

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001191-MR
AND
NO. 2002-CA-001229-MR

ARTURO RODRIGUEZ

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 98-CI-00870

KENTUCY FARM BUREAU MUTUAL
INSURANCE COMPANY

APPELLEES/CROSS-APPELLANTS

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from a judgment entered by the Hardin Circuit Court after a jury found that appellant Arturo Rodriguez was not entitled to recover damages against appellee Kentucky Farm Bureau Mutual Insurance Company. For the reasons stated hereafter, we affirm.

This case arose out of a July 1996 motor vehicle accident involving appellant, who was insured under a policy issued by appellee. After the accident appellant was taken to a hospital, where he was examined and released. Evidently the bills for the medical services rendered on the date of the accident were promptly paid by appellee.

Subsequently, appellant sought chiropractic treatment from Dr. Carmen Alampi, D.C. Prior to receiving treatment, appellant was required to sign numerous documents provided by Alampi. Among other things, the documents purported to assign to Alampi the rights to appellant's medical benefits under his motor vehicle PIP coverage. Alampi thereafter billed appellee \$9,010 for chiropractic treatment rendered between July 1996 and March 1997 but, based on an outside review of Alampi's records and billings, appellee paid Alampi only \$3,110.

Appellant then filed this action seeking damages relating to appellee's alleged wrongful denial of PIP benefits, and a jury trial eventually was conducted. Among the issues before the jury were whether Alampi ever accepted the assignment of benefits and, if so, whether such acceptance was later rescinded. The jury returned a verdict in favor of appellee after finding that Alampi had accepted and had not rescinded appellant's assignment of his rights to receive payment from appellee, and the court overruled appellant's motion seeking

judgment n.o.v. or a new trial. This appeal and protective cross-appeal followed.

Initially, we note that CR 76.03(8) limits appellant's discussion on appeal to those issues which were properly raised in the prehearing statement, unless this court permits other issues to be submitted after a timely motion shows the existence of good cause. No such motion was filed herein, and appellant's prehearing statement raised only the following two issues for consideration on appeal:

1. Did the trial court err by ignoring a pretrial order issued by a previous circuit judge (*res judicata*) and then submitting this question of law to the jury to resolve?
2. Did the trial court err in allowing testimony from Defendant's experts over objection of Plaintiff's counsel in violation of KRS 312.200, KRS 312.175 and KAR 21.075 Section 2(1)?

Despite those limitations appellant raised numerous additional issues on appeal, including contentions that the trial court erred (1) by instructing the jury regarding the assignment of PIP benefits because that issue was one of law for the court's determination, (2) by failing to find that appellee lacked standing to contest the validity of the assignment, and (3) by failing to find that appellant's cause of action against appellee was nonassignable. Appellant also asserted that appellee waived any challenge to the issue of whether his cause

of action was assigned to Alampi by failing to raise that issue by specific negative averment in its pleadings. However, because none of these issues were raised in appellant's prehearing statement pursuant to CR 76.03, and he did not show good cause or make a timely motion to submit them as additional issues, they are not properly before us on appeal.

Moreover, it appears that the issues raised by appellant regarding jury instructions and the assignability of his cause of action were not raised below so as to be preserved for appellate review. Although CR 76.12(4)(c)(v) requires any appellant's brief to contain at the beginning of each argument "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner," appellant's direct brief contains no such references to the lengthy record in regard to these issues. Even after these serious preservation deficiencies were noted in appellee's brief, appellant failed to adequately address them in his reply brief or to otherwise indicate any way in which the issues may have been preserved, and we have found no other indicia of preservation. That being so, this court will not consider the merits of these issues on appeal. See Sharp v. Sharp, Ky., 491 S.W.2d 639 (1973); McGinnis v. McGinnis, Ky. App., 920 S.W.2d 68, 73 (1995).

Appellant also is not entitled to relief regarding his claim that appellee waived any challenge to appellant's capacity to sue by failing to timely and specifically raise that challenge in his pleadings rather than in later motions. See CR 9.01. As there is nothing in appellant's briefs to indicate that he ever raised this issue in response to appellee's pleadings, we conclude that he waived any right to raise the matter on appeal. See CR 15.02. See, e.g., Commonwealth v. Lavit, Ky., 882 S.W.2d 678 (1994); Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225 (1989); Abuzant v. Shelter Insurance Co., Ky. App., 977 S.W.2d 259 (1998).

Appellant further alleges that the trial court erred by failing to find that appellee lacked standing to contest the validity of the assignment. Although it again appears that this issue was not raised below and is not preserved for review, appellant contends that the issue of standing is a jurisdictional matter which may be raised for the first time at any point in the proceedings, including on appeal. However, the issue of standing in fact relates to a party's standing to sue, which is defined as a plaintiff's "real and substantial interest in the subject matter of the litigation." Stevens v. Stevens, Ky., 798 S.W.2d 136, 139 (1990); Rose v. Council for Better Education, Inc., Ky., 790 S.W.2d 186, 202 (1989). In other words, standing to sue is the right of a plaintiff, and not that

of a defendant, "to take the initial step that frames legal issues for ultimate adjudication." Kraus v. Kentucky State Senate, Ky., 872 S.W.2d 433, 439 (1993). Clearly, this unpreserved contention regarding standing does not present a jurisdictional issue which now may be raised on appeal by the former plaintiff against the former defendant.

Next, we are not persuaded by appellant's contention that the trial court erred by addressing the issue of his alleged assignment of benefits to Alampi because a previous order denying summary judgment was res judicata as to the assignment issue. CR 54.02(1) provides that unless the order includes specific finality language, a court order which adjudicates less than all of the outstanding claims in an action "is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." A subsequent judgment which adjudicates the remaining claims is "deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment." CR 54.02(2). Here, it is clear that by its very nature, the December 1999 order denying summary judgment was an interlocutory order which was subject to readjudication and revision at any time. Hence, the trial court did not err by

failing to treat that order as res judicata when it entered its final judgment.

Finally, appellant contends that the trial court erred by admitting the testimony of appellee's expert witnesses. We disagree.

Appellant asserts that Dr. Alan Bragman's testimony should not have been admitted because he does not qualify as a peer reviewer in Kentucky. Similarly, appellant asserts that Dr. L.B. Payne's testimony should not have been admitted because appellant never executed a release permitting a peer review of his records. However, since Bragman and Payne both testified as expert witnesses in regard to their review of appellant's records for purposes of litigation, rather than as peer reviewers of those records for the Kentucky Board of Chiropractors, we are not persuaded that the witnesses' failure to be qualified as peer reviewers was relevant in any way to their qualifications as expert witnesses or to the admissibility of their testimony at trial. Hence, the court did not err by admitting their testimony. Moreover, appellant's contentions regarding the propriety of permitting Dr. Broeg to testify at trial are rendered moot because he in fact evidently did not testify below.

Given our conclusions to this point, it is unnecessary to address the issues raised in appellee's protective

cross-appeal.

The court's judgment is affirmed.

ALL CONCUR.

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