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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

1997-CA-000720-MR

JUDY HAMILTON

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 94-CI-0651

CAROL SUE HAMILTON,
AMERICAN MANUFACTURERS MUTUAL
INSURANCE COMPANY, and
ALLSTATE INSURANCE COMPANY,

APPELLEES

AND 97-CA-0742-MR

CAROL HAMILTON

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 94-CI-0651

JUDY HAMILTON and
AMERICAN MANUFACTURERS
MUTUAL INSURANCE COMPANY

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

* * * * *

BEFORE: ABRAMSON, BUCKINGHAM, and COMBS, Judges.

BUCKINGHAM, JUDGE. Carol Sue Hamilton (Carol) and Judy Hamilton (Judy)¹ filed separate appeals after a jury trial in the Floyd Circuit Court.² For the reasons set forth hereinafter, the judgment as it relates to Judy's claim for damages should be affirmed, but the judgment as to Carol's claim for damages should be reversed and remanded.

On March 27, 1994, Carol and Judy were involved in an automobile accident. Judy was backing out of a driveway in a pickup truck when she collided with a vehicle driven by Carol. Carol filed a complaint for damages due to personal injury against Judy in the Floyd Circuit Court, and Judy filed a counterclaim for similar damages against Carol. Carol also asserted a claim against her insurance company, American Manufacturers Mutual Insurance Company (American), in which she sought underinsured motorist (UIM) benefits.

The case was tried before a jury, and the jury determined in its verdict that Judy was eighty percent at fault and Carol was twenty percent at fault. Neither party requested that the jury instructions include past medical expenses as an item of damages, and the jury by its verdict awarded \$2,500 to Carol for pain and suffering and nothing to Judy.

¹ Carol and Judy are not related.

² The appeals have been consolidated.

Carol appeals from a pretrial order of the trial court which granted Judy's motion to strike Carol's demand for lost wages.³ In the course of discovery, Judy forwarded a request for production of documents to Carol. The request for production contained a request that Carol produce her income tax returns for the years of 1987 through 1993. Carol only provided the 1987 tax returns. Judy did not file a motion for an order compelling discovery pursuant to Civil Rule (CR) 37.01, but filed a motion to strike Carol's claim for lost wages. The trial court stated at the hearing on the motion that Carol had had "more than sufficient time to obtain the IRS records" and granted the motion. Carol argues that the sanction of dismissal of that part of her claim was not permitted since she had not failed to obey or comply with a court order.

CR 37.02(2)(c) provides in relevant part that if a party fails to obey an order to provide or permit discovery, then the court may make "such orders in regard to the failure as are just," including "dismissing the action or proceeding or any part thereof" Judy and American contend that Carol failed to comply with the court's pretrial conference order by not supplying the requested information within the time deadlines imposed by the order. Judy and American cite the provision of the pretrial conference order which states that a party intending

³ We have searched the record and cannot find Judy's motion to strike. We found a copy of it as an exhibit to Judy's second brief, and we assume that the motion was properly before the court.

to introduce an exhibit at trial should furnish a copy of the exhibit to the other parties at least thirty days prior to trial.

We agree with Carol that the trial court erred. Carol simply failed to comply with the discovery request, but there was no court order directing her to do so. The pretrial conference order did not contain such a directive. The provision in the pretrial conference order relied upon by Judy and American relates only to exhibits to be introduced at trial, and Carol never intended to introduce the tax returns to support her claim.⁴

"CR 37.02(2)(c) applies solely and only to situations where there has been a failure to comply *with an order of court.*" Sublett v. Hall, Ky., 589 S.W.2d 888, 891 (1979). The trial court's dismissal of Carol's lost wages claim was erroneous as she had not failed to comply with a court order in that regard.⁵

Judy and American also argue that Carol waived any claim for lost damages by failing to request a jury instruction on that item of damages at trial. Carol had no reason to request a jury instruction for that item of damages, however, as the trial court had already dismissed her claim in this regard. Her objection to the court's ruling was already preserved for

⁴ Carol represented to the trial court that she was unable to obtain the tax records and stated that she intended to prove her lost wages by social security records.

⁵ While Judy could not obtain dismissal of Carol's claim, she could have sought relief pursuant to CR 34.02 and CR 37.01.

appellate review, and she was not required to request such a jury instruction which would be an exercise in futility.

Judy appeals from an order of the trial court denying her motion for a new trial. The jury awarded Judy no damages, and she claims that she is entitled to a new trial since the unrebutted medical evidence proved that she was injured as a result of the accident.

Judy's injury claim was supported by the testimony of Dr. Michael Baghdoian, who testified that Judy had suffered a disk herniation at L4-5 which resulted in surgery. He further testified that Judy would have future physical impairment as a result of the injury. However, Judy admitted on cross-examination that she had previously suffered back and neck problems, which were substantiated by medical records introduced into evidence. Furthermore, Dr. Baghdoian testified that his opinion that Judy's back problems were related to the accident was based upon the history she provided to him and that he had no recollection that she told him of any previous problems with her back. He further testified that his opinion regarding the cause of her injury may have been different had he known of her prior back problems.

As this court held in Carlson v. McElroy, Ky.App., 584 S.W.2d 754 (1979), the fact that a person is involved in an automobile accident in which the other party is at fault does not "mean she was entitled to some damages, if, as here, the jury believed she was not injured, or, if so, she was injured as a

result of some other cause." Id. at 756. Also, the jury is not required "to accept as the absolute truth" the testimony of Judy or her treating physician. Id. The jury was free to believe that Judy's surgery was due to her previous back problems and not to any injury suffered in this accident. Id.

Judy also claims that the jury verdict was inconsistent since she was entitled to recover the medical expenses in connection with her surgery. The verdict, however, was not inconsistent in that the jury did not award medical expenses to Judy. Again, the jury was free to believe that her surgery was not related to any injury suffered in the accident. Carlson, supra. In short, the trial court properly denied Judy's motion for a new trial.

The judgment of the Floyd Circuit Court is affirmed as to the denial of Judy's motion for a new trial but is reversed and remanded as to Carol's claim for lost wages.

All CONCUR.

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