

1996

Lawrence C. Kay, Joy Kay, Robert L. Kay and  
Teresa Kay v. Summit Systems, Inc., a corporation;  
Val E. Southwick : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS <sup>A10</sup>

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### Priority No. 15

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### JURISDICTIONAL STATEMENT

The Third Judicial District Court for Salt Lake County, with the Honorable J. Dennis Frederick presiding, entered an order denying the defendant's/appellant's Motion to Enforce Settlement Agreement on October 16, 1995. The order was appealed by the filing of a Notice of Appeal on November 15, 1995. The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Annotated § 78-2a-3(2)(k).

### STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Trial Court abused its discretion in denying the defendant's/appellant's motion to order the equitable remedy of specific performance of a settlement agreement where only two of the four plaintiffs/appellees accepted a settlement offer but where two of the four plaintiffs/appellees (the wives of the two plaintiffs/appellees who accepted the settlement offer) were not consulted and never gave their consent to the settlement offer notwithstanding a purported unconditional acceptance in writing of the offer by their attorney.

Because the defendant/appellant Val E. Southwick ("Southwick") seeks the equitable remedy of specific performance, the trial court's summary denial of an equitable remedy (i.e., enforcement of an alleged settlement agreement) should "not be reversed on appeal unless it is shown that there was an abuse of discretion." *John Deere Co. v. A & H Equipment, Inc.*, 876 P.2d 880, 883 (Utah App. 1994); *Zions First National Bank v. Barbara Jensen Interiors, Inc.*, 781 P.2d 478, 479 (Utah App. 1989) (quoting *Mascaro v. Davis*, 741 P.2d 938, 942 n.11 (Utah 1987)). The issue of whether

an alleged contract ever came into existence between the parties is a question of law which this Court reviews under a “correctness of error” standard. . *John Deere Co. v. A & H Equipment, Inc.* 876 P.2d 880, 883 (Utah App.1994) quoting *Hern Hughes & Sons, Inc. v. Quintek*, 824 P.2d 582, 583 (Utah App. 1992).

#### DETERMINATIVE STATUTORY PROVISIONS

Utah Code Ann. § 78-51-32(2) (1992).

#### STATEMENT OF THE CASE

##### ***A. Nature of the Case.***

This is an appeal from a final order in a civil action wherein it was determined, based on the equitable arguments of opposing counsel and as a matter of law from the pleadings and motions, that there was not an enforceable settlement agreement between Southwick and the plaintiffs/appellees regarding Southwick’s proposed settlement. On October 16, 1995, Judge J. Dennis Frederick of the Third Judicial District Court of Salt Lake County entered an Order Denying Vale E. Southwick’s Motion to Enforce Settlement Agreement. On November 15, 1995, Southwick filed this appeal.

##### ***B. Statement of Fact.***

1. Plaintiffs/appellants Lawrence C. Kay and Joy Kay are husband and wife and Robert L. Kay and Teresa Kay are likewise husband and wife (R. at 2697) (Addendum F.)

2. Leslie W. Slaugh ("Kays' attorney") has acted as one of the attorneys for all the Plaintiffs/Appellants in the above matter. (R. at 2689) (Addendum E.)

3. In December of 1993, judgment was entered against Southwick and others in favor of the Kays in the amount of \$652,347.00 for intentional tortuous acts. (R. at 1980-1983 and 2659.)

4. On March 16, 1995, Southwick, through his attorney, transmitted a settlement offer by facsimile to the Kays' attorney. (R. at 2655 and 2670) (Addendum B, Exhibit A (Addendum C, p. 2.)

5. A revised written settlement offer was transmitted via facsimile by Southwick's attorney to the Kays' attorney on March 16, 1995. (R. at 2656 and 2670 (Addendum B, Exhibit B) (Addendum C. p.2.)

6. Kays' attorney discussed the proposed settlement agreement only with Plaintiffs/Appellants Lawrence Kay and Robert Kay. (R. at 2689-2690) (Addendum E.)

7. Neither Plaintiff/Appellant Joy Kay nor Plaintiff/Appellant Teresa Kay were consulted personally by Kays' attorney regarding the proposed settlement. (R. at 2690)(Addendum E.)

8. Neither Joy Kay nor Teresa Kay ever agreed to the proposed settlement. (R. at 2690 and 2697 - 2698)(Addendum E.)

9. Neither Joy Kay nor Teresa Kay ever authorized or gave the Kays' attorney the authority to settle or accept any offers of settlement on their behalf. (R. 2690 and 2697 -2698)(Addendum D, E, and F.)



10. On April 7, 1995, the Kays' attorney mailed a written acceptance of the revised offer to settle for \$10,200.00. (R. at 2658 and 2670) (Addendum B, Exhibit C)(Addendum C, p.2.)

11. Following the receipt by Southwick's attorney of the written acceptance , Southwick transferred funds into his attorney's trust account and directed his attorney to prepare a written Settlement and Release Agreement (the "Proposed Agreement"). (R. at 2651, 2670-2671) (Addendum B, p.2) (Addendum C, pp. 2-3.)

12. On April 18, 1995, the Proposed Agreement was mailed to the Kays' attorney. (R. at 2658-2662) (Addendum B, Exhibit D.)

13. On May 9, 1995, Southwick's attorney spoke to Kays' attorney by telephone to inquire as to the status of the Proposed Agreement. The Kay's attorney told Southwick's attorney that he was satisfied with the language contained therein and sent it to the Kays for their signatures. (R. at 2671) (Addendum C, p. 3.)

14. On May 23, 1995, Southwick's attorney left a telephone message with the Kays' attorney inquiring as to whether the Proposed Agreement was fully executed. (R. at 2671) (Addendum C, p. 3.)

15. On June 20, 1995, Southwick's attorney spoke with the Kays' attorney regarding the status of the Proposed Agreement. The Kays' attorney stated that his clients may have changed their minds with respect to proposed settlement. Southwick's attorney told the Kays' attorney that he should tell the Kays that Southwick's attorney did not believe the Kays could change their mind at this point and Southwick's attorney

would file a motion to enforce the agreement if they did not sign and return the Proposed Agreement. (R. at 2671) (Addendum C, p. 3.)

16. On July 11, 1995, Southwick's attorney mailed written notice to the Kays' attorney informing him that if the Proposed Agreement was not signed and returned by July 21, 1995, a motion would be filed to enforce the Proposed Agreement. (R. at 2671-2672) (Addendum B, Exhibit E) (Addendum C, pp. 3-4.)

17. On August 2, 1995, Southwick's attorney filed a Motion to Enforce Settlement Agreement, a memorandum in support thereof and an attorney's affidavit (R. at 2648-2682) (Addenda A, B and C.)

18. On August 15, 1995, the Kays' attorney filed a memorandum in opposition to the motion and two affidavits in support thereof. (R. at 2685-2691 and 2697-2698) (Addenda D, E and F.)

19. On August 21, 1995, Southwick's attorney filed a reply to the Kays' opposition to the motion. (R. at 2692-2696) (Addendum G.)

20. On August 28, 1995, the Kays' attorney filed a supplemental memorandum to the opposition to the motion. (R. at 2704-2706) (Addendum H.)

21. On August 30, 1995, Southwick's attorney filed a response to the supplemental memorandum. (R. at 2701-2703) (Addendum I.)

22. On September 12, 1995, the Trial Court entered a Minute Entry which denied the motion "FOR REASONS SPECIFIED IN OPPOSING MEMORANDA." (R. at 2707-2708) (Addendum J.)

23. On October 16, 1995, the Trial court entered the Order denying the motion. (R. at 2709-2710) ( Addendum K.)

24. On November 15, 1995, Southwick's attorney filed the Notice of Appeal. (R. at 2711-2712) (Addendum L.)

### SUMMARY OF THE ARGUMENT

The authority of an attorney to bind his or her clients with respect to any of the substantive steps which are the subject of pending litigation has been expressly limited by the Utah legislature, through the enactment of §78-51-32, to agreements "filed with the clerk or entered upon the minutes of the court". This has been the law in Utah now for nearly 100 years. The legal effect of this limitation is to insure that parties to pending litigation personally consent to and agree with such steps and to insure so that courts in which such actions are pending will have the opportunity to exercise their judicial oversight responsibility over all such steps. The settlement of a judgment such as that claimed by Southwick in this case is certainly such a substantive step.

Notwithstanding the unambiguous provisions of § 78-51-32, Southwick seeks to have this Court overrule and ignore the limitations it places upon an attorney's authority by attempting to shift the focus away from the statute itself to his claim that an attorney's authority should be governed by equitable principles. However, the equitable principles relied upon by Southwick simply have no application to the facts of this case.

### ARGUMENT

**A.     The Proposed Agreement Was Never Approved By All Of The Kays  
And Is Therefore Not Enforceable.**

The authority of an attorney to bind his or her client to a compromise or settlement of a client's claim in pending litigation is limited under Utah law by statute, rule and applicable legal precedents. While an attorney has control over the procedural aspects of litigation, only the client may consent to a compromise or settlement of his or her claims. § 78-51-32 (1992); McWhirter v. Donaldson, 36 Utah 293, 104P.731, 734 (1909); Rule 4-504(8), Utah Code of Judicial Administration; 71 Am.Jur.2d Specific Performance §13 (1973), Accord, Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491, 493 (1967).

The limitation of an attorney's agency to so act for and bind his or her client is expressed as follows in § 78-51-32:

An attorney and counselor has authority . . . . (2) to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the Court, and not otherwise (emphasis added.)

Rule 4-504(8), UCJA, provides further:

No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record. (emphasis added.)

The effect of the foregoing statute and rule is to void the Proposed Agreement and render it unenforceable. In McWhirter 104P. at 734 the Utah Supreme Court in construing the identical statute which is now § 78-51-32(2), stated:

The stipulation in question was neither filed with the clerk nor otherwise made a part of the record. Therefore appellant cannot claim anything for the stipulation, because, under the foregoing provisions of the statute, *neither he nor his counsel had any right to rely upon it.*

In the case of *Borkheim v. N.B. & M. Ins. Co.*, 38 Cal. 623, the Supreme Court of California, in construing a statute identically the same as the one under consideration here, said: *'It declares such agreements null and void unless they are in writing and filed with the clerk or have been entered in the minutes of the court. Of such agreement, therefore, there can be no specific performance. To allow the court to enforce them as was done in this case, against the will or without consent of the parties, is to allow the court to work the precise mischief which the statute was designed to prevent!* (emphasis added.)

The *McWhirter* court then went on to recognize that instead of nullifying the statute, the statute "ought to be strictly adhered to, for it is the dictation of wisdom," and that deviation from the statutory standard would cause the courts to be "frequently annoyed by disputes between counsel concerning their agreements, and thus forced to try innumerable side issues more perplexing than the case itself, attended, also with the delay to business, and with detriment to the public service." *McWhirter*, 104 P. at 734.

This is not a case where all of the Kays reviewed the Proposed Agreement, agreed to it and authorized Kays' attorney to accept the same on their behalf. Neither Joy Kay nor Teresa Kay so reviewed, agreed or gave any such authorization. The inadvertent but unauthorized approval by the Kays' attorney did not and could not bind Joy Kay or Teresa Kay where they did not personally agree and authorize any such approval.

Accordingly, no agreement ever came into existence which the Trial Court could enforce. (R. at 2690 and 2697-2698) (addenda E and F). The requirements set forth in § 78-51-32(2) and Rule 504(8) for establishing the authority of the Kays' attorney were never satisfied.

In an effort to overcome the clear lack of actual authority on the part of the Kays' attorney, Southwick seeks to have this Court determine that the Kays' attorney had apparent authority which would bind Joy Kay and Teresa Kay based upon their refusal to agree and their silence. Under even the most liberal interpretation of agency law, ones refusal to agree, or silence in not accepting an opponents offer provides no basis for supporting Southwick's claim against the Kays. (Appellants Brief Pages 6-13.)

Southwick has accurately stated that in order to have a binding settlement agreement there must be an offer, acceptance and consideration in that such agreements are governed by the rules of contract law. *Zions First National Bank v. Barbara Jenson Interiors, Inc.*, 781 P.2d 478, 479 (Utah App, 1989); *Butcher v. Gilroy*, 744 P.2d 311, 312 (Utah App. 1987). As this Court has held in the cases cited above, before an alleged settlement agreement may be enforced, the record must establish a binding agreement and the excuse for nonperformance must be comparatively unsubstantial. *Zions First National Bank*, 781 P.2d at 479.

In the case now before the Court, the undisputed facts demonstrate that Southwick made an offer of settlement that was communicated to the Kays' attorney, (R. at 2656, 670, 2675) who in turn only reviewed the proposal with Lawrence Kay and Robert Kay.

Lawrence Kay and Robert Kay accepted Southwick's offer. (R. at 2690.) Based on that acceptance, Kays attorney caused a purported unconditional offer of acceptance to be sent to Southwick's counsel. (R. 2676 and 2690.) However, until and unless all of the Kays agreed to the Proposed Agreement and the requirements of § 78-51-21(2) and Rule 4-504(8) had been satisfied, neither Southwick "nor his counsel had any legal right to rely upon it." § 78-51-32; *McWhirter*, 104 P. at 734. (R. at 2651, 2670, 2671 )(Addendum B, P.2)(Addendum C, pp. 2-3.)

Southwick readily concedes that the Kays are correct in their reading of § 78-51-32 (1992), *McWhirter*, and *Borkheim*. (Appellant's Brief at pages 7 & 8.) What Southwick fails to address in his argument is the fact that the very remedy sought by him on this appeal, specific performance, is simply unavailable to him. *McWhirter*, 104 P. at 734. Southwick's efforts to persuade this Court that one's refusal to accept an offer coupled with silence somehow bind Joy Kay and Teresa Kay to something that was never reviewed by them with Kays' attorney, agreed to or authorized by them is without merit.

Neither Joy Kay nor Teresa Kay acted negligently or engaged in any other conduct which mislead Southwick in any respect. Nor did Joy Kay or Teresa Kay receive any benefit as a result of their claimed silence or refusal to agree. Simply stated Southwick had no legal right to rely on the Proposed Agreement until it had been personally reviewed and agreed to by each of the Kays and thereafter became a matter of record in compliance with the requirements of § 78-51-32 and Rule 4-504(8). One's silence with respect to a tortfeasor's unsolicited settlement offer is not and cannot be

construed as bad faith. Whether Southwick performed his part under the Proposed Agreement is immaterial.

Settlement agreements are favored in the law and may be summarily enforced when there has been a binding agreement. However, under contract law, there must be a meeting of the minds in order to form such a contract. *Sackler v. Savin*, 897 P.2d1217, 1220 (Utah 1995); *John Deere Co.*, 876 P.2d at 884-885 (Utah App. 1994); 71 Am. Jur.2d Specific Performance § 13 (1973). With respect to Joy Kay and Teresa Kay, Southwick cannot and does not argue that there was any meeting of the minds as to them. Where there was no meeting of the minds the trial court did not abuse its discretion when it refused to order the Kays to perform an agreement that never came into existence. *John Deere Co.*, 876 P.2d at 885 (Utah App. 1994).

B. This Court Should Not Enforce The Alleged Settlement Agreement  
Where There Is No Showing Of An Abuse Of Discretion By The  
Trial Court And Where There Was No Evidentiary Basis Before  
The Trial Court For Invoking Its Equitable Powers.

“Specific performance is a remedy of equity which addresses the sense of justice and good conscience of the Court...”*Morris v. Sykes*, 624 P.2d 681, 684 (Utah 1981); See also *Reed v. Alvey*, 610 P.2d 1374, 1377 (Utah 1980); *Ferris v. Jennings*, 595 P.2d 857, 859 (Utah 1979); *LHIW, Inc. v. DeLorean*, 753 P.2d 961, 963 (Utah 1988). *Borkheim* and *McWhirter*, have proven to be prophetic in that this Court is now being called upon to



resolve “disputes between counsel concerning their agreements” and is thus “forced to try . . . side issues” that have nothing to do with the central issue of the case.

It is significant that Southwick made no effort to conduct any discovery or make any record to establish the actual facts concerning the knowledge and conduct of Joy Kay and Teresa Kay with respect to the Proposed Agreement. Instead, Southwick has chosen to inappropriately raise questions concerning their knowledge, credibility, and conduct through innuendo. Innuendo is not a proper basis upon which to invoke the equitable powers of this Court. Were Southwick cites no authority, statute, or parts of the record such to support his innuendoes, the related claims and issues should not be considered. *First Sec. Bank of Utah v. Creech*, 858 P.2d 958, 962 (Utah 1993).

Southwick’s claim that with respect to justice and fairness he only has clean hands (Appellant’s brief at page 10) totally ignores the judgment of over \$652,347.00 that was entered against him. (R. at 1980-1983). With respect to justice and fairness it is inconceivable that one found to have tortuously injured the plaintiffs/appellees to the extent of over \$650,000.00 can now claim clean hands. Justice and fairness requires that Joy Kay and Teresa Kay be afforded the full opportunity to personally review and approve the Proposed Agreement before waving or releasing their very significant judgment against Southwick. Southwick’s arguments that it would be unfair to deny him the benefit of the bargain evidenced by the Proposed Agreement ignores the real and greater unfairness that would thereby result to Joy Kay and Teresa Kay through its enforcement.

### CONCLUSION

No enforceable Agreement ever came into existence between the parties as a matter of fact, no enforceable contract ever came into existence as a matter of law and no enforceable agreement ever came into existence as a matter of equity. The Trial Court's denial of Southwick's motion to enforce the Proposed Agreement should not be reversed where (a) the requirements of § 78-51-32(2) and Rule 4-504(8) were never as a matter of fact and law satisfied, and (b) where the Trial Court properly exercised its discretion in refusing to specifically enforce the Proposed Agreement.

DATED this 7 day of October, 1996.



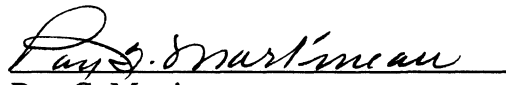
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**Certificate Of Hand Delivery**

Two Copies of the foregoing Brief Of Appellees were hand delivered to  
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