IN THE COURT OF APPEALS

VALORIE FINE COX, Individually and as Mother and Next of Kin of Wesley Dillon Grant, a Minor Child, Deceased, Plaintiff-Appellant	HAMILTON CIRCUIT C.A. NO. 03A01-9510-CV-00335
vs.	HON. SAMUEL H. PAYNE JUDGE
NEWAY-LOVE DISTRIBUTORS, INC., JOHN K. MARSHALL and JOHN DOE, Defendant-Appellee	REVERSED AND REMANDED

JAMES R. McKOON, Baker, Donelson, Bearman & Caldwell, Chattanooga, for Appellant.

PAUL CAMPBELL, JR., Campbell & Campbell, Chattanooga, for Appellee.

OPINION

McMurray, J.

This is an appeal from the judgment of the trial court sustaining a motion for summary judgment in favor of Pennsylvania National Insurance Company, appellant's uninsured motorist carrier, and dismissing the appellant's complaint. We reverse the judgment of the trial court.

The facts pertinent to this appeal are undisputed. Therefore, our duty is to ascertain the state of the law and apply it to the facts of this case.

STANDARD OF REVIEW

> The standards governing an appellate court's review of a trial court's action on a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the trial court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56 have been met. Cowden v. Sovran Bank/Central South, 816 S.W.2d 741, 744 (Tenn. 1991). Tenn. R. Civ. P. 56.03 provides that summary judgment is only appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993); and (2) the moving party is entitled to a judgment as matter of law on the undisputed facts. Anderson v. Standard Register Co., 857 S.W.2d 555, 559 (Tenn. 1993). The moving party has the burden of proving that its motion satisfies these requirements. Downen v. Allstate Ins. Co., 811 S.W.2d 523, 524 (Tenn. 1991).
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> The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. Byrd, 847 S.W.2d at 210-11. Courts should grant a summary

> judgment only when both the facts and the conclusions to be drawn from the facts permit a reasonable person to reach only one conclusion. Id.

Carvell v. Bottoms, 900 S.W.2d 23 (Tenn. 1995).

THE FACTS

On August 26, 1989, the plaintiff, Valerie Fine Cox, (Formerly Grant), was driving a Jeep vehicle on Interstate 75. An unidentified vehicle being driven by an unidentified driver herein referred to as the defendant, John Doe, changed lanes and struck a car in front of the plaintiff's vehicle. The plaintiff slowed or stopped her vehicle and was struck in the rear by a tractor-trailer truck being driven by the defendant, John K. Marshall and owned by the Defendant, Neway-Love Distribution, Inc. Pennsylvania National Insurance Company was the uninsured motorist carrier for the plaintiff. The defendant, John Doe, was never identified. Ms. Cox alleges that she suffered serious injuries as a result of the accident and that her son, Wesley Dillon Grant, was pronounced dead at the scene.

The plaintiff filed her action against Neway-Love Distribution, Inc., John K. Marshall, and John Doe. Pennsylvania National was served with process pursuant to T.C.A. § 56-7-1206.[1] Penn

[1]Though not material to the issues under consideration here, we note that the case was removed to the Federal District Court but was remanded to the Circuit Court for Hamilton County.

National filed its answer alleging negligence on the part of the plaintiff, Ms. Cox, and John K. Marshall, driver of the tractor-trailer truck owned by Neway. Penn National also relied on all the policy defenses, contractual or otherwise.

Neway was insured by Integral Insurance Company. A receiver and Rehabilitator was appointed for Integral by order of the Circuit Court of Jackson County, Missouri, due to financial difficulties. The plaintiff successfully negotiated a settlement with the rehabilitator of Integral by which Integral paid to the plaintiff $200,000.00 for her injuries and $200,000.00 for the death of her son. Subsequently, an order was entered in the Hamilton County Circuit Court dismissing this action with prejudice, as to Neway and Marshall, thus leaving John Doe (Penn National) as the only remaining defendant. Penn National's uninsured motorist coverage limit was $100,000.00.

Penn National filed a motion for summary judgment pursuant to Rule 56, et seq., Tennessee Rules of Civil Procedure, on the grounds that "there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law." The motion further asserted that there were only two issues to be decided: (1) Whether Ms. Cox is entitled to recover from Penn National under the Uninsured Motorist section of her policy, and (2) Whether Penn

National is entitled to recover from Ms. Cox monies paid under the collision coverage by Penn National.[2]

DISCUSSION

Simply stated, Penn National claims a credit for all sums received by Ms. Cox for her injuries and the death of her son from Neway's insurance carrier. Since the sums paid exceed the limits of Penn National's coverage, Penn National claims that it cannot be held liable for any amount, but on the other hand, is entitled to recover the amounts paid under the collision provisions of its policy, less attorney's fees.

T.C.A. § 56-7-1202(a) provides as follows:

> **56-7-1202. "Uninsured motor vehicle" defined.** —(a) For the purpose of this coverage, "uninsured motor vehicle" means a motor vehicle whose ownership, maintenance, or use has resulted in the bodily injury, death, or damage to property of an insured, and for which **the sum of the limits of liability available to the insured under all valid and collectible insurance policies**, bonds, and securities applicable to the bodily injury, death, or damage to property is less than the applicable limits of uninsured motorist coverage provided to the insured under the policy against which the claim is made. (Emphasis added.)

[2]Penn National had previously paid to Ms. Cox the sum of $10,500.00 under the collision provisions of Ms. Cox' policy and had taken in return a "loan receipt."

The provisions of the policy in question provide in pertinent part as follows:

INSURING AGREEMENT

> A. We will pay damages which an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle" because of ... .
>
> * * * *
>
> ... . We will pay under this coverage only after the limits of liability under **any applicable liability bonds or policies** have been exhausted by payment of judgments or settlements. (Emphasis added).

LIMIT OF LIABILITY

> A. The limit of liability shown in the Schedule or in the Declarations for this coverage [$100,000.00] is our maximum limit of liability for all damages resulting from any one accident. This is the most we will pay regardless ...
>
> B. The limit of liability shall be reduced by all sums:
>
> 1. Paid because of the "bodily injury" or "property damage" by or on behalf of persons or organizations who may be **legally responsible**. This includes all sums paid under Part A of the policy: and ... . (Emphasis added).

There is little question but that the position of Penn National would have been correct prior to the Supreme Court's decision in McIntyre v. Ballentine, 833 S.W.2d 52 (Tenn. 1992). In McIntyre, the court abolished the defense of contributory negligence, gave birth to the comparative fault doctrine in this jurisdiction and announced the demise of joint and several liability. While the filing of this action predates the decision

in McIntyre, the pronouncements of McIntyre are to be applied to (1) all cases tried or retried after the date of the McIntyre opinion [May 4, 1992], and (2) all cases on appeal in which the comparative fault issue has been raised at an appropriate stage in the litigation. McIntyre, at page 58. The hearing in this case post-dates the McIntyre decision, therefore, the principles announced in McIntyre must be applied here.

Insofar as we have been able to ascertain, the precise issue presented by this appeal has not been considered by any appellate court in this jurisdiction. It has, however, been considered and discussed in other jurisdictions which have adopted the comparative fault doctrine and abolished joint and several liability. It appears that the majority of cases in other states have disallowed a credit to a non-settling defendant for the proceeds of any settlement received from a settling defendant. See e.g. Roland v. Bernstein, 828 P.2d 1237 (Ariz. App. 1991); Green v. United States, 709 F.2d 1158 (7th Cir. 1983); Kusman v. City of Denver, 706 P.2d 776 (Colo. 1985); Thomas v. Soleburg, 442 N.W.2d 73 (Iowa 1989); D.D. Williamson & Co. v. Allied Chem. Corp., 569 S.W.2d 672 (Ky. 1978); Wilson v. Galt, 668 P.2d 1104 (N.M. 1983); Charles v. Giant Eagle Markets, 522 A.2d 1 (1987); and Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984)

Roland v. Bernstein, supra, (citing all the above cases) is perhaps the most persuasive of authorities because of its similarity to the case under consideration.

In Roland, supra, the plaintiff brought a medical malpractice complaint against a neurosurgeon, his professional corporation, an anesthesiologist, and a hospital. The hospital and the anesthesiologist settled the plaintiff's claim against them for $700,000 each and the case proceeded to trial against the neurosurgeon and his corporation. The jury found plaintiff's damages to be $1,965,000 and assessed fault against the neurosurgeon at 47%, 28% to the anesthesiologist, and 25% to the hospital. The question then arose as to whether Arizona's contribution among tortfeasors act should apply. The trial court held that it should and thus entered a judgment for $565,000 rather than for $923,550 (47% of $1,965,000). On appeal the Court of Appeals of Arizona reversed the judgment of the trial court. The court stated:

> [1] When more than one defendant caused plaintiff's injuries the rule originally was that each such defendant was liable for the whole injury, that recovery against one eliminated the claim against the others, and that no right of contribution existed among defendants. See generally W. Prosser & W. Keeton, Torts §§ 46-52 (5th ed. 1984). Over time the rigor of these rules was relaxed, permitting settlement by one of the defendants without eliminating rights against the others, so long as double recovery did not occur, and contribution among tortfeasors. That result was accomplished in Arizona by passage of the Uniform Contribution Among Tortfeasors Act, A.R.S. § 12-2501 et seq. Section 12-2504, at issue in this case, provides that a settlement with "one of

two or more persons liable in tort for the same injury ... does not discharge any of the other tortfeasors from liability for the injury ... but it reduces the claim against the others" by the amount of the settlement. If that section were applicable here the trial judge's ruling would be correct because the $1,400,000 settlement would be deducted from the $1,965,000 verdict to arrive at a $565,000 judgment against [the non-settling defendant].

We conclude, however, that § 12-2504 does not apply because it was enacted as part of a statute permitting contribution between defendants liable for the entire amount of damages caused by the concurrent negligence of each of them. It was not designed for this case which was tried under A.R.S. § 12-2506, a more recently enacted statute. Section 12-2506 abolished joint and several liability, limiting recovery against any defendant to that percentage of a plaintiff's total injuries representing that defendant's degree of fault. Because recovery is so limited, contribution can never occur. ...

This result can be easily squared with the statutory language. Section 12-2504 applies when "two or more persons [are] liable in tort for the same injury." Section 12-2506, on the contrary, provides that "the liability of each defendant for damages is several only and is not joint." In short, each defendant is liable only for the portion of the injury he caused, not the whole injury; no two are liable for the same injury. See Kussman v. City and County of Denver, 706 P.2d 776 (Colo. 1985).

In addition, we believe that it would be anomalous to give the benefit of an advantageous settlement, not to the plaintiff who negotiated it, but to the non-settling tortfeasor. Had plaintiff made a disadvantageous settlement, she would have borne that consequence because her recovery against [the non-settling defendant] would have been limited to $923,550. At a minimum, symmetry requires that if the disadvantage of settlement is hers so ought the advantage be. Beyond that, we see no reason why a non-settling tortfeasor ought to escape the liability that is his by reason of the faulty assessment of probabilities by a settling tortfeasor. Indeed, such a rule might well discourage settlement by the last tortfeasor on the reasoning that his exposure is limited to his degree of fault and even that might be reduced by reason of pre-existing settlements. These consider-

> ations have led most courts considering this question to apply the rule we are adopting. (Citations omitted).

The court remanded the case for the entry of a judgment in plaintiff's favor for $923,550.

Roland is strikingly similar to the case under consideration here. The primary difference is that Arizona abolished joint and several liability by statute. Here, the adoption of comparative fault and the abolition of joint and several liability was done by the Supreme Court in McIntyre, supra. While we recognize that the Arizona court was dealing with the Uniform Contribution Among Tortfeasors Act, we find the reasoning to be appropriate in its application to the facts of this case.

Applying McIntyre and Roland to the facts of this case requires a finding that John Doe (Penn National) is responsible for only the portion of the injury he caused, not the whole injury. Similarly, Neway-Love was responsible for only the portion of the injury it caused. It logically follows, therefore, that no portion of the liability coverage of Neway-Love could inure to the benefit of John Doe (Penn National). Taking this reasoning a step further, it is clear that the cap on coverage under uninsured motorists policies set out in T.C.A. § 56-7-1202 is inapplicable to the facts of this case. There are no "collectible insurance policies bonds and securities applicable to the bodily injury, death and damage to

property" insofar as that portion of fault and damage resulting from the negligence of John Doe (Penn National) is concerned.

The appellee has cited no cases from this jurisdiction or any other jurisdiction which would require a different result. A multitude of authority predating McIntyre v. Ballentine, has been cited, however, these cases are no longer controlling under the circumstances of this case.

The appellee insists that summary judgment was a proper disposition of this case because by the settling with Neway-Love and the subsequent dismissal of her action against Neway-Love and its driver, Penn National's right of subrogation is lost. In support of this position, the appellee cites us to the unpublished case of Aetna Casualty and Surety Company v. Tennessee Farmers Mutual Insurance Company, Tenn. App. 1993, E.S. opinion filed March 30, 1993. In Aetna, the issues were not the same as the issues presented by this appeal. In Aetna, Tennessee Farmer's insured and Aetna, without the consent of Tennessee Farmers, executed a release, releasing the sole tortfeasor for all claims arising out of the accident in question. On the other hand, in this case, the tortfeasor to whom Penn National must look to for subrogation is John Doe and John Doe only should he be identified. John Doe was in no way released by the Appellant's settlement with Neway-Love,

hence, the right of subrogation belonging to Penn National has not been impaired by the settlement.

This position is bolstered by the provisions of T.C.A. § 56-7-1204(a) which provides as follows:

> **56-7-1204. Payment by insurer - Subrogation.** (a) In the event of payment to any person under the coverage required by this part, and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, **be subrogated to all of the rights of the person to whom such payment has been made, and shall be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or property damage for which such payment is made**, including the proceeds recoverable from the assets of an insolvent insurer.

It seems clear, under the above provisions, that if Penn National is required to make any payments to the plaintiff, subrogation will be limited to all of plaintiff's rights against John Doe. As hereinabove noted, these rights have not been impaired.

We hold that:

1. John Doe has not been released by the dismissal, with prejudice, of the action against Neway-Love and its driver.

2. Penn National had no right of subrogation against Neway-Love and, therefore, no right of subrogation has been impaired by the actions of the plaintiff.

3. Penn National is not entitled to a credit for any amounts received by the plaintiff as a result of plaintiff's settlement with Neway-Love.

4. The judgment of the trial court must be reversed and the case remanded for a full trial on the merits with an apportionment of fault and damages among the principals, i.e., the plaintiff, the defendant, Neway-Love, and the defendant, John Doe (Penn National). Neway-Love should be treated as a non-party charged with negligence by the defendant, John Doe (Penn National), pursuant to the teachings of McIntyre.

5. Penn National is liable only for damage, if any, resulting from the negligence of John Doe after a proper apportionment of fault and damages has been made by the trier of fact or the policy limits of $100,00.00, whichever is less, with a right of subrogation against John Doe, when and if identified.

The appellee has raised in its brief several issues which are denominated as sub-issues. All these sub-issues have been resolved by our disposition of the above issue except for the following:

> Does Mrs. Cox have the burden of proving that John Doe was uninsured and the cause of her damages and if she fails to do that, is recovery against John Doe barred?

It is elementary that before there can be a recovery on an uninsured motorist policy, it must be established that the defendant sought to be charged was uninsured at the time of the accident. It need not be established that the negligence of the uninsured motorist was **the** cause, but only **a** cause of damages. The burden of establishing these facts rests with the plaintiff at trial. On motion for summary judgment, however, the burden of

establishing that there is no genuine issue of material fact regarding whether the defendant was uninsured is upon the movant. See Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993). The question of whether or not John Doe was uninsured was not addressed in the appellee's motion for summary judgment nor was any evidence proffered to demonstrate that John Doe was not uninsured. Therefore, as to the motion for summary judgment, Penn National has failed to meet its burden of showing that it is entitled to judgment as a matter of law.

The appellant has presented another issue challenging the court's judgment in failing to strike affirmative defenses of the appellee or in the alternative for summary judgment. The motion to strike or for summary judgment as to the affirmative defenses resulted from the action of the court in allowing the defendant to amend its answer. Rule 15.01, T.R.C.P., provides inter alia that a party may amend pleadings by leave of court which shall be freely given when justice so requires. In this case, the defendant filed a motion for permission to file an amended answer. The motion was allowed and the amended answer was filed. The rule allowing amendment of pleadings is to be liberally construed. See Walden v. Wylie, 645 S.W.2d 247 (Tenn. App. 1982); Derryberry v. Ledford, 506 S.W.2d 152 (Tenn. App. 1973). The trial court's discretion in allowing amendments at any stage of the proceedings should not be disturbed unless it appears that such discretion was abused. See

Merriman v. Smith, 599 S.W.2d 548 (Tenn. App. 1980); McKinney v. Educator & Executive Insurers, Inc., 569 S.W.2d 829 (Tenn. App. 1978); Derryberry v. Ledford, supra. We find no abuse of discretion by the trial court. We find no merit in the appellant's second issue.

The appellee has asked us to find that this is a frivolous appeal and to impose sanctions upon the appellant. In view of the disposition of this case, this request is denied.

The appellant filed a motion for permission to supplement the record in this case by filing the depositions of Valorie Fine Cox and John Marshall taken April 14, 1992, and September 27, 1991, respectively. The court has previously entered an order reserving the resolution of the motion until the case was submitted for disposition. Since, in our opinion, the depositions are unnecessary to the disposition of this case, the motion is denied.

We reverse the judgment of the trial court in granting appellee's motion for summary judgment. This case is remanded to the trial court for other and further action consistent with this opinion. Costs are taxed to the appellee.

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Don T. McMurray, J.

CONCUR:

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Houston M. Goddard, Presiding Judge

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Charles D. Susano, Jr., J.

IN THE COURT OF APPEALS

VALORIE FINE COX, Individually and as Mother and Next of Kin of Wesley Dillon Grant, a Minor Child, Deceased, Plaintiff-Appellant	)	HAMILTON CIRCUIT C.A. NO. 03A01-9510-CV-00335
vs.	)	HON. SAMUEL H. PAYNE JUDGE
NEWAY-LOVE DISTRIBUTORS, INC., JOHN K. MARSHALL and JOHN DOE, Defendant-Appellee	)	REVERSED AND REMANDED

ORDER

This appeal came on to be heard upon the record from the Circuit Court of Hamilton County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was reversible error in the trial court.

We reverse the judgment of the trial court in granting appellee's motion for summary judgment. This case is remanded to the trial court for other and further action consistent with this opinion. Costs are taxed to the appellee.

PER CURIAM