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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000604-MR

ALLSTATE INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 07-CI-00466

WINONA MARIE HATFIELD;
AND JAMAHL MACQUIS BERRY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: VANMETER, ACTING CHIEF JUDGE; KELLER AND MOORE, JUDGES.

VANMETER, ACTING CHIEF JUDGE: Allstate Insurance Company appeals from a summary judgment entered by the Whitley Circuit Court, in favor of Winona Marie Hatfield, in a matter relating to uninsured motorist insurance benefits. For the reasons stated hereafter, we affirm.

In August 2006, Jamahl Macquis Berry was following Hatfield on I-75 when his vehicle struck Hatfield's vehicle in the rear. According to the record, Hatfield suffered a broken collarbone as well as injuries to her head, neck, back and shoulder. Hatfield indicated in her December 2007 deposition that in addition to receiving medical and physical therapy treatment, she continued to rely on the daily use of medication and a TENS unit for the treatment of pain. Hatfield stated that Berry's putative insurer reimbursed her for the value of her vehicle.

In July 2007, Hatfield filed the underlying action against Berry and her own insurer, appellee Allstate. She alleged that Berry negligently and carelessly operated his vehicle so as to collide with hers, causing "severe and permanent mental and physical injuries which have resulted in and will continue to result in medical expenses, pain and suffering, and lost wages." Hatfield further alleged that her ability to earn money was permanently impaired as a result of Berry's negligence, and she sought underinsured motorist benefits from Allstate.

An attempt was made to serve Berry with a copy of the summons at the Wheeler Wood Road address in Augusta, Georgia, which was listed on the police report of the accident. Although the summons was returned to the circuit court clerk as undelivered, on July 17 an attorney entered his appearance on Berry's behalf and requested receipt of all pleadings and correspondence. The attorney filed an answer on Berry's behalf, admitting only that Berry was involved in the collision. Four weeks later, the attorney moved to withdraw, stating that his employer, Berry's putative insurance carrier, had determined Berry in fact was not

insured by it or its subsidiaries at the time of the collision. A copy of the attorney's motion was served on Berry at the Wheeler Wood Road address, modified only by the addition of "Apt. C." For reasons not disclosed in the record, the order granting the motion was served on Berry at a different address on Wrightboro Road in Augusta.

Subsequently, the court entered an agreed order permitting Hatfield to file an amended complaint to add an uninsured motorist's claim against Allstate. The order and Allstate's response again listed Wheeler Wood Road as Berry's address for service, and it appears from the record that the order was returned as unable to be forwarded. Allstate then filed a motion to take Hatfield's deposition, listing for Berry a variation of the Wrightboro Road address.

Hatfield next sought summary judgment against Berry after Berry failed to answer the request for admissions which Hatfield mailed both to Berry at the Wheeler Wood Road address and to Allstate's attorney. According to Hatfield's summary judgment motion, Berry's failure to respond conclusively established:

> 1. Defendant Berry was negligent or at fault for causing the subject accident . . . ;
> 2. Defendant Berry did not have automobile liability insurance at the time of the subject accident;
> 3. . . . Hatfield, suffered injuries and damages as a direct and proximate result of Defendant Berry's negligence in causing the subject accident.
> 4. The value of [Hatfield's] injuries and damages as a result of the subject accident is in excess of $50,000.

The court agreed and granted partial summary judgment in accordance with the admissions, utilizing the finality language set out in CR[1] 54.02(1). The judgment was served on Berry at the Wheeler Wood Road address.

Allstate moved to alter, amend or vacate the partial summary judgment, noting Berry's *pro se* status and his failure to respond to the request for admissions. Allstate indicated it had timely opposed[2] the motion for summary judgment and had raised issues of fact concerning Hatfield's damages. Anticipating Hatfield's argument that Allstate was obligated to pay her $50,000 as uninsured motorist benefits, Allstate requested amendment of the partial summary judgment to permit a jury determination of damages. Alternatively, Allstate argued it should not be collaterally estopped from contesting issues of liability and damages. The court denied Allstate's motion in May 2008. No appeal followed.

Some seven months later, in December 2008, Hatfield sought summary judgment against Allstate, claiming that the uninsured motorist provisions of the insurance policy obligated Allstate to pay those damages which Hatfield is legally entitled to recover from Berry. Hatfield asserted that under the "essential facts" approach, she is required only to establish that Berry was at fault, and the extent of the resulting damages. *U.S. Fidelity & Guar. Co. v. Preston,* 26 S.W.3d 145, 147 (Ky. 2000). Allstate objected, arguing that issues of fact exist

[1] Kentucky Rules of Civil Procedure.

[2] A copy of Allstate's response was not included in the original record on appeal but, by order of this court, was added as part of a supplemental record.

regarding the extent of Hatfield's damages. The trial court granted summary judgment for Hatfield, and this appeal followed.

Allstate first addresses issues of standing and preservation. The record shows Hatfield's complaint was filed against both Berry and Allstate, and the partial summary judgment against Berry contained CR 54.02(1) language which resulted in the judgment's finality. The trial court denied Allstate's motion to alter, amend or vacate the partial summary judgment, and no timely appeal followed. Thus, the liability and damages issues were finally resolved by the partial summary judgment against Berry, and they are not properly before this court on appeal from the subsequent judgment against Allstate. Absent a timely appeal from the partial summary judgment against Berry, questions regarding Allstate's standing to challenge that judgment are rendered moot. Thus, the merits of the judgment against Berry, including issues regarding liability and the amount of damages, shall not further be discussed on appeal. Similarly, the various issues raised by Allstate regarding the court's failure to alter, amend or vacate the judgment against Berry are not properly before this court in this appeal and will not be addressed.

Next, Allstate makes a multi-faceted argument in support of its claim that the trial court erred by granting summary judgment against Allstate. More specifically, Allstate contends that genuine issues of material fact exist regarding the extent of Hatfield's damages. It asserts that the court erred by relying on either Berry's failure to respond to the request for admissions, or the partial summary

judgment against Berry, as the basis for determining liability and damages. Finally, Allstate argues that it is not bound by Berry's failure to respond to the request for admissions. We disagree.

Summary judgment shall be granted only if "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Further, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482. On review, the appellate court must determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App. 1996).

CR 36.01(2) provides in pertinent part that when a party, in writing, requests another party to admit the truth of a matter,

> [t]he matter is admitted unless, within 30 days after service of the request, . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney[.]

Further, CR 36.02 states that "[a]ny matter admitted under Rule 36 is conclusively established unless the court on motion permits withdrawal or amendment of the admission." A judicial admission "'has the effect of removing a fact or issue from the field of dispute; it is conclusive against the party and may be the underlying basis for a summary judgment, directed verdict, or judgment notwithstanding the verdict.'" *Berrier v. Bizer,* 57 S.W.3d 271, 279 (Ky. 2001) (quoting R. Lawson, *The Kentucky Evidence Law Handbook* § 8.15, at 386 (3d ed. 1993)). This rule holds true even if the admission goes to the ultimate issue in the case. *Lewis v. Kenady,* 894 S.W.2d 619, 621 (Ky. 1994). Further, admissions may conclusively address and eliminate issues of damages, including the amount owed. *Manus, Inc. v. Terry Maxedon Hauling, Inc.,* 191 S.W.3d 4, 10 (Ky.App. 2006).

Here, as noted above, Hatfield made several requests for admission to Berry, including requests regarding Berry's liability and Hatfield's damages. Because Berry did not respond, the matters necessarily were admitted pursuant to CR 36.01(2), providing a basis for the partial summary judgment against him. When no appeal was taken, the final partial summary judgment became subject to enforcement.

Part V of the parties' insurance policy, addressing coverage, required Allstate to "pay those damages that [Hatfield] is legally entitled to recover from the owner or operator of an uninsured auto[.]" The policy therefore contractually entitled Hatfield to recover from Allstate the damages, up to the $50,000 policy limit for uninsured motorist coverage, which Hatfield was legally entitled to

recover from Berry by virtue of his admissions and the partial summary judgment against him. Allstate's argument that it should have had additional opportunities to litigate damages is negated by the reasoning set out in 9 *Couch on Insurance* § 124:19, which addresses the impact that a judgment against an uninsured motorist may have on an insurer:

> Whether a judgment against an uninsured/underinsured motorist has res judicata effect on an UM/UIM insurer typically depends on whether the insurer was given an appropriate opportunity to defend its interests in the original lawsuit. However, even where an insured obtains a default judgment against an uninsured/underinsured motorist, a court may still find the judgment binding against the insurer if it determines that the insurer had been sufficiently involved in the lawsuit. This is because UM/UIM coverage is triggered when an uninsured motorist is deemed legally liable to an insured, not when an insured obtains judgment against the insurer.

(Footnotes omitted.)

Here, Allstate was involved in the proceeding from its inception. Allstate therefore was on notice that Berry was uninsured, that he was not represented by counsel, that Hatfield claimed Berry was legally liable to her for damages in excess of $50,000, and that Hatfield sought uninsured motorist coverage under the terms of her insurance contract with Allstate. Nevertheless, Allstate elected to take no action when Berry was served and failed to respond to the critical requests for admission, despite Berry's *pro se* status and the fact that under CR 36.01(2), Berry's failure to respond necessarily resulted in the admission of fault and damages. Consistent with the "essential facts" approach described in

U.S. Fidelity & Guar. Co. v. Preston, 26 S.W.3d 145 (Ky. 2000), Hatfield established through the request for admissions both that Berry was at fault, and that damages exceeded the policy limits of $50,000. As noted above, no appeal was taken from the partial summary judgment against Berry, and Berry is not a party to this appeal. Thus, any issues relating to the partial summary judgment's impact on Berry are not properly before us. Further, although Allstate was a named party and an active participant in the proceedings below, it made no timely attempt to protect its own interests by ensuring Berry responded to the critical request for admissions. Once the partial summary judgment based on such admissions became final and legally enforceable against Berry, no factual issues remained for a jury's determination in the claim against Berry. Allstate then was contractually obligated, under the terms of its policy, to pay "those damages" that its insured was "legally entitled" to recover from Berry as an uninsured driver, and the trial court did not err by failing to involve a jury in the determination of damages.

Allstate next asserts that the trial court committed palpable error by failing to serve, or by failing to require Hatfield to serve, Berry at his correct address. Although the issue was not raised below, Allstate claims that relief is necessary in order to prevent manifest injustice. We disagree.

As noted above, the initial pleading was sent to Berry at the address listed on the police report but was returned to the circuit court clerk. Nevertheless, Berry obviously received notice of the proceeding since he initially was represented by counsel. Subsequently, documents were sent to Berry either at the

address listed on the police report, or at one of several versions of a second address. Although it appears that after October 2007 Allstate served various pleadings on Berry by sending mail to a version of the second address, the record contains no document advising the court or other parties of a changed address for Berry.

CR 5.02 permits service upon a party by mailing a document to the party "at his last known address or, if no address is known, by leaving it with the clerk of the court[,]" and "[s]ervice by mail is complete upon mailing." Although Allstate complains on appeal regarding the sufficiency of notice to Berry because of address discrepancies, the record shows the initial complaint was answered by counsel on Berry's behalf, a notification of changed address was never filed, and even Allstate served Berry at several different addresses without notifying the court of any known discrepancies. Allstate thus has not shown that service was improper pursuant to CR 5.02. Moreover, Allstate was not entitled to sit on the purported notice issue and then raise it for the first time on appeal.

The summary judgment of the Whitley Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Mindy G. Barfield
Stephen D. Thompson
Lexington, Kentucky

BRIEF FOR APPELLEE WINONA MARIE HATFIELD:

Todd K. Childers
Corbin, Kentucky

NO BRIEF FOR APPELLEE JAMAHL MACQUIS BERRY