

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000475-MR

ALLSTATE INSURANCE COMPANY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY L. WILLETT, JUDGE
ACTION NO. 98-CI-006602

BOBBIE D. POWELL

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI, AND KNOPF, JUDGES.

BAKER, JUDGE. Allstate Insurance Company (Allstate) brings this appeal from an August 17, 2001, judgment of the Jefferson Circuit Court. We affirm.

It appears that an unknown driver collided with the vehicle that Bobbie D. Powell (Powell) was driving. As a result, Powell brought a civil action for uninsured motorist's (UM) benefits against Allstate. A jury awarded Powell \$21,649.70 for past medical expenses and \$3,500.00 for future

medical expenses. By judgment entered August 17, 2001, the circuit court found that Powell had been awarded \$21,649.70 in workers' compensation benefits for past medical expenses and that Powell would be entitled to workers' compensation benefits in the sum of \$3,500.00 or more for future medical expenses. The court thus concluded that the UM benefits should be set off against the workers' compensation benefits:

. . . the Court finding that payment and receipt of workers' compensation benefits is adequate compensation and adequate recovery for the damages awarded Plaintiff by the verdict of the jury;

IT IS HEREBY ORDERED AND ADJUDGED:

. . .

2. That Plaintiff takes nothing further from Defendant Allstate Insurance Company.

Thereupon, Powell filed an "Objection to Tendered Judgment of Allstate Insurance Company." By order dated January 9, 2002, the circuit court amended its January 17, 2001, judgment. Relying on Philadelphia Indemnity Insurance Company v. Morris, Ky., 900 S.W.2d 621 (1999), the court held that "the plaintiff is entitled to recover the full amount of damages awarded by the jury, \$25,149.70, without any setoff or reduction for workers' compensation benefits paid to her or on behalf of Bobbie D. Powell." This appeal follows.

Allstate contends that the circuit court committed error by failing to offset the workers' compensation benefits against UM benefits. We observe that such offset would effectively reduce Powell's UM benefits to naught. To resolve this appeal, we must initially examine the setoff provision allegedly contained in Allstate's insurance policy. Allstate makes reference to such an offset provision in footnote three on page three of its brief. However, Powell argues that "Allstate's contract does not have a setoff provision, but that provision applies to UIM coverage." Brief for Appellee at 4. We are unable to resolve this dispute, as the insurance policy is not in the record on appeal.

In the record, we located a document entitled "Exhibits (Plaintiff)." Upon that document, it is indicated that Exhibit 1 is the Allstate policy and Exhibit 2 is a medical expense summary. The document indicates that there should be a check mark by the exhibits which were introduced into evidence. A check mark is found by Exhibit 2, the medical expense summary, but not by Exhibit 1, the Allstate insurance policy. This leads to the conclusion that the Allstate insurance policy was never introduced into evidence. Nevertheless, after an exhaustive search of the record, we are unable to locate the Allstate insurance policy at issue. We note that Powell has placed a

purported copy of the insurance policy in the appendix to his brief.

Civil Rule of Procedure 76.12(4)(c)(vii) states:

The first item of the appendix shall be a listing or index of all documents included in the appendix. The appellant shall place the judgment, opinion, or order under review immediately after the appendix list so that it is most readily available to the court. **Except for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs.** (Emphasis added).

As the Allstate insurance policy is not in the record, we think it clearly improper for Powell to include it in the appendix of his brief. See Croley v. Alsip, Ky., 602 S.W.2d 418 (1980). Moreover, we observe that the insurance policy in the appendix of the brief is missing pages.

It is well-established that the burden is on the appellant to ensure that this court is supplied with a sufficient record to decide the appeal. See Fanelli v. Commonwealth, Ky., 423 S.W.2d 255 (1968), reversed on other grounds, 455 S.W.2d 126 (1969). We are to assume that that portion of the record not before us supports the decision of the circuit court. See Colonial Life & Accident Insurance Co. v. Weartz, Ky. App., 636 S.W.2d 891 (1982). As such, we must assume that the Allstate insurance policy did not contain a pertinent setoff provision. Without such a setoff provision, we

are compelled to conclude that Allstate is not entitled to set off workers' compensation benefits against UM benefits owing under its policy.¹

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

Robert L. Catlett, Jr.
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¹ This opinion should not be misconstrued as passing upon whether Allstate Insurance Company possesses subrogation rights. Wine v. Globe American Casualty Co., Ky., 917 S.W.2d 558 (1996).