DIVISION II

CA07-119

November 14, 2007

PATRICK J. BOOTH and JUANITA P. BOOTH APPELLANTS	AN APPEAL FROM PULASKI COUNTY CIRCUIT COURT [No. CV03-9863]
v.	HONORABLE TIMOTHY D. FOX, CIRCUIT JUDGE
RIVERSIDE MARINE REMANUFACTURERS, INC. APPELLEE	REVERSED AND REMANDED

This is the second appeal in this breach-of-contract case.[1] Following remand from the first appeal, appellee Riverside Marine Remanufacturers, Inc., moved for summary judgment. The Pulaski County Circuit Court granted the summary judgment and appellants Patrick Booth (Pat) and Patsy Booth (Patsy) bring this appeal, asserting that there are genuine issues of material fact remaining. We agree and reverse and remand.

The following background is taken from the earlier opinion.

> Pat founded Riverside in the 1970s and was its majority shareholder. [His son,]Tom was the only other shareholder. In August 2001, Pat entered into a stock purchase agreement with Riverside and Tom whereby he would sell 169 shares to Tom. Riverside would redeem another 120 shares. Also as part of the sale, Pat and Riverside entered into a consulting agreement which provided, inter alia, that Pat would receive "[c]ompany paid health insurance for he and his wife and such health insurance shall continue for the life of [Pat] and the life of [Pat's] wife, Patsy Booth."

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[1] *Riverside Marine Remfrs., Inc. v. Booth*, 93 Ark. App. 48, 216 S.W.3d 611 (2005).

> The consulting agreement further provided that it would expire upon Pat's death, provided that Riverside would continue health insurance coverage for Patsy until her death. The consulting agreement was specifically mentioned in the stock purchase agreement and incorporated by reference therein.
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> In July 2002, Riverside's insurance agent, with Tom's approval, wrote a letter to Pat, stating that, because Pat was not a full-time Riverside employee, it was illegal under federal law to carry him on Riverside's group policy. The letter also suggested alternative coverages. On February 20, 2003, Tom notified Riverside's insurance carrier that, effective March 1, 2003, Pat and Patsy were to be dropped from the group policy. Pat and Patsy obtained other coverage, for which Riverside has continued to pay.
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> Pat and Patsy filed suit against Riverside in August 2003, alleging that Riverside had breached the consulting agreement by providing less favorable benefits. The complaint sought damages for their additional out-of-pocket expenses, together with specific performance of the consulting agreement. In the alternative, they sought reformation of the consulting agreement. Riverside answered, denying that it had breached the consulting agreement and stating that the agreement required only that it provide health coverage, not group coverage.

93 Ark. App. at 49-50, 216 S.W.3d at 612-13.

Following remand, Riverside moved for summary judgment, asserting that the consulting agreement's provision regarding "company paid health insurance" was unambiguous and did not require a particular type or level of insurance. The motion also asserted that Riverside had continued to pay for the Booths' health insurance. The Booths responded by asserting that the consulting agreement was ambiguous and that there were material issues of fact to be determined. In their response, the Booths presented testimony from the earlier bench trial to the effect that Pat and Riverside agreed that the insurance benefits would remain at the same level as the group coverage that was in effect at the time the consulting agreement was executed. Riverside presented testimony that there was never any discussion that the coverage would be equal to or better than the group coverage in effect

in August 2001. It also presented testimony that there was a conscious decision made not to specify the level of benefits because it could later bind Riverside with respect to the level of coverage it provided its employees.

On October 11, 2006, the circuit court entered an order finding that the phrase "company paid health insurance" was not inherently ambiguous; that the phrase did not contain a latent ambiguity; and that there was no mutual mistake in the drafting of the provision. The court also found that it was undisputed that Riverside has at all relevant times paid for health insurance for the Booths. Accordingly, the court granted Riverside's motion for summary judgment and dismissed the complaint.[2] The Booths timely appealed.

The Booths raise two points on appeal, contending that the circuit court erred in finding that the consulting agreement was unambiguous and that the circuit court erred in finding that there was no clear and convincing evidence of mistake.

Summary judgment is appropriately granted by a circuit court only when there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof to demonstrate the existence of a material issue of fact. *Id*. On appellate review, this court determines if summary judgment was appropriate based on whether the

[2]The circuit court subsequently awarded Riverside attorney's fees and costs of $36,934.50. The Booths filed an amended notice of appeal from the fee award. However, they do not make a separate argument as to the fee issue. Instead, they note that, if the summary judgment is reversed, Riverside is no longer the prevailing party and would not be entitled to fees.

evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id*. This court reviews the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id*. Our review focuses not only on the pleadings but also on the affidavits and other documents. *Id*.

In their first point on appeal, the Booths argue that the phrase "company paid health insurance" is ambiguous. Riverside argues, and the circuit court agreed, that the term is not ambiguous. Based on its finding that the term was unambiguous, the circuit court concluded that Riverside had not breached the agreement because it had continued to pay for health insurance for the Booths. However, in concluding that Riverside had not breached the consulting agreement, the circuit court went too far in deciding the motion for summary judgment because the Booths' claim is that Riverside breached the consulting agreement by failing to provide *the same level of benefits* as existed at the time of the execution of the consulting agreement.[3] The Booths' claim cannot be decided simply by reference to the agreement because that agreement is silent on the level of benefits to be provided. By its silence on this term, the contract as a whole was rendered ambiguous. *See Lee v. Hot Springs Vill. Golf Schs.*, 58 Ark. App. 293, 951 S.W.2d 315 (1997). The ambiguity is heightened because the phrase "and such health insurance shall continue for the life of [the Booths]"

[3]This reliance on a certain level of benefits serves to distinguish the present case from *Twombly v. Association of Farmworker Opportunity Programs*, 63 F. Supp. 2d 69 (D. Me. 1999), *rev'd in part on other grounds*, 212 F.3d 80 (1st Cir. 2000), relied upon by Riverside. In *Twombly*, the district court noted that, in opposing a motion for summary judgment, the plaintiff/employee did not offer any proof that she contemplated a certain level of benefits in the coverage provided. 63 F. Supp. 2d at 72-73.

could refer to the group coverage in effect at the time of the agreement. However, it could also refer to new insurance that was to be purchased under the consulting agreement, which would not necessarily be group coverage. And, because there is ambiguity in the contract, a question of fact remains as to the parties' intent. *Id*. Therefore, the circuit court erred in granting Riverside's motion for summary judgment. *Id*.

Because we reverse on the Booths' first point, we need not address their second point concerning mutual mistake.

Reversed and remanded.

HART and MILLER, JJ., agree.