

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002894-MR

HARDEE'S FOOD SYSTEMS, INC.

APPELLANT

v.

APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 98-CI-00135

DAVID G. CRABTREE

APPELLEE

OPINION
VACATING AND REMANDING
** **

BEFORE: COMBS, EMBERTON, and TACKETT, Judges.

COMBS, JUDGE: Hardee's Food Systems, Inc. ("Hardee's") appeals from a judgment entered by the Trigg Circuit Court. The appellant contends that the trial court erred by awarding David G. Crabtree certain damages that he was not legally entitled to recover. After our review of the record and the legal arguments, we agree that Crabtree failed to comply with the provisions of Kentucky Rule of Civil Procedure (CR) 8.01(2). Consequently, we are compelled to vacate and remand.

Crabtree filed this negligence action against Hardee's on September 16, 1998. He alleged that he had been severely injured when he took a fall on Hardee's premises. He sought

reimbursement for his lost wages, compensation for his impaired ability to earn money, compensation for his past and future medical expenses, and an award for pain and suffering.

Hardee's filed a timely answer and, in accord with CR 8.01(2), propounded interrogatories aimed at discovering the specific amounts sought by Crabtree for the unliquidated damage claims. CR 8.01(2) provides as follows:

In any action for unliquidated damages the prayer for damages in any pleading shall not recite any sum as alleged damages other than an allegation that damages are in excess of any minimum dollar amount necessary to establish the jurisdiction of the court provided, however, that all parties shall have the right to advise the trier of fact as to what amounts are fair and reasonable as shown by the evidence. When a claim is made against a party for unliquidated damages, that party may obtain information as to the amount claimed by interrogatories; if this is done, the amount claimed shall not exceed the last amount stated in answer to interrogatories.

(Emphasis added).

Crabtree's answers to interrogatories were timely filed and properly verified. With respect to his claim for lost wages, Crabtree indicated that his response would be "supplemented at a later date." In response to a request to provide the specific amounts "claimed for each allegation of unliquidated damages," the plaintiff listed "[p]ain and suffering - \$100,000.00." He claimed \$4,685.00 in medical expenses.

On March 11, 1999, the trial court ordered the parties to complete discovery prior to the pre-trial conference scheduled for August 9, 1999. The pre-trial conference was held as planned, and the trial was scheduled for August 26, 1999.

Without seeking leave of court, counsel attempted to supplement Crabtree's answers to interrogatories in the mid-afternoon of August 25, 1999, by means of an unverified facsimile to counsel for Hardee's.¹ In response, Hardee's filed a motion *in limine* heard by the trial court on the morning of trial (August 26, 1999). Citing the provisions of CR 8.01(2), Hardee's argued that Crabtree's attempt to supplement his earlier answers was inadequate and unseasonable. Consequently, it objected to any proof relative to a claim for lost wages or for permanent impairment of earning capacity and contended that proof relative to Crabtree's medical expenses must be limited to the previously disclosed sum of \$4,685.00. The trial court held that Hardee's was not prejudiced by the late disclosures and denied the motion. The court also refused a request in the alternative for a continuance of the trial.

Following closing arguments, the trial court overruled Hardee's objections to jury instructions that reflected the supplemented damage claims. The case was submitted to the jury with instructions to determine whether Hardee's had failed to exercise reasonable care with respect to Crabtree and, if so, to award him damages that fairly and reasonably compensated him for: medical expenses (not to exceed \$7,816.00), any future medical expenses, lost wages (not to exceed \$22,000.00), permanent impairment of power to labor and earn money (not to exceed \$99,000.00), and pain and suffering (not to exceed \$100,000.00).

¹These responses were not filed with the court until some three weeks following the end of trial.

The jury found that both Crabtree and Hardee's had acted negligently, apportioning fault 25% to Crabtree and 75% to Hardee's. It returned a verdict awarding Crabtree \$7,816.00 in medical expenses, \$75,000.00 in future medical expenses, \$45,000.00 for pain and suffering, \$22,000.00 for lost wages, and \$75,000.00 for permanent impairment of his power to labor and to earn money. In accordance with the verdict, the trial court entered judgment in favor of Crabtree in the amount of \$168,612.00 (75% of the entire sum awarded by the jury). The trial court denied Hardee's subsequent motions for judgment notwithstanding the verdict (JNOV) or a new trial. This appeal followed.

The parties agree that the Kentucky Supreme Court's decision in Fratzke v. Murphy, Ky., 12 S.W.3d 269 (1999), controls the outcome of this appeal. While we believe that the facts and circumstances of this case involve some issues not examined by the Fratzke Court, the reasoning of that decision necessarily dictates and directs our analysis in this appeal.

In Fratzke, the Kentucky Supreme Court confirmed that a trial court may not award damages for unliquidated claims that are in excess of the last amount claimed by the plaintiff in answers to interrogatories. See also Burns v. Level, Ky., 957 S.W.2d 218 (1997), holding that the language of the rule is mandatory and gives a trial court no discretion as to its application; and National Fire Ins. Co. v. Spain, Ky. App., 774 S.W.2d 449 (1989). In view of this controlling precedent, Crabtree concedes that he is not entitled to recover any portion

of the jury's award of future medical expenses. He admits that the sum sought for this unliquidated claim was never properly identified in his answers or supplementary answers to interrogatories.

Crabtree argues, however, that his claims for lost wages and permanent impairment of ability to labor and to earn money had been properly identified in his supplemental answers to interrogatories and, consequently, that he is entitled to retain that portion of the judgment.² Analyzing the requirements of CR 8.01(2) under strikingly similar circumstances, the Fratzke court squarely rejected this contention.

In Fratzke, the plaintiff had originally filed timely and responsive answers to interrogatories propounded by the defendant. These answers, however, omitted an amount for any damage claim other than medical expenses incurred to date. By failing to identify any other sums, the court held, "Fratzke effectively stated that her claim for unliquidated damages was nothing." Fratzke, supra at 271.

As in the case before us, the trial court in Fratzke had overruled defense counsel's objection to any mention of the plaintiff's claims for unliquidated damages on grounds that CR 8.01(2) prohibited Fratzke from recovering on those claims. The trial court reasoned that such a result was unduly harsh on the plaintiff. On the afternoon of the last day of trial, the plaintiff finally filed with the court clerk her supplemental

²Crabtree maintains that the additional sums claimed for past medical expenses are not "unliquidated damages" and thus that they are not governed by CR 8.01(2). We agree.

answers to interrogatories providing monetary amounts for unliquidated damage claims.

On appeal, the Kentucky Supreme Court affirmed this court's opinion reversing the trial court's decision. Construing the provisions of CR 26.05 as imposing a "seasonable" time limit on a party's ability to supplement an answer to interrogatories for claims for unliquidated damages, the Supreme Court held that any attempt to supplement answers to interrogatories after trial has commenced is not seasonable as a matter of law. Fratzke, supra at 272.

The Supreme Court acknowledged that its decision was severe but held that the result was required by the plain language of the rule and controlling precedent. Id. at 273. The Court concluded its opinion with the observation that Fratzke had had the opportunity to comply with the rule seasonably or that even after a seasonable time had expired, she could have moved the trial court to permit her to supplement her answers. Id. at 273. Her failure to do either had the obvious consequence of the severe outcome dictated by the combined impact of CR 8.01(2) and CR 26.05.

In this case, we are presented with two issues: (1) whether counsel's attempt to supplement the answers to interrogatories was seasonable and (2) whether Crabtree's failure to verify the responses as required by CR 33.01 affects the answers. While the former issue is governed by Fratzke, the latter involves application of the plain language of CR 33.01.

Counsel attempted to supplement the answers to interrogatories by means of facsimile transmission weeks after the court-imposed discovery deadline had passed and just hours before trial was scheduled to commence. We cannot agree that he seasonably complied with the rule in responding to the defendant's timely discovery requests. The responses filed with the court clerk approximately three weeks following trial were not seasonable as a matter of law pursuant to Fratzke. As an argument in the alternative, Crabtree suggests that Hardee's was under an obligation to seek a court order compelling his timely response to the interrogatories. We disagree. There is no such requirement either stated or implied in the pertinent civil rules.

We next turn to Crabtree's failure to verify the supplementary answers to interrogatories. CR 33.01(2) provides, in part, as follows:

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objections shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(Emphasis added).

The rule plainly provides in mandatory language that answers to interrogatories are to be sworn to and signed by the party served. In 6 Bertelsman & Philipps, Kentucky Practice, CR 33.01, Comment 4 (5th ed. 1995), the author explains that answers to interrogatories should be in such a form that they may be used

at trial and that it is improper for a party's attorney to sign those responses.

The record indicates that the supplementary answers were never verified by Crabtree. Nor is there anything in the record to suggest that the parties stipulated or agreed to any other procedure not provided for by the rule. Under our rules of civil procedure, the act of verifying answers to interrogatories is testimonial in nature. As a result, Crabtree's failure ever to verify the responses cannot be overlooked. A party's obligation to verify answers to interrogatories is explicit and meaningful; his failure to comply with this obligation is fatal.

Based upon the holding of the Kentucky Supreme Court in Fratzke, supra, and our reading of CR 33.01, we are compelled to conclude that Crabtree's supplementary answers to interrogatories were both unseasonable and unacceptable in their form. Our resolution of these issues renders moot the appellant's remaining issues.

The judgment of the Trigg Circuit Court is vacated, and the matter is remanded with directions to enter judgment based on the directives in our decision.

ALL CONCUR.

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