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SUPREME COURT OF KENTUCKY
2007-SC-0046-DG
2007-SC-0673-DG
(2005-CA-1290-MR)

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

vs.

JEFFERSON CIRCUIT COURT
2004-CI-3573

CYRUS M. TALAI **RESPONDENT/CROSS-MOVANT**

COMBINED BRIEF OF RESPONDENT/CROSS-MOVANT, CYRUS M. TALAI

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Certificate required by CR 76.12(6)

I hereby certify that a copy of this Brief has been served by mail, this 29th day of January, 2008, upon Lee E. Sitlinger, SITLINGER, McGLINCY, THEILER & KAREM, Attorney for Movant/Cross-respondent, 455 South Fourth Avenue, 370 Starks Building, Louisville, Kentucky 40202; 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.

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STATEMENT CONCERNING ORAL ARGUMENT

Respondent/Cross-movant, Cyrus M. Talai, does not believe that oral argument would assist the court in this case. This case has been fully briefed and argued at the court of appeals and will be fully briefed in this court. Further argument would be a waste of judicial resources.

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This matter arose out of an automobile accident involving the Respondent/Cross-movant, Cyrus M. Talai, and Movant/Cross-respondent, James B. Tennill, on May 2, 2002, in Louisville, Kentucky. (T.R., pp. 1-2.) On that date, Mr. Tennill's vehicle was stopped in a BP gas station lot as Mr. Tennill waited to pull out onto the main roadway. (Depo. of James B. Tennill, pp. 21-26; TAPE; 3/7/05; 14:47:00-16:05:30; 16:02:15.) The accident occurred when Mr. Talai's vehicle entered the BP gas station lot. (Id.) Mr. Tennill argues in his brief that liability for the accident is clear; however, this issue was never adjudicated, as the trial court entered default judgment against Mr. Talai, prohibiting him from raising any applicable liability defenses.

Mr. Tennill filed this action for personal injury against Mr. Talai in the Jefferson Circuit Court on April 28, 2004. (T.R., pp. 1-2.) On August 23, 2004, Mr. Tennill filed a motion for judgment *pro confesso*. (T.R., pp. 6-10.) On August 25, 2004, the trial court entered default judgment against Mr. Talai. (T.R., p. 10.)

A few days later, on August 30, 2004, Mr. Talai filed a motion to set aside the default judgment. (T.R., pp. 12-16.) The basis for Mr. Talai's motion was that the Jefferson Circuit Clerk's office did not reflect service on Mr. Talai. (T.R., pp. 12-16, 414-424; affidavit, attached as Exhibit A.) The clerk's office had also been advising Mr. Talai's counsel's office that service was not yet perfected upon Mr. Talai. (T.R., pp. 12-16, 414-424; Exhibit A.) Believing that service had not been perfected, Mr. Talai's counsel's office had not yet filed an answer on Mr. Talai's behalf. (T.R., pp. 12-16, 414-424.)

Despite these facts, the trial court denied Mr. Talai's motion to set aside the default

judgment at a hearing on October 11, 2004. (T.R., p. 36.) During the same hearing, the trial court scheduled this case for a damage assessment hearing.

On October 19, 2004, Mr. Talai propounded upon Mr. Tennill written discovery requests. (TAPE 3/7/05; 14:35:05-14:40:30; interrogatories, attached as Exhibit B; and requests for production, attached as Exhibit C.)

By interrogatory and requests for production, Mr. Talai asked Mr. Tennill CR 8.01 damage information and for any supporting documents. (Interrogatories, Exhibit B, p. 14; and requests for production, Exhibit C, pp. 2-3.) Mr. Talai never responded to the discovery, nor did he ever seek leave from the trial court to answer the discovery out of time.

The trial court held a damage assessment hearing on March 7, 2005. (T.R., p. 404.) Despite the fact that Mr. Tennill failed to answer written discovery requests in any manner, the trial court permitted Mr. Tennill to introduce evidence of unliquidated damages. (T.R., pp. 404-411, Exhibit G to Mr. Tennill's brief; and TAPE; 3/7/05; 14:40:30.) The trial court even permitted Mr. Tennill to introduce previously unproduced and unknown evidence, including evidence of Mr. Tennill's past income. (TAPE 3/7/05; 16:04:15; 16:05:45; and court of appeals' opinion, p. 4, fn. 4, Exhibit I to Mr. Tennill's brief.) The trial court agreed with Mr. Tennill's argument that the civil rules did not apply to Mr. Talai because he was in default. The trial court determined Mr. Talai had neither a right to compel discovery nor a right to notice of the damage assessment hearing. (T.R., pp. 404-411, Exhibit G to Mr. Tennill's brief.)

The trial court rendered findings of fact, conclusions of law, and a judgment on April 6, 2005. (T.R., pp. 404-411, Exhibit G to Mr. Tennill's brief.) According to the judgment,

Mr. Tennill shall recover damages from Mr. Talai in the amount of $45,076.00. (Id.) Specifically, the trial court awarded Mr. Tennill $11,269.00 in lost income for 2002, and then multiplied that amount by three to determine an award for pain and suffering. (Id.)

The trial court overruled Mr. Talai's CR 59 motion on May 23, 2005, without any analysis or explanation. (T.R., p. 436, Exhibit H to Mr. Tennill's brief.)

Mr. Talai appealed the judgment and the overruling of his CR 59 motion to the court of appeals. Mr. Talai argued that the trial court erred by 1) overruling Mr. Talai's motion to vacate the default judgment entered against him; 2) allowing Mr. Tennill to introduce evidence of unliquidated damages; 3) entering a judgement that was inconsistent with the evidence presented; 4) permitting a judgment when Mr. Tennill had not reached statutory thresholds required by the KMVRA; and 5) failing to reduce the recovery for PIP benefits paid or payable. (Court of appeals brief of Appellant, Cyrus M. Talai.)

In a December 15, 2006, opinion, the court of appeals affirmed the trial court in part, but vacated the judgment. The court of appeals upheld the trial court in not overturning the default judgment, but vacated the judgment because Mr. Tennill failed to respond to discovery and, therefore, was not entitled to recover unliquidated damages. (Court of appeals' opinion, Exhibit I to Mr. Tennill's brief.)

Mr. Tennill moved this court to accept discretionary review of this case, which motion this court sustained. Mr. Talai cross-moved for discretionary review, as the court of appeals, because it vacated the trial court's judgment, did not consider all of Mr. Talai's arguments on direct appeal. This court also accepted discretionary review of those issues.

Mr. Talai files this combined brief as both his brief on his cross-motion for

discretionary review and as his response brief to Mr. Tennill's brief served on November 30, 2007.

ARGUMENT

I. The court of appeals properly vacated the judgment entered by the trial court.

The court of appeals properly applied Fratzke and LaFleur to this case. In his brief, Mr. Tennill essentially argues that a defaulting party, in defending a damages hearing (which a defaulting party clearly has the right to do) is not entitled to the protections of the civil rules directly related to damages. Instead, he argues, at least *vis a vis* a party in default, that Fratzke and LaFleur are a mere "technicality." (Mr. Tennill's brief, p. 8.) He offers absolutely no viable reason, however, why a civil rule should not apply to parties that have had default judgments entered against them. The fact that Mr. Talai was unsuccessful in getting the trial court to vacate the default judgement does not effect in any way his rights to defend himself at the hearing on damages, and Mr. Tennill offers no legitimate argument for why it should. Further, Mr. Tennill argues that this court should overturn Fratzke and LaFleur ignoring principles of *stare decisis* and the clear language of CR 8.01(2).

For Mr. Tennill to prevail this court must overturn Burns, Fratzke, and LaFleur. There is no viable reason not to apply these cases to a party defending a hearing on damages after a default judgment has been entered. There is no question that Mr. Tennill failed to comply with CR 8.01 and no question that he did not move the court for leave to answer the discovery. As such, the trial court had no option but to apply Fratzke and LaFleur. When it did not, the court of appeals had no option but to vacate the judgment. This leaves only this court with the option of overruling well-established law, something this court need not

do and should not do. *Stare decisis* requires this court to stand by its previous rulings unless there are, "sound legal reasons to the contrary." Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984).

As argued below, adequate safeguards exist within the framework of CR 8.01 and Fratzke and LaFleur to allow a party failing to abide by the rules to seek relief from the trial court if properly asked. CR 8.01(2); see also, Prater v. Castle, 139 S.W.3d 921 (Ky. App. 2003). Further, as indicated below, there are sound reasons for this court's decisions in Fratzke and LaFleur. The current law -- that plaintiffs must, by rule, identify the amount of damages they seek or, failing that, they must seek leave to comply with the rules -- adequately protects the balance of interests between plaintiffs and defendants in cases where unliquidated damages are sought.

A. Mr. Tennill did not respond to a CR 8.01 interrogatory and, therefore, he cannot recover unliquidated damages.

It is undisputed that Mr. Tennill never responded to the interrogatories served upon him, including a request under CR 8.01 for the amount he was claiming in unliquidated damages. (Mr. Tennill's brief, p. 4; and court of appeals' opinion, Exhibit I to Mr. Tennill's brief, p. 3.) In his brief, Mr. Tennill repeatedly argues that Mr. Talai's insurance carrier was aware that Mr. Tennill was seeking in excess of $25,000.00, the limits of Mr. Talai's insurance policy and, therefore, there was no "surprise" in the amount sought. (Mr. Tennill's brief, p. 6.) CR 8.01, however, is designed to provide a party defending a claim for unliquidated damages with a maximum amount that may be sought in recovery. The fact that the insurance carrier (not a party to the action) may have been aware of the fact that Mr. Tennill sought in excess of a certain, arbitrary amount (which amount had nothing to do with

the claim) in no way provides Mr. Talai with the maximum amount that might be sought as contemplated by the rule.

He further argues that Mr. Talai had CR 8.01 information, which was obtained through a deposition, etc. This court has repeatedly and consistently held, however, that strict compliance with the express requirements of CR 8.01 is required in that a plaintiff, to recover unliquidated damages, must specify an amount of unliquidated damages sought in response to an appropriate interrogatory, and will not be allowed to seek an amount in excess of that amount. CR 8.01(2); Burns v. Level, 957 S.W.2d 218 (Ky. 1998); Fratzke v. Murphy, 12 S.W.3d 269 (Ky. 2000); and Lafleur v. Shoney's, Inc., 83 S.W.3d 474 (Ky. 2002).

In Burns, a motion for directed verdict was made at the end of the plaintiff's case-in-chief based on the plaintiff's failure to respond to interrogatories concerning damages the plaintiff was claiming. The motion for directed verdict was granted by the trial court and upheld by this court. This court held that the plaintiff's failure to specify an amount of damages sought for permanent impairment to earn money, an element of unliquidated damages subject to the requirements of CR 8.01(2), in response to defense interrogatories that had clearly requested information regarding all damages being sought, barred recovery of such damages. Burns, 957 S.W.2d at 221.

In Fratzke, this court reiterated and expounded on its holding in the Burns case. In Fratzke, the plaintiff failed to specify an amount of pain and suffering damages in response to defense interrogatories. Procedurally, the issue was raised by way of an objection made during the plaintiff's opening statement. The trial court reserved ruling on the matter. On the last day of trial, the plaintiff filed supplemental answers to interrogatories. Counsel for

the defendant reiterated the objection to unliquidated damages after closing arguments. The trial court permitted the claim for unliquidated damages. This court reversed. Despite the acknowledged harshness of its ruling, this court reiterated CR 8.01(2) must be construed in light of CR 26.05 and held plaintiff's attempt to supplement her answers to interrogatories on the last day of trial and without leave of court was unseasonable as a matter of law. This court explained that unspecified damages could not be awarded as, "the plaintiff's failure to identify specific sums requested for unliquidated damages was equivalent to stating that her claim for her unliquidated damages was nothing." Fratzke, 12 S.W.3d at 271. This court further explained that the language of CR 8.01(2) is mandatory and gives the trial court no discretion as to its application. Id., at 273.

In Lafleur, the plaintiff, as in this case, failed to disclose the amount of her claims for unliquidated damages in answer to defense interrogatories. The defendant moved *in limine* on the morning of trial to preclude any evidence of unliquidated damages. The trial court overruled the motion. In affirming a reversal by the court of appeals, this court explained:

> The purpose of the rule is to put a party on notice as to the ***amount*** of unliquidated damages at stake to allow that party to make economically rational decisions concerning trial preparation and trial strategy. Its purpose is not to put a party on notice as to the ***type*** of damages at stake.

LaFleur, 83 S.W.3d at 481 (emphasis added).

The purpose of the rule is not to ensure that a non-party insurance carrier knows that the damages sought are some unknown, unspecified amount in excess of the insurance policy limits. The purpose is to provide a maximum amount that will be sought. Mr. Tennill essentially argues that he did not have to comply with CR 8.01 because Mr. Talai's insurance

carrier knew that Mr. Tennill was claiming in excess of the policy limits and still did not settle. This falls well short of the strict compliance with CR 8.01 required by this court.

B. A party against whom a default judgment is entered has the right to participate in a hearing on damages and to conduct discovery.

Mr. Tennill makes numerous red-herring type arguments to avoid the basic fact that a party in default is still entitled to participate in any hearing to assess damages. Citing Howard v. Fountain, 749 S.W.2d 690, 692 (Ky. App. 1988), the court of appeals in its opinion in this case found that, "since a defaulting party does not admit unliquidated damages, he should be permitted to participate in the damage assessment hearing." (Court of appeals' opinion, Exhibit I to Mr. Tennill's brief, p. 3.)

Any meaningful participation in the hearing would have to include the ability to conduct discovery. Mr. Tennill does not appear to argue that Mr. Talai is not entitled to participate or that Mr. Talai is not entitled to discovery. He does argue that Mr. Tennill is not entitled to notice of the hearing, which is a red herring in that Mr. Talai did have notice and did participate. He further argues that Fratzke and LaFleur should not apply to parties in default, but gives no support for this distinction. Mr. Tennill argues that Mr. Talai, because he is in default, should not be permitted to avoid liability to Mr. Tennill under Fratzke and LaFleur. Again, this is a red herring. Fratzke and LaFleur have nothing to do with liability; they deal with the right of recovery of damages. In a hearing on damages, which even a defaulting party is entitled to, all of the rules on damages apply.

Mr. Tennill argues that Mr. Talai was afforded a fair opportunity to participate in the evidentiary hearing. (Mr. Tennill's brief, pp. 9-10.) Mr. Tennill, however, misses the point.

As Mr. Talai, under Howard, is clearly entitled to participate in the hearing and is clearly entitled to discovery, there is no reason that Mr. Talai should not be given the full protection of the law on all issues related to damages. The only "fair" participation is "full" participation, and to fully participate, Mr. Talai must have the full protection of the law.

C. Fratzke and LaFleur do not need to be revisited by this court.

Mr. Tennill argues that this court should reverse its holdings in Fratzke and LaFleur, as these rulings cause harsh results. First, the result in this case is not unduly harsh. Mr. Tennill did not answer Mr. Talai's written discovery requests in any manner. He did not object or apply for a protective order upon receipt of the discovery requests. At trial, Mr. Tennill failed to move the trial court for leave to serve answers to interrogatories or to provide amounts of unliquidated damages. Mr. Tennill asserted simply that he was not obligated to comply with discovery as Mr. Talai was involved in the hearing simply as a matter of courtesy. This position taken by Mr. Tennill, though clearly wrong under the law, had nothing to do with the trial court's discretion. A simple request for leave to serve discovery responses by Mr. Tennill would have given the trial court the necessary discretion to weigh the facts that Mr. Tennill now argues should prevent this court from applying Fratzke and LaFleur.

In his brief, Mr. Tennill argues a lot of facts related to Mr. Talai's insurance carrier and information provided to the carrier. First, not every civil case involves insurance. Mr. Tennill seems to be arguing that this court should treat civil cases where an insurer is involved (although not a party) differently from other cases. Nothing in his brief supports this argument.

Further, in his brief Mr. Tennill argues only that he indicated that he was seeking more than the policy limits. He never stated at any time, nor does he so state in his brief, the amount he was seeking. He argues that Mr. Talai had the substantial equivalent of CR 8.01 information, but that number is nowhere to be found in his brief. This is important in that, as pointed out by the court of appeals in this case, Mr. Tennill was permitted to introduce evidence regarding his lost wage claims that had not been previously produced. (Court of appeals' opinion, Exhibit I to Mr. Tennill's brief, p. 4, fn. 4.) The civil rules exist to avoid specifically a situation where a party is introducing evidence of damages at trial that have not been previously produced, particularly as part of a plaintiff's case-in-chief.

Finally, Mr. Tennill's argument that Fratzke and LaFleur create harsh results was specifically rejected in Fratzke. In that case, this court stated:

> Contrary to the argument may by the dissent, our opinion today does not "bury a landmine in civil litigation." Rather we merely hold that CR 8.01(2) means what it says. The language of the rule is mandatory and gives a trial court no discretion as to its application. The dissent argues that our reading of the rule "will inevitably lead to a miscarriage of justice, as in the instant case." However, as noted, Fratzke was free to seasonably supplement her answers. Further, after a seasonable time had expired, **she could have moved the trial court to allow her to supplement her answers.** She did neither. Therefore, applying the plain and ordinary meaning of the rule does not and will not create an "inflexible rule that will surely result in injustice." There are other safeguards in place to protect the interests of fairness and justice without resorting to the dissent's tortured interpretation of the rule.
>
> While the result in this case may seem harsh, it is required by the plain language of CR 8.01 and the holding of [Burns].

Fratzke, 12 S.W.3d at 273 (emphasis added).

This language makes the application of CR 8.01 mandatory; it does not, however, remove all discretion from the trial court. In Prater, *supra*, the court held that, under

Fratzke, the application of CR 8.01 is mandatory, but that both Fratzke and LaFleur, allow a trial court discretion to entertain a motion for leave to supplement or leave to answer interrogatories. Prater, 139 S.W.3d at 925-26.

D. This court should affirm the court of appeals' vacating of the trial court's judgment.

Without question, Burns, Fratzke, and LaFleur apply to this case. There is no reason why a party against whom a default judgment has been entered should not be entitled to the full protection of the law on recovery of damages when defending a hearing on damages. The court of appeals correctly vacated the judgment.

Further, there is no need for this court to revisit its rulings in Fratzke and LaFleur, as the trial court retains the necessary discretion to consider a motion for leave to answer or supplement discovery, if the party who has failed to answer asks for leave.

In the conclusion to his brief, Mr. Tennill argues for the reversal of Fratzke and LaFleur, to permit, "cases to be resolved on their merits." This is an ironic argument given the fact that Mr. Tennill was only in the position to have a hearing on damages because of a default judgment that specifically prevented Mr. Talai from presenting his case on its merits. Burns, Fratzke, and LaFleur are well-settled law, and there is no reason for this court to revisit its holdings in those cases.

If this court were to affirm the court of appeals in its vacating of the judgment against Mr. Talai, it need not consider Mr. Talai's remaining arguments. If it does not affirm on that issue, however, Mr. Talai makes the following, alternative arguments.

II. The court of appeals erred in affirming the trial court's overruling of Mr. Talai's motion to set aside the default judgment rendered against him on August 25, 2004.

The trial court abused its discretion in overruling Mr. Talai's motion to set aside the default judgment, and the court of appeals erred in affirming this abuse of discretion. Under CR 55.02, a court may set aside a default judgment for good cause shown, in accordance with CR 60.02, which provides, in part:

> On motion a court may, upon such terms as are just, relieve a party . . . from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; . . . (f) for any other reason of an extraordinary nature justifying relief.

CR 60.02 (a).

A party seeking to have a default judgment set aside must show good cause; i.e., the moving party must show, "(1) a valid excuse for the default; (2) a meritorious defense to the claim; and (3) absence of prejudice to the non-defaulting party." PNC Bank v. Citizens Bank of N. Kentucky, Inc., 139 S.W.3d 527 (Ky. App. 2003).

It is clear that the determination of whether to grant relief from a default judgment pursuant to CR 60.02 is generally left to the sound discretion of the trial court. Schott v. Citizens Fidelity Bank and 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 exercising that discretion, however, the trial court must consider: (1) whether the moving party had a fair opportunity to present his claim at a trial of the merits, and (2) whether granting CR 60.02 relief would be inequitable to other parties. Bethlehem Minerals Co. v. Church and Mullins Corp., 887 S.W.2d 327 (Ky. 1994). Moreover, a liberal attitude should be observed toward

a timely application to set aside a default judgment. Childress v. Childress, 335 S.W.2d 351 (Ky. 1960). Good cause is in fact most commonly defined as a timely showing of the circumstances under which the default judgment was procured. Green Seed Company, Inc. v. Harrison Tobacco Storage Warehouse, Inc., 663 S.W.2d 755, 757 (Ky. App. 1984).

As this court is well aware, default judgments are strongly disfavored as it is preferable to decide cases on the merits. Dressler v. Barlow, 729 S.W.2d 464, 465 (Ky. App. 1987); Green Seed Company, 663 S.W.2d at 757; Bargo v. Lewis, 305 S.W.2d 757 (Ky. 1957).

In this case, Mr. Talai's failure to file an answer within the requisite time period was a result of mistake, inadvertence, surprise, or excusable neglect. Counsel was retained by Mr. Talai's insurance carrier when Mr. Tennill filed suit to represent Mr. Talai on all claims resulting from the subject automobile accident. When counsel was retained, however, Mr. Tennill had not perfected service upon Mr. Talai. Consequently, Mr. Talai's counsel's office contacted the Jefferson Circuit Clerk's office periodically to inquire into service upon Mr. Talai. Each time, the clerk's office advised Mr. Talai's counsel's office that service had not been perfected upon Mr. Talai. Since Mr. Talai's counsel had no knowledge of service upon Mr. Talai, no answer was filed on his behalf before the trial court granted default judgment.

It cannot be disputed that the clerk's office had no record of service upon Mr. Talai either when Mr. Tennill filed his motion for judgment *pro confesso* or the trial court granted default judgment. (Affidavit, Exhibit A.) In fact, the clerk's office had no record of service upon Mr. Talai even as late as April 15, 2005. (Id.) Again, since Mr. Talai's counsel had no knowledge of service upon Mr. Talai, no answer had been filed on Mr. Talai's behalf.

When Mr. Talai's counsel discovered the default judgment, a motion to set aside was filed on Mr. Talai's behalf. The motion was filed within one week of Mr. Talai's application for default and just a few days after the trial court granted default judgment. In the motion, Mr. Talai's counsel set forth the valid and justifiable basis for failing to file an answer on Mr. Talai's behalf. The timely showing of the circumstances under which the default was procured clearly represented good cause for setting aside the default judgment.

In refusing to set aside the default judgment, the trial court denied Mr. Talai a fair opportunity to defend against Mr. Tennill's claims at a trial on the merits. As further demonstrated below, this denial of a fair opportunity would become even more abundantly clear during the remainder of the proceedings before the trial court. Mr. Talai disputed liability, causation, and the nature and extent of Mr. Tennill's damages. (Depo. of Cyrus M. Talai; and T.R. 49-198.) He was unjustly precluded from defending himself on any of those issues before the trial court.

Lastly, Mr. Tennill would not have sustained any prejudice had the trial court set aside the default judgment. The motion to set aside was filed less than two months after service was allegedly perfected, one week after the application for default, and just a few days after the default judgment was entered. No action was taken by Mr. Tennill before the motion to set aside was filed. In his response to Mr. Talai's motion, Mr. Tennill could not even argue that he would have been prejudiced by the vacating of the default judgment. In fact, the court of appeals recognized that vacating the default judgment would have caused, "little or no prejudice" to Mr. Tennill. (Court of appeals' opinion, Exhibit I to Mr. Tennill's brief, p. 7.)

In sum, the trial court abused its discretion in overruling Mr. Talai's motion to set aside the default judgment. Mr. Talai demonstrated good cause by quickly filing a motion setting forth a valid basis for the default being procured. He was denied a fair opportunity to defend this action on the merits. No prejudice would have been sustained by Mr. Tennill had the default judgment been set aside.

III. The trial court erred by rendering a judgment wholly inconsistent with the evidence presented by Mr. Tennill at the damage assessment hearing.

At the damage assessment hearing, Mr. Tennill sought recovery for only alleged wage loss and pain and suffering. He did not seek recovery of alleged medical expenses. (TAPE; 3/7/05; 15:05.) No evidence was introduced by Mr. Tennill establishing payment of those expenses. In any event, Mr. Talai submits the Trial Court rendered an award wholly inconsistent with the evidence introduced by Mr. Tennill at the damage assessment hearing.

First, it should be noted that Mr. Tennill had failed to produce any evidence of wage loss prior to the hearing. (TAPE; 3/7/05; 14:45:00-14:46:25.) Mr. Talai's interrogatory no. 20 provided:

> If you are making a lost wage claim or claim for lost income, profit or compensation, please state the name and address of your employer, the dates and hours of work missed and the amount of lost wages claimed.

(Exhibit B.)

Mr. Tennill's tax returns and all documents supporting any lost wage claim were also requested in Mr. Talai's requests for production of documents nos. 5 and 7. (Exhibit C.) Nevertheless, the trial court permitted Mr. Tennill over objection, to introduce tax returns for the years 2000, 2002, and 2003. (TAPE; 3/7/05; 14:50:35; 16:04:00-16:04:30.)

Recognizing Mr. Tennill's tax return for the year 2001 was pertinent to his lost wage claim, the trial court ordered Mr. Tennill to produce a copy of his 2001 tax return subsequent to the damage assessment hearing. (TAPE; 3/7/05; 16:36:00.) When the 2001 tax return was later produced by Mr. Tennill, it reflected income being earned in the amount of $15,642.00. (T.R., pp. 404-411, Exhibit G to Mr. Tennill's brief.) The accident occurred in 2002. In rendering its award, however, the trial court arbitrarily determined, "2001 was an aberration." (Id.) There was absolutely no evidence introduced at the damage assessment hearing supporting the trial court's determination that 2001 was an aberration. (TAPE; 3/7/05; 14:46:48-16:05:00.) Indeed, Mr. Tennill offered no testimony whatsoever regarding income earned in 2001. (TAPE; 3/7/05; 14:46:48-16:05:00.) Mr. Tennill did not even produce the 2001 tax return until after the damage assessment hearing.

It was a clear abuse of discretion for the trial court to first recognize that evidence of 2001 income was pertinent to rendering an award, and then blatantly disregard the evidence when it failed to support Mr. Tennill's claim. This abuse of discretion is further magnified when considering that Mr. Tennill offered no testimony whatsoever regarding income earned in 2001. (TAPE; 3/7/05; 14:46:48-15:58:00.)

Mr. Tennill's lost wage claim was not only disputed by his 2001 tax return, but it was also disputed by other evidence. Mr. Tennill reluctantly acknowledged on cross-examination that he was semi-retired. (TAPE; 3/7/05; 15:59:00-16:00:10.) Mr. Tennill also seemingly testified that income received in a particular year was actually earned the previous year. (TAPE; 3/7/05; 15:07:20.) If this testimony were true, any lost wages suffered by Mr. Tennill during 2002 (the year of the subject accident) would have been reflected in his income earned

for the year 2003. Mr. Tennill received $66,096.00 in income during 2003. (T.R., pp. 404-411, Exhibit G to Mr. Tennill's brief.) The subject accident obviously did not hamper Mr. Tennill's ability to earn that income in 2002.

Likewise, the manner in which the trial court determined Mr. Tennill's pain and suffering award was a further abuse of discretion. The trial court determined, "a multiple of three times" Mr. Tennill's lost income, "appears to be an appropriate amount for pain and suffering." (T.R., pp. 404-411, Exhibit G to Mr. Tennill's brief.) Mr. Tennill's tenuous lost wage claim bore no relation to his claim for pain and suffering. There is simply no logical or experiential correlation between the monetary value of a lost wage claim and the quantum of pain and suffering endured as a result of an alleged injury. Moreover, mathematical formulas which rely on a multiple of specials to determine pain and suffering are, at best, arbitrary and cannot gauge actual pain and suffering.

The trial court also disregarded substantial evidence contradicting Mr. Tennill's claims. At his deposition, Mr. Tennill testified that he denied injury at the scene of the accident. (Depo. of James B. Tennill, pp. 33-34.) He testified otherwise at the damage assessment hearing. (TAPE; 3/7/05; 15:12:25-15:15:50.) Mr. Tennill claimed at his deposition he went to the emergency room three days after the accident complaining of head, shoulder, and back pain. (Depo. of James B. Tennill, pp. 38-42.) He acknowledged at the damage assessment hearing that he actually underwent previously ordered and unrelated MRI tests that day. (TAPE; 3/7/05; 15:16:30-15:20:50.) Mr. Tennill introduced a 'summary of medical expenses' at the damage assessment hearing despite previously acknowledging that some of those expenses were unrelated to the subject accident. (Depo. of James B. Tennill,

pp. 38-42; and TAPE; 3/7/05; 15:05:05; 15:43:30-15:46:00.) This summary included costs of the previously ordered and unrelated MRI tests. Mr. Tennill testified in his deposition that he had no problems with his neck, back, and head or sleep disturbance prior to the subject accident. (Depo. of James B. Tennill, p. 53.) Mr. Tennill offered no medical testimony relating these claimed medical expenses to injuries sustained in the accident, and provided no testimony that the treatment was in any way reasonable or necessary in treating the claimed injuries.

Further, It was abundantly clear based upon Mr. Tennill's testimony and medical records that Mr. Tennill had suffered from all of those ailments prior to the subject accident. (T.R., pp. 49-198; and TAPE; 3/7/05; 15:22:00-15:58:00.) Mr. Tennill even attempted to relate a pre-existing and wholly unrelated knot on his neck to the subject accident. (Depo. of James B. Tennill, pp. 59-61; and TAPE; 3/7/05; 14:51:00-14:58:00; 15:03:30.) He then claimed he could not recall this condition being reported to two physicians prior to the subject accident. (Id.) Mr. Tennill testified in both his deposition and at the damage assessment hearing that he was able to vacation and play golf in Hilton Head two or three times per year. (Depo. of James B. Tennill, pp. 55-56; and TAPE; 3/7/05; 16:00:00-16:01:45.) Although the foregoing evidence strongly disputed Mr. Tennill's claims for pain and suffering, it was apparently disregarded by the trial court.

In sum, the trial court's award of lost income was wholly inconsistent with the evidence introduced by Mr. Tennill at the damage assessment hearing. The trial court further abused its discretion by utilizing a mathematical formula to determine an award for pain and suffering and disregarding substantial evidence contradicting Mr. Tennill's claim.

IV. The Trial Court erred in overruling Mr. Talai's motion to dismiss Mr. Tennill's claims because Mr. Tennill failed to meet The $1,000.00 economic threshold requirement for filing suit under Kentucky law.

The Kentucky Motor Vehicle Reparations Act requires a plaintiff to prove he has incurred medical expenses in excess of $1,000.00 to recover damages in tort. KRS 304.39-060(2)(b). See also, Bolin v. Grider, 580 S.W.2d 490 (Ky. 1979). At the damage assessment hearing, there was no question Mr. Tennill failed to prove medical expenses in excess of $1,000.00. (T.R. pp.. 49-198; and TAPE; 3/7/05; 15:22:00-15:58:00.)

First, Mr. Tennill failed to introduce any expert medical testimony at the damage assessment hearing to establish a causal connection between the subject accident and his alleged medical expenses. A causal connection between an accident and an injury must be shown by medical testimony and the testimony must be that the causation is probable. Jarboe v. Harting, 397 S.W.2d 775, 778 (Ky. 1965). Expert medical testimony was vital to establish a causal connection in this case because Mr. Tennill's medical records failed to support his claims. (TAPE; 3/7/05; 15:22:00-15:58:00.) Indeed, Mr. Talai clearly established that Mr. Tennill's complaints following the subject accident were almost identical to his complaints preceding the accident. (TAPE; 3/7/05; 15:22:00-15:58:00.)

Most importantly, each and every one of Mr. Tennill's medical visits following the subject accident were outlined to the trial court in Mr. Talai's trial memorandum. (T.R., pp. 49-198.) Only Mr. Tennill's visits to Louisville Bone and Joint Specialists on May 23, 2002, and September 17, 2002, and to his family physician, Dr. Bratton, on June 7, 2002, and July 5, 2002, can arguably be related to the subject accident. (Id.) The expenses of those four visits total the sum of $387.00 -- an amount far below the economic threshold. Even those

expenses cannot qualify toward the threshold, however, in that no medical testimony was introduced to connect the visits to the claimed injuries in this case.

Accordingly, the trial court erred in overruling Mr. Talai's motion to dismiss under CR 41.02, and this court should dismiss the case.

V. The Trial Court erred by failing to reduce from its judgment all sums recoverable as personal injury protection benefits.

Mr. Talai submits the trial court further erred in failing to reduce its award by all sums recoverable as PIP benefits. Under KRS 304.39-060, the sum of $10,000.00 must be deducted from a judgment when it includes amounts recoverable as PIP benefits. To the extent that PIP is payable for medical expenses and lost wages, tort liability for those claims is abolished. KRS 304.39-060(2)(a). It does not matter whether a plaintiff actually recovers PIP, it only matters whether PIP was payable. Bohl v. Consolidated Feightways Corp., 777 S.W.2d 613 (Ky. App. 1989); Speck v. Bowling, 892 S.W.2d 309 (Ky. App. 1995).

Mr. Tennill made no claim for medical expenses at the damage assessment hearing. (TAPE; 3/7/05; 15:05:15.) However, there was no evidence that any of those expenses had been paid by Mr. Tennill's PIP carrier. Perhaps all of Mr. Tennill's medical expenses incurred subsequent to the subject accident were submitted to his health insurance carrier since they were unrelated to the accident.

Regardless, the trial court awarded Mr. Tennill lost wages in the amount of $11,269.00. The trial court's award thus includes an amount properly recoverable as PIP benefits. Under KRS 304.39-060, any and all amounts recoverable as PIP benefits must be deducted from the trial court's judgment.

CONCLUSION

For the foregoing reasons, this court should affirm the court of appeals vacating of the judgment entered by the trial court in this case and remand for dismissal of the suit against Mr. Talai. Alternatively, this court should reverse the court of appeals affirming of the trial court's denial of Mr. Talai's motion to vacate the default judgment entered against him and remand the case to the trial court for further proceedings. Alternatively, this court should vacate the judgment as it is not consistent with the evidence at trial. Alternatively, this court should dismiss this case for Mr. Tennill's failure to reach the required threshold in KRS 304.39-060(2)(b). Finally, and alternatively, this court should reduce the amount of the judgment by $10,000.00 as that amount was payable as PIP benefits for lost wages.

Respectfully submitted by:

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