

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002969-MR
AND
NO. 2001-CA-000043-MR

PATRICIA STANLEY;
AND GEORGE E. THOMAS

APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE GEOFFREY MORRIS, JUDGE
ACTION NO. 98-CI-002300

STAR COMMUNITY TAXI

APPELLEE/CROSS-APPELLANT

OPINION
REVERSING AND REMANDING
** **

BEFORE: BUCKINGHAM, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE: On May 3, 1996, appellants Patricia Stanley and George Thomas, both of New Orleans, were injured as they left Churchill Downs in a taxi cab driven by Johnny Smith¹ and owned by appellee, Star Community Taxi Service (hereinafter Star Taxi). The Star Taxi vehicle struck the rear of a cab in front of it in stop-and-go traffic. Appellants were injured in the collision.

¹ Johnny Smith was not made a party to this appeal.

Appellants filed suit against Star Taxi and Johnny Smith on April 27, 1998. When no response was filed, appellants filed a motion for default judgment. On July 17, 1998, the Jefferson Circuit Court granted appellants a default judgment against Star Taxi and Johnny Smith on the issue of liability, and for costs expended. The trial court held a hearing without a jury to determine damages. Appellants were present and testified as to the injuries they sustained. Appellee was not represented at the hearing. At the close of the hearing, the court awarded appellants the amount requested for their reasonable and necessary medical expenses and \$25,000 each for pain and suffering. The court rendered a judgment consistent with its findings on March 31, 1999.

On June 17, 1999, appellee filed a motion to set aside the default judgment. Following a hearing on the motion, the trial court affirmed the default judgment as to liability, and set aside the damages portion of the default judgment. Appellants filed a motion to alter, amend, or vacate the judgment pursuant to CR 59.05. The trial court denied appellants' motion. Appellants appealed from this order, but this Court dismissed the appeal as being interlocutory.

The trial court thereafter held a jury trial on the issue of damages. The jury found that appellee was liable for all the medical expenses appellants incurred. However, the jury awarded appellants nothing for pain and suffering. The court

entered a judgment consistent with the jury's verdict, awarding appellant Stanley \$3,359 for her medical expenses and appellant Thomas \$3,218 for his medical expenses. Appellants thereafter filed a motion for judgment notwithstanding the verdict on the basis that awarding them their entire medical expenses but nothing for pain and suffering was at odds with the court's prior evaluation of damages and was an inconsistent and impermissible verdict. The court denied the motion. Appellants appeal from the court's orders.

Star Taxi filed a motion to alter, amend, or vacate the judgment. Star Taxi claimed that the court should have entered a judgment whereby appellee would pay nothing due to the set off under the Kentucky Motor Vehicle Repairs Act of \$10,000 of the award by basic reparation benefits that would be payable to appellants by their own insurance carrier. The trial court denied the motion. Appellee cross-appeals from the order denying the motion to alter, amend, or vacate.

Appellants first argue that the trial court erred in setting aside the default judgment as to damages. CR 55.02 authorizes a court "[f]or good cause shown" to set aside a default judgment in accordance with CR 60.02. CR 60.02 states that on motion a court may, upon such terms as are just, relieve a party or his legal representative from a final judgment upon the following grounds:

- (a) mistake, inadvertence, surprise or excusable neglect;
- (b) newly discovered

evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

Additionally, the Rule requires that the motion be made within a reasonable time.

Thus, to set aside a default judgment, the defaulting party must timely show a reasonable excuse or good cause for setting aside the judgment. Howard v. Fountain, Ky. App., 749 S.W.2d 690, 692 (1988). Good cause is most commonly defined as a timely showing of the circumstances under which the default judgment was procured. Green Seed Co. v. Harrison Tobacco Storage Warehouse, Inc., Ky. App., 663 S.W.2d 755 (1984). In S.R. Blanton Dev., Inc. v. Investors Realty and Management Co., Ky. App., 819 S.W.2d 727, 729 (1991), we held that a party moving to set aside a default judgment must show a valid excuse for default, a meritorious defense to the claim, and the absence of prejudice to the non-defaulting party. Absent a showing of all three elements, a default judgment will not be set aside. Sunrise Turquoise, Inc. v. Chemical Design Co., Ky. App., 899 S.W.2d 856 (1995). Setting aside a default judgment is a matter of discretion with the trial court, and the decision to do so

will not be reversed absent an abuse of discretion. Howard, 749 S.W.2d at 692.

While we recognize that default judgments are not favored, we conclude that the setting aside of the default judgment in this case was an abuse of the court's discretion. Appellee established no good cause for setting aside the default judgment against them. Before the court can examine any claims of meritorious defense and absence of prejudice, the court must find that there was a good reason for setting aside the default judgment. Appellee made no claim of excusable neglect or any other reason which would justify relief. Therefore, we find that the trial court abused its discretion in setting aside the default judgment.

Moreover, we do not believe that the Howard case provided a mechanism for the trial court to set aside the damages portion of the default judgment in this case. We conclude that Howard is distinguishable on its facts from the case at bar. The decision in Howard to allow the defaulting party to participate in the hearing on damages was based on the fact that the defendant therein had entered an appearance before the hearing. We held therein *that fundamental fairness requires that a defaulting party be given notice of a damage assessment hearing where he has entered an appearance in the action prior to the hearing.*@ Id. at 693 (emphasis supplied.)

Furthermore, we do not believe appellee, despite its failure to appear, was entitled to a hearing pursuant to Howard because the damages were unliquidated. As stated above, it was the entry of appearance and not the fact that the damages were unliquidated that was the basis of the court's holding in Howard that the defendant's were entitled to notice of the hearing. In this case, the trial court did not enter judgment on the pleadings but held a hearing on the issue of damages. Thus, the unliquidated portion of the judgment was determined. There was no requirement of a second hearing in this case. Therefore, we reinstate the original default judgment and the damages determined at the hearing before the court.

Appellee cross-claims to the effect that they were improperly required by the trial court's judgment to pay despite the statutory exclusion of the first \$10,000 in basic reparations benefits under the Kentucky Motor Vehicle Reparations Act (KRS 304.39-060 et seq.). Under KRS 304.39-060(2)(a),

Tort liability with respect to accidents occurring in this Commonwealth and arising from the ownership, maintenance, or use of a motor vehicle is "abolished" for damages because of bodily injury, sickness or disease to the extent the basic reparation benefits provided in this subtitle are payable therefor, . . .

There is nothing in the record on appeal to indicate whether appellants collected basic reparation benefits for the injuries they sustained. Nevertheless, the statute excludes the statutory amount to the extent the benefits are ~~A~~payable, and regardless

of whether the injured party was insured. Stone v. Montgomery, Ky. App., 618 S.W.2d 595 (1981). Therefore, we agree with appellee that the first \$10,000 of the damages for personal injury is excluded under the above statute. We discern no reason why this statutory provision would be inapplicable where a default judgment was entered and the claim was raised post-judgment. Therefore, the amount which may be set off shall be adjudged by the court upon remand.

For the foregoing reasons, we reverse the order of the Jefferson Circuit Court which set aside the default judgment in this case. We remand for further proceedings consistent with this opinion.

TACKETT, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS BY SEPARATE OPINION.

BUCKINGHAM, JUDGE, CONCURRING BY SEPARATE OPINION. I agree with the majority opinion that the trial court erred in setting aside the default judgment against the appellee/cross-appellant. According to the Sunrise Turquoise case cited in the majority opinion, a party moving to set aside a default judgment must show a valid excuse for default, a meritorious defense to the claim, and the absence of prejudice to the non-defaulting party. Id. at 859. Furthermore, the court in that case held that "[a]bsent a showing of all three elements, the default judgment will not be set aside." Id. In the case *sub judice*, it does not appear that the appellee/cross-appellant has attempted

to offer any valid excuse for the default. Rather, contrary to the holding in Sunrise Turquoise, it argues that all three elements need not be shown in order to set aside a default judgment.

The appellee/cross-appellant argues that the Sixth Circuit has not required a showing of all three elements in order to set aside a default judgment under the corresponding federal rules of civil procedures. See Berthelsen v. Kane, 907 F.2d 617 (6th Cir. 1990). It seems to me that the approach by the Berthelsen case makes more sense than the approach in the Sunrise Turquoise case, particularly where the party moving to set aside the default judgment was in default due to mere negligence rather than willful action. Nevertheless, I will reluctantly follow the precedent that this court set in the Sunrise Turquoise case in 1995.²

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² It seems odd that the court in the Sunrise Turquoise case cited Perry v. Central Bank & Trust Co., Ky. App., 812 S.W.2d 166, 170 (1991). It does not appear that the Perry court would have required a showing of all three elements before granting relief.