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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001422-MR

ROSALENE BOBBITT, ADMINISTRATRIX
OF THE ESTATE OF ROBERT BOYD APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 05-CI-04967

GWENDOLYN COLLINS; MARK PEEL;
JENNY JAMES; HEATHER HOBBS;
SHEA ALLEN; AND NATHAN ANDERSON APPELLEES

AND NO. 2008-CA-002109-MR

ROSALENE BOBBITT, ADMINISTRATRIX
OF THE ESTATE OF ROBERT BOYD APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 05-CI-04967

NATHAN ANDERSON APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: STUMBO, THOMPSON, AND WINE, JUDGES.

WINE, JUDGE: Rosalene Bobbit, Administratrix of the Estate of Robert Boyd ("the Estate"), appeals from summary judgment orders dismissing Boyd's personal injury claims arising from a multi-vehicle collision which occurred on November 28, 2003. We agree with the trial court that the clear language of the release with one tortfeasor operates to discharge the other joint tortfeasors. However, we disagree with the trial court that the written release precluded Boyd from seeking rescission of the release based on mutual mistake. Furthermore, since the parties to the release agree that the general release term was included by error, we find that the Estate is clearly entitled to rescission of the release. Hence, we reverse the trial court and remand for further proceedings.

For purposes of this appeal, the relevant facts are not in dispute. At approximately 10:00 p.m. on November 28, 2003, Robert Boyd ("Boyd") was driving a Mercedes C220 on New Circle Road in Lexington, Kentucky. The Mercedes belonged to Boyd's girlfriend, Cornelia Alexander ("Alexander"), who was a passenger in the vehicle. The weather was inclement, with wet snow and icing conditions. As Boyd proceeded, he encountered several vehicles that had spun out of control and collided. As he approached the scene of the prior accident, Boyd's vehicle also spun out and struck the guardrail. Boyd got out of the car to inspect for damage. While outside the car, Boyd was struck by another vehicle that came across the accident. Neither Boyd nor Alexander could identify the car which struck him.

Boyd brought this action against the drivers of all of the vehicles involved at the scene, including: Gwendolyn Collins ("Collins"), Mark Peel ("Peel"), David Mulder ("Mulder"), Jenny James ("James"), Nathan Anderson ("Anderson"), Heather Hobbs ("Hobbs"), and Shea Allen ("Allen"). On November 1, 2006, Mulder served Boyd with an offer of judgment pursuant to Kentucky Rule[s] of Civil Procedure ("CR") 68. Mulder offered to settle all claims with Boyd for "$25,000.00 inclusive of any collateral source subrogation claims or liens, together with costs incurred to the date of this offer." On November 15, 2006, Boyd accepted the offer of judgment. Pursuant to that agreement, Mulder's counsel sent an agreed order of partial dismissal, a general release, and a check for the $25,000.00 settlement amount. The agreed order of dismissal states that "all other claims remain pending and are unaffected by this Order." However, the general release contained the following language:

> I, **ROBERT BOYD**, being of lawful age, do hereby release, acquit, and forever discharge **DAVID MULDER** and **UNITED SERVICES AUTOMOBILE ASSOCIATION (USAA)**, their heirs, executors, administrators, agents and assigns *and all other persons, firms, corporations liable, or who might be claimed to be liable*, of and from any and all services, expenses and compensation, on account of, or in any way growing out of, any and all known and unknown personal injuries and property damage, and all other claims which I have asserted or could have asserted in a civil action, together with all claims arising from the defense, adjustment, negotiation and/or representatives, or employees of **UNITED SERVICES AUTOMOBILE ASSOCIATION (USAA)**, resulting or to result from an accident that occurred on or about **11/28/2003** at or near **FAYETTE** County, Kentucky.

(Emphasis added.)

The trial court entered the agreed order of partial dismissal on December 27, 2006. Shortly thereafter, the remaining defendants (except Anderson, who had not been served) moved to amend their answers based on the language in the general release. Specifically, they argued that the language in the release operated to release Boyd's claims against all of the defendants, as set out in Kentucky Revised Statute[s] ("KRS") 411.182(4); and *Abney v. Nationwide Mutual Insurance Co.*, 215 S.W.3d 699 (Ky. 2007).

In response, Boyd argued that the parties' agreement is governed by the language of the settlement offer and agreed order of dismissal and not by the contrary language in the general release. He further argued that the release should be rescinded based on mutual mistake of the parties. Finally, Boyd argued that his counsel only had express authority to settle with Mulder and therefore a release against any other party is unenforceable.

The trial court rejected the first two arguments in an order entered on April 6, 2007. The court noted that the release clearly releases all parties from liability. The court also pointed out that the release contains a clause which merges all prior representations into the release. In addition, the trial court stated that Boyd was not entitled to rescission of the release based on mutual mistake. In a separate order entered on May 2, 2007, the trial court added that the CR 68 Offer of Judgment had expired at the time Boyd attempted to accept it. Consequently,

the court found that the parties' agreement is governed by the language of the General Release. Finally, the trial court found that the release clearly releases all defendants, thus negating any need for express authority to settle.[1]

Boyd filed a timely notice of appeal from the judgment dismissing his complaint.[2] Boyd died on October 3, 2007, and Rosalene Bobbitt ("Bobbitt") was appointed as administratrix of Boyd's estate. In an order entered on April 21, 2008, this Court substituted the Estate as the party appellant. Thereafter, Boyd's complaint was finally served against Nathan Anderson. Anderson appeared before the trial court and moved for summary judgment on the same grounds as the other defendants. The trial court granted the motion on August 8, 2008, and denied Boyd's motion to alter, amend or vacate on October 17, 2008. The Estate filed a timely notice of appeal from that order, and the later appeal was consolidated into the senior action.

The central issue on appeal concerns the enforceability of the general release by defendants who were not parties to the settlement agreement. Under the common law, the release of one joint tortfeasor discharged all tortfeasors unless

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[1] On June 29, 2007, the trial court entered an order which designated the April 6 and May 2 orders as final and appealable.

[2] In its order of April 6, 2007, the trial court overruled the defendants' motion for summary judgment on the factual merits of Boyd's claim. Although the trial court found that the defendants were entitled to summary judgment based on the general release, it also found that there were factual issues which would preclude summary judgment absent the release. All of the defendants, except Anderson, filed a Notice of Cross-Appeal from this order. Appeal No. 2007-CA-001008-MR. However, this Court dismissed that Appeal in an order entered on January 4, 2008, finding that it had been taken from a portion of the April 6 order which was not final and appealable.

stated otherwise in the agreement. *See Richardson v. Eastland, Inc.,* 660 S.W.2d 7, 9 (Ky. 1983). This rule was abrogated by the adoption of KRS 411.182(4), which provides that the release of one joint tortfeasor "shall not be considered to discharge any other persons liable upon the same claim unless it so provides." In *Abney v. Nationwide*, *supra*, the Kentucky Supreme Court held that "general release" language, such as is present in the current case, is sufficient to meet the requirements of KRS 411.182(4). As a result, the Court concluded that the release discharged all other defendants even though they were not specifically named in the release. *Id.* at 703.

Based on *Abney*, the clear language of the release in this case discharges all other defendants. However, the Estate argues that the release does not represent the parties' agreement and therefore is not binding as a contract. In support of this argument, the Estate presents three grounds for invalidating the release. First, the Estate contends that the parties' agreement is governed by the language of the settlement offer and agreed order of dismissal, not by the contrary language in the general release. Second, the Estate argues that the release should be rescinded based on mutual mistake of the parties. And third, the Estate asserts that Boyd's counsel only had express authority to settle with Mulder and therefore a release against any other party is unenforceable.

On the first argument, the Estate notes that the settlement was made subject to an offer of judgment pursuant to CR 68. The rule provides that, at any time more than ten days before trial, a party defending against a claim may serve

upon the adverse party an offer to allow a judgment to be taken against that party for money, property, or to the effect specified in the offer with costs then accrued. If the adverse party serves a written notice accepting the offer within ten days after service of the same, and notice of acceptance is filed, the rule directs that the court "shall" render a judgment accordingly. The Estate correctly notes that the rule does not permit the settling party to withdraw the offer after it has been timely accepted. *Pennyrile Citizens Bank & Trust Co. v. Scent*, 676 S.W.2d 798, 799 (Ky. App. 1984). Likewise, the Estate argues that Mulder was not entitled to add additional terms after it was accepted.

We agree with the trial court, however, that Boyd did not make a timely acceptance of the offer of judgment. Under the clear language of the rule, an offer of judgment is deemed withdrawn if not accepted within the ten-day period. *Id.,* citing CR 68(3). Boyd did not accept the offer of judgment until November 15, 2006 – fourteen days after it was made.

The Estate points out that the parties agreed to extend the time for acceptance. But while Mulder and USAA were free to extend the settlement offer beyond the ten-day period, it was no longer an offer of judgment under CR 68. Rather, it was simply a settlement offer subject to ordinary contract law. *Frear v. PTA Industries, Inc.*, 103 S.W.3d 99, 105 (Ky. 2003).

And unlike in *Frear*, Boyd did not object to the general release language and seek to enforce the settlement agreement as originally negotiated. Rather, Boyd signed the written release tendered by Mulder and USAA. As the

trial court noted, the release contains terms specifying that the written release "**REPRESENTS THE ENTIRE AGREEMENT OF THE PARTIES WITH REGARD TO THE MATTERS SET FORTH HEREIN. ALL PRIOR REPRESENTATIONS MADE ARE HEREBY MERGED INTO THIS AGREEMENT**." (Capitals and bold in original). Thus, the trial court correctly found that the release is enforceable as a contract provision.

The Estate also points to the recent opinion by the Kentucky Supreme Court in *Coleman v. Bee Line Courier Service, Inc.*, 284 S.W.3d 123 (Ky. 2009), which states, among other things, that the release is only one part of a settlement contract. The court must also consider the offer and acceptance and the payment of consideration. *Id.* at 125. However, the Court in *Coleman* was interpreting an ambiguity in the settlement contract – whether the release and indemnity clause covered the insurer's claim for reimbursement of no-fault benefits.[3] The release in this case is not ambiguous. Therefore, the trial court was not required to look beyond the terms of the release to interpret it. In this case, the release clearly

[3] In *Coleman v. Bee Line Courier Service, Inc.*, *supra*, the plaintiff, Coleman, entered into a settlement of a personal injury claim with the sole defendant, Bee Line. The settlement included a general release and a clause which required Coleman to indemnify Bee Line "from any claims asserted by any third parties . . . including . . . all medical providers and any other insurance carriers against the proceeds of this settlement." *Id*. at 126. After the settlement, Coleman's insurer, Nationwide, sought reimbursement of basic reparation benefits (BRB) which it had paid to Coleman. Bee Line demanded that Coleman indemnify it against Nationwide's claim. The Kentucky Supreme Court held that reimbursement of BRB is a distinct statutory and contractual claim from the injury claim. *Id.* at 127. Since the general release and indemnity clause did not specifically mention no-fault benefits, the Court concluded that a BRB reimbursement claim was not subject to the settlement agreement. *Id.* at 127-28.

discharges all other persons who are subject to liability. Since the release clause was not ambiguous, the trial court properly interpreted the clause as written.

However, we disagree with the trial court that the release precludes Boyd and his Estate from seeking rescission of the release. Based on the presence of the merger clause in the written release, the trial court implicitly concluded that Boyd could not present parol evidence to show mutual mistake. The parol evidence rule is one of substantive law. Where the parties put their engagement in writing, all prior negotiations and agreements are merged in the instrument. *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343, 345 (Ky. 1970). However, the parol evidence rule does not preclude an equitable claim for rescission or reformation based on fraud, illegality or mutual mistake. *Id.*

Likewise, in *Abney*, the Kentucky Supreme Court recognized that a party may make a claim for rescission based on mutual mistake even though the contract contained a similar merger clause. In *Abney*, the Supreme Court also set out the elements necessary to vary the terms of a writing based on mistake:

> To vary the terms of a writing on the ground of mistake, the proof must establish three elements. First, it must show that the mistake was mutual, not unilateral. Second, "[t]he mutual mistake must be proven beyond a reasonable controversy by *clear and convincing evidence*." Third, "it must be shown that the parties had actually agreed upon terms different from those expressed in the written instrument."
>
> The mistake must be one as to a material fact affecting the agreement and not one of law, which is "an erroneous conclusion respecting the legal effect of known facts." A

> material fact is one that goes to the root of the matter or the whole substance of the agreement.

Abney v. Nationwide, *supra* at 704 (citations omitted).

In this case, there was clearly evidence meeting the first three elements. The parties to the contract, Boyd, Mulder and USAA, each agree that they did not intend for the settlement to affect Boyd's claims against other defendants. The agreed order of dismissal specifies that all other claims which remain pending are unaffected by the order. Moreover, Mulder's counsel provided an affidavit stating:

> Due to a mutual mistake, the terms of the General Release did not accurately reflect the agreed to disposition of the claim against David Mulder. The parties actually agreed to release only the claims against Mr. Mulder in consideration for the $25,000.00 bodily injury limits, not the claims against the other Defendants, as set-out in the Agreed Order of Partial Dismissal.

Affidavit of Keith Bond, February 8, 2007, Record on Appeal ("ROA") at 576.

The undisputed evidence clearly establishes a mutual mistake by the parties to the contract. The Appellees maintain that the mistake involves an issue of law, not of fact. But while the legal effect of the general release language is an issue of law, the presence of that language is a factual issue which relates to the formation of the contract.[4]

The Appellees also contend that rescission is unavailable because Boyd was negligent in failing to discover the additional term included in the

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[4] In addition, Boyd returned the $25,000.00 which Mulder and USAA paid to settle the claim.

release. But where the mistake is mutual, Boyd's negligence in accepting the general release term does not preclude him from seeking rescission or reformation. *See Pressley v. Morton*, 325 S.W.2d 81 (Ky. 1959); and *Daniel Boone Coal Co. v. Crawford*, 203 Ky. 666, 262 S.W.1097 (1924). The parties to the contract agree that they never intended the general release language to be included. Thus, the inclusion of the term constitutes a mutual mistake of fact. As a result, Boyd clearly established his right to rescission of the release, and the trial court erred by failing to grant such relief.

Furthermore, we question whether the Appellees have standing to object to rescission in this case. As a general rule, where a contract is for the benefit of a third party, the parties to the contract cannot rescind it so as to deprive him of its benefits, after he has accepted, adopted or acted upon the contract. *Rhodes v. Rhodes*, 266 S.W.2d 790, 792 (Ky. 1953). In addition, reformation or rescission of a contract is inappropriate where third parties have relied on the written agreement. *Whitson v. Parks*, 291 Ky. 141, 163 S.W.2d 298, 299 (1942). But here, the parties to the contract did not intend to benefit any third parties. Likewise, the Appellees do not suggest that they took any actions in reliance on the release. Finally, the Appellees do not show that they will be prejudiced by allowing rescission in this case. Rescission will simply restore the *status quo* which existed before the release was executed. Consequently, the trial court erred by denying Boyd's request for rescission of the release.

Since we find that Boyd was entitled to rescission of the release as a matter of law, we need not reach his remaining argument that his counsel lacked express authority to agree to the general release term. The trial court separately found that there are genuine issues of material fact concerning the negligence of the parties involved in the accident. Therefore, this matter must be remanded for further proceedings on the merits of the Estate's claim.

Accordingly, the summary judgments dismissing the Estate's claims are reversed, and this matter is remanded to the Fayette Circuit Court for further proceedings as set forth in this opinion.

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