COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2007-SC-0046-DG
2007-SC-000673-DG
(2005-CA-1290-MR)



JAMES B. TENNILL, SR. — MOVANT/CROSS-RESPONDENT

JEFFERSON CIRCUIT COURT
2004-CI-3573

V.

CYRUS M. TALAI — RESPONDENT/CROSS-MOVANT

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**COMBINED BRIEF FOR MOVANT/CROSS-RESPONDENT, JAMES B. TENNILL, SR.**

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Respectfully submitted by:

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**CERTIFICATE OF SERVICE**

I certify that a copy of this response has been served by mail, this 5th day of March, 2008, upon David A. Shearer, Jr., David W. Zahniser, 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

## STATEMENT CONCERNING ORAL ARGUMENT

In his original brief herein, Movant/Cross-Respondent, James B. Tennill, Sr., expressed a desire for oral arguments in this matter as he believes it would facilitate this Court's understanding of the issues and arguments of the parties. However, Respondent/Cross-Movant, Cyrus M. Talai, has stated that he "does not believe that oral argument would assist the Court in this case". Therefore, Movant/Cross-Respondent, James B. Tennill, Sr. would respectfully defer to this Court's determination following its review of the briefs herein as to whether or not oral argument would be of assistance to the Court.

## COUNTERSTATEMENT OF POINTS AND AUTHORITIES

## COUNTERSTATMENT OF THE CASE

Although a detailed statement of the case is set forth in the brief for Movant, James B. Tennill, Sr., the following counterstatement of the case will describe those facts and proceedings pertinent to Respondent, Cyrus M. Talai's cross-appeal.

This personal injury action arose out of a motor vehicle accident that occurred on May 2, 2002 in Jefferson County, Kentucky, involving a motor vehicle operated by Plaintiff/Movant, James B. Tennill, Sr. (hereinafter "Tennill"), and a motor vehicle operated by Defendant/Respondent, Cyrus M. Talai (hereinafter "Talai"). Contrary to Respondent's unsupported allegation in his brief, liability for the occurrence of this motor vehicle accident was clear and rested solely with Talai.

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

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 $25,000.00. Safe Auto's representative repeatedly failed to respond to Tennill's counsel's request for a response to a settlement proposal for Talai's liability coverage limits. Tennill's counsel, therefore, by letter dated March 29, 2004 (T.R., p. 28; Attachment A) informed Safe Auto of his intention to proceed with the filing of a lawsuit against its insured Talai. Safe Auto was therefore on notice that a lawsuit would be filed within the near future and presumably advised its insured Talai to promptly notify it when a lawsuit had been filed so that a timely Answer could be filed on his behalf.

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 B), even though such additional notice was not required. Safe Auto was therefore extended the courtesy of being notified that a lawsuit had actually been filed against its insured and that it should take appropriate action to protect its insured's interest.

Talai was personally served by a special bailiff on July 19, 2004 (T.R., p. 30; Attachment C). No dispute exists regarding the fact that service was properly effected on Talai on this date and Talai himself acknowledged receipt of summons at that time;

> Q: Do you recall in July of 2004, being served with a summons from a special bailiff?
>
> A: Yes, sir.

(Depo. Cyrus Talai, p. 25)[1].

As an additional courtesy, Tennill's counsel informed Safe Auto by letter dated July 21, 2004 (T.R., p. 31; Attachment D) that its insured had been served with process and even provided Safe Auto with a copy of that summons return. In spite of that additional courtesy, neither Safe Auto nor any other representative of Talai attempted to contact or communicate with Tennill's counsel.

Still having received no response from Safe Auto or any representative of Talai, Tennill's counsel proceeded with the filing of a Motion for Judgment Pro Confesso. As an additional courtesy, a copy of that motion was mailed to both Safe Auto and Talai even though not required by the Rules of Procedure. (T.R., pps. 32-35; Attachment E).

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[1] During the deposition of Talai, Talai's counsel refused to permit Plaintiff/Movant's counsel from questioning him with regard to what communications he had with Safe Auto following his receipt of summons. (Depo. Talai, pps. 25-32).

In spite of these repeated courtesies, neither Safe Auto nor any other representative of Talai attempted to contact Tennill's counsel or file an Answer.

By Order entered August 25, 2004, a judgment pro confesso was entered in favor of Plaintiff/Movant Tennill against Defendant/Respondent Talai and this case was assigned to September 7, 2004 for a hearing before the Court on the issue of damages.[2]

Despite being found inexcusably in default, Talai's counsel was permitted to obtain a lengthy deposition of Plaintiff/Movant Tennill and was provided with medical authorizations enabling him to obtain copies of Tennill's medical and hospital records from any provider he desired. In fact, Talai's counsel utilized that authorization and obtained medical and hospital records from all of Tennill's health care providers who had seen him for any medical condition either before or after this accident.

In addition, the Trial Court postponed the hearing on Tennill's damages and assigned same to a date convenient with Talai's counsel's schedule. During that hearing on March 7, 2005, Talai's counsel was permitted to introduce witnesses and documentary evidence including Tennill's medical and hospital records, cross-examine witnesses and essentially fully participate in an adversarial proceeding.

Lastly, following the evidentiary hearing, the Trial Court granted Talai an additional thirty (30) days to supplement the record with whatever additional evidence, both documentary and testimonial, he desired before the Trial Court rendered Findings of Fact and Conclusions of Law.

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[2] This hearing date was subsequently postponed as an additional courtesy to Talai's counsel.

## ARGUMENT

### I. RESPONSE TO RESPONDENT/CROSS-MOVANT, CYRUS M. TALAI'S CROSS-APPEAL.

#### (a) The Court of Appeals did not err in affirming the Trial Court's overruling of Talai's Motion to Set Aside the Judgment Pro Confesso entered against him.

It is respectfully submitted that the Trial Court was well within its sound discretion in denying Talai's motion seeking to set aside Tennill's Judgment Pro Confesso. In this regard, CR 55.02 provides as follows;

> "For **good cause** shown the Court may set aside a judgment by default in accordance with Rule 60.02."

As acknowledged by Talai in his brief, it is incumbent upon a party in default to persuade the Trial Court that "good cause" exists for the setting aside of a judgment. As further acknowledged by Talai, the decision whether to grant such relief rests solely within the discretion of the Trial Court and subject to reversal on appeal only upon a showing of an abuse of that discretion. Schott v. Citizens Fidelity Bank & Trust Co., 692 S.W.2d 810 (Ky. 1985); Fry v. Kersey, 833 S.W.2d 392 (Ky. 1992); Fortney v. Mahan, 302 S.W.2d 842 (Ky. 1957).

In the present action, Talai and his carrier were given numerous notices that a lawsuit was being filed against him both before and after the lawsuit had been filed. After summons was personally served upon Talai by a special bailiff, notice of that service and a copy of that service return was sent to Talai's carrier as a courtesy yet no attempt was made by Talai, his carrier or any other representative to contact either Tennill's counsel or the Court or to file an Answer to this Complaint. Talai himself has

acknowledged personal receipt of that summons yet no timely Answer was ever filed on his behalf. Lastly, prior to the entry of a judgment pro confesso, a copy of the motion requesting that relief was sent to both Talai and his carrier yet no attempt was made by Talai, his carrier or anyone else on his behalf to contact either the Court or Tennill's counsel or to file an Answer. It is thus eminently clear that there was more than sufficient evidence to support the Trial Court's conclusion that Talai's failure to timely file an Answer to this lawsuit was inexcusable.

On appeal, the Kentucky Court of Appeals properly concluded that the Trial Court did not abuse its discretion in denying Talai's Motion to Set Aside Tennill's Judgment Pro Confesso against him;

> Talai has raised several claims of error in this appeal. First, Talai has argued that the trial court abused its discretion in denying his motion to set aside the default judgment. He states that his "failure to file an answer within the requisite time period was a result of [counsel's] mistake, inadvertence, surprise, or excusable neglect."[6] We reject this argument.
>
> Generally, when a party is seeking relief from a default judgment, it "must show good cause; . . . i.e., . . . ' (1) a valid excuse for the default; (2) a meritorious defense to the claim; and (3) absence of prejudice to the non-defaulting party.'"[7] "Good cause is most commonly defined as a timely showing of the circumstances under which the default judgment was procured."[8] "Absent a showing of all three elements, the default judgment will not be set aside."[9] "Although default judgments are not favored, a trial court is vested with broad discretion when considering motions to set them aside, and an appellate court will not overturn the trial court's decision absent a showing that the trial court abused its discretion."[10]
>
> In this case, while there may have been little or no prejudice in setting aside the default judgment and while there may have been a defense to the claims, we conclude that the trial did not abuse its discretion by finding that Talai has not provided any good cause to show why is answer was not filed in a timely manner. Talai's counsel states that he continually checked with the Jefferson Circuit Clerk's office concerning service of the complaint upon

Talai and was consistently told that service had not been perfected. Counsel went so far as to procure an affidavit from a deputy clerk which states that "according to the Jefferson County Clerk's computer database no service of summons was perfected upon the defendant, Cyrus Talai, as of 4-15-05" [emphasis added]. However, what counsel fails to discuss is the existence in the record of a summons showing that Talai was personally served with Tennill's complaint by special bailiff on July 19, 2004. Talai's signature appears on the summons.

While we understand that Talai's counsel was employed for him by his insurance company, Safe Auto, "negligence of an attorney is imputable to the client and is not a ground for relief under CR 59.01(c) or CR 60.02(a) or (f)" [citations omitted].[11] Counsel's ignorance of the fact that Talai had been personally served with the complaint does not compel a finding of good cause by the trial court. The trial court did not abuse its discretion in this instance.

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[6] Talai's motion was filed in accordance with CR 55.02, which states that "[f]or good cause shown the court may set aside a judgment by default in accordance with Rule 60.02."

[7] PNC Bank, N.A. v. Citizens Bank of Northern Kentucky, 139 S.W.3d 527, 531 (Ky.App. 2003) (citing Sunrise Turquoise, Inc. v. Chemical Design Co., Inc., 899 S.W.2d 856, 859 (Ky.App. 1995)).

[8] Green Seed Co. Inc. v. Harrison Tobacco Storage Warehouse, Inc., 663 S.W.2d 755, 757 (Ky.App. 1984).

[9] Sunrise Turquoise, 899 S.W.2d at 859.

[10] PNC Bank, 139 S.W.3d at 530 (citing Howard v. Fountain, 749 S.W.2d 690, 692 (Ky.App. 1988)). (In Howard, a motion to set aside a default judgment was denied where the "good cause" shown was mere inattention on the part of the defendant and his attorney. The basis for the late filing of a responsive pleading was that the complaint had been filed on November 13, 1985, but the attorney was not contacted regarding the summons and complaint until December 5, 1985.)

[11] See Vanhook v. Standford-Lincoln County Rescue Squad, Inc., 678 S.W.2d 797, 799 (Ky.App. 1984).

(Kentucky Court of Appeals Opinion, pps. 6-8).

Talai's counsel's[3] contention that he was not aware of the fact that service on his client by a special bailiff was contained within the Court file does not constitute excusable neglect. This conclusion was recently reiterated by the Supreme Court of Kentucky in Watson v. Best Financial Service's, Inc., _____ S.W.3d _____, (2008) where the Kentucky Supreme Court held that a recently substituted attorney in a case was charged with knowledge as to everything that was contained in the Court record;

> "... reasonable diligence and promptness includes reviewing the Court record in the case into which the lawyer is substituted."

In sum, it is respectfully submitted that the Court of Appeals did not err in affirming the Trial Court's overruling of Talai's motion set aside the judgment of pro confesso rendered against him.

**(b) The Trial Court's assessment of Tennill's damages was consistent with and supported by the evidence.**

Talai's contention that the judgment entered by the Trial Court assessing Tennill's damages was "inconsistent with the evidence" is ill-founded.

At the outset, it should be noted that the determination of credibility and weight to be given to evidence is a peculiar function of the trier of fact whether a jury, judge or other tribunal and should not be reversed on appeal unless clearly erroneous;

> "... the problem is one of credibility of witnesses and the weight to be given to evidence. The determination of credibility and weight to be given to evidence is a peculiar function of the trier of fact. ... It was the function of the trial judge to chose. It is not our function to interfere with his choice. Therefore, we hold that the trial court's determination of the amount of net estate is not clearly

[3] Apparently Safe Auto employed counsel to defend its insured Talai after being notified that suit had been filed. That counsel, however, never communicated with Tennill's counsel and, therefore, Tennill's counsel was unaware of the fact that he was intending to represent Talai in this action.

erroneous. ..." (Singer v. Singer, 440 S.W.2d 783, 785 (Ky. 1969).

To the same effect in Quick Loans Inc. v. Ashland Finance Co. No. 2 of Lexington, 424 S.W.2d 399 (Ky. 1968) the Court of Appeals of Kentucky (Now the Kentucky Supreme Court) held as follows;

> "The second question presented is whether the decision of the chancellor in believing Appellee's witnesses and discrediting the testimony of Appellant's witnesses was "reasonable or arbitrary." Where there is conflict in the evidence, the chancellor must by necessity believe one theory to the disbelief of the other; otherwise, he would never arrive at a judgment. In so doing, he does not act unreasonably or arbitrarily; he only performs his duty." At p. 402.

As pertinent to the within action involving a case where a non-jury fact-finder was required to weigh and consider "contrary medical evidence", the Supreme Court of Kentucky in Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977) noted as follows;

> "The Board is the fact-finder. The claimant's own testimony is competent and of some probative value. Johnson v. Skillton Construction Corp., Ky., 467 S.W.2d 785 (1971). The preponderance of the medical evidence introduced by Caudill is consistent with her testimony. There was contrary medical evidence introduced by the employer. The Board had the right to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." At p. 16.

To the same effect in KRL v. PAC, 210 S.W.3d 183 (Ky.App. 2006), the Kentucky Court of Appeals noted as follows;

> "...the trial court, as the finder of fact, has the responsibility to judge the credibility of all testimony, and may choose to believe or disbelieve any part of the evidence presented to it. ..." At p. 187.

Applying these basic principles to the facts presented in the within action, it is respectfully submitted that the evidence considered by the Trial Court at the evidentiary hearing assessing Tennill's damages amply supported the Trial Court's award.

### (i) The Trial Court's assessment of $33,807.00 for Tennill's pain and suffering was reasonable and amply supported by the evidence.

In its findings of fact, the Trial Court discussed and considered **all evidence** introduced at the evidentiary hearing pertaining to Tennill's injuries and resultant pain and suffering and loss of enjoyment of life. Contrary to Talai's contentions, the Trial Court thoroughly considered all competing medical evidence and properly weighed all evidence and rendered an award assessing Tennill's pain and suffering and loss of enjoyment of life which was amply supported by the evidence. In its Findings, the Trial Court summarized Tennill's injuries and medical treatment;

> Mr. Talai evidently lost control of his vehicle after spilling a cup of coffee, causing him to hit Mr. Tennill's vehicle. Mr. Tennill did not indicate that he was hurt at the scene of the accident. However, he was dizzy and his neck hurt immediately after the accident. He had pain in his back soon thereafter. The accident occurred on a Thursday and Mr. Tennill stayed home over the weekend to recover. At his son's insistence, he called Dr. Werner and got an appointment as soon as possible.
>
> Mr. Tennill had a CT scan at Jewish Hospital soon after the accident although this CT scan was set up before the accident for an unrelated prior sinus problem.
>
> On May 23rd, 2002, Mr. Tennill saw Dr. Joseph Werner, an orthopedic surgeon, who used the CT scan and his own x-rays to check out Mr. Tennill's neck and lower back and to assess his dizziness. Dr. Werner found a mass behind Mr. Tennill's left ear and referred him to Dr. Murphy for a follow up. It appears that this mass may have pre-existed the accident. Dr. Werner referred

Mr. Tennill to Dr. Bryan Murphy to further examine and determine the cause of the swelling in Mr. Tennill's neck.

In any event, Mr. Tennill advised that before the accident he did not have problems with dizziness and headaches. He also advised that he had no problems sleeping before the accident although his medical records indicated some prior problems. Because of his sleeping difficulties, Mr. Tennill was referred to a neurologist, Dr. Ajmal Bangash, who evaluated him in November of 2002. Besides this, Mr. Tennill was seen by his family physician, Dr. Bratton, on four separate occasions between June and December, 2002, for symptoms related to the motor vehicle accident.

While Mr. Tennill submitted various medical records, he made no claim for medical expenses as a result of the accident. He did though claim that he lost some $25,000.00 to $30,000.00 in income as a result of the accident. He advised that for months after the accident he was not able to operate as well, that he could not travel and that he is still tense when traveling because of the emotional trauma of the accident.

Mr. Tennill advised that to date he still experiences neck problems, sleep problems and dizziness. He said that his lower back had improved and that on occasion he used over-the-counter medications to deal with minor problems. He believed that he was still only fifty-to-sixty percent back to normal at the time of his testimony.

Mr. Tennill acknowledged that he received no medical attention at the scene of the accident or shortly thereafter. He also acknowledged that he had seen his ophthalmologist, Dr. Stephenson, regularly between 1985 and 2001 for glaucoma although the medical records also showed that he had seen Dr. Stephenson for migraine headaches. Medical records also showed that Mr. Tennill had seen Dr. Bratton in 1998 and in 2002 for headaches. While acknowledging these problems, Mr. Tennill said that his problems before the accident were minimal and that they became a lot worse after the accident.

James Tennill, Jr., is Mr. Tennill's only child. They talk daily and see each other on a frequent basis. Mr. Tennill, Jr., advised that his father works every day and was in great shape at the time of the accident. When he took his father to get a rental car several days after the accident, his father was still disorientated and complained of neck and back pain. Because of this, he encouraged his father to go to the doctor. He advised that his father's many doctors'

> appointments and his physical problems resulting from the accident all affected his ability to work throughout the remainder of 2002. Finally, he advised that his father is still having physical and emotional problems as a result of the accident.
>
> (T.R., pps. 404-411).

The Trial Court thereafter in its Conclusions described its analysis of that medical evidence which clearly supported the Trial Court's assessment of damages which Tennill sustained as a result of the pain and suffering from injuries which he received in this motor vehicle accident;

> The Court concludes that Mr. Talai was at fault in causing the May, 2002, motor vehicle accident. The Court further concludes that it would have been extraordinary for an 83-year-old man not to have suffered injuries as a result of the collision. It is not uncommon for injuries to manifest several days after such an accident. It was more than reasonable for Mr. Tennill to seek medical attention to address his injuries following the accident.
>
> In fact, Mr. Tennill saw Dr. Joseph Werner on May 23rd, 2002, complaining of both neck and back pain. Dr. Werner ordered additional diagnostic studies and found that Mr. Tennill had sustained strains and sprains to both his neck and back which had activated and aggravated an underlying degenerative disc disease.
>
> During his examination, Dr. Werner found a mass in Mr. Tennill's neck. Dr. Werner referred him to Dr. Bryan Murphy because the cause of the mass was undetermined and its relationship to the symptoms which began after the car accident were unknown.
>
> Although medical records seem to indicate otherwise, Mr. Tennill denied any significant prior neck or cervical problems. As a result of the motor vehicle accident, Mr. Tennill has had considerable difficulty in sleeping and has experienced a significant increase in the frequency, intensity and duration of headaches since injuring his neck in the car accident. Because of his sleeping difficulties, Mr. Tennill was referred to a neurologist, Dr. Ajmal Bangash, who evaluated him in November of 2002. Besides this Mr. Tennill was seen by his family physician, Dr. Bratton, on four separate occasions between June and December, 2002, for symptoms related to the motor vehicle accident.

*** *** ***

> It is also apparent that Mr. Tennill has suffered pain and suffering and continues to suffer as a result of this accident. A multiple of three times his special damages appears to be an appropriate amount for pain and suffering. Because of this, the Court will award him $33,807.00 in pain and suffering and a total judgment of $45,076.00 ($11,269.00 + $33,807.00). (T.R., pps. 404-411).

In sum, it is respectfully submitted that the Trial Court's assessment of $33,807.00 for Tennill's pain and suffering and loss of enjoyment of life as a result of the injuries sustained in this motor vehicle accident was amply supported by the evidence and clearly not unreasonable.

**(ii) The Trial Court's assessment of $11,269.00 for Tennill's lost income was reasonable and amply supported by the evidence.**

Contrary to Talai's contention, the Trial Court considered all evidence pertaining to Tennill's claim for lost income and its determination that his loss in this regard was $11,269.00 was clearly reasonable and amply supported by the evidence[4];

> Mr. Tennill had been in the auto parts business for approximately 35 years and is presently the president of his condominium association. He is still active in the real estate business. He presented his Form 1040 2002 Schedule C showing gross profits from his real estate endeavors in the amount of $42,827.00. His Schedule C for 2003 showed gross receipts of $66,096.00. At the Court's request, Mr. Tennill presented his Schedule C for 2000 and 2001. He had gross receipts of $53,365.00 for 2000 and $15,642.00 for 2001. Mr. Tennill's 2004 Schedule C has not been prepared yet.

*** *** ***

[4] The Trial Court's assessment of Tennill's lost wages at $11,269.00 was substantially less than the $25,000 - $30,000.00 total amount of lost income claimed and further evidences a fair and reasonable assessment of that damage element by the Trial Court.

It appears that Mr. Tennill has continued to work actively even at his age. His real estate business has been both his love and his hobby. The Court concludes that Mr. Tennill suffered a loss of income in 2002 as a result of the injuries he received from the accident. Exactly how much he lost is more difficult to quantify. His Schedule Cs reflect the following total gross receipts for the past four years:

| YEAR | GROSS RECEIPTS |
|---|---|
| 2000 | $53,365.00 |
| 2001 | $15,642.00 |
| 2002 | $42,827.00 |
| 2003 | $66,096.00 |

Given this earning history, it appears that 2001 was an aberration. When the Court averages Mr. Tennill's earnings for 2000, 2002 and 2003, it appears that his average gross receipts for those three years were $54,096.00. Thus, his 2002 earnings were $11,269.00 below that average.

It appears that there as no reason other than the automobile accident attributable to this decline. Because of this, the Court will award him $11,269.00 in lost income for 2002.

(T.R., pps. 6-7).

The Trial Court's assessment of Tennill's lost wage claim was clearly reasonable and well-supported by the evidence.

**(iii) The Trial Court properly concluded that Tennill had met the $1,000.00 medical expense threshold of KRS 304.39-060(2)(b).**

Although Tennill advised the Trial Court that he was not seeking to recover damages for medical expenses incurred for treatment of injuries from his MVA accident, medical expenses introduced exceeded $8,000.00 and did not include the January 6, 2003 CT scan at Baptist Hospital East or the statement of Dr. Bangash, neurologist which Talai has questioned. Tennill's September 3, 2002 MRI at Jewish Hospital alone cost

$1,810.70. Clearly Tennill's medical expenses resulting from his motor vehicle accident injuries exceeded the $1,000.00 medical expense threshold of KRS 304.39-060.

In the present case, Tennill's medical expenses clearly exceed the $1,000.00 threshold of KRS 304.39-060. The record was replete with evidence relating these medical expenses to injuries which Tennill sustained in the accident not only in the medical and hospital records but by the testimony of Tennill and his son. It is for the trier of fact to determine whether the preponderance of the evidence supports a conclusion that the incurred medical expenses were "reasonable and necessary" as a result of injuries sustained in the motor vehicle accident. Bolin v. Grider, Ky., 580 S.W.2d 490 (1979); Thompson v. Piasta, Ky.App., 662 S.W.2d 223 (1983). In the present action, it is respectfully submitted that the conclusion that Tennill's medical expenses in excess of $1,000.00 were incurred as a result of injuries which he sustained in this motor vehicle accident was not only sufficient but compelling.

In addition, KRS 304.39-020(5)(a) provides a statutory presumption that any medial bill submitted is reasonable. This presumption further supports the Trial Court's determination in this regard.

This issue was fully addressed by the Trial Court who examined the medical records and medical expense statements introduced as evidence at trial and concluded that the medical expenses incurred by Tennill as a result of injuries sustained in this motor vehicle accident far exceeded the $1,000.00 threshold of KRS 304.39-060(2)(b) thereby enabling Tennill to seek damages for non-economic harm;

> The Court concludes that Mr. Tennill has more than met the $1,000.00 medical expense threshold to maintain this action under KRS 304.39-060. The listing of Mr. Tennill's medical expenses admitted into evidence exceeded $8,000.00. Mr. Tennill

> acknowledged that one of the expenses listed to the Family Allergy and Asthma Center in the amount of $1,002.00 was not directly related to the accident. Still, the remaining expenses exceeded $7,000.00. And these expenses did not include a January 6th, 2003, CT scan performed by Baptist Hospital East or a statement of services by Mr. Tennill's neurologist, Dr. Bangash. Therefore, the Court concludes that Mr. Tennill easily exceeded the $1,000.00 threshold. (T.R., p. 6)

In sum, the evidence clearly supported and the Trial Court properly concluded that Tennill incurred medical expenses in excess of $1,000.00 for treatment of injuries sustained in this motor vehicle accident thereby enabling him to seek non-economic damages.

**(iv) The Trial Court's judgment did not include damages for medical expenses paid or payable as basic reparation benefits.**

Talai's last contention that the Trial Court failed to reduce its judgment by amounts paid or payable by Tennill in basic reparation benefits is incorrect. As the record will reflect, Tennill's medical expenses were paid in basic reparation benefits by his own carrier and, therefore, Tennill did not claim those medical expenses as damages at trial. To the contrary, those medical expenses were introduced as evidence solely for the purpose of establishing that Tennill had clearly exceeded the medical expense threshold of KRS 304.39-060(2)(b) thereby enabling him to seek non-economic damages. This was acknowledged by the Trial Court in its findings;

> "While Mr. Tennill submitted various medical records, he made no claim for medical expenses as result of the accident."

Contrary to Talai's contention, under the Kentucky Motor Vehicle Reparations Act, KRS 304 Subtitle 39 and in particularly KRS 304.39-060(2)(a), Tennill could not

seek or recover damages for medical expenses paid or payable in basic reparation benefits;

> "Tort liability with respect to accident occurring in this Commonwealth and arising from the ownership, maintenance, or use of a motor vehicle is "abolished" for damages because of bodily injury, sickness or disease to the extent the basic reparation benefits provided in this are payable therefore or that would be payable but for any deductible authorized by this subtitle, under any insurance policy or other method of security complying with the requirements of this subtitle..."

To the extent that Tennill's medical expenses were paid or payable in basic reparation benefits, Tennill simply had no claim against Talai for such damages as that claim, to the extent permitted[5], rested with his reparation obligor against Talai's reparations obligor under KRS 304.39-070(3).

In sum, Tennill was not seeking a double recovery of medical expenses for which he had already been compensated in basic reparation benefits by his own carrier nor was he seeking to assert any claim against Talai to which he was not entitled to recover. The judgment entered by the Trial Court did not include compensation for any basic reparation benefits either paid or payable to Tennill and, therefore, Talai's contention that the Trial Court should have reduced its judgment by those amounts is ill-founded.

[5] Under KRS 304.39-070(4) if the tort feasor's liability insurance coverage is insufficient to satisfy a claimant's personal injury claim and a claimant's reparation obligor's BRB reimbursement claim, the claimant's personal injury claim takes priority.

## CONCLUSION

Based on the foregoing it is respectfully submitted that the Trial Court did not err in refusing to set aside the Judgment Pro Confesso entered against Talai and that portion of the Court of Appeals' Opinion affirming that action should be affirmed by the Kentucky Supreme Court. In addition, the Trial Court's assessment of Tennill's damages was consistent with and supported by the evidence and should not be disturbed on appeal.

It is therefore respectfully requested that the arguments for relief set forth in Respondent/Cross-Movant, Cyrus M. Talai's cross-appeal should be denied.

## II. REPLY OF MOVANT, JAMES B. TENNILL, SR., TO RESPONDENT TALAI'S RESPONSE REGARDING TENNILL'S APPEAL.

Pages 4-11 of Respondent Talai's combined brief constitutes his response to the original brief filed herein on behalf of Movant, James B. Tennill, Sr.[6] The purpose of this reply will therefore be to address those arguments.

In his response, Talai argues that it would be necessary for this Court to overturn its prior opinions in Burns v. Level, 957 S.W.2d 218 (Ky. 1998); Fratzke v. Murphy, 12 S.W.3d 269 (Ky. 2000) and Lafleur v. Shoneys, Inc., 83 S.W.3d 474 (Ky. 2002) in order for Tennill to prevail in this appeal. Such a contention is not accurate. While this Court may well wish to revisit those opinions, the issue as to whether a defaulting party is entitled to prevent assessment of damages against him under Fratzke, Lafleur and Burns is an issue of first impression before this Court.

Talai's further contention that Tennill didn't "move the Court for leave to answer discovery" and provide CR 8.01 information is illogical and misleading. The specific amounts of monetary damages requested by Tennill were conveyed prior to the commencement of the evidentiary hearing. As set forth in more detail in Tennill's brief, Talai was well aware of the specific amounts claimed for special damages and was further aware of the fact that Tennill was claiming an amount in excess of Safe Auto's liability coverage limits in noneconomic damages before and throughout the course of this lawsuit. In any event, the Trial Court concluded prior to the commencement of the evidentiary hearing that Talai's motion to dismiss on that basis was ill-founded. Under these facts and circumstances, a motion for leave to provide any additional information

[6] The remaining pages 12-20 of Talai's combined brief pertain to Talai's arguments presented in his cross-appeal.

was unnecessary since Talai had already been provided with that information. Talai's argument in this regard is therefore illogical and ill-founded.

In addition, the evidentiary hearing was conducted before the Trial Court sitting without a jury[7]. Evidentiary hearings before a judge rather than a jury as a trier of fact, of course, are substantially different. The judge has greater flexibility in establishing a timetable for the presentment of evidence. In this regard, the Trial Court advised Talai's counsel at the conclusion of the evidentiary hearing that he would give him thirty (30) days after the date of the initial hearing to offer any additional evidence which he desired prior to the Court rendering its Findings and Conclusions. In fact, the Trial Court would have granted Talai even additional time if same had been requested. However, such additional time was not necessary since Talai never availed himself of the opportunity to present any additional evidence or take any other action. Thus, Talai had actual knowledge of all specific items of claimed damages well in advance of the Trial Court's entry of its Findings and Conclusions yet that advanced knowledge in no way altered Talai's defense of this action. This non-action clearly demonstrates the fact that Talai was clearly not prejudiced in any manner and is merely seeking to avoid liability on a technicality.

Talai's suggestion that he was somehow prevented from fully participating in discovery prior to the evidentiary hearing is incorrect. As previously stated, the original date for the evidentiary hearing was continued so as to allow Talai's counsel sufficient time to conduct appropriate discovery. During the course of that discovery period, Talai's counsel was provided with authorizations executed by Tennill enabling Talai's counsel to obtain complete copies of any and all medical and hospital records pertaining

[7] Talai never objected to the evidentiary hearing being conducted by the Trial Court sitting without a jury.

to Tennill's medical history both before and after the date of this accident. In fact, Talai's counsel utilized that authorization for that purpose and obtained voluminous records pertaining to Tennill's medical care from numerous healthcare providers.

In addition, Talai's counsel obtained a lengthy and detailed deposition of Tennill at which time he was provided unlimited opportunity to inquire into anything pertaining to the accident, Tennill's injuries, his medical history, his income, his income activities, etc.

The issue pertaining to unanswered interrogatories is simply a red herring. As previously set forth in Tennill's brief, a question arose as to whether those interrogatories were actually sent to Tennill's counsel. Since the deposition of Tennill had been scheduled, Talai's counsel questioned Tennill with regard to virtually every question which had been contained in those written interrogatories.[8] At no time thereafter did Talai's counsel ever file a motion to compel discovery or request in any manner, formally or informally, from Tennill's counsel any additional information or supplementation to those answers including CR 8.01 information. This conduct further demonstrates the absence of any prejudice to Talai under the fact and circumstances presented.

In addition, of course, Talai's counsel was not limited in any manner from fully participating in the evidentiary hearing. He was permitted to and did in fact offer testimonial and documentary evidence and he extensively cross-examined witnesses called on behalf of Tennill.

[8] Thus, during the deposition Talai's counsel had the opportunity to specifically request CR 8.01 answers from Tennill if such information was truly desired.

In sum, Talai was afforded all rights to discovery prior to the hearing and all rights to trial participation during the evidentiary hearing which would have been afforded to a non-defaulting party.

## CONCLUSION

In sum, it is respectfully requested that the Kentucky Supreme Court specifically hold that a defaulting party is not entitled to prevent the assessment of damages against him under Fratzke and Lafleur.

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

Lastly, it is respectfully requested that this Court revisit its holdings in Fratzke and Lafleur and reverse or modify those opinions to the extent necessary 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 other alleged failures to respond to interrogatories under CR 37.04.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was mailed this 5th day of March, 2008 to:

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