

2005

Jillene Barnes v. Lagoon Corporation : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JILLENE BARNES,

Plaintiff/Appellant,

v.

LAGOON CORPORATION, INC., a
corporation, and JOHN DOES I-V,

Defendants/Appellees.

CASE NO. 20050213-CA
ORAL ARGUMENT REQUESTED

REPLY BRIEF OF APPELLANTS

Appeal from a Judgment of Second Judicial District Court
of Davis County, State of Utah
Honorable Michael Allphin

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SUMMARY OF ARGUMENT

The proper standard of appellate review is *de novo*, with all material factual issues resolved against the moving party, here, Lagoon. Barnes does not need to marshal the evidence in favor of Lagoon. The trial court decided the disputed issue, whether there was a binding agreement for \$2,500.00, on the basis of affidavits, without an evidentiary hearing. There is no reason to give deference to its conclusions as to credibility. Instead, Barnes should have the jury trial she demanded.

Barnes did not accept Lagoon's offers of \$2,000.00, or \$2,500.00. Her affidavit does not admit a settlement agreement. And if there is ambiguity in her response, then the fact-finder should hear her explanation. Further, the trial court erred in deciding that Lagoon could demand that Barnes sign the \$2,000.00 check as a condition precedent to getting the additional \$500.00 that it offered. The \$2,000.00 check contains no language suggesting that it was a condition precedent, but affirmatively declared that cashing it was a "full payment of all claims". There is no basis to turn "full payment" into "condition precedent to getting more money".

Finally, it is a bad public policy to allow trial courts to decide on the basis of affidavits whether large personal injury claims have been settled for a pittance, without any supporting documentation. Further, it is bad public policy to allow injured persons to do the same. The courts should exercise a sound discretion in refusing to enforce personal injury settlements either in favor of, or against injured persons, that are not clearly documented.

ARGUMENT

A.

BARNES DOES NOT NEED TO “MARSHALL THE EVIDENCE” TO CLAIM HER RIGHT TO A JURY TRIAL

Lagoon suggests that Barnes should have “marshalled the evidence” in her brief. Lagoon cites various cases for that proposition. But none of these cases involves review of a summary disposition of a case. Each of the cited cases reviewed either a jury verdict or a decision following a plenary bench trial. See *Fitz v. Synthes (USA)*, 1999 UT 103, 990 P.2d 391 (jury verdict reviewed); *Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998)(complex bench trial reviewed); *Child v. Gonda*, 972 P.2d 425 (Utah 1998)(jury verdict reviewed); *Scharf v. BMG Corp.*, 700 P.2d 1068 (Utah 1985)(bench trial reviewed); *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311 (Utah App. 1991)(bench trial reviewed). Lagoon specifically cites *Chen v. Stewart*, 2004 UT 82, 100 P.3d 1177 extensively for the proposition that Barnes needed to marshall the evidence. However, *Chen* was reviewed after extensive evidentiary hearings by the trial court. The quote actually states the deferential review of the application of the legal standard to the facts as found at trial. The quote presumes that the correct legal standard is applied. Here, the correct legal standard is to construe the disputed evidence in favor of the non-moving party. If that were not the rule, then every summary judgment ruling would be reviewed with deference, since every summary judgment ruling is necessarily “fact-sensitive”.

The quoted portion of *Chen* relies upon *In Re Estate of Beesley*, 883 P.2d 1343 (Utah 1994), which was also a review of an evidentiary bench trial. Every case cited by Lagoon involves appellate review after a jury trial or an evidentiary bench trial. Not one case involves the summary disposition of a case without any trial at all.

Obviously, after an evidentiary hearing or a trial, the fact-finder's findings are accorded deference. See *Searle v. Milburn Irrigation Co.*; 2005 UT 58, ¶15; ___ P.3d ___; (deference given because "the district court enjoys an appreciable advantage over appellate courts in this context due to its ability to assess witness demeanor and credibility, factors that are not readily discernable from a cold record. See *Pinecrest Pipeline Operating Co.*, 2004 UT 67 at ¶ 48."). But here, there was no bench trial or jury trial. There was no trial at all. The trial court was in no better position to decide the contested credibility question than this court. The issue was decided summarily by the trial court on affidavits, basically like a motion for summary judgment. Therefore, the trial court's findings of fact are really statements of what should have been termed "undisputed material facts" entitling Lagoon to summary enforcement of a settlement agreement. But if there are disputed material facts on that question, Barnes is entitled to a jury trial.

B.

BARNES DID NOT ACCEPT LAGOON'S OFFER TO SETTLE FOR EITHER \$2,000 OR \$2,500

Lagoon concedes that "[i]t is fundamental that a meeting of the minds on the integral features of an agreement is essential to the formation of a contract. An agreement cannot be enforced if its terms are indefinite". *Nielsen v. Gold's Gym*, 2003 UT, ¶11, 78 P.3d 600.

Lagoon claims that Barnes admitted to agreeing to settle, but points to no specific statement of Barnes that she ever accepted Lagoon's offer. The actual statements from Barnes' affidavit make this clear:

Lagoon's Offer:

"Lagoon kept offering, instead, to pay a set amount, for a full and final settlement. Finally, they offered \$2,000.00, and sent me a check in that amount." Barnes aff., ¶6.

Barnes' Response:

"I said I would think about it." Barnes aff., ¶6.

Barnes' Rejection of the Offer:

"After thinking about it, I did not feel physically well or good about settling on a final basis, as I was worried about my future medical bills. I told Lagoon this." Barnes aff., ¶7.

This sequence of statements makes clear that Barnes never agreed to the \$2,000.00 offer made by Lagoon.

Lagoon argues that Barnes accepted a second offer of \$2,500.00. Barnes' statements are to the contrary:

Lagoon's Second Offer:

"Lagoon agreed to an additional \$500.00." Barnes aff., ¶8.

Barnes' Response:

"I was never sent an additional \$500.00 or anything in writing from Lagoon that they would agree to pay \$2,500.00 to settle after they agreed to the \$500.00. If I had gotten such a settlement agreement, I would have consulted an attorney to review it. **Since I never got such a document, I never had to decide whether to settle for that amount.**" Barnes aff., ¶10. (Emphasis added).

"Had I been sent an additional \$500.00 check, I would have consulted an attorney to decide whether to settle for that amount. Since I never got the remaining \$500.00 that Lagoon wanted to pay me, I never had to decide whether to settle for that amount." Barnes aff., ¶11.

Barnes' statements do NOT admit accepting Lagoon's additional offer of \$500.00. Instead, Barnes repeatedly states what she stated in response to the \$2,000.00 offer, that she would think about it. She refers to the \$500.00 "that Lagoon wanted to pay me", clearly describing it as an offer from Lagoon. Nowhere does she say "I agreed to the additional \$500.00 that Lagoon offered". Barnes' averments about the \$500.00 are all in the third person: "they" agreed to the \$500.00, "they" would agree to pay \$2,500.00 to settle. Barnes' first person statements are that "I" never had to

decide whether to settle.

Lagoon claims that Barnes agreed, but there is simply no supporting fact in Barnes' affidavit. All Barnes' statements indicate that Lagoon was making offers, that she never decided to accept. This is consistent with the fact that Lagoon only sent one check for \$2,000.00 which stated "full payment of all claims". There is no writing sent by Lagoon that confirms an offer of \$2,500.00, let alone an agreement to settle for \$2,500.00. Obviously, there is no writing of Barnes that acknowledges settlement for either \$2,000.00 or \$2,500.00.

C.

CASHING LAGOON'S \$2,000.00 CHECK WAS NOT A CONDITION PRECEDENT TO GETTING ANOTHER \$500.00

Lagoon still argues that cashing the \$2,000.00 check was merely a condition precedent to getting an additional \$500.00. This is a contortion of the facts. Had Barnes cashed the check, a written contract for settlement would have been created in the amount of \$2,000.00. The trial court's theory would have placed Barnes in the position of simply trusting Lagoon to not enforce the restrictive language on the check, that it was "full payment of all claims". Obviously, Lagoon could have easily taken the position that by cashing the check, Barnes had entered a binding settlement for \$2,000.00. The logical course of action, if there really was a settlement for \$2,500.00, would have been for Lagoon to ask for return of the \$2,000.00 check, and to re-issue a new check in the amount of \$2,500.00. The fact that this was never done is evidence that there was no final agreement for \$2,500.00.

Lagoon argues that it could waive the condition precedent of cashing the \$2,000.00 check. The short answer is that it didn't attempt to waive it. Had Lagoon sent the additional \$500.00, it might argue it implicitly waived the prior cashing of the \$2,000.00 check. But, Lagoon sent nothing,

only a check for \$2,000.00.

Of course, Barnes refused to cash the check, which was the same as refusing the offer. Had Lagoon sent any other release documents, perhaps more might be inferred. However, all it ever sent Barnes was a check, for \$500.00 less than what it contends was the settlement amount. Lagoon's memorandum originally suggested that a release in the amount of \$2,500.00 had been sent to Barnes, and that the only thing left was for her to send it back and get the remaining \$500.00. Lagoon now concedes that it never sent a release to Barnes. There was never any written commitment on Lagoon's part to pay \$2,500.00. The only written communication to Barnes was a \$2,000.00 check, which Lagoon admits Barnes never cashed. The only evidence of a contract for \$2,500.00 before the court is internal notes made by Lagoon. There are no documents that were ever sent to Barnes to commit Lagoon to this offer. There are no documents from Barnes agreeing to settle for \$2,500.00. All the court has before it is a party's internal notes to evidence a binding contract. Whether or not these notes are ultimately admissible, they certainly are not binding on Barnes, who never saw them, and who never received any written settlement agreement for \$2,500.00.

D.

**THE TRIAL COURT IMPROPERLY REFUSED TO LET A JURY ASSESS
THE CREDIBILITY OF BARNES AND LAGOON'S ADJUSTER**

Lagoon contended, and the trial court agreed, that a settlement agreement could be summarily enforced without an evidentiary hearing. (R., 83). This was error. A settlement agreement can only be summarily enforced if there are no factual issues requiring an evidentiary hearing. While the Utah Supreme Court used the term "complex factual issues" requiring evidentiary hearings, *Tracy-Collins Bank & Trust Co. v. Travelstead*, 592 P.2d 605, 609 (1979), the essence of the court's concern is that disputed factual issues receive appropriate evidentiary treatment.

There are disputed facts: Lagoon says Barnes agreed to settle for \$2,500.00 and Barnes says she didn't. This credibility question must be sent to a jury. See e.g. *Pugh v. Hughes*; 2005 UT App 203, ¶26; ____ P.3d ____:

¶26 In sum, the trial court improperly weighed and evaluated the relative strength of the proffered evidence. This was error, because at that stage in the proceedings--a summary judgment motion--the court was to view all facts and reasonable inferences in the light most favorable to the nonmoving party. See *Carrier*, 2004 UT 98 at ¶3. Furthermore, there were disputed issues of material fact, such as whether Wife knew of the Note's contents when she acquiesced to Decedent's burial in St. George, making summary judgment improper. **These issues turn on witness credibility and cannot be decided without an evidentiary hearing.**

Emphasis added. In this case, a jury was demanded, making summary disposition even more inappropriate. While the question of who to believe, Barnes or the Lagoon adjuster, is not complicated, the point is that it cannot be resolved summarily.

E.

IT IS BAD PUBLIC POLICY TO SUMMARILY ACCEPT THE AFFIDAVIT OF AN ADJUSTER OR AN INJURED PERSON THAT THERE WAS A SETTLEMENT

If Lagoon's position is adopted, there is nothing to stop any unscrupulous adjuster for a big business or an insurer from simply claiming that there was a settlement, creating a note to the file that there was a settlement, and then submitting an affidavit that there was a settlement. No injured person will be safe from such a claim. Even if there is a low probability of success, the benefit in the occasional case will justify the tactic. The possibility of settling a large case for a pittance will create the incentive to fudge or cheat.

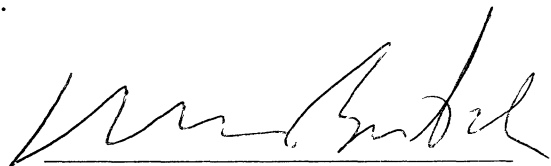
The flip side is also true. Any injured person could just claim that there was a substantial settlement in any case, submit an affidavit, and hope that the fact-finder might agree. A clear ruling that requires a definite and unambiguous settlement must be required to avoid mischief.

CONCLUSION

Utah has recognized that settlement agreements are treated like any other contract. If there is no genuine issue of material fact surrounding the formation or performance of the settlement agreement, then it is enforced in the ordinary fashion. If there are genuine issues of material fact, the trial court must submit those issues to the trier of fact. Here, Lagoon claimed an oral \$2,500.00 settlement, but only sent a check for \$2,000.00 that “acceptance signifies full payment of all claims”.. Barnes said that she only agreed to think about it, but never received the \$2,500.00, or an additional \$500.00 either. There is clearly a disputed issue of material fact, that should go to a jury.

Even if it is clear that the parties agreed to settle for \$2,500.00, Lagoon was required to tender, not a check for \$2,000.00 with an endorsement that “acceptance signifies full payment of all claims”. It was required to either send a check for \$2,500.00 (and stop payment on the other \$2,000.00 check), or send another check for \$500.00 within a reasonable time. It did neither until four years later, after the trial court had ruled to enforce the settlement. This is clearly error. The case should be reversed and sent back for a trial on the issues.

DATED THIS 1st day of December, 2005.

A handwritten signature in black ink, appearing to read "Daniel F. Bertch", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1 day of December, 2005, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, and by deposit in first class mail, postage prepaid to the following counsel of record:

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