

**SETTLEMENT AGREEMENT IS ENFORCEABLE
AGAINST A PLAINTIFF EVEN THOUGH NOT
PERSONALLY SIGNED BY THE DEFENDANTS**

May a plaintiff who develops a severe case of “buyer’s remorse” back out of a mediated settlement on the basis that the defendants had not personally signed the agreement? If you follow the court’s holding in *Stewart v. Preston Pipeline Inc.*, the answer is clearly “no.”

Darren Stewart was injured when his vehicle collided with a backhoe that had fallen off a truck owned and operated by the defendants. After suit was filed, the case was mediated; however, the opinion unfortunately does not tell us whether this was court ordered mediation or a voluntary mediation by the parties. Nevertheless, the mediation appeared to be successful in that a settlement was reached, and a “Confirmation of Settlement as a Result of Mediation” document was signed by the plaintiff, the plaintiff’s attorney and the defense attorney. None of the actual defendants were present at the mediation, but a claims representative from the defendant’s insurance carrier personally attended the mediation (but did not sign the settlement agreement).

Defense counsel promptly prepared a Release Agreement and obtained the settlement draft. These documents were then forwarded on to the plaintiff’s attorney. It turned out that the plaintiff had fired the attorney representing him at the mediation, and had retained new counsel. It was the new attorney that wrote back refusing the tender of the settlement draft and advising that his client would not be signing the Release Agreement. The new attorney claimed that there was no settlement of the case, and that there had been no agreement reached at the mediation. Furthermore, even if there were an agreement, plaintiff now wished to rescind it.

The defense attorney successfully moved the court to allow an amended answer that added an affirmative defense that the case had been settled. The defense then filed alternative motions for either enforcement of the

settlement agreement under *Code of Civil Procedure* § 664.6, or for summary judgment on the basis of settlement as an affirmative defense. The court granted the summary judgment motion and did not rule on the motion to enforce the settlement agreement.

In plaintiff’s appeal from the summary judgment motion, he argued that the trial court never should have considered the contents of the “Confirmation of Settlement as a Result of Mediation” document since it was covered by mediation confidentiality. Also, plaintiff claimed that the settlement agreement was not binding since it was not signed by each of the parties (i.e., no mutual consent). In the alternative, plaintiff alleged there was a triable issue as to whether he could rescind the agreement due to his own mistake. The Court of Appeals affirmed the trial courts’ granting of summary judgment in every respect.

The Court of Appeals reiterated both the portions of the Code as well as the strong policy in the State of California that communications during the mediation

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**FAILURE TO REQUEST A
CONTINUED HEARING DATE WHEN
OPPOSING SUMMARY JUDGMENT
MOTION IS NOT EXCUSABLE
NEGLECT THAT REQUIRES RELIEF
DUE TO MISTAKE**

John Ambrose was a ready-mix cement truck driver. As he was delivering a load of cement, the left front tire on his vehicle suddenly went flat, causing the truck to crash. The investigating officer opined that the tire “exploded.” Mr. Ambrose sued the tire manufacturer, alleging products liability.

Shortly after suit was filed, the defense brought a motion for summary judgment. The motion was originally served and filed in June of 2004, but the hearing was set for late September of 2004. Opposition was thus due in mid September.

When the plaintiff’s attorney ultimately filed his opposition papers, he provided a substantial brief that stressed plaintiff’s perceived triable issues of fact as to whether or not the truck tire was defective. The opposition addressed the summary judgment motion on substantive bases, not procedural bases, and did not make any reference to the need for additional time to conduct further investigation or discovery, despite the fact that three months had elapsed since the motion had been served.

On the day of the hearing on the motion, plaintiff’s counsel for the first time orally requested a continuance of the summary judgment motion so that he could have his out-of-state expert examine the tire at issue and render a report. Plaintiff’s counsel felt that would be sufficient to defeat the summary judgment motion. The trial court denied that oral request on the grounds that such requests for continuance need to be made either in the opposition papers at the time the opposition is filed or by ex parte application. Since counsel did not do either of these, the court found no triable issues of fact and granted the defendant’s motion for summary judgment in its entirety.

Six days later, Ambrose’s counsel filed a motion for relief from judgment under *Code of Civil Procedure* § 473, claiming that the failure to request a continuance in the opposition papers was an “inadvertent mistake.” According to the attorney’s declaration, he was

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apparently in a hurry to meet the filing deadline for the opposition papers and, given the press of his business and other trials, he inadvertently forgot to request a continuance. This motion was denied on the grounds that it was not excusable neglect.

Denial of the motion for relief was affirmed by the Court of Appeals in *Ambrose v. Michelin North America, Inc.* The Court of Appeals found that plaintiff’s first contention that a trial court is required to either deny summary judgment or grant a continuance did not have merit. Denial or continuance of the summary judgment may only be had where the opposing party can demonstrate on or before the due date for the opposition to the summary judgment motion that controverting evidence may exist but cannot yet be presented. The request for denial or continuance of the motion must contain an affidavit which specifies the facts that cannot be presented and why they cannot be presented at that time. By statute, the application to continue the motion to obtain necessary discovery may be made on ex parte

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basis, so long as that is done prior to the due date for the opposition.

In this case, plaintiff neither filed an ex parte application prior to the time for service of the opposing papers nor requested a continuance or denial of the motion in the opposing papers themselves. Moreover, there was no affidavit attached identifying the controverting evidence and why it could not be produced timely for consideration by the court. While the Court of Appeals agreed that denial or continuance of the motion is no longer discretionary once the appropriate affidavit or ex parte application has been made, the time limits for making such an application are mandatory and were not complied with in this instance.

Even if the request had been made in a timely manner, the reason for not providing the evidence was also insufficient. While the court has discretion to grant a party relief from a judgment or dismissal caused by his counsel's excusable mistake, the mistake must indeed be excusable. Failure to timely object or properly advance an argument does not constitute excusable neglect. Rather, excusable neglect is an error that a reasonable person under similar circumstances might have made. A reasonably prudent attorney simply does not fail to include an essential request for a continuance and the accompanying affidavit when opposing a summary judgment motion.

As for those provisions in *Code of Civil Procedure* § 473(b) that provide for mandatory relief from a dismissal or default due to an attorney's mistake, the court also held that a summary judgment motion is not the equivalent of a default or dismissal. Those situations anticipate the attorney's mistake depriving a party of his or her opportunity to oppose the entry of default or dismissal on the merits. That is not the case with a summary judgment motion. The court again noted that plaintiff filed a substantial opposition controverting all points that were raised in the summary judgment motion. In other words, plaintiff had indeed had his day in court but simply lost. While the opposition was substantial, it omitted the critical request for a continuance to provide evidence to defeat the summary judgment motion.

- Thomas E. Martin

NEW AT WESIERSKI & ZUREK

Wesierski & Zurek LLP is proud to announce the addition to the firm of Patsy Moore and Edye Ann Hill:

Patsy Moore: Ms. Moore attended the University of Nebraska, Lincoln and Washington State University, earning her Bachelor of Arts degree in Communications in 1980. Ms. Moore received her Juris Doctor degree from California Western School of Law in San Diego, California, where she received an Am Jur award for trial practice. She was admitted to the California State Bar in 1997 and the California Central District of the U.S. District Court in 1999.

Prior to attending law school, Ms. Moore founded a residential program for emotionally disturbed adolescents and worked in community relations for the Las Vegas Metropolitan Police Department. While in law school, Ms. Moore was a founding member of the Women's Law Caucus and worked on the campaign staff for Nevada Governor Robert Miller.

Ms. Moore worked in the areas of insurance defense, insurance coverage, transportation, construction defect, business litigation, and premises liability before joining Wesierski & Zurek.

Edye Ann Hill: Ms. Hill attended Allegheny College in Meadville, Pennsylvania earning her Bachelor of Arts in 1999 with a major in History and a minor in Rhetoric. Ms. Hill received her Juris Doctor degree in 2002 from American University Washington College of Law in Washington, D.C. where she graduated cum laude. While in law school, she served as a student advocate with the nationally recognized Community and Economic Development Law Clinic at American University. She was admitted to the California State Bar and the California Central District of the U.S. District Court in 2002.

Prior to joining Wesierski & Zurek, Ms. Hill worked in the areas of insurance defense, insurance coverage, construction defect, business litigation, and premises liability.

Ms. Hill is a member of the American Bar Association and the 'Ainahu o Kaleponi Hawaiian Civic Club.

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process are strictly confidential in the hopes of fostering candid discussion and a complete exchange of information during mediation to facilitate settlements. However, *Evidence Code* § 1123 specifically provides an exception to mediation confidentiality for a written settlement agreement prepared in the course of, or pursuant to a mediation if the agreement provides that it is admissible or subject to disclosure, or if the agreement provides that it is enforceable or binding, or if all the parties to the agreement expressly agree in writing to the disclosure of the agreement. In plaintiff's case, the settlement agreement first contained an explicit waiver of mediation confidentiality over the contents of the agreement. Thus, the agreement specifically stated that it was enforceable and binding on all parties to it. Accordingly, two of the provisions of *Evidence Code* § 1119 had been met and the agreement was admissible for consideration by the court on the summary judgment motion.

As to the suggestion that there was no mutual consent since the actual defendants had not signed the agreement, the court dismissed that argument on two grounds. First, the requirements for signatures of all parties for an enforceable settlement agreement applies only to the summary enforcement procedure envisioned by *Code of Civil Procedure* § 664.6, and not the procedure used by the defendants in this case - a motion for summary judgment. Additionally, the defense attorney had the ability to enter into at least that portion of the settlement agreement that waived the mediation confidentiality. If that portion of the agreement alone was now binding and enforceable, then the whole agreement was properly in evidence before the court. Just because the agreement did not necessarily meet the standards for *Code of Civil Procedure* § 664.6 did not mean that the agreement was not otherwise enforceable.

The court found no merit in plaintiff's argument that mutual consent did not occur, even though the plaintiff himself submitted a declaration in opposition to the summary judgment claiming that he did not read the contract in its entirety and did not understand the portions that he read. Mutual assent to a contract is based upon objective and outward manifestations, not a party's subjective intent. In this case, the plaintiff's own signature appeared on the settlement agreement. Additionally, his attorney's signature appeared on the agreement. A review of the documents showed no indication that plaintiff did not intend to be bound by the terms of the agreement or that his assent was in any way conditional. Ordinarily, one who

signs an agreement is deemed to have assented to all of the terms of the contract.

Finally, plaintiff's claim that there was a triable issue as to whether he could rescind the contract was likewise dismissed. In order to successfully rescind an otherwise binding contract, a party claiming unilateral mistake must show that the mistake was regarding a basic assumption upon which that party entered into the contract, and that the mistake had a material effect on performance that is adverse to the party claiming mistake. Also, a party must prove that it does not bear the risk of a mistake, and that the effect of the mistake is such that enforcement of the contract would now be unconscionable. Failure to read and understand the terms to an agreement is not excusable neglect. All of the outward appearances were that plaintiff objectively manifested his assent to be bound by the settlement agreement by signing it without condition. Case law and the Restatement of Contracts are clear that failure to know all of the contents of an agreement is not sufficient to avoid being bound by the terms of the agreement.

The holding in this case makes two principles evident. First, post mediation settlement agreements should contain clauses that they are enforceable under *Code of Civil Procedure* § 664.6. Second, post-mediation settlement agreements should contain the signature of all parties to the action (not just their attorneys or claims representatives). Alternatively, they should contain clauses that the agreements are not subject to the mediation confidentiality rules and are specifically admissible in evidence in order to enforce the terms of the agreement.

While certainly not addressed in this opinion by the court, it also would appear prudent to include an attorney's fees clause for the successful party who has to apply to the court in one form or another for assistance in enforcing the terms of the post-mediation settlement agreement.

- Thomas E. Martin

Editor

Paul J. Lipman