

RENDERED: March 3, 2000; 10:00 a.m.
NOT TO BE PUBLISHED
MODIFIED: May 19, 2000; 2:00 p.m.

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002203-MR
and
NO. 1998-CA-002361-MR

DR. CHARLOTTE MARIE HEBERT

APPELLANT

v. CONSOLIDATED APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NO. 97-CI-00554

JAMES S. HUNSAKER, STEPHEN S. HUNSAKER,
JANE-ANN TERRY, VERNON S. HUNSAKER, and
ALL CREATURES GREAT AND SMALL ANIMAL
HOSPITAL, LLC

APPELLEES

OPINION
REVERSING AND REMANDING
** **

BEFORE: COMBS, DYCHE, and McANULTY, Judges.

COMBS, JUDGE: These consolidated appeals arise from an action filed by the appellees in Fayette Circuit Court. Through this appeal, Charlotte Marie Hebert seeks to have a default judgment entered against her set aside, to have a damages award entered in favor of the appellees vacated, to be permitted to file an omitted counterclaim, and finally, to have various other orders of the trial court vacated. We reverse and remand.

The transaction giving rise to these appeals concerns the formation of a corporate entity to be known as All Creatures Great and Small Animal Hospital, L.L.C. In June 1996, Hebert, a licensed veterinarian, announced that she was seeking financial backing for a veterinary clinic she proposed to establish in Lexington, Kentucky. Eventually, she met with a group of investors, including appellee Vernon Hunsaker of Hunsaker Management Corporation. Agreement was apparently reached among the parties as Articles of Incorporation were prepared and filed in July 1996. Start-up capital was soon invested, and Hebert began practicing at the clinic.

Within months, the parties' business relationship began to deteriorate. In January 1997, Hebert ostensibly ceased work for the corporation, and the parties suspended communication. Hebert continued to operate the veterinary clinic from the same location, however, and eventually incorporated the business as All Creatures Great & Small Animal Hospital, P.S.C.

In February 1997, the appellees filed this action against Hebert. In their complaint, the appellees alleged that Hebert had breached their agreement in several respects and that she continued wrongfully to withhold corporate assets – including equipment and inventory. The appellees sought the return of those corporate assets, appointment of a receiver, a restraining order and an injunction against Hebert, and finally, recovery of monetary damages. No answer, motion, or any type of pleading was filed by Hebert within the twenty days provided by CR 12.01. As

a result, a default judgment on the issue of liability was entered by the trial court on March 18, 1997.

Because a motion to set aside the judgment was not filed, an evidentiary hearing was later held to determine the amount of damages to be awarded pursuant to the default judgment. Hebert and counsel appeared at that hearing and vigorously defended against the amount of damages claimed. Despite their efforts, however, the trial court entered judgment for the appellees in an amount exceeding \$70,000.00, on January 14, 1998.

In May 1998, Hebert filed a motion to stay execution of the judgment and to set aside the January 14 damages award. In July 1998, she filed a motion pursuant to CR 60.02 requesting relief from the default judgment entered on March 18, 1997. In her 60.02 motion, Hebert alleged that she was entitled to relief on several grounds: that the judgment had been procured through perjury and fraud affecting the proceedings; that the judgment had been partially satisfied; and finally, that the judgment had been entered as a result of the incompetent performance of defense counsel.¹ Hebert also sought to assert a counterclaim in the action; to regain possession of several horses and miscellaneous equipment; to require an accounting of the defunct corporation's business; and to compel an inventory of the items previously executed upon. Hebert later filed a motion requesting

¹Hebert's accompanying memorandum also contained disparaging remarks against the appellees' trial counsel. Hebert alleged that counsel had engaged in deceit during certain settlement negotiations, had made false representations to the court, and had knowingly filed false pleadings on behalf of his clients.

recusal of the trial judge.² Following a hearing, the trial court denied the various motions, and these appeals followed.

On appeal, Hebert argues that the trial court erred by failing to afford her the relief sought under CR 60.02. The appellees have not filed an appellate brief with this court. Under Ky. R. Civ. Proc. (CR) 76.12(8)(c), when an appellee fails to file a brief, we are authorized to:

(i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if the appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

Under the circumstances presented in this case, we elect to proceed according to CR 76.12(8)(c)(iii), treating the failure of the appellees to file a brief as a confession of error justifying reversal of the judgment in their favor. Commonwealth, Dept. of Highways v. Johnson, Ky., 377 S.W.2d 596 (1964); Louisville and Jefferson Co. Human Relations Comm'n v. Mr. Maid, Inc., Ky. App., 828 S.W.2d 679 (1992).

Accordingly, the court's order denying the appellant's motion filed pursuant to CR 60.02 is reversed, and we remand this matter to the trial court with directions that it address the grounds asserted in that motion and that it grant appropriate relief.

ALL CONCUR.

²In that motion, Hebert alleged that the trial judge had failed to take appropriate action against plaintiffs' counsel despite his unethical and unprofessional conduct and had further revealed her partiality and bias in favor of the appellees by entering the default judgment and damages award.

BRIEF FOR APPELLANT:

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