

RENDERED: JULY 6, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001695-MR

NICHOLAS EPLING AND
PATRIOT CONSTRUCTION COMPANY

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 04-CI-00955

LIBERTY MUTUAL INSURANCE COMPANY

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

DIXON, JUDGE: This dispute arose over the proper interpretation and construction of a Mediation Agreement negotiated and signed by all parties and their counsel. The Mediation Agreement provided it was a settlement of all claims by all parties. After the parties signed the Mediation Agreement, one of the parties, Liberty Mutual Insurance Company's (Liberty Mutual) counsel learned for the first time that Liberty Mutual had paid \$10,000 in Personal Injury Protection (PIP) benefits and \$60,000 in Added

Reparations Benefits (ARB) to the Plaintiff, Barbara McCoy. Liberty Mutual failed to inform its own attorney of these payments before the Mediation Agreement was signed.

Liberty Mutual thereafter, moved the trial court for leave to assert its statutory subrogation claims against Nicholas Epling, Patriot Construction Company and Barbara McCoy. All of the parties, except Liberty Mutual, had deemed all claims fully and finally settled by the Mediation Agreement. The trial judge, nevertheless, granted Liberty Mutual's motion and allowed Liberty Mutual the right to proceed with its subrogation claims despite its Mediation Agreement to the contrary. McCoy's claim has been settled and the narrow issue remains whether Liberty Mutual may now pursue subrogation claims against Epling, Patriot Construction and their insurance companies. We believe that all parties relied upon Liberty Mutual's promises and representations that it was settling all claims by all parties, and hold that the Mediation Agreement is enforceable. Because we determine that proper application of contract principles prevents Liberty Mutual from pursuing its subrogation claims in this case, we reverse.

Hiram McCoy was killed as a result of Appellant, Nicolas Epling's, negligence while driving a Patriot Construction truck. Epling lost control of his truck causing it to swing into McCoy's lane of traffic. The ensuing collision resulted in Hiram McCoy's death.

Suit was filed by Barbara McCoy individually and as Administratrix of Hiram McCoy's (hereinafter collectively referred to as "McCoy") estate naming Epling,

Patriot Construction and joining Liberty Mutual in its capacity as McCoy's underinsurance motorist carrier.

All parties met at mediation with their counsel on March 9, 2005. As a result of the mediation, the parties reached an agreement. The Mediation Agreement was entered into without the parties' knowledge of Liberty Mutual's payments of PIP and ARB benefits. However, the Agreement provides that it includes "all parties" and "all claims." Specifically, the Agreement states:

IT IS HEREBY AGREED by and **between the parties** hereto that **all claims** contained therein between the parties to this Agreement are **fully and finally settled** with the **Plaintiff receiving a total settlement of \$255,000** from the defendants in exchange for which the Plaintiff agrees to execute a full and final **Release of all claims** including Underinsured Motorist Claims (UIM) against said Defendants arising out of this litigation and an entry of **dismissal with prejudice**, with each party to this litigation paying the parties respective court cost and attorneys fees. (Emphasis added).

The settlement was allocated with \$235,000 for the wrongful death of Hiram McCoy; \$10,000 for personal injury to Hiram McCoy; and \$10,000 to Barbara McCoy for loss of consortium. Liberty Mutual contributed \$5,000 of the total payment of \$255,000. After reciting allocation of the settlement amounts and in connection with the total payment to McCoy, the Agreement provides, "settlement proceeds are exclusive of PIP." This language is commonly used in releases to clarify that no other claims, off-sets or subrogation rights will reduce the Plaintiff's receipt of the total settlement amount.

Finally, the mediation statement provided that McCoy would receive the total settlement amount of \$255,000 from the defendants (including Liberty Mutual's contribution of \$5,000), upon McCoy's agreement to execute a release for full and final payment for all claims including Liberty's Underinsured Motorist Claim. The Mediation Agreement concluded with McCoy providing indemnity to all insurance carriers and Defendants from any and all future claims.

However, at the time of the mediation, Liberty Mutual had already paid \$10,000 in basic reparation benefits and \$60,000 in added reparation benefits to Barbara McCoy. Unfortunately, Liberty Mutual's counsel was unaware of these payments and did not raise subrogation issues during mediation. Nor had Liberty Mutual's counsel asserted any subrogation rights after being sued. It is now clear that no cross-claim was made by Liberty Mutual against any party for recovery of basic or added reparation benefits because counsel for Liberty Mutual was simply unaware of these payments.

After the parties learned of the Liberty Mutual payment, they failed to agree upon appropriate language for the release. McCoy, Epling, and Patriot Construction filed separate motions to require compliance with the Mediation Agreement. The trial judge entered an order on May 16th granting both motions to compel all parties' compliance with the Mediation Agreement and denying Liberty Mutual's belated attempt to pursue its subrogation claim. Had the matter ended at this point, this Court would have no reason to disturb the trial court's findings.

However, Liberty Mutual filed a Motion to Alter, Amend or Vacate the trial court's order enforcing the Mediation Agreement under CR 60.02. Hearings were conducted on June 10 and July 25, 2005. The court then made Findings of Fact, Conclusions of Law and a Final Judgment. In its findings, the trial court construed the language providing that the payments would be, "exclusive of PIP," to open the door for Liberty Mutual's belated claims. It is from this Order that Epling and Patriot Construction appeal.

While Liberty Mutual contends its subrogation rights survive the Mediation Agreement, it is clear that in agreeing to settle this case McCoy, Patriot Construction, Epling and their insurance carriers relied upon the finality of the release to settle all claims of all parties. We believe the circuit court misconstrued the parties' Mediation Agreement. The language that payment of \$255,000 would be "exclusive of PIP" was clearly intended to guarantee that no other claims, off-sets, or subrogation claims would be allowed to reduce the agreed upon amount. There is simply no other interpretation of the Mediation Agreement that is consistent with this language. This construction is common sense and made more compelling here with McCoy's agreement to indemnify all Defendants against future claims. In taking this step, the trial court allowed Liberty Mutual's subjectively mistaken belief to control construction of the Mediation Agreement rather than the clear intent of the parties at the time the agreement was signed. McCoy is entitled to the full payment of \$255,000, and each settling Defendant-Patriot Construction, Epling and their insurance carriers-bought their peace from Liberty Mutual

by paying the amounts in the Mediation Agreement. The settling parties had a right to rely upon Liberty Mutual's promise that this was a full and final settlement of all claims which could have been made by any party. Had Liberty Mutual properly advised its counsel upon payment of reparations benefits, the other settling Defendants may, or may not, have elected to go forward with the settlement.

If Liberty Mutual were allowed to proceed with this action it would violate Liberty Mutual's promises, guarantees and warranties by its counsel on March 9, 2005. Obviously, any subrogation recovery against McCoy would necessarily decrease the amount she was receiving under the settlement. In addition, the settling Defendants relied on the settlement as a full and binding agreement between the parties. Clearly the parties had a right to rely upon the plain meaning of the agreement. *Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830 (Ky. 2005); *Hamilton v. BS & W*, 870 S.W.2d 436 (Ky. App. 1993); *Equitable Life Assur. Soc. of U.S. v. Hall*, 253 Ky. 450, 69 S.W.2d 977 (1934).

Liberty Mutual made a mistake. Unfortunately, all of the parties were relying upon Liberty Mutual's representations at the mediation. There is no way to know if Epling's and Patriot's insurance carriers would have agreed to these payments if it was not a full settlement of all claims. Liberty Mutual's mistake was a unilateral mistake of fact from which no relief may be granted without sacrificing the integrity of the Mediation Agreement.

The problem of this case arose when Liberty Mutual and its attorney were apparently unaware of the earlier payments. This mistake on Liberty Mutual's part was a subjective mistake. If Liberty Mutual was allowed to proceed with the subrogation at this time, it would be in derogation of the settlement proceeding that guaranteed the \$255,000 payment to McCoy. It would also violate the long established rule against splitting a cause of action. *Kirchner v. Riherd*, 702 S.W.2d 33 (Ky. 1985); *Egbert v. Curtis*, 695 S.W.2d 123 (Ky. App. 1985); and *Hayes v. Sturgill*, 302 Ky. 31, 193 S.W.2d 648 (1946). These cases acknowledge a long, well established history of pleading that requires all claims that arise out of the same facts to be litigated together. To hold otherwise would result in piecemeal litigation. This rule is essential to efficient management litigation.

Finally, we turn to Liberty Mutual's CR 60.02 motion arguing that it was entitled to seek redress against the other parties to the litigation. The decision was based upon a rule of law and not a question of fact. There was no factual basis for the decision within the purview of CR 60.02. A motion revolving around a point of law without a contested issue of fact need not be reviewed only for abuse of discretion, but rather it should be reviewed *de novo*.

Permitting Liberty Mutual to violate the terms of its contract as objectively entered into by the parties at mediation was error.

For all the foregoing reasons, the judgment of the Pike Circuit Court is reversed. This matter is remanded to the Pike Circuit Court with directions to dismiss the subrogation claim of Liberty Mutual with prejudice.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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