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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000752-MR
AND
NO. 2014-CA-000792-MR

ALLSTATE INSURANCE COMPANY APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 10-CI-06063

YAMILE PENDONES REYES APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Allstate Insurance Company appeals from a jury verdict awarding Yamile Reyes $171,738.88 for her claim for underinsured motorist (UIM) benefits. That award was later reduced to $50,000 so as to conform to the underinsured motorist insurance policy limits. Allstate argues that the trial court

should have granted its motion to set aside the verdict due to the improper closing remarks made by Reyes' counsel and the jury's excessive verdict. Allstate also claims that the trial court should have redacted a portion of the videotaped testimony of Reyes' treating physician. Reyes cross-appeals the trial court's decision to reduce the jury award to $50,000. We find the trial court committed no error in this case and affirm.

The facts of this case are not in dispute. On October 28, 2008, Reyes and her fifteen-month-old child, Abiel, were involved in a car accident in Lexington, Kentucky.[1] Their car was struck by a vehicle being driven by Terry Brown. Reyes and her son were both injured. Reyes filed suit on October 20, 2010. Brown's insurance carrier settled Reyes' claim for Brown's insurance policy limit. The only defendant left was Allstate, Reyes' UIM carrier.

The case proceeded solely on the contractual UIM claim against Allstate.[2] Allstate stipulated to liability, past medical expenses in the amount of $11,098.88, and lost wages of $10,640. The only issues left for the jury were future medical expenses and physical and mental pain and suffering. Testifying at trial were Reyes, an independent eyewitness to the accident, and Dr. Angela Webb, Reyes' treating physician. The jury then returned a verdict in favor of Reyes for $171,738.88. Allstate then moved, pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, to set aside the verdict. That motion was denied.

[1] Abiel is not a party to this action. All of Abiel's claims have been settled.

[2] Reyes also brought a claim against Allstate based on unfair claims settlement practices; however, that claim was bifurcated and held in abeyance pending the outcome of the UIM case.

Allstate later moved, pursuant to CR 60.02, to reduce the jury's verdict to $50,000. That amount is Reyes' UIM policy limit. Reyes' counsel agreed that the verdict should be reduced to that amount; however, argued that the interest on the judgment be calculated as if the original $171,738.88 still applied. The trial court granted Allstate's motion, but would not calculate interest at the higher amount. This appeal and cross-appeal followed. Further facts will be discussed as they become necessary.

Allstate's first argument on appeal is that the trial court erred in denying its motion to set aside the verdict based on the improper closing argument by Reyes' counsel. Allstate claims Reyes' counsel made statements during closing argument that were prohibited by a motion in limine ruled upon prior to trial. We find no error.

When reviewing the denial of a motion to set aside a verdict, this Court reviews the trial court's decision for an abuse of discretion. *Davis v. Graviss*, 672 S.W.2d 928, 932-33 (Ky. 1984) (*overruled on other grounds by Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002)). Before trial, Allstate made multiple motions in limine. One such motion concerned Allstate's relationship with Reyes. Allstate moved to

> exclude from evidence at the trial of this action any mention that Allstate Insurance Company is an uninsured [sic] motorist carrier and the amount of coverage available under the underinsured motorist coverage. The Defendant further moves to exclude any arguments alleging that Allstate denied coverage for Plaintiff's claim, that the Plaintiff has properly paid her insurance

> premiums for the relevant policy period, or references to Allstate's marketing materials.

Allstate argued that this evidence is irrelevant because it had never denied coverage or rejected Reyes' claim. Allstate claimed that this case was not about its business practices and that the only issue before the jury is the amount of damages sustained by Reyes. Allstate believed Reyes would use the above evidence to criticize Allstate and inflame the jury, resulting in an award that would be based on the jury's desire to punish the insurance company.

There is no written order regarding this motion in the record, but a hearing was held on the day of trial concerning the motion. At the hearing, the trial court orally sustained the motion at issue; however, based on the arguments of counsel, the court allowed Reyes' counsel to discuss the reasons the parties were involved in the suit, that Reyes had a policy with Allstate, that this policy was a contract, and that they were having a trial to determine damages.

During closing arguments, Reyes' counsel made statements such as: "Your insurance company is supposed to protect you. . . . Not make you litigate a case for four years and go to trial."; "Even a big company like Allstate . . .they insure families."; and "she had an agreement with Allstate."[3] Allstate claims these statements, among others, were improper based on the trial court's ruling on the motion in limine.

[3] This is not a full account of the alleged improper comments Allstate claims Reyes' counsel made, it is just an illustrative sample.

As previously stated, this Court's standard of review in this instance is abuse of discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We do not believe the trial court's denial of the motion to set aside the verdict based on this issue was an abuse of discretion.

Trial counsel has wide latitude during closing arguments. *Noakes v. Commonwealth*, 354 S.W.3d 116, 122 (Ky. 2011). Here, the trial court did not have a written order specifically describing what could and could not be said regarding the relationship between Allstate and Reyes. The court ruled on this motion in limine from the bench and allowed Reyes' counsel to discuss some parts of this relationship between Allstate and Reyes. Based on what Allstate requested be excluded in its motion in limine and what the trial court still allowed Reyes' counsel to discuss, we do not believe the trial court was unreasonable in denying the motion to set aside the verdict. While Reyes' counsel might have strayed close to the line of inappropriate topics, we believe, like the trial court, that he did not cross that line.

Allstate's second argument on appeal is that the trial court erred in denying its motion to set aside the verdict due to the excessive verdict amount. Allstate claims that the jury's award for future medical expenses was not supported by the evidence presented at trial. We decline to rule on the merits of this issue because it was not preserved for our review.

The jury awarded Reyes $50,000 for future medical expenses. The proposed jury instructions submitted by both parties stated that the potential award for future medical expenses should not exceed $50,000. In addition, after the evidence had been presented, the jury instructions utilized by the court stated that future medical expenses could not exceed $50,000. Allstate did not object to this jury instruction or the $50,000 amount listed. By failing to object to the jury instruction or the amount of recovery, Allstate has waived this issue. *Gibson v. Fuel Transp., Inc.*, 410 S.W.3d 56, 61 (Ky. 2013); *Gersh v. Bowman*, 239 S.W.3d 567, 574 (Ky. App. 2007). In addition, Allstate did not request palpable error review until its reply brief. "The reply brief is not a device for raising new issues which are essential to the success of the appeal." *Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. App. 1979). Because of this, we decline to review this issue for palpable error.

Allstate's final argument on appeal is that the trial court erred in not redacting a portion of Dr. Webb's videotaped testimony. Dr. Webb's trial testimony was presented by videotape. Prior to trial, Allstate objected to a portion of Dr. Webb's testimony. Allstate wanted this portion to be removed from the videotaped testimony. The objectionable portion lasted approximately 35 seconds and consisted of an exchange between Dr. Webb and Reyes' counsel. That exchange is as follows:

> Q.: What type of problems was [Reyes] relating to you that she was having?
> A.: Um, sorry, I'm gonna get tearful because she left such an impression on me. Um, she had a young child. Her young son was in the car with her and she was just

> devastated by the accident. Um, she said she was afraid he was gonna stop breathing. She, you know, just didn't want to be out of his presence, um because when the accident occurred she was concerned that he was dead.
> Q.: Right.
> A.: And her daughter as well. So, um.
> Q.: Okay, she, and I looked through the medical records, and I, trust me, I feel the same about her that you do.
> A.: Yeah.

Allstate claimed that this exchange was irrelevant, prejudicial, and its only purpose was to provoke juror sympathy. The trial court denied the motion to redact this portion of the testimony. Allstate claims that it was reversible error for this part of Dr. Webb's testimony to be introduced at trial. We find no error.

The proper standard for review of evidentiary rulings is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). We do not think the trial court abused its discretion or acted unreasonably by not redacting this portion of Dr. Webb's testimony. This testimony was relevant because Dr. Webb had been treating Reyes for physical and emotional trauma after the accident. Reyes' counsel asked Dr. Webb what kind of problems Reyes had been having after the accident. Dr. Webb then discussed what Reyes had relayed to her regarding her anxiety and stress. Furthermore, this testimony was not overly prejudicial. Dr. Webb testified for about forty minutes. This part of her testimony only lasted thirty-five seconds. Additionally, Dr. Webb did not break down crying, she merely said she was getting tearful. Contrary to Allstate's allegation, this exchange was not only used to provoke juror sympathy.

On cross-appeal, Reyes only raises one issue. She argues that the trial court improperly granted Allstate's CR 60.02 motion to conform the judgment to the UIM policy limits. Reyes claims that Allstate should have raised this issue in its CR 59.05 motion to set aside the verdict and that CR 60.02 was an improper method of raising this issue.

CR 60.02 states:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Here, the trial court granted Allstate's CR 60.02 motion by finding excusable neglect under CR 60.02(a) and that this was an extraordinary situation under CR 60.02(f).

We review a trial court's decision on a CR 60.02 motion for an abuse of discretion. *Kurtsinger v. Bd. of Trustees of Kentucky Ret. Sys.*, 90 S.W.3d 454, 456 (Ky. 2002). Generally, CR 60.02

> "is designed to provide relief where the reasons for the relief are of an extraordinary nature." A very substantial showing is required to merit relief under its provisions. Moreover, one of the chief factors guiding the granting of CR 60.02 relief is the moving party's ability to present his claim prior to the entry of the order sought to be set aside.

U.S. Bank, NA v. Hasty, 232 S.W.3d 536, 541-42 (Ky. App. 2007) (citations omitted).

Reyes argues that this issue could have been brought pursuant to CR 59.05; therefore, this is not such an extraordinary situation as to justify the trial court granting the motion pursuant to CR 60.02(a) and (f). While Reyes might be technically correct, this Court is of the opinion "that in the absence of some good reason to the contrary, when the parties to a lawsuit agree in good faith that a mistake has been made and that the judgment should be vacated there is no justifiable basis for overruling a CR 60.02 motion." *Robertson v. City of Hazard*, 401 S.W.2d 223, 223 (Ky. 1966). We believe the trial court did not abuse its discretion.

During the hearing on this motion, counsel for both parties agreed that Allstate was only liable for the UIM policy limit of $50,000. Reyes only objected to the motion in order to attempt to receive more money in interest. In addition, Kentucky Revised Statutes (KRS) 304.39-320(2) states that a UIM judgment is limited to the policy limits. Finally, KRS 360.040 states that a judgment "shall bear twelve percent (12%) interest." Here, all parties and the law agree that the judgment amount in this case could not exceed the policy limit of $50,000;

therefore, amending the judgment pursuant to CR 60.02 was reasonable. That being the judgment amount, $50,000 is also the amount that will bear the 12% interest.

Based on the foregoing, we affirm the judgment of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:

Ernest H. Jones, II
Jamie Wilhite Dittert
Lexington, Kentucky

J. Warren Keller
London, Kentucky

ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE:

Ernest H. Jones, II
Lexington, Kentucky

BRIEFS FOR APPELLEE/CROSS-APPELLANT:

Vincent Johnson
Jason Ellis
David Scott
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANT:

Jason Ellis
Louisville, Kentucky