave to file belated answers to interrogatories during the court of the trial. While *Fratzke* precludes a trial court "from awarding damages for unliquidated claims that are in excess of the last amount claimed by the plaintiff in answers to interrogatories," the Supreme Court further stated that "nothing in the rules precludes a trial court from entertaining a motion to supplement answers to interrogatories after trial has commenced."
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> Thus, the trial court's reliance on *Fratzke* in support of its decision to deny Prater's motion for leave to file belated answers is misplaced as *Fratzke* does not limit a trial court's discretion in this regard. *Fratzke* simply limits the amount of unliquidated damages a party can claim to the last amount stated in the answer to

> interrogatories. It is within the discretion of the trial court during the trial to determine whether it will allow the plaintiff to supplement those answers, thus changing the last amount stated.
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> Prater v. Castle, 139 S.W.3d 921 (Ky.App., 2003), at pps. 925-926 (emphasis added).

The within action, of course, was tried before the Trial Court sitting without a jury as the Finder of Fact as well as the Determiner of Law. CR 8.01 information had been provided to Talai's counsel prior to the commencement of the evidentiary hearing. The Trial Court permitted Tennill to assert claims up to the amount of those claimed amounts[6]. It is significant to note that Talai's alleged error in this regard did not stem from any allegation that Tennill failed to request leave of court to belatedly provide that information but rather Talai claims that the Trial Court had no discretion to consider such a supplementation of CR 8.01 information in any manner. The Trial Court clearly had discretionary authority to allow Tennill to supplement his CR 8.01 information at the commencement of the evidentiary hearing in the manner in which that leave to supplement was requested. Since that information had already been provided, a motion to supplement was unnecessary.

As the Court of Appeals' opinion in the within action clearly demonstrates, lack of discretionary authority with the Trial Court on matters pertaining to discovery, including CR 8.01, and other such matters can lead to unjust results. The Trial Court is uniquely positioned by virtue of his or her knowledge of the totality of the case to render decisions on such matters fair to all parties which achieve just results based on the merits of the case.

The recognition of the potential for a miscarriage of justice in any given case by an appellate court failing to defer to a Trial Court's discretion in such matters was accurately

[6] The Trial Court's total damages awarded thirty (30) days later, were in fact substantially less than the CR 8.01 claim information provided by Tennill to Talai prior to the commencement of the hearing.

predicted by various members of the Supreme Court in the initial cases addressing the most appropriate manner of dealing with alleged violations of CR 8.01.

> "...The perspective of the trial judge with respect to analyzing prejudice, unfair surprise, and generally allocating responsibility is far superior to that of any appellate court" On an issue such as this, we should not substitute our judgment for that of the trial court. A trial judge is in the best position to assess prejudice. If the trial judge finds that there is no harm to the opposing party due to the omission, the trial judge should be allowed to admit the evidence on the damage claim." LaFleur v. Shoney's Inc., Supra, at p. 482.
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> "...I see no reason for this Court to usurp the discretion of the trial court in its handling of this discovery motion. Our draconian application of CR 8.01 has resulted in injustice, and harmed the judicial process by disturbing the relationship between appellate courts and trial courts." LaFleur v. Shoney's Inc., Supra, at p. 481.
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> "...actually sanctions "trial by ambush" and creates significant externalities likely to disrupt the "Economic Theory of Settlement." LaFleur v. Shoney's Inc., Supra, at p. 482.
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> "...Rules cannot think; judges can. It is for this that we should accord great discretion to trial judges in matters of this nature." Fratzke v. Murphy, Supra, at p. 275.
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> "... "there are no good economies in an unjust law," *Hilen v. Hays,* Ky., 673 S.W.2d 713, 718 (1984) and, above all else, this Court is charged with the duty to do justice." LaFleur v. Shoney's Inc., Supra, at pps. 482-483.

The fact that the three-judge panel of the Kentucky Court of Appeals in Prater and the within action consisted of two of the same judges demonstrates a need for the Kentucky Supreme Court to clarify and delineate the specific rules and responsibilities of the Trial Court and an

appellate court respectively in dealing with issues arising out of alleged violations of CR 8.01. It is respectfully submitted that the Trial Court is in the best position to consider all factors presented in any specific case and best able to render decisions balancing all equities and concerns and reaching just results, fair to all-concerned. The Trial Court should thereafter be given broad discretion in such matters subject to reversal only upon a clear showing of abuse of that discretion and resulting harm. Neither a clear abuse of discretion nor a resultant harm to a defaulting party are present in the within action. For that additional reason, the Court of Appeals' opinion in this case was erroneous and should be reversed.

III. The Supreme Court of Kentucky should revisit its holdings in Fratzke and LaFleur and either limit their unjust results or reverse them in their entirety.

It is respectfully submitted that this Court's opinions in Fratzke and LaFleur place too great of an importance on the parties in requiring a plaintiff to state what amount of damages are being requested for unliquidated damages under CR 8.01 prior to trial.

The underlying justification for the harsh application of CR 8.01 is based on an overly simplistic appreciation of the settlement negotiation process both before and during the litigation process. That underlying purpose which this Court has described as the "Economic Theory of Settlement"[7] fails to recognize the fact that the parties' evaluation of a case is not based on the amount of damages which a plaintiff's attorney requests from the jury but rather upon the information and documentation obtained during the course of discovery pertaining to both liability and damages. From that information and documentation a reasonable and experienced attorney evaluates his or her client's risk and exposure. The amount of damages requested by a plaintiff's attorney during closing arguments has little, if any, bearing on that evaluation. The

[7] LaFleur v. Shoney's Inc., Supra, at 478.

plaintiff attorney's settlement demand and the defendant attorney's settlement offer, if any, are known to the parties prior to the commencement of trial even without CR 8.01.

The determination as to what amount of unliquidated damages a plaintiff's attorney elects to request from a jury is based on "strategy" not "substance". A plaintiff's attorney needs to balance his or her desire to impart his or her perceived significance of the case to the jury while simultaneously maintaining jury credibility. As any experienced trial attorney knows, that amount can and invariably will change even during the course of the trial dependent upon how the evidence is received by the jury.

Unlike special damages which can be quantified, unliquidated damages are by their very nature not capable of quantification. The determination as to the amount of unliquidated damages to be awarded in any particular case rests solely and exclusively within the province of the jury. While both the plaintiff and the defendant are at liberty to suggest an appropriate award for unliquidated damages, the jury can and invariably does disregard both parties' suggestions. Therefore, a plaintiff's attorney's statement as to the amount of unliquidated damages which he may request from the jury has limited, if any, real value.

Therefore, what is a defendant's purpose in desiring plaintiff's opinion regarding the value of his unliquidated damage claims? Two purposes have been suggested and on close examination both have limited, if any, value. Certainly those reasons do not justify the harsh sanction of denying a plaintiff any recovery for unliquidated damages solely by virtue of a technical failure to comply with CR 8.01.

(a) One purpose that has been suggested is that it enables an insurance company and the insurance company's counsel to advise the defendant of potential claims in excess of available liability insurance coverage.

As previously stated, this reason is non-existent under the facts and circumstances presented in this case since Talai's insurance carrier and its counsel were always continually aware of the fact that Tennill was seeking damages in excess of Talai's available liability insurance coverage limits. However, further examination of that stated purpose demonstrates its limited value.

Prior to the adoption of CR 8.01(2), a plaintiff was required to specify in his or her complaint a specific amount of money which he or she might ultimately request from the jury for unliquidated damages[8]. That obligation was unrealistic in many instances since the ultimate amount which might be requested from the jury in any specific case could vary significantly up or down dependent upon information learned during the course of discovery. In addition, many injured plaintiffs were still under active medical treatment for personal injuries which made an accurate evaluation of his or her claims impossible until his or her prognosis could be reasonably ascertained. As a result, the amount of *ad danum* claimed in the initial complaint was frequently high. Some attorneys utilized this opportunity to assert an excessive claim apparently for the purpose of scaring his or her opponent in what has been referred to as "shock value." Such attempts, however, have little or no effect upon an experienced defense attorney or insurance company representative who evaluate cases on their merits. In any event, CR 8.01(2) is nothing more than a mechanism to obtain this information, for whatever purpose, which had previously been provided in the original complaint.

[8] See Thompson v. Sherwin Williams Inc., 113 S.W.3d 140 (Ky. 2003), at p. 142.

Previously, insurance companies would routinely send a letter to their insured advising him or her of the fact that damages were being sought in excess of its available liability insurance coverage when the amount of damages claimed in the Complaint exceeded the amount of the insurance carrier's liability coverage limits. However, since this procedural change, insurance companies have had little difficulty in adjusting to this undetermined amount. Insurance carriers now routinely advise their insureds that the Complaint seeks unspecified damages which may exceed their available liability insurance coverage limits. Therefore, an insured defendant is always advised at the outset of any litigation of this potential personal exposure claim.

In addition, an insurance company and its retained defense counsel, are obligated to continually evaluate all evidence obtained during the course of discovery and advise the insured defendant when it appears that a potential excess verdict is probable regardless of plaintiff's CR 8.01 interrogatory answer.

In sum, the argument that an insurance company is entitled to be provided with CR 8.01 information for the purpose of advising its insured of his or her potential excess liability is therefore untenable and certainly does not warrant the harsh result of denying an innocent injured victim of his or her right to recover unliquidated damages.

(b) It has further been suggested that a CR 8.01 interrogatory answer is necessary to assist a defendant's insurance company in determining when to notify a reinsurer of a potential excess verdict claim.

Again, the underlying facts and circumstances presented in this case do not give rise to a consideration of this potential concern. In any event, this perceived purpose also has limited, if any, value and certainly does not warrant the imposition of a harsh sanction for a technical noncompliance.

By virtue of our broad and liberal discovery opportunities, an insurance company and its insured defendant have the opportunity to obtain virtually unlimited information regarding the nature and extent of an injured plaintiff's injuries and special damages. Based on the insurance company and its retained insurance counsel's vast experience, they are in at least an equal position to a plaintiff attorney to reasonably evaluate the amount of unliquidated damages which any reasonable jury is likely to assess. In fact, it is the insurance company and its retained counsel's evaluation and not a plaintiff's attorney's claimed amount which forms the basis for the insurance carriers' determination as to the amount of reserves to be set in any particular case and, when necessary, the appropriate reinsurers who need to be notified. That duty and responsibility is a continual duty which applies throughout the course of a pending lawsuit.

In the present case, Talai's counsel had available to him well before the commencement of the damage assessment hearing all medical records, information regarding Tennill's injuries, claimed medical expenses, etc. In addition, Talai even had available to him prior to commencement of the damage assessment hearing the specific amount of unliquidated damages which Tennill would be seeking at trial.

Lastly, Talai's counsel had available to him all information in this regard including CR 8.01 information for approximately one (1) month thereafter prior to the trial court's rendition of

its findings of fact herein yet it had no effect upon Talai's carrier's evaluation of Tennill's claims. This clearly demonstrates the fact that Talai's carrier suffered no harm by virtue of not receiving CR 8.01 information at an earlier date but is rather seeking to avoid payment of Tennill's valid claim merely on an alleged technical violation.

In sum, a Rule 8.01 interrogatory answer has limited value or use. The purpose of the foregoing is not to denigrate Rule 8.01 but to keep its purpose and potential harm if not followed in perspective to the loss of a meritorious claim for inadvertent failure to comply with Rule 8.01. The potential harm or the potential prejudice to a defendant and his insurance carrier pales in comparison.

This vividly demonstrates the importance of CR 37.04 being utilized in a consideration of the application of CR 8.01. If in fact a defendant truly requires a specific monetary amount in a Rule 8.01 interrogatory answer and same is not forthcoming, this Rule grants him or her the right to obtain a Court Order to compel same. If plaintiff fails to comply with that Court Order, the plaintiff and his or her attorney are subject to very severe sanctions including a dismissal of plaintiff's claims. A dismissal of a plaintiff's claims, of course, should be reserved for only the most egregious cases where a defendant has suffered actual substantive harm. Clearly these available remedies are sufficient to prevent any abuse of Rule 8.01 by any plaintiff.

In addition, the utilization of CR 37.04 in conjunction with CR 8.01 places the determination as to how best to obtain the objectives of both rules, i.e. fairness and justice, with the individual in the best position to make that determination ... the trial judge. The trial judge is clearly in the best position to balance the equities presented in any given situation;

> "...the sound discretion of the trial judge. The perspective of the trial judge with respect to analyzing prejudice, unfair surprise, and generally allocating responsibility is far superior to that of any appellate court. ..." Chief Justice Lambert's dissent in Fratzke.

"...rules cannot think; judges can. It is for this that we should accord great discretion to trial judges in matters of this nature. ..." Justice Kellar's dissenting opinion in Fratzke.

CONCLUSION

In conclusion, the Trial Court's Findings of Fact, Conclusions of Law and Judgment in the underlying action should have been affirmed by the Kentucky Court of Appeals. It is therefore respectfully requested that the Kentucky Supreme Court render an opinion reversing that Court of Appeals' opinion to the extent that the Court of Appeals vacated the Trial Court's award of $45,076.00 for lost wages and pain and suffering based on the facts and circumstances presented herein.

It is further requested that this Court's opinion hold that a defaulting party is not entitled to prevent the assessment of damages against him under Fratzke v. Murphy, 12 S.W.3d 269 (Ky. 1999) and LaFleur v. Shoney's Inc., 83 S.W.3d 474 (Ky. 2002).

It is further requested that this Court's opinion hold that a trial court has discretionary authority with regard to alleged CR 8.01(2) violations in the same manner in which the trial court has discretionary authority in other discovery matters subject to reversal by an appellate court only upon a clear showing of an abuse of that discretion.

Lastly, it is respectfully requested that this Court reverse its holdings in Fratzke and LaFleur in order to avoid their potential unjust results and enable cases to be resolved on their merits and hold that alleged failures to respond to CR 8.01 Interrogatories should be addressed by the Trial Court in the same manner as a other alleged failures to respond to Interrogatories under CR 37.04.

Respectfully Submitted,

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