FILED
MAR 2 1 2008
CLERK
SUPREME COURT

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

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

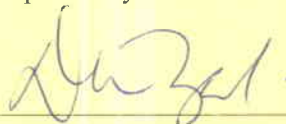
vs.

JEFFERSON CIRCUIT COURT
2004-CI-3573

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

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

Respectfully submitted by:



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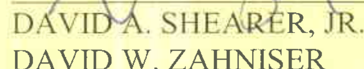
Certificate required by CR 76.12(6)

I hereby certify that a copy of this Brief has been served by mail, this 20th day of March, 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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I. Purpose.

This reply brief shall address the response of Movant/Cross-resondent, James B. Tennill, Sr., to the Cross-appeal of Respondent/Cross-movant, Cyrus M. Talai. It will address the trial court's abuse of discretion in denying Mr. Talai's motion to vacate the default judgment entered against him; the trial court's entry of a judgment inconsistent with the evidence; the trial court's denial of Mr. Talai's motion to dismiss for failure of Mr. Tennill to prove entitlement to sue under KRS 304.39-060(2)(b); and the trial court's failure to reduce the judgment under KRS 304.39-060(2)(a). Finally, it will provide the relief sought.

II. Argument.

A. The court should have set aside the default judgment.

Mr. Tennill argues that Mr. Talai's carrier had ample notice of the lawsuit. But the Jefferson Circuit Clerk did not reflect service on Mr. Talai.[1] As the court is aware, Mr. Talai's counsel was hired for him by Mr. Talai's insurance carrier. Because of that unique relationship, Mr. Talai's counsel could not file an answer on his behalf without verifying service, as this would inappropriately volunteer Mr. Talai into court. The fact that counsel was aware of the suit did not change these circumstances. While the clerk proved to be wrong about service, this was certainly a mistake or, at the very least, excusable neglect.

Good cause to overturn a default judgment is most commonly defined as a timely showing of the circumstances under which the default judgment was procured.[2] Here, Mr.

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[1] Affidavit, Exhibit A to Mr. Talai's combined brief.

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

Talai moved the trial court timely to overturn the default judgment, explaining the circumstances that lead to a clear mistake.

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. Mr. Tennill has never argued that vacating the default judgment would have prejudiced him, nor could he. The court of appeals specifically recognized that vacating the default judgment would have caused, "little or no prejudice" to Mr. Tennill.[3]

B. The trial court erred by entering a judgment inconsistent with the evidence.

In his response, Mr. Tennill essentially quotes the trial judge and concludes that the findings were consistent with the evidence. There is no argument even presented for why it would be appropriate for the trial judge to conclude that pain and suffering was equal to three times lost wages. Perhaps that is because there is no argument that this is an appropriate method for determining lost wages. Pain and suffering have absolutely no connection to lost wages. Otherwise, any award for pain and suffering would depend on a person's salary, not the person's pain or injury.

Further, the trial court abused its discretion in determining that the 2001 income tax returns were necessary, and then disregarding them altogether. It is a clear abuse of discretion to "average" Mr. Tennill's yearly income to determine lost wages but not include the one year during the period where Mr. Tennill had low earnings, particularly here, where

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[3] Court of appeals' opinion, Exhibit I to Mr. Tennill's brief, p. 7.

it was the year proceeding the accident. Had 2001 been included in the "average" the average would have been $44,482.50, very close to Mr. Tennill's actual earnings for 2002.[4]

Further, the trial court concluded that there was no other reason other than the accident for the loss of income in 2002. But there was no loss of income in 2002. Mr. Tennill *gained* $27,185.00 from 2001 to 2002. Further, he testified to a one-year lag in income from earnings, meaning his 2002 earnings were actually 2003 income, a year in which he *gained* another $23,269.00 in income.

Awarding pain and suffering based on a formula of three times the lost wages is a clear abuse of discretion. This error was compounded by the illogical and prejudicial manner in which the lost wages were calculated. Neither award should stand.

C. Mr. Tennill failed to meet the $1,000.00 economic threshold required by the MVRA.

KRS 304.39-060(2)(b) requires proof of incurred medical expenses in excess of $1,000.00 to recover in tort. Mr. Tennill failed to offer such proof and the trial court should have dismissed the case.[5] There was no expert testimony offered that the medical expenses offered at trial by Mr. Tennill resulted from injuries he received in the accident. The trial court may not rely on the expenses and the testimony of Mr. Tennill and his son, neither of whom was qualified as an expert, to find a causal connection. A causal connection between the accident and the injury must be shown by expert medical testimony.[6]

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[4] Had the tax returns been produced in discovery as asked, perhaps this situation would have been avoided.

[5] T.R. pp.. 49-198; and TAPE; 3/7/05; 15:22:00-15:58:00.

[6] Jarboe v. Harting, 397 S.W.2d 775, 778 (Ky. 1965).

Without expert medical testimony on causation, the evidence of medical expenses incurred is insufficient to allow a finding that Mr. Tennill met the threshold of KRS 304.39-060(2)(b), and the trial court should have dismissed the case.

D. The trial court should have reduced its judgment by $10,000.00.

Under KRS 304.39-060, up to $10,000.00 must be deducted from a judgment when the judgment 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.[7] It does not matter whether a plaintiff actually recovers PIP, it only matters whether PIP was payable.[8]

PIP is available for both medical expense and wage loss. Mr. Tennill has completely ignored this fact in his brief. Although he states that the record reflects that his PIP carrier paid his medical expenses, he does not cite to the record for this assertion. In fact, the record does not reflect the amount of PIP benefits paid for medical expenses and there was no evidence offered on this issue. Even if the $10,000.00 *available* for wage loss were reduced by the amount paid for medical expenses, there is no way to calculate this amount based on the record, as that amount, if it exists, is unknown.

Mr. Tennill only sought recovery for wage loss. Although ignored in Mr. Tennill's response, by law, $10,000.00 in PIP was *payable* for wage loss and, therefore, Mr. Talai is entitled to a reduction to the lost wages award in the amount of $10,000.00.

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[7] KRS 304.39-060(2)(a).

[8] Bohl v. Consolidated Feightways Corp., 777 S.W.2d 613 (Ky. App. 1989); Speck v. Bowling, 892 S.W.2d 309 (Ky. App. 1995).

III. Relief Sought.

For this court to reverse the court of appeals, it must overrule Burns, Fratzke, and LaFleur. The only other option would be to rule that the civil rules do not apply to a hearing on damages where a default judgment has been entered on liability. The law on this issue is clear; a party in default, but that has appeared in the action, has a right to notice of and participation in the hearing. To participate, a party must have the protection of all of the civil rules, particularly those rules dealing specifically with damages. There is no arguable reason why a particular civil rule, in this case CR 8.01, should not apply to this situation.

Mr. Tennill's protests notwithstanding, there is no debate that Mr. Tennill failed to comply with CR 8.01 and failed to move for leave to comply. Apply Burns, Fratzke, and LaFleur, this court must affirm the court of appeals. This is the last brief to be filed in the Supreme Court. The case went to hearing and through an entire appeals process in the court of appeals. But the record still does not contain an answer to Mr. Talai's CR 8.01 interrogatory, and the record still does not include a specific, maximum amount that Mr. Tennill is claiming. The court of appeals should be affirmed in vacating the judgment.

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.

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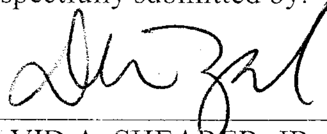

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