

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001797-MR

MARY A. HOPKINS; AND
WILLIAM HOPKINS

APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 00-CI-00653

GWEN BIRTHELMER; AND
PROGRESSIVE MAX INSURANCE
COMPANY

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, DYCHE AND TACKETT, JUDGES.

BARBER, JUDGE: The Appellants, Mary A. Hopkins and William Hopkins, appeal from a trial order and judgment of the Kenton Circuit Court dismissing, based upon a jury verdict in favor of the Appellee, Gwen Birthelmer. Appellants also appeal from an order denying their motion for judgment notwithstanding the verdict and granting the motion to dismiss filed by the

Appellee, Progressive Max Insurance Company, (Progressive).

Finding no error, we affirm.

This appeal arises out of litigation over an April 23, 1999 motor vehicle accident between Mary Hopkins and Gwen Birthelmer. Ms. Hopkins alleged that she sustained personal injuries and lost time from work as a result of the accident. Progressive was Ms. Hopkins reparations obligor.

On May 28, 2000, the Appellants, Mary A. Hopkins and William Hopkins, her husband, filed a complaint in the Kenton Circuit Court against the Appellees, Gwen Birthelmer, Ollie Birthelmer, owner of the vehicle, and Progressive Insurance Company.¹ Appellants claimed that Progressive violated its duty to pay further personal injury protection benefits under the policy, and violated the Kentucky Unfair Claims Settlement Practices Act (the "UCSPA").

The evidence regarding the manner in which the accident occurred and the causation of Ms. Hopkins' physical injuries was in conflict. By order entered February 12, 2001, the trial court bifurcated the bad faith claims against Progressive.

The case was tried on June 12 and 13, 2001. The jury returned a unanimous verdict in favor of the defendant, Gwen

¹ By agreed order entered May 10, 2001, "Progressive Max Insurance Company" was substituted as a party Defendant for "Progressive Insurance Company."

Birtheimer. On June 18, 2001, Appellants filed a motion for judgment notwithstanding the verdict. By order entered June 28, 2001, the trial court dismissed the case as to Ms. Birtheimer with prejudice. On July 2, 2001, Progressive filed a motion to dismiss, on ground that Appellants' claims against it "were effectively extinguished" by the jury's verdict - that the accident of January 23, 1999, was not a substantial factor in causing Ms. Hopkins' injury. By order entered July 20, 2001, the trial court granted Progressive's motion.

On appeal, Appellants simply reargue their case. Our role is limited to determining whether the verdict rendered is palpably and flagrantly against the evidence, so as to indicate it was reached as a result of passion or prejudice.² As the trial court stated in its order denying the motion for judgment notwithstanding the verdict, "substantial evidence [was] presented at trial upon which the Jury could base its belief that the accident was not a substantial factor in causing injury to Mary A. Hopkins." In fact, the Appellants concede that the opinion of the treating physician was contradicted by the defense examining physician. We find no error.

² *NCAA v. Hornung*, Ky., 754 S.W.2d 855, 860 (1988).

Next, Appellants assert that Progressive violated the Kentucky UCSPA; however, they fail to point out any error on the trial court's part in granting Progressive's motion to dismiss. As explained by the trial court, it was "abundantly clear" that the jury did not believe that Ms. Hopkins was injured as a result of Birthelmer's conduct and the consequent accident. Moreover, as Progressive notes, Appellants did not file a response to its motion to dismiss. Again, we find no error.

We affirm the order of the Kenton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE, GWEN
BIRTHELMER:

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BRIEF FOR APPELLEE,
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