RENDERED: May 27, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000114-MR

BILL JOE HARKRADER — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 99-CI-00910

FARRAR OIL COMPANY; DOUG YATES;
AND RONDALL TROGDEN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI and TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.[1]

EMBERTON, SENIOR JUDGE: The single issue in this appeal is whether the Daviess Circuit Court erred in granting appellees' motion to enforce a settlement agreement negotiated in the course of mediation of a personal injury action. We affirm.

Appellant instituted this action for damages due to personal injuries allegedly incurred as a result of the combined

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

negligence of appellees. After the exchange of discovery information, the parties entered into a voluntary mediation agreement for the purpose of settling the appellant's claim. On September 30, 2003, W. Douglas Myers conducted a mediation conference at the offices of Jerry Rhoads, appellant's former counsel. Appellees maintain that after several hours of negotiation a settlement agreement was reached but that no written document memorializing the agreement was executed on that date. Shortly after the mediation, appellant's counsel informed them that appellant no longer wished to be bound by the agreement, precipitating the motion to enforce the agreement which forms the basis of this appeal.

At the hearing conducted on appellees' motion, appellant's former counsel confirmed appellees' version of the facts surrounding the mediation and settlement. He agreed that a settlement had in fact been reached, that appellant himself had been present and agreed to the terms of the settlement, that he had notes which corresponded to the terms of the settlement as set out by appellees, and that after the settlement appellant had informed him that he no longer wished to go forward with the settlement. The mediator who conducted the settlement negotiations supplied an affidavit in which he stated that all parties including appellant himself entered into a settlement of his claims against appellees; that in exchange for a payment of

$310,000.00, appellant agreed to fully and completely release all claims and would hold harmless and indemnify appellees from responsibility for all third party claims including those related to medical care claims and claims for attorneys' fees and costs by appellant's prior counsel; that appellant would pay recoverable court costs to his counsel, estimated to be $500.00, as well as the mediator's fees and expenses; and that all essential terms of the agreement had been specifically agreed to by all parties, including appellant with the advice and assistance of counsel.

Appellant argued at the hearing that when he left the mediation conference he had not agreed to a final settlement, but believed that he had received appellee Farrar's highest offer which he was to consider. He stated that he had no intention of making any final decision on that day because he was still wearing a morphine patch from a recent surgery. The trial judge allowed appellant to fully explain his position as to the facts of the mediation and the purported settlement. The trial judge thereafter entered an order enforcing the settlement agreement according to the previously recited terms.

Appellant supports his argument for reversal of that order by contending: 1) that the trial judge erred in considering the affidavit of the mediator; and 2) that the trial judge was without authority to enforce the settlement agreement

absent a written document confirming the terms of the agreement. We find no merit in either proposition.

As a preliminary matter, we note that neither of appellant's complaints were presented to the trial judge and thus have not been preserved for our review. Appellant did not contest the propriety of the mediator's affidavit nor did he argue that pursuant to the Kentucky Model Mediation Rules the agreement was required to be in writing in order to be enforced. Nevertheless, in the interest of judicial economy, we will briefly address them.

First, while the mediation agreement did contain a specific provision to the effect that the mediator could not be compelled to testify or to produce records, notes or work product in any future proceeding, nothing in that document precluded the mediator from providing the trial judge with pertinent information of his own volition. His affidavit was entirely competent and the trial judge did not err in considering it. Nor was there anything unethical or improper in appellant's counsel reciting for the trial court his recollection of the facts surrounding the mediation, the settlement agreement and appellant's subsequent attempt to repudiate that agreement. Counsel fully disclosed to the trial court that appellant's attempt to avoid the terms of the settlement had placed him in an awkward position and he informed

the trial judge that appellant would be personally presenting his position as to the existence of a settlement agreement. We find absolutely nothing improper in the trial court's handling of the argument presented at the hearing.

Next, it must be emphasized that this was a voluntary mediation in which enforcement of the Model Rules had not been invoked. In any event, appellant's reliance upon Mediation Rule 11, which requires that the parties' agreement be reduced to writing, is misplaced. Obviously, disputes of this type would be avoided if a writing can be executed at the mediation conference, but the rule does not require simultaneous execution of a written document. And, of course, reason dictates that in complex cases generating a settlement document at the mediation conference may not be possible.

The trial judge had before him abundant evidence from which he could conclude that a binding settlement agreement had been reached, as well as to the specific terms of that agreement. This case falls squarely within the rationale set out by the Supreme Court of Kentucky in resolving a similar dispute:[2]

> The second inquiry is whether the settlement offer of $500,000.00 was accepted before it was withdrawn. There again, a dispute of fact existed before the trial court. This dispute was resolved against General Motors.

[2] General Motors Corporation v. Harold, 833 S.W.2d 804, 807 (Ky. 1992).

> This Court in its appellate capacity is bound by the trial court's finding of fact unless there is clear error committed or there is an abuse of discretion by the trial court.

Appellant has failed to demonstrate clear error or abuse of discretion or, in fact, any alleged error the trial judge had an opportunity to consider. We find absolutely no basis for disturbing the decision of the trial court and its judgment is in all respects affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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