RENDERED: NOVEMBER 10, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2004-CA-000026-MR

JINCY ROUSE — APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 93-CI-00024

EDWIN DWIGHT ROUSE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.[1]

EMBERTON, SENIOR JUDGE: Jincy Rouse appeals the denial of her post-decree motion to enforce a provision in an October 16, 2001, order confirming the report of the domestic relations commissioner that required appellee to pay one-half of her medical insurance premiums until she reached age 65. In denying her motion, the trial judge concluded that because appellant had

[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.

failed to procure medical insurance, there were no premiums for appellee to pay under the terms of the October 16, 2001, order. Finding no error in that determination, we affirm.

In the decree dissolving the parties' marriage entered on November 29, 1995, appellee was directed to "continue to pay medical insurance on the Petitioner, Jincy Rouse, due to his employment with Western Southern Life Insurance Company, the company holding that policy." Although the decree also ordered appellee to pay appellant maintenance in the amount of $1,200.00 per month to age 65, that amount was subsequently reduced to $500.00 per month by order entered June 5, 1996.

On October 16, 2001, the trial court confirmed the recommendation of the domestic relations commissioner that maintenance again be modified "to the extent that each party pay one-half (1/2) of the Petitioner's medical insurance premium." An appeal from that order was docketed in this Court but the appeal was ordered dismissed in May 2003, due to appellant's failure to timely file a brief. Approximately one month after the dismissal of her appeal, appellant filed a motion for specific performance of the October 16, 2001, order.

The trial judge conducted a lengthy hearing on appellant's specific performance motion during which appellant admitted that appellee had made required payments for COBRA benefits of $110.00 per month until they expired in December

1998. In fact, appellant testified that appellee continued to pay her the amount of the COBRA premium until December 2000, despite her failure to procure a subsequent health insurance policy. Appellant explained her failure to obtain insurance by citing its high cost and appellee's statements that he could not afford the rates appellant was being quoted. Appellant also conceded that prior to the hearing before the commissioner which culminated in the October 16, 2001, order, appellee had tendered to her checks in excess of $5000.00 (apparently representing appellee's calculation as to what he owed for medical insurance premiums between the date he stopped making the $110.00 payments and the date of the hearing), but that she had returned those checks in anticipation of an argument by appellee that she failed to mitigate her damages for uninsured expenses by failing to purchase insurance appellee had paid her for. At the hearing before the commissioner, appellant took the position that appellee should be required to pay her uninsured medical expenses based upon his obligation to pay her health insurance premiums.

In addressing appellant's complaint with respect that the failure to make premium payments, the commissioner entered the following findings and conclusions:

> At or about December 2, 1998, Respondent [appellee] contacted twenty one insurance companies in an effort to assist

> Petitioner to obtain medical insurance after her COBRA benefits expired. At least one of the companies, Central Reserve Life Health Insurance, sent an application and premium quote to Petitioner. Petitioner contacted Respondent and he mailed her a check in the amount of $394.17 for the premium. Subsequently, the insurance company returned to Respondent the $394.17 with its check evidently refusing Petitioner medical insurance. Respondent was not presented with any other bills for medical insurance premiums either by the Petitioner or an insurance company on her behalf.
>
> For a period of well over two (2) years, Petitioner has made no effort to obtain a policy of medical insurance.
>
> * * *
>
> Petitioner contends Respondent should be ordered to pay hospital and medical bills incurred by her after termination of COBRA medical insurance benefits. Respondent was not ordered to pay Petitioner's medical expenses, but only to pay premiums for Petitioner's medical insurance policy. Respondent can not be held liable for uninsured medical expenses without a showing of fault on his part as to their having been incurred. Petitioner is the would-be insured and medical insurance coverage could be obtained only by her personally applying therefore. Respondent could not have done so. Respondent did contact insurance companies on Petitioner's behalf and did all he could to assist her in doing so. Respondent is free of all fault for the incurrence of the uninsured medical expenses.

The commissioner thus absolved appellee from liability for payment of the uninsured medical expenses and recommended that "the medical insurance premium for Petitioner's medical

insurance be paid one-half (1/2) by each party **when a policy of medical insurance is obtained**."[2] These are the findings, conclusions and recommendations which were confirmed by the October 16, 2001, order at issue here.

The dismissal of appellant's appeal from the October 16, 2001, order had the effect of rendering these findings res judicata between these parties until such time as they were altered or amended by appropriate order.[3] Nothing in the record indicates that the findings have been in any way altered, nor does it disclose any request for amendment or alteration subsequent to the dismissal of the previous appeal. It is therefore clear that appellee's obligation to pay one-half of appellant's medical insurance premiums fixed by the October 16, 2001, order arose **only when and if** she obtained a medical insurance policy.

Nevertheless, appellant appears to argue that appellee should be required to pay the medical insurance premiums from and after October 16, 2001, plus interest, regardless of whether she ever obtained a policy. Not only is such a contention contrary to the plain language of the commissioner's recommendation, it would require pure speculation to determine

[2] Emphasis added.

[3] See BTC Leasing v. Martin, 685 S.W.2d 191 (Ky.App. 1984).

what constitutes one-half of the premium on a policy never purchased.

In sum, the trial judge did not err in denying appellant’s motion as the contingency for payment of one-half of the premium never arose.

The judgment of the Lewis Circuit Court is affirmed.

ALL CONCUR.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
| Charles L. Douglas, Jr.<br>Greenup, Kentucky | Thomas M. Bertram, II<br>Vanceburg, Kentucky |