

RENDERED: JUNE 15, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002844-MR

TROY P. ALSTON AND MAGGIE ALSTON,
ADMINISTRATORS OF THE ESTATE OF
DEVORA YVONNE ALSTON JACKSON, AND
AS GUARDIANS FOR D.A. AND L.A.,
MINOR CHILDREN OF DEVORA YVONNE
ALSTON JACKSON

APPELLANTS

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE HUGH ROARK, JUDGE
ACTION NOS. 97-CI-01100 & 97-CI-01716

ALVIN JACKSON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Troy P. Alston and Maggie Alston, administrators of the estate of Devora Yvonne Alston Jackson and guardians for D.A. and L.A., minor children of Jackson, have appealed from an order entered by the Hardin Circuit Court on November 16, 1999. The trial court ruled that the award from a personal injury and wrongful death action should be divided in equal thirds between

Jackson's two surviving minor children and her widower, the appellee, Alvin Jackson. Having concluded that the trial court did not err in its interpretation of the parties' agreement, we affirm.

On May 10, 1997, Devora Jackson suffered the eruption of an undiagnosed ectopic pregnancy and she went into a coma. Devora was taken off life support on May 26, 1997, and died. Devora was the mother of two minor children, D.A. and L.A., and had recently married Alvin Jackson; Alvin was not the father of either child. Following Devora's death, the Alstons, her parents, were named as guardians for the children and as administrators of her estate. The Alstons had not met Alvin before Devora underwent an unsuccessful emergency surgery at Hardin Memorial Hospital in Elizabethtown, Kentucky.

Initially, the Alstons and Alvin refused to cooperate with each other in pursuing personal injury and wrongful death litigation, and separate civil actions were filed against the hospital, nurses, and the treating physician. The Alstons were represented by Lawrence F. Smith, while Alvin retained the services of the Becker Law Office. During the course of the litigation, the Alstons and Alvin wanted to settle their claims against Hardin Memorial Hospital and nurse Sharon Bland; and the parties entered into the following written agreement concerning the division of past and future settlement proceeds:

This Agreement, made and entered into this ___ day of June, 1999, by and between Attorney Rhoda Grossberg Faller, of Jefferson County, Kentucky, individually and on behalf

of Alvin K. Jackson, of Florida and Becker Law Office of Jefferson County, Kentucky, hereinafter referred to as First Party, and Attorney Lawrence F. Smith, of Hardin County, Kentucky, individually and on behalf of Troy P. Alston and Maggie Alston of Hardin County, Kentucky, administrators of the estate of Devora Yvonne Alston Jackson, deceased, and as guardians of Devora Yvonne Alston Jackson's two minor children, hereinafter referred to as Second Party;

WHEREAS the parties herein are involved in the prosecution of a wrongful death action and loss of consortium claim against Hardin Memorial Hospital, Nurse Sharon Bland, Dr. Lynn Keith and Bluegrass Emergency Physicians [emphasis added]; and

WHEREAS the parties have become embroiled in certain disagreements over the prosecution of said action [emphasis added]; and

WHEREAS the parties are desirous of effecting an agreement to facilitate a successful prosecution of said action [emphasis added]; and

WHEREAS the parties believe it in the best interests of the estate of Devora Yvonne Alston Jackson, her surviving children and widower to set aside any and all disagreements and to agree on the strategy to be employed in prosecuting the litigation [emphasis added]:

WHEREFORE THE PARTIES AGREE AS FOLLOWS:

1. That the parties immediately accept, in settlement of all claims prosecuted against Sharon Bland and Hardin Memorial Hospital, an amount equal to or in excess of \$170,000.00.

2. The settlement proceeds realized from Bland and the hospital shall be apportioned as follows: \$20,000.00 to Alvin Jackson, as loss of consortium, \$20,000.00 to [L.A.] for loss of consortium, \$20,000.00 to [D.A.] for loss of consortium and \$110,000.00 to the estate for wrongful death.

3. That said settlement proceeds shall be distributed to Mrs. Jackson's children and widower in equal one-third portions, less attorney fees and expenses. Alvin Jackson waives his spousal exemption and Troy and Maggie Alston waive administrators' fee.

4. It is recognized that all expenses thus far expended by either party has benefitted the estate and should be recouped from this initial settlement. It is further recognized that certain costs are recoverable from the defense. As such, any and all nonreimbursable expenses thus far expended by either party in the prosecution of this claim, including expert fees, transportation, deposition and other out of pocket expenses of the parties shall be reimbursed by the estate [emphasis added].

5. That in the event that defendants resist paying reimbursable expenses and further court action is required to effectuate recovery thereof, the parties shall jointly pursue available remedies.

6. That the attorney fees earned in the settlement or trial¹ set forth in paragraph 1 shall be as follows: Rhoda Grossberg Faller and Becker Law Office shall receive 33 1/3% of the gross attorney fees and Lawrence F. Smith shall receive 66 2/3% of the gross attorney fees [emphasis added].

7. That the parties agree that further settlement negotiations will be engaged in regarding the remaining defendants and further agree that in the event that settlement negotiations are successful, the formula for the division of the proceeds to the beneficiaries as set forth in paragraphs 2 and 3 above and the division of attorney fees as set forth in paragraph 6 above shall be followed.

8. Becker Law Office will pay disbursements for expert witnesses, trial exhibits and other costs, including Attorney

¹The phrase "or trial" was a handwritten addition to the contract which was initialed by the attorneys.

Faller's necessary expenses in finalizing discovery and trial preparation which will be reimbursed by the estate upon conclusion of this matter by settlement or verdict and upon receipt of said proceeds. Smith Law Office will pay for the disbursements for Attorney Smith's necessary expenses in attending to discovery and trial which will be reimbursed by the estate upon conclusion of this matter by settlement or verdict and upon receipt of said proceeds [emphasis added].

9. In the event that settlement with the remaining defendants is unsuccessful, it is agreed that Attorney Faller shall be the lead attorney at trial on the medical malpractice portion and Mr. Jackson's consortium claim. It is further agreed that Attorney Smith shall be lead attorney at trial on Devora's life, the impact of her death, valuation and other issues agreed upon between counsel. Attorneys Faller and Smith further shall agree on any remaining litigation decisions prior to trial [emphasis added].

10. That each party to this agreement, including any person associated with the respective law firms, including any attorney who has participated on behalf of plaintiffs in this action, is prohibited from making any disparaging remark concerning any party or other attorney participating in this action.

11. That attorneys Greg Bubalo and H.D. Callicotte shall immediately file an [sic] motion in Hardin District Court in case 97-P-00394 remanding any and all motions previously filed on behalf of Alvin K. Jackson.

12. That attorneys Greg Bubalo and H.D. Callicotte shall immediate [sic] submit a letter of apology to the administrators of the subject estate and Attorney Lawrence F. Smith for their allegations of conflict of interest and breach of fiduciary obligations.

13. That attorneys Wes Durham and H.D. Callicotte shall immediately cease any involvement in the prosecution of this litigation after the obligations contained in

paragraphs 11-12 are completed. Attorney Greg Bubalo may be involved in all trial preparations in this action, including depositions and settlement negotiations but it is specifically understood and agreed by the parties that Attorney Rhoda Faller shall remain the only counsel of record on behalf of Becker Law Office and Attorney Faller shall be the only attorney from Becker Law Office sitting at counsel table during any trial phase of this action and Attorney Bubalo will do nothing during any trial phase of this action which would demonstrate to any juror or plaintiff that he is participating in the prosecution of this action.

14. Alvin Jackson, of his own desire, voluntarily reduces his statutory right to one-half of the estate of Devora Jackson to one-third of said estate in order that [L.A.] receives one-third of the estate and [D.A.] receives one-third of the estate.

15. That the parties hereby ratify all actions taken on behalf of the prosecution of this litigation taken by Attorney Smith and the administrators of this estate and by Attorney Faller and Alvin K. Jackson.

16. This agreement is in conformity with SCR 3.130 rule 1.5[e][1][b] and [e][2] as the Becker Law Office and Smith Law Office are not members of the same firm and the division of fees agreement, as set forth above, is in writing and authorized by the clients represented by the two firms. Rhoda Faller, on behalf of Becker Law Office and Lawrence Smith, on behalf of Smith Law Office, assume joint responsibility for the representation. The clients, acknowledge their knowledge of this agreement and declare they have no objection to the participation of all the lawyers involved as indicated in the agreement.

The Alstons' and Alvin's claims against the treating physician and her professional corporation did not settle; and the case was tried. On October 4, 1999, a jury returned the following verdict in favor of the plaintiffs:

(1) Troy P. Alston and Maggie Alston,
Administrators of the Estate of Devora Yvonne
Alston Jackson;

- a. Permanent impairment of her power to
labor and earn money. \$350,000
- b. Mental and physical pain and
suffering. \$100,000
- c. Funeral Expenses. \$5,800

(2) [D.A.], infant through his guardians Troy
P. Alston and Maggie Alston for loss of
parental consortium until reaching the age of
18; \$1,000,000

(3) [L.A.], infant through her guardians Troy
P. Alston and Maggie Alston for loss of
parental consortium until reaching the age of
18: \$1,000,000

(4) Alvin Jackson, as husband of Devora
Yvonne Jackson, for loss of consortium from
the time of her injury until her death:
\$100,000

Percentage of the total fault was
attributable to each of the parties found to
be at fault.

Dr. Lynn Keith	40%
Hardin Memorial Hospital Employees	60%

As can be seen from the jury's verdict, the bulk of the
jury's award was allocated to the two children for their loss of
consortium claims. On October 13, 1999, Lawrence Smith, attorney
for the Alstons, sent the following letter to Rhoda G. Faller,
attorney for Alvin, outlining his interpretation of the agreement
and the jury's verdict:

Dear Rhoda,

First of all let me extend once again my
congratulations to you for a very successful
prosecution of the Alston/Jackson vs Keith
matter. Over the last two and one half years

it has been a joy working with you and I am glad that I had the opportunity to join forces for the common good of all the plaintiffs.

I want to review the distribution of attorney fees and the proceeds mandated by our contract of July 7, 1999. First of all we agreed that the attorneys fees between the lawyers will be split 1/3 to the Becker Law office 2/3 to Lawrence F. Smith pursuant to paragraph six. It is also my understanding that the same division applies to all attorney fees generated by the combined cases. It is also my understanding that the estate will pay the total cost in the matter pursuant to paragraph 4. We have asked you [sic] office to provide your list of costs to us as soon as possible so that we can begin preparing the necessary paperwork to accomplish that reimbursement.

Because there was a trial, it appears that the provisions of paragraph number 7 no longer apply. Had there been a settlement, the provisions of paragraph number 7 would have required that the proceeds be divided in the same manner as the Bland proceeds were divided as outlined in paragraph number 2. In this case, settlement negotiations were not successful and the parties were forced to trial. The jury has now decided distribution of proceeds by their verdict. While we all agree that this does not effect the division of attorney fees in paragraph 6 it does effect, in my opinion, the distribution of verdict proceeds. It looks to me now like the children get 40% of \$2 million and their percentage of the estate and Alvin gets 40% of \$100,000.00 in his percentage of the estate. It also appears that the provisions of paragraph number 14 apply. That is that each beneficiary of the estate receives an equal share.

Please review the contract to see whether you can agree with my interpretation. I am concerned that any other interpretation would leave both firms open to a challenge by the children any time between now and 2009 when the youngest child reached nineteen years of age. If there is a dispute at this juncture,

it would be best for the provisions of the contract to be placed for review at a hearing with Judge Roark so that we could get a judicial interpretation. I want to be sure that whatever our joint decision is that it, is ratified by the court after a full and free disclosure at a hearing.

What I am afraid that if we do something other than what the contract specifically states, a lawyer reviewing this five or six years from now can hold me as the attorney for the estate directly responsible. That person could also seek return of those assets from your firm and from Alvin. It is the potential of this litigation that we need to work to avoid.

I am confident that a mutually agreeable compromise will be able to be achieved and I am now reviewing all possibilities that I can think of in reaching a position acceptable by all parties. Among the items in consideration is to amend the contract to eliminate Mr. Jackson's giving up a portion of his estate to the children. Additionally it would appear that the waiver of Mr. Jackson's spousal exemption could be reversed along with the waiver of the Alstons of their administrators' fee. Any ideas or suggestions that you have in avoiding any conflict, bearing in mind the four corners of the contract are actively solicited.

The parties have not been able to agree on a distribution of the jury's award. Alvin's contention has been that the parties were working together to maximize the proceeds received, whether by settlement or jury verdict. Alvin claims it was the parties' intention to distribute the proceeds in equal one-third shares among Devora's two minor children and himself.

On October 26, 1999, the Alstons filed a motion with the trial court asking the court to review the agreement and to issue an order resolving the conflict. On that same day, the

trial court entered an order that placed all of the funds in an interest bearing account until it could resolve the dispute. On November 16, 1999, the trial court entered an order which provided:

IT IS HEREBY ORDERED that the sum total of the monies received, for whatever claim, be divided with one-third to Alvin Jackson, one-third to [L.A.] and one-third to [D.A][.]

This appeal followed.

Since this case involves the legal interpretation of the agreement between the Alstons and Alvin, we are not required to give deference to the trial court's decision on that issue, and our review is de novo.² The Alstons frame the issue for our review as follows, "CAN PAROL EVIDENCE MODIFY THE TERMS OF A WRITTEN AGREEMENT PREPARED BY ATTORNEYS AFTER SERIOUS NEGOTIATIONS[?]" While we agree with the statements of law expounded by the Alstons relating to the parol evidence rule and modification of a contract, we do not believe these rules are applicable to the case sub judice.

It should be noted that the trial court made its decision without making any findings of fact. Therefore, while it is not totally clear, it would appear that the trial court did not rely upon parol evidence in making its determination. Alvin argues that there was no need for the trial court to consider parol evidence. He contends the agreement contemplated a jury

²First Commonwealth Bank of Prestonsburg v. West, Ky.App., 27 S.W.3d 472, 479 (2000) (quoting Calomiris v. Woods, 353 Md. 425, 727 A.2d 358, 362 (1999)).

trial, as well as a possible settlement; and the parties intended to divide any recovery into equal thirds. We agree.

We must first determine what effect, if any, paragraph 7 has on the disbursement of the jury award:

7. That the parties agree that further settlement negotiations will be engaged in regarding the remaining defendants and further agree that in the event that settlement negotiations are successful, the formula for the division of the proceeds to the beneficiaries as set forth in paragraphs 2 and 3 above and the division of attorney fees as set forth in paragraph 6 above shall be followed.

Paragraph 7 clearly provides that if the parties reach a settlement, the settlement proceeds would be divided into equal thirds as set forth in paragraphs 2 and 3. But, this paragraph does not directly address the division of a jury award.

In interpreting a contract, the intention of the parties must be ascertained from the writing as a whole. The main objective in every case involving the construction of a contract is to ascertain and effectuate the intentions of the parties. To do so, the language used in the contract, the contract's subject matter, and the purpose of the contract may be considered.³ If the contract is susceptible to two meanings, it should be construed most strongly against the party preparing or drafting it.⁴ It is elementary that a contract is to be

³D.L. Walker & Co. v. Lewis, 267 Ky. 107, 101 S.W.2d 685, 687 (1937) (citing, Bullock v. Young, 252 Ky. 640, 641, 67 S.W.2d 941 (1933)).

⁴Id.

interpreted as a whole and its meaning shall be gathered from the entire context and not from particular clauses or words. Particular clauses and words must be construed in harmony with the whole content of the contract and in a way that will be consistent with the general intent and purpose of the instrument.⁵

In the case sub judice, the Alstons emphasize the fact that paragraph 7 only mentions "settlement" and that it is silent as to a trial. They contend that this agreement did not cover an award from a trial, and that the trial court should have distributed the award according to the jury's verdict.

From our reading of the contract as a whole, we hold that the only reasonable interpretation of paragraph 7 is that its silence as to the consequences of a trial is due to a drafting oversight rather than from any intention of the parties to omit reference to a trial. As a basis for this conclusion, we look at the language and the structure of the entire agreement. As we emphasized earlier, the agreement, which was drafted by the Alstons' attorney, refers to the "prosecution of a wrongful death action and loss of consortium claim," "an agreement to facilitate a successful prosecution of said action," and "prosecuting the litigation." We further believe the intention of the parties to divide the trial proceeds as well as any settlement proceeds into equal one-third shares is evidenced by the careful measures the

⁵Wright v. Bethlehem Minerals Co., Ky., 368 S.W.2d 179, 181 (1963).

attorneys took to make sure there was clarity in the agreement as to how they would be paid, by amending paragraph 6 to cover trials as well as settlements. Obviously, the parties and their attorneys contemplated the possibility of a trial.

Alvin argues that to maximize the total recovery, the parties entered into an oral agreement that it was in their mutual interest to follow a trial strategy focusing on the loss that the children suffered, which they would in turn share as a part of the total recovery.⁶

⁶In support of this argument, Alvin's attorney submitted an affidavit to the trial court, which stated in part:

Throughout the remaining months until trial, Mr. Smith, Mr. Salansky and I worked together to prepare the case for trial. During the trial of the action, all of the attorneys were in very frequent communication with each other. We did indeed work as team for the mutual benefit of all the Plaintiffs, and planned trial strategy to increase the award by the jury to [sic].

I e-mailed a copy of my closing argument to Mr. Smith the weekend prior to the closing. Mr. Smith read it and thought it was a "fantastic" closing. The strategy employed was clearly known by Mr. Smith, and was agreed to by him.

The Alstons were informed by Mr. Smith as to the trial tactics and strategy to enhance the award for all of the parties. Neither the Alstons nor Attorney Smith did anything but agree to those tactics and indeed stood silently by knowing how the case was to be presented.

On the morning of the closing, I spoke with Mr. Smith and confirmed that the strategy was chosen since all of the Plaintiffs were to share equally in a jury

(continued...)

The Alstons are unable to offer any logical reason as to why they would share the original settlement in equal thirds and agree to share later settlements in equal thirds, but an award from a trial would be shared in some other manner. "It is the rule of law that all writings, whether they be contracts or statutes, shall not be presumed to have been entered into or enacted in vain; and no statute will be construed or applied so as to result in an absurdity."⁷

We believe it would be an absurd result to allow the attorney's fees to be divided in equal thirds and the plaintiffs to divide in equal thirds settlement proceeds, but to give the agreement an interpretation where the plaintiffs would not share a jury award in equal thirds, when a jury verdict was obviously contemplated by the parties and their attorneys. The purpose of the agreement was to promote and to help facilitate a successful

(...continued)

award. Mr. Smith confirmed that this was his understanding.

Mr. Smith, and the Alstons, know that the jury did not "choose" to award the children the lion's share but were asked to do so on the understanding that all the Plaintiffs would share all awards equally.

The conversations referred to in Faller's affidavit are outside of the record and we are without a videotape or transcript of the trial to review to see if this strategy was in fact implemented. However, we conclude that the agreement itself reflects the parties' desire to divide the award in equal one-third shares.

⁷Nuetzel v. Travelers' Protective Ass'n, 168 Ky. 734, 183 S.W. 499(1916) (citing Sutherland on Statutory Construction, § 479; 36 Cyc. pp. 1106-1108).

prosecution of the actions against the defendants. While the parties hoped to reach a settlement, the fact that they contemplated the possibility of a trial is reflected in the language the attorneys inserted into the agreement. We believe the parties' intention, as shown by the agreement, was that any recovery, whether through a settlement or a jury award, would be shared in equal, one-third amounts.

Accordingly, the order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Lawrence F. Smith
Radcliff, KY

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Timothy J. Salansky
Louisville, KY