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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001819-MR

ALIJA MURATOVIC,
RASKO MURATOVIC,
KASIM MURATOVIC, and
ASIM MURATOVIC — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 06-CI-01617

SAKIB AHMETOVIC and
MIRSAD AHMETOVIC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND CLAYTON, JUDGES; HARRIS,[1] SENIOR JUDGE.

[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

CLAYTON, JUDGE: Alija, Rasko, Kasim, and Asim Muratovic ("Appellants")[2] have appealed from the Warren Circuit Court's final judgment awarding damages relating to an assault to Sakib and Mirsad Ahmetovic ("Appellees"). After reviewing the record and the applicable law, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellees filed a complaint against Appellants, alleging that Sakib Ahmetovic sustained personal injuries after Appellants assaulted him with a knife, baseball bat, and large piece of wood. The complaint also alleged that Mirsad Ahmetovic's car was damaged during the attack. Sakib claimed damages for his pain and suffering, his medical expenses, and his lost wages, while Mirsad claimed damages to his vehicle. Appellants failed to respond to the complaint in any way, and Appellees made a motion for, and the trial court granted, a default judgment on the issue of liability.

The trial court subsequently held a hearing on the issue of damages at which Appellants were represented by counsel and Appellees appeared *pro se*. Mirsad testified that his car was damaged in the assault on Sakib, and that he received an estimate for the repairs from a Ford dealership in the amount of $1,712.33. While the estimate was not introduced into evidence because it had not been previously identified as an exhibit, the court found that Mirsad's testimony was sufficient to establish that Appellants had caused the damage to the car and that the total amount of damages was $1,712.33, and therefore awarded a judgment

[2] We note that Alija Muratovic passed away during the pendency of this action and was dismissed from the lawsuit by the trial court because no motion to substitute his estate was filed.

to Mirsad against Appellants in that amount. Appellants have noted in their brief that they are not appealing the judgment awarded to Mirsad.

Sakib testified at the hearing that he had $15,000 in medical bills, a portion of which had been paid by the Crime Victims Compensation Board (the "Board"), a statutorily created board established to provide monetary aid to crime victims. The trial court awarded Sakib that amount, subject to any subrogation rights of the Board. The trial court also awarded Sakib lost wages in the amount of $6,760, and an award for pain and suffering of $10,000. Finally, the court awarded Sakib punitive damages in the amount of $15,000. Appellees appeal the trial court's allocation of damages, alleging multiple claims of error.

ANALYSIS

On appeal, if a trial court's findings are supported by substantial evidence, those findings will be upheld as not being clearly erroneous. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998); Kentucky Rules of Civil Procedure (CR) 52.01. With regard to the trial court's application of law to those facts, this Court will engage in a *de novo* review. *Keeney v. Keeney*, 223 S.W.3d 843, 848-49 (Ky. App. 2007).

With these standards in mind, we will examine Appellants' claims of error. Appellants first argue that the trial court erred when it refused to grant Appellants' motion to dismiss for Appellees' failure to join the Board as a necessary party in the action under CR 19.01. Appellants claimed that, because the Board had previously made payments to Sakib, it should have been joined as a

party, as Kentucky statutes provide that the Board is subrogated to any claims paid to a victim. *See* KRS 346.170. The trial court found at the hearing that Appellants waived the defense of failure to join an indispensable party because they failed to make an appearance in the action before the default judgment was entered.

Therefore, we must first determine whether Appellants waived the defense of failure to join an indispensable party by failing to make a timely objection. Under CR 12.08, a defense of failure to join a party indispensable under CR 19 "may be made in any pleading permitted or ordered under Rule 7.01, or by motion for judgment on the pleadings, or at the trial on the merits." CR 12.08(2). Appellants filed the motion to dismiss after the default judgment was entered. Thus, because the defense was not made in a pleading, was not made in a motion for judgment on the pleadings under CR 12.03, and was not made at a trial on the merits, it would at first blush appear that the motion was not timely filed, and that Appellants waived the defense under CR 19.01.

However, Kentucky cases have held that when an indispensable party is omitted, the objection may not be waived, and may be made at any time. *Treadway v. Russell*, 299 S.W.2d 245 (Ky. 1957). Indeed, joinder of an indispensable party may not be waived on appeal, even though no objection was raised at the trial level. *Id.* (citing *Flynn v. Brooks*, 70 App.D.C. 243, 105 F.2d 766 (C.A.D.C. 1939)). Therefore, we must determine whether Appellees were required to join the Board as a necessary party to the litigation.

Unlike statutes in other states, KRS 346.170 contains no requirement that the Board must be joined as a party to the action.[3] Under the statute, when the Board makes payments to a victim, the Board is "subrogated to and [has] a lien upon any recovery . . . to the extent of the payments made by the state to or on behalf of [the victim]." KRS 346.170(1). As stated in *Hulsey v. Com. Crime Victims Compensation Bd.,* 628 S.W.2d 890, 893 (Ky. App. 1982), the victim "becomes a trustee for the reparation obligor of so much of the recovery as represents payment for the same damages covered by the basic reparation benefits." *Id.* (citing *State Farm Mutual Automobile Insurance Co. v. Fletcher*, 578 S.W.2d 41 (Ky. 1979)).

Although the statute does not require the Board to be added as a party in order to recover any expenditures it makes, Appellants argue that under CR 19.01, the Board should have been joined as a necessary party and that the trial court erred when it denied Appellants motion to dismiss for Appellees' failure to do so. Therefore, we must next determine whether the Board meets CR 19.01's requirements to be a necessary party.

In relevant part, CR 19.01 provides as follows:

> A person who is subject to service of process . . . shall be joined as a party in the action if (a) in his absence complete relief cannot be accorded among those already parties, or (b) he claims an interest relating to the subject of the action and is so situated that the disposition of the

[3] *See, e.g.,* W.S.A. 949.15(2): "In addition to the authority of the department to bring an action under sub. (1), the claimant may bring an action to recover damages. In any such action, the department has subrogation rights under sub. (1) *and the claimant shall join the department as a party* . . . ." (Emphasis added).

> action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

The Kentucky Supreme Court has made it clear that the rule should be construed to provide for just adjudication and not for dismissal on technical grounds. *See West v. Goldstein*, 830 S.W.2d 379, 385-386 (Ky. 1992).

We do not think that the Board meets the requirements for joinder under CR 19.01. In this case, complete relief may be accorded among those who are already parties. Appellees received judgments and a lien in favor of the Board attached to Sakib's judgment pursuant to KRS 346.170. The relief awarded has completely resolved the dispute. Additionally, the Board's ability to protect its interests was not impeded because a lien would attach under the statute to any judgment awarded to Sakib to the extent of payments made to him by the Board regardless of whether the Board was added as a party. Further, none of the persons who were already parties were subject to multiple or inconsistent obligations. Therefore, we affirm the trial court's denial of Appellees' motion to dismiss, although for different reasons than the trial court.

We next turn to Appellants' contention that the trial court erred when it awarded unreasonable and excessive monetary damages that were not supported by substantial evidence. As proof of preservation, Appellants cite to their notice of appeal. They did not, as required by CR 76.12(c)(v), cite to the precise point in the record at which Appellants apprised the trial court of its alleged error and gave it

the opportunity to rule on the matter. Just as citing to a prehearing statement in *Baker v. Weinberg*, 266 S.W.3d 827, 835 (Ky. App. 2008), was found by this Court to be inadequate to preserve an alleged error for our review, citing to a notice of appeal is equally inadequate. The purpose in requiring the statement of preservation is to ensure the trial court was given the opportunity to rule on the issue before we can consider it on appeal. *Hines v. Carr*, 296 Ky. 78, 81, 176 S.W.2d 99, 100-101 (1943). The foundation of appellate review is based on the principle that the lower court has first had a chance to deliberate and decide upon the issues. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593 (Ky. App. 2006). Accordingly, Appellants' claim of excessive damages was not preserved for our review.

Based on the foregoing, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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Bowling Green, Kentucky

BRIEF FOR APPELLEES:

Dan Rudloff
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