

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000976-MR

PATRICK MURPHY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLET, JUDGE
ACTION NO. CI-006128

LIBERTY MUTUAL INSURANCE COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CLAYTON AND WINE, JUDGES.

ACREE, JUDGE: Patrick Murphy appeals from an order of the Jefferson Circuit Court granting summary judgment in favor of Liberty Mutual Insurance Company, on his claim of bad faith under the Kentucky Unfair Claims Settlement Practices Act (UCSPA).

Try as this court might, we cannot reach the merits of this appeal as fully as the rules of appellate procedure envision. To get even this far, we have found it necessary to indulge and accommodate Murphy's counsel's numerous failures to comply with even the most basic rules of our Court. Our efforts have been largely unavailing.

Therefore, just as the previous panel did in reviewing Murphy's companion case, *Murphy v. Gerton*, 2004 WL 1098765 (Ky.App. 2004), we apply *Elwell v. Stone*, 799 S.W.2d 46 (Ky.App. 1990), undertake an overall review of the voluminous record and, finding no manifest injustice, “decline further to address any issues not presented in accordance with CR¹ 76.12(4)(c)(iv) [now (4)(c)(v)].” *Elwell* at 48. We therefore affirm the judgment of the Jefferson Circuit Court.

This case originated in October 1997, when Murphy brought suit in Jefferson Circuit Court against Wanda J. Gerton for negligence, and against her liability insurer, Liberty, for violation of the UCSPA. The Jefferson Circuit Court tried these claims separately, and first addressed the claim against Gerton.

In October 2002, the circuit court entered a judgment reflecting a jury verdict in favor of Murphy against Gerton in the net amount of \$2,555. Murphy's subsequent motions for judgment notwithstanding the verdict and for a new trial were denied and Murphy appealed that judgment. In May 2004, this Court rendered an opinion in that companion appeal, focusing primarily on the numerous deficiencies in the form and content of Murphy's brief. The case was decided based on the precedent set in *Elwell*.

Elwell establishes the principle that, where an appellant refuses to comply with CR 76.12(4)(c)(v), a reviewing court need only undertake an overall review of the record for manifest injustice.

¹ Kentucky Rules of Civil Procedure

We have taken an overall view of this lengthy record and find no manifest injustice and decline further to address any issues not presented in accordance with CR 76.12(4)(c)(iv) [now (4)(c)(v)] except to say, if any errors there be, they were harmless.

Id. at 48.

In *Murphy v. Gerton, supra*, we noted a reluctance to take advantage of an opportunity to correct errors, saying “Murphy has failed to comply, **even after the omissions were called to his, and the court's, attention** in the brief filed by Gerton.” *Murphy v. Gerton* at 2 (emphasis supplied). Consistent with *Elwell*, the Court undertook an overall review of the record, found no manifest injustice, and affirmed the trial court.

Murphy comes before this Court again, having violated several of our procedural rules and tendering yet another deficient brief. Murphy's original brief was tendered on January 9, 2006. We did not permit filing of the tendered brief because it failed to comply with CR 76.12(4)(c)(vii). This rule requires that the judgment or order from which the appeal is taken be attached as the first item in the appendix. On January 10, 2006, we issued an order allowing Murphy ten days to correct this deficiency. The corrected brief was due on January 20, 2006, but Murphy did not tender another brief until March 24, 2006. Even then, this tendered brief still did not include the summary judgment, entered February 3, 2005, that Murphy now appeals. Instead, he attached the order, entered April 7, 2005, denying his motion to alter, amend or vacate the summary judgment, and the order entered July 28, 2003, denying his motion for judgment notwithstanding the verdict or for a new trial in the companion case against Gerton.

Because Murphy filed this ostensibly corrected brief more than two months late, the brief again was not accepted. The clerk of the Court returned the brief to counsel on March 24, 2006.

We did not hear from Murphy or, more appropriately, his counsel for nearly two more months. On May 12, 2006, this Court issued an order on its own initiative requiring Murphy's counsel to file a status report advising the Court whether the appeal had been abandoned. The order specifically advised that failure to file a status report might result in dismissal of the appeal and the imposition of sanctions on Murphy's counsel. Counsel was given twenty (20) days to file that status report, so that it was due on June 1, 2006. This deadline passed and Murphy's counsel did not file the status report.

On June 12, 2006, Murphy filed motions for extensions of time to file the overdue status report and overdue corrected brief. Liberty opposed this motion. However, on September 12, 2006, this Court again indulged Murphy. On that date, Murphy filed his status report and brief.

The status report claims that Murphy filed his original brief on January 27, 2006, but this is not borne out by the Court's records. If he had, the brief still would have been a week late. The status report claims that when Murphy tendered the so-called corrected brief two months late, on May 24, 2006, he also filed with it a motion for extension of time to file the late brief. If the late brief had been accompanied by such a motion it would not have been returned to Murphy until that motion was ruled upon. Furthermore, under penalty of CR 11 sanction, Liberty's counsel states in her June 23,

2006, response that she never received a service copy of such a motion. Most telling is the fact that this Court's records do not support Murphy's counsel's contentions.

We now turn to the brief itself. We begin by saying that, with the entire history of this case before us, we believe we improvidently permitted Murphy to file the brief. We repeat what we said in the companion case of *Murphy v. Gerton*, “Murphy has failed to comply, even after the omissions were called to his, and the court's, attention in the brief filed by” Liberty. Not only does the brief fail to include the summary judgment Murphy challenges, there are no citations at all to the record as required by CR

76.12(4)(c)(iv). Murphy's statement of the case was supposed to consist

of a chronological summary of the facts and procedural events necessary to an understanding of the issues presented by the appeal, **with ample references to the specific pages of the record, or tape and digital counter number** in the case of untranscribed videotape or audiotape recordings, or date and time in the case of all other untranscribed electronic recordings, **supporting each of the statements narrated in the summary.**

CR 76.12(4)(c)(iv)(emphasis supplied).

Additionally, Murphy's counsel appears to have learned nothing from our opinion in Murphy's companion case focusing specifically on his failure to comply with another subsection of that rule, CR 76.12(4)(c)(v). This brief, drafted originally and in its amended form long after our previous opinion was rendered, continues to lack any statement indicating how the errors complained of were preserved.

As Liberty notes, Murphy's brief could be stricken, pursuant to CR 76.12(8)(a), for its failure to comply with the provisions of CR 76.12(4)(c)(iv), (v), and

(vii). And well it could be. However, we hesitate to punish Murphy too severely for the shortcomings of his counsel. Therefore, again applying the standard in *Elwell*, we have taken an overall review of the record and find no issues of material fact. The circuit court properly entered a summary judgment for Liberty. Finally, we note that Murphy's counsel has established a reputation which we expect will improve by future adherence to our rules in any matter he may bring before us.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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