

1989

Kelly Howard v. Robert E. Buhler : Brief of Appellant

Utah Court of Appeals

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Donald J. Purser; M. Taylor Florence; Purser, Overholt and Okazaki; Attorneys for Respondent.
Robert B. Hansen; Attorney for Appellant.

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BRIEF

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DOCKET NO.

890073-CA

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

KELLY HOWARD,	:	
	:	
Appellant,	:	Case No. 890073
	:	
v.	:	(Priority Order - 14b)
	:	
ROBERT E. BUHLER,	:	
	:	
Respondent.	:	

APPEAL
From the Order of the
Third Judicial District Court of Salt Lake County
State of Utah
Honorable James S. Sawaya

BRIEF OF APPELLANT

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JUL 1 1989

CONFIDENTIAL

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

KELLY HOWARD,	:	
Appellant,	:	
v.	:	Case No. 890073
ROBERT E. BUHLER,	:	(Priority Order - 14b)
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PARTIES

Kelly Howard

Robert E. Buhler

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STATEMENT OF JURISDICTION

This appeal is brought pursuant to the provisions of Article VIII, Sections 3 and 5 of the Utah Constitution and pursuant to Rules 3 and 4 of the Rules of the Utah Court of Appeals. Plaintiff appeals from the Third Judicial District Court's entry of Judgment in favor of Respondent.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, AND RULES.

None

ISSUE PRESENTED FOR REVIEW*

Did the trial court err when it entered judgment that plaintiff's claims for bodily injury were barred by accord and satisfaction?

STATEMENT OF THE CASE

A. Nature of Case

On November 9, 1985 Kelly Howard was injured in a two car automobile collision in which Robert E. Buhler was the driver of the other vehicle. After various contacts and communications between Howard and the insurance adjustor for Buhler's insurance carrier Howard brought suit for personal injuries and other claims. Buhler asserted, among other defenses, the affirmative defense of accord and satisfaction (R10).

B. Course of Proceedings and Disposition Below

The case was tried to the Court without a jury on June 7 and 8, 1988. At the conclusion of the trial the Court requested that Howard respond to Buhler's Trial Memorandum Respecting Accord and Satisfaction Defense dated June 7, 1988 (R245-25). Howard filed his response on June 15, 1988 (R180-195). On June 17, 1988 Buhler filed his Defendant's Reply to Plaintiff's Trial Memorandum Respecting Accord and Satisfaction (R196-207). On September 21, 1988 the Honorable James S. Sawaya filed a Memorandum Decision in favor of Buhler (R242,243). On

*Another issue may be presented pursuant to Rule 2 R.Ut. App. Ct.

October 13, 1988 the judgment appealed from was entered (R288-290). On November 4, 1988 Howard filed his Notice of Appeal (R303).

C. Statement of Facts

In the first contact that Howard had with Ms. Kirchoff on November 12, 1985, the adjustor for Buhler's insurance carrier, Howard gave her a statement of the accident Howard told her then that he had "spoke with an attorney" (T104), which she recorded (T43,95,104). Thereafter on January 24, 1986 Kirchoff sent Howard a release form to settle the claim for \$2,844 (T43,96). She advised Howard that "When I received that back by return mail, I would forward a check" (T97). The release was never signed and returned (T98,99). On May 29, 1986 Howard consulted with his present counsel and then learned he could obtain legal service on a contingent fee basis without charge on the sum the insurance carrier was willing to pay if their offer was in writing (Ex.43). On July 8, 1986, after Howard decided to go into a lighter line of work as recommended by his doctor and take a computer course costing \$3,700 to qualify him for computer work, Kirchoff made a settlement offer of \$8,000 (T99, Ex.13). In doing so she "discussed the release that I would need, the computer school contract for \$3,700. I would forward a release. He would return it by mail, sign the release, have it notarized. Upon receipt of the release in our office, I would forward him a check and conclude the matter." (T102) On August 6, 1986 Kirchoff sent Howard a letter requesting that he send the release

(T102, Ex.12). On August 7, 1986 he called his attorney and advised that written proof of an \$8,000 insurance company was being sent to him (Ex.44). A contingent fee, contract excluding \$8,000 was signed by Howard August 18, 1986 (Ex.44). It was never signed (Ex.13). Buhler was served with summons in this suit on October 9, 1986 (T110). Kirchoff never told him before that date that this case had been settled (T110).

SUMMARY OF ARGUMENTS

The trial court erred in determining that Howard accepted the offer of \$8,000 rather than only indicating that at that time he was "ready to settle" since the quoted words were the only facts to which Buhler's adjustor testified to regarding his comments and especially in view of his not signing and returning two release forms that the adjustor said he'd have to sign before she paid him.

The preponderance of the evidence is there was no accord. In any event this Court should require the higher degree of proof of clear and convincing evidence to find an accord in settling insurance claims.

ARGUMENT

A. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF ORAL ACCEPTANCE OF AN \$8,000 OFFER AND THE OFFER WAS CONDITIONAL UPON SIGNING OF A WRITTEN RELEASE WHICH WAS NEVER SIGNED.

In Paragraph No. 2 of a mixture of facts and conclusions which were not separated (R289) the Court states that "plaintiff accepted the settlement figure of \$8,000 on July 8, 1986." There is no evidence to support any finding of fact to justify such a conclusion of law. In only one part of the record does Buhler's witness on this point testify as to what Howard said on that date. Her quote as to his statement was "I am ready." (T181) At that point in time he had consulted with counsel and he was "ready", ready to either settle the case or to go to court if the settlement offered was not what the claim was worth. He did not have the benefit of his counsel's evaluation of an \$8,000 offer then and he obviously intended to obtain it before making his decision (Ex.43,44).

Although Buhler had the burden of proof on this issue he did not present any proof as to what was actually said in the form of a telephone recording, even though the adjustor involved previously recorded their initial call concerning the facts of the case.

The adjustor had made it clear to Howard that he had to sign the release form she sent him before he could be paid. He was justified in relying on her representation in that regard and particularly since there was no effort to hold him to a prior offer of \$2,844 which the adjustor claimed was also accepted by him (T105). The evidence was in conflict as to whether Howard told Kirchoff that he was going to consult an attorney before he settled the case (T49 and T105). Jay Wood corroborated Howard's

testimony on this point (T121,122).

Much was made at trial of Exhibit 14 a statement Jay Wood sent to Kirchoff at Howard's request on August 8, 1986 which reads as follows:

"Enclosed is the contract from the school which I am attending (Mountainwest College).

Please send me my release form for \$8,000.00 on which we agreed."

There is no doubt from the evidence that Kirchoff needed a copy of the computer school contract before she would be able to settle and that Howard needed a written offer of settlement before his attorney would make an exclusion from his contingent fee contract if the offer were inadequate. This need for an exchange is what that note was all about.

The most telling proof that there was no acceptance by Howard of the \$8,000 telephone offer on July 8, 1986 was Kirchoff's letter of August 6, 1986 in which she states, *inter alia*, "If you are still interested in settling your claim, please provide American Concept with a copy of your education contract so that we may conclude this matter" (Ex.12) (underscoring added).

The preponderance of the evidence is against an accord and satisfaction for the following reasons:

1. No release was signed in this case although Kirchoff told Howard that would be required before he could be paid. (Ex.13, T 102)

2. Howard and Kirchoff had previously discussed settlement at a different figure and Kirchoff claimed they had reached

accord but the formal release was not signed and Kirchoff did not seek to enforce it (thus leading Howard to believe that there would not be an enforceable settlement until the formal release had been signed). (T96,97)

3. Plaintiff consulted with counsel on May 29, 1986 and knew he could pursue any claim that was not deemed fair by his attorney without paying a fee on the sum offered in writing. (Ex.43)

4. No recording was made of the remarks of the claimant although the adjustor had previously made a recording of the claimants oral statements and claimant knew that. (T104 and absence of proof of recording "settlement discussion.)

5. Kirchoff did not testify that plaintiff actually agreed to settle his claims for \$8,000.00 (can't cite to the negative).

6. Kirchoff did not follow up the phone conference of July 8, 1986 in which she claims plaintiff agreed to settle for \$8,000.00 with any confirming letter or other documentation sent at that time. (Id.)

7. On August 6, 1986 Kirchoff wrote plaintiff in pertinent part as follows: "If you are still interested in settling your claim, please provide American Concept with a copy of your education contract so we may conclude this matter." (underscoring added) (Ex.12)

8. Kirchoff had not followed up on the above letter by the time Buhler was served with process in this suit which occurred on the 9th day of October, 1986 and she never told me before then

that she'd settled the case.

In the court below Buhler's counsel urged the Court to find an accord on the facts of this case by following the four following precedents:

(1) Sugarhouse Finance Co. v. Anderson, 610 P2d 1369 (Utah 1980).

(2) Jaramillo v. Farmers Insurance Group, 669 P2d 1231 (Utah 1983).

(3) Allen v. Bissinger & Co., 219 P539 (Utah 1923).

(4) Lawrence Construction Co. v. Holmquist, 642 P2d 382.

As for (1), deals almost entirely with the question of "consideration," that being the fourth element it listed as being essential to an Accord and Satisfaction (element 3 being "assent or a meeting of minds," which is the critical element on the instant case--was stated as being present there and thus not discussed.

As for (2), the facts were not in dispute. The facts there were stipulated to. In a three to two decision the majority found that there was a conflict between the stipulation of facts and the release in evidence and held that the former was controlling and that a prior precedent of that Court would not alter the legal effect of the parties agreement to settle a case contrary to that precedent (the Ivie case which held that Utah's no fault law does not confer on a no-fault insurer the right of subrogation to funds received by its insured in a subsequent

action against the tortfeasor.

As for (3), the accord was based on correspondence and the Court said "there is no substantial conflict in the evidence, the most important part of which consists of written communications between the parties." This is in sharp contrast with the case at bar where the critical communications are oral rather than in writing and the testimony is diametrically opposed as to the substance of the phone conversations in question.

As for (4), the issue was whether the settlement was subject to certain conditions. There the party held to an oral accord actually signed the Stipulation (but three days after the stated deadline) and the Court noted (P.383) that "neither the letter nor the Stipulation specifically states that the settlement was contingent on those conditions." Although an oral accord was there enforced there was no dispute as to what was said in the prior oral agreement. In the instant case there is no proof at all as to what Howard said (disregarding his own testimony at trial said the evidence must be reviewed in the light most favorable to the prevailing party) only the adjustor's conclusion that he had accepted.

None of the foregoing cases hold or even imply that one party stating he is "ready to settle" is equivalent to saying "I accept your offer of \$8,000" or words to that effect. Thus, this case is one of initial impression and one likely to lower the case adjustors henceforth take to be sure a settlement is a settlement.

Buhler in his post-trial brief went outside the record in quoting from a deposition he took of Howard. This is quoted here to contrast the type of factual statement which would constitute an oral acceptance with the total absence of such evidence in this record. There Buhler's counsel asked this hypothetical question:

"If you called her (Kirchoff) up and said 'I want to settle this case for \$8,000' and you discussed your school contract and she said 'okay, send me the school contract and I'll send you a release and we can conclude your claim' as you never said anything more to her, do you think it's reasonable for her to believe that you settled your claim?" (R199,200) Over objection Howard answered affirmatively. (R200)

B. CLEAR AND CONVINCING EVIDENCE SHOULD BE REQUIRED DEGREE OF PROOF IN INSURANCE CLAIMS TO PROVE AN ORAL ACCORD.

Sound policy considerations impel caution in accepting an insurance adjustor's uncorroborated claim that the claimant settled his or her claim by an oral statement alone. Otherwise many claimants may never have "their day in court." A recent illustration of this Court applying such caution even to a stipulation recorded in a deposition to which a party's counsel agreed is the case of Brown v. Brown, 744 P2d 333 (Utah App. 1987). Admittedly there is no stipulation involved in this case. Even so the principle of requiring evidence to be more than a preponderance should be required in those classes of cases where, as here, there could be an advantage unfairly taken without detection by the more experienced person such as an insurance adjustor.

No Utah case has ever decided whether the usual civil rule of preponderance applies in a case of an oral contract of settlement of an insurance claim. The imposition by this Court of the standard of clear and convincing evidence would have a salutary effect of requiring insurance companies to corroborate an oral acceptance by voice recordings, confirmation by other witnesses to the statements made, contemporaneous documentation or whatever satisfies the higher degree of proof.

Our Supreme Court in the case of Holder v. Holder, 340 P.2d 761 (Utah 1959) increased the required proof from clear and convincing to proof beyond a reasonable doubt in an annulment suit involving a question of paternity for comparable reasons of public policy to those Howard respectfully urges upon this Court to establish where no prior degree has yet been established. to settle this case for \$8,000' and you discussed your school contract and she said 'okay, send me the school contract and I'll send you a release and we can conclude your claim' as you never said anything more to her, do you think its reasonable for her to believe that you settled your claim?" (R199, 200)

In the reply memorandum Buhler's counsel states "When judged by an objective standard all conduct of Plaintiff indicated that he had settled this case with Ms. Kirchoff." Howard respectfully points out that his following conduct does not indicate he had settled this case with Ms. Kirchoff: (1) he consulted with an attorney in November 1985 whose name he could not recall to give Ms. Kirchoff at that time (T104), (2) He obtained a proposed

written contingent fee contract from his present attorney on May 29, 1986 (Ex. 43), (3) On August 15, 1986 he signed a written contingent fee contract with his present counsel (Ex.44), (4) He did not sign, notarize or return to the insurance adjustor the written release she said he's have to sign before she could pay him (R227), (5) He caused process to be served upon Buhler on October 8, 1986. (R5)

In the same memorandum Buhler's counsel contends it is clear "even beyond a reasonable doubt that Plaintiff entered into a binding accord and satisfaction in this case." Accordingly, Buhler ought not to object to the application in this case of a lesser standard of "clear and convincing" in deciding whether an accord was proved.

CONCLUSION

The evidence is insufficient to find an accord and, alternatively, the preponderance of the evidence is there was no accord. Alternatively to all of the above the Court should require as a matter of public policy that oral accords in insurance case should require proof that is clear and convincing rather than a mere preponderance.

Howard respectfully requests this court to set aside the trial court's entry of judgment based on accord and satisfaction and remand the case to trial court for findings of fact,

conclusions of law and judgment as to issues of liability and damages.

RESPECTFULLY SUBMITTED this 4th day of August, 1989.

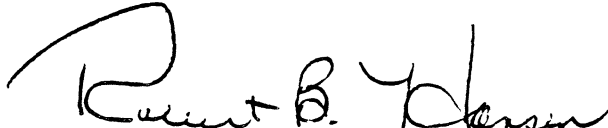

Robert B. Hansen
Attorney for Appellant

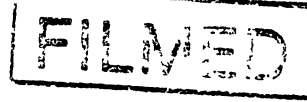
CERTIFICATE OF SERVICE

This is to certify that on the 7th day of August, 1989, four true and correct copies of the foregoing BRIEF OF APPELLANT were hand-carried by undersigned, to:

Donald J. Purser
M. Taylor Florence
PURSER, OVERHOLT & OKAZAKI
39 Post Office Place
Salt Lake City, Utah 84101

Attorneys for Robert E. Buhler


Robert B. Hansen



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

KELLY HOWARD,	:	MEMORANDUM DECISION
Plaintiff,	:	CIVIL NO. C-86-7662
vs.	:	
ROBERT E. BUHLER,	:	
Defendant.	:	

The issues of this case were tried before the Court, sitting without a jury, commencing June 7, 1988. Robert B. Hansen, Esq. appeared on behalf of plaintiff, and Donald J. Purser, Esq. and M. Taylor Florence, Esq. of Purser, Okazaki and Berrett, appeared on behalf of the defendant. The matter was fully presented, argued and submitted, and the Court's decision thereon taken under advisement. The Court having now considered the evidence and arguments of counsel, together with written Memoranda submitted, now makes its decision and ruling thereon as follows:

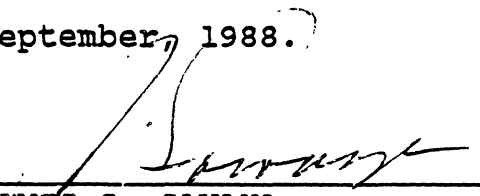
This is a personal injury case resulting from an automobile collision. The issues of liability, causation and damages were presented, as well as the defendant's affirmative defense of accord and satisfaction. It was stipulated by counsel and agreed by the Court that the issue of accord and satisfaction would be considered by the Court, and if defendant prevailed on that

issue, that it would be dispositive of all other issues. Counsel has presented written Memoranda in support of their respective positions, and the Court has reviewed the same.

The Court on the issue of the affirmative defense of accord and satisfaction finds, based upon the reasons and for the grounds stated in defendant's Memorandum, in favor of the defendant and rules that there was, in fact, an accord and satisfaction. Based upon this ruling, the Court determines that it is dispositive to all other issues of the case.

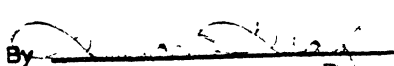
Counsel for defendant is requested to prepare an appropriate Order and Findings consistent with the Court's ruling in this matter.

Dated this 21st day of September, 1988.



JAMES S. SAWAYA
DISTRICT COURT JUDGE

ATTEST
H. DIXON HADLEY
Clerk

By  _____
Deputy Clerk

FILED IN CLERK'S OFFICE

OCT 13 3 30 PM '88

CLERK
[Signature]
CLERK

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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

KELLY HOWARD,

Plaintiff,

vs.

ROBERT E. BUHLER,

Defendant.

: 2143208
: 10-14-88-8:04 am
: ORDER, FINDINGS AND
: ENTRY OF JUDGMENT
:
:
: Civil No. C86-7662
: (Judge James S. Sawaya)
:

On June 7, 1988, the above-referenced parties regularly appeared before the Court at the trial of this matter. Robert B. Hansen, Esq. appeared on behalf of the Plaintiff, and Donald J. Purser, Esq. and M. Taylor Florence, Esq. of Purser, Okazaki & Berrett, P.C. appeared on behalf of the Defendant. Both parties proceeded to put on evidence in their respective cases in chief. The matter was fully presented, argued and submitted, and the courts decision thereon taken under advisement.

The Court having considered the evidence and arguments of counsel, as well as the written memorandum submitted and all

other documents of record in this case, thereafter submitted its memorandum decision dated September 21, 1988, finding in favor of Defendant on his affirmative defense of accord and satisfaction. In support of said decision, the following findings of fact are submitted:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This is a personal injury case resulting from an automobile collision on November 9, 1985. The issues of liability, causation and damages were presented during the trial of this matter, as well as Defendant's affirmative defense of accord and satisfaction. It was stipulated by counsel and agreed by the Court that the issue of accord and satisfaction would be considered by the court, and if Defendant prevailed on the issue, that it would be dispositive of all other issues.

2. The Court, on the issue of the affirmative defense of accord and satisfaction, finds that on July 8, 1986, Christine Kirchoff, on behalf of Defendant's liability insurer offered Plaintiff the amount of \$8,000.00 as settlement of all claims arising out of the automobile accident at issue herein. On or about this same date, Plaintiff accepted the settlement figure in the amount of \$8,000.00. Therefore, the parties expressed a mutual assent or meeting of the minds with regard to this settlement figure and a binding accord and satisfaction had been

achieved.

3. The Court further finds that the settlement of the claims arising out of the automobile accident herein is the proper subject matter for an accord and satisfaction and that the parties thereto were competent to enter into such an agreement. Finally, the Court finds that there was valid consideration in the agreement to settle a disputed, uncertain cause of action sufficient to create a binding accord and satisfaction.

4. The finding of a valid accord and satisfaction is dispositive of this case and the Court, therefore, need not reach the issues of liability, causation and/or damages with respect to the personal injury claims herein.

5. Accordingly, it is hereby ordered that judgment be entered against Defendant, Robert E. Buhler, for the amount of \$8,000.00.

6. On file with the court and dated January 15, 1988, is a Notice of Offer of Judgment pursuant to Rule 68 of the Utah Rules of Civil Procedure in the amount of \$16,000. In as much as the judgment finally obtained by Plaintiff in this case was