2010

Glade Terry and Kairle Terry v. C. William Bacon, M.D.; Central Utah Clinic, P.C. and Utah Valley Regional Medical Center : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

GLADE TERRY and KAIRLE TERRY, Plaintiffs and Appellants, vs. C. WILLIAM BACON, M.D.; CENTRAL UTAH CLINIC, P.C. and UTAH VALLEY REGIONAL MEDICAL CENTER, Defendants and Appellees.	BRIEF OF APPELLEES C. WILLIAM BACON, M.D. and CENTRAL UTAH CLINIC, P.C. Case No. 20100893

Appeal from the Fourth District Court, Utah County, Judge Samuel McVey

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STATEMENT OF JURISDICTION

The Utah Supreme Court has original jurisdiction of this appeal pursuant to Utah Code Ann. § 78A-3-102(3). The Supreme Court transferred the case to the Utah Court of Appeals pursuant to Utah Code Ann. § 78A-3-102(4). This appeal is properly before the Court of Appeals.

STATEMENT OF THE ISSUES

Defendants do not dispute Plaintiff's articulation of the issues, but do assert that Statement D raises the same considerations as Statement C and, likewise, the issue is a question of fact that should be reviewed for clear error.

STATEMENT OF THE CASE

This is a medical malpractice action from the Fourth District Court that was filed by Plaintiffs Glade Terry and Kairle Terry against Defendant C. William Bacon, an orthopedic surgeon, and his group, Central Utah Clinic, P.C. Plaintiffs claim that Dr. Bacon incorrectly performed L5-S1 surgery on Mr. Terry's back, resulting in right lower extremity paralysis and pain. (R. 1-8) Plaintiffs filed a Complaint in Court, which was subsequently removed to an arbitration panel to a valid arbitration agreement. (R. 30) Plaintiff's original counsel, Jim McConkie of Parker and McConkie, worked up the case and engaged in discovery with Defendants' counsel.

Beginning in October 2008, Mr. McConkie began to negotiate with Defendants' counsel regarding settlement of the case, culminating in an agreement in January 2009 to settle Plaintiffs' claims against Defendants for $15,000. (R. 66, 67-70) Defendants'

counsel secured the settlement check and conveyed it to Jim McConkie. (R. 69) Subsequently, Mr. McConkie indicated his client was having second thoughts regarding the settlement. (R. 69) Mr. McConkie subsequently withdrew his representation of Plaintiffs, and Plaintiffs hired their present counsel, James Haskins of James Haskins and Associates to continue to pursue the litigation. (R. 50, 58)

Defendants made a limited appearance at the trial court and filed a motion to enforce the settlement agreement. (R. 60-82) Following briefing and an evidentiary hearing, Judge McVey ruled that Plaintiff Glade Terry had authorized Mr. McConkie to enter into a settlement agreement, that Mr. McConkie entered into a valid settlement agreement with Defendants' counsel, that Mr. Terry's claims were subject to that agreement, and that Mrs. Terry's claims were derivative of Mr. Terry's claims and, accordingly, had ceased to exist. (R 180, 152) Plaintiff then filed the instant appeal.

STATEMENT OF FACTS

1. On June 7, 2005, Plaintiff Glade Terry presented to Central Utah Clinic for a urologic consult, and was presented with an "Arbitration Agreement" (hereinafter "Agreement") by Defendants' representative. (R.12-13) Plaintiff signed the Agreement and, by so doing, agreed to waive his right to have his Claim decided by a judge or jury. (R. 12)

2. On October 17, 2005, Dr. Bacon performed a surgical procedure at the L5-S1 levels of Plaintiff's spine. (R. 7)

3. On or about September 26, 2007, Plaintiffs filed a Complaint against Defendants alleging, among other things, medical negligence relating to their surgical and postoperative care of Plaintiff, Glade Terry. (R. 8) Defendants subsequently invoked the terms of the arbitration agreement, and the parties proceeded in arbitration. (R. 30, 33)

4. In October 2008, Jim McConkie (original counsel for Plaintiffs' Glade and Kairle Terry) and R. Scott Williams (counsel for Dr. Bacon and Central Utah Clinic) began engaging in settlement negotiations in relation of the above-captioned matter. (R. 72)

5. On October 23, 2008, Mr. McConkie sent a letter to defense counsel encouraging settlement negotiations. (R. 66)

6. In early January 2009, Mr. Williams and Mr. McConkie had a telephone conversation in which an agreeable settlement resolution was reached. Specifically, Mr. McConkie, on behalf of his clients, accepted $15,000 for the complete settlement and resolution of Plaintiffs' claims against Dr. Bacon and Central Utah Clinic. Mr. McConkie assured Mr. Williams that upon receipt of the $15,000, his clients would sign and fully execute settlement documents dismissing with prejudice all of Plaintiffs' claims against Dr. Bacon and Central Utah Clinic. (R. 70)

7. On January 9, 2009, in reliance on the above-described telephone conversation, Mr. Williams forwarded to Mr. McConkie a check for $15,000, along with a Release of All Claims, Stipulation for Dismissal with Prejudice and Order of Dismissal

with Prejudice. (R. 70, 64) The accompanying cover letter instructed Mr. McConkie and his clients to sign and return the settlement documents. (R. 64)

8. Despite agreeing to do so, Plaintiffs have failed to sign and return the settlement documents. (R. 70)

9. In April 2009, defense counsel became aware that the settlement check sent to Mr. McConkie back in January had not been presented for payment. (R. 69)

10. Defense counsel contacted Mr. McConkie about the settlement check and status of settlement documents. Mr. McConkie explained that he was experiencing difficulty reaching his clients to finalize the settlement documents and thus, had not presented the check for payment. (R. 69)

11. In May 2009, Mr. McConkie contacted Mr. Williams by telephone and explained that his clients no longer wanted to settle and were seeking a second opinion. Mr. McConkie assured Mr. Williams that his clients had indeed agreed to settle the case back in January and now simply changed their mind. Mr. McConkie advised Mr. Williams that he had explained to his clients the settlement agreement was binding. Mr. McConkie expressed his intention to withdraw as Plaintiffs' counsel and asked for further time to try and explain to his clients, and any new counsel they were consulting, the binding nature of the settlement agreement already reached and why the settlement was fair and reasonable in light of the facts of this particular matter. (R. 69)

12. On May 7, 2009, Mr. McConkie withdrew as Plaintiffs' counsel. (R. 50)

13. In July 2009, Mr. Williams had another telephone conversation with Mr. McConkie. During that conversation, Mr. McConkie explained that he had spoken with Plaintiffs again and that they had retained attorney, Jim Haskins to represent them. Mr. McConkie further advised that he had tried to reach Mr. Haskins to discuss the consent to settle given by Plaintiffs prior to engaging in settlement negotiations, but Mr. Haskins did not return his telephone messages. (R. 69)

14. On July 28, 2009, Mr. Haskins filed a Notice of Appearance of Counsel on behalf of Plaintiffs. (R. 58)

15. On August 18, 2009, Defendants filed a Motion to Enforce Settlement Agreement with the trial court. (R. 63)

16. On January 7, 2010, Plaintiff's original counsel filed a lien on this case for his fees and costs. (R. 111) Therein, Plaintiff's original counsel identified $8,335 then owing in costs.

17. On March 1, 2010, the Court entertained oral argument on Defendants' Motion. At that hearing, the Court ordered an evidentiary hearing to consider Defendants' Motion. (R.117-116)

18. On May 10, 2010, an evidentiary hearing was held to consider Defendants' Motion. (R. 180) The key witness at the hearing was Plaintiffs' original attorney, who testified that a settlement agreement had been reached by the parties. (R. 180 at 17-27, 44-48).

19. In conjunction with Mr. McConkie's testimony, the parties argued whether the attorney-client privilege barred Mr. McConkie from testifying, and the Court concluded that it did not because Plaintiff had put his representation at issue. (R. 4-17, 53-54)

20. Plaintiff and his wife also testified and offered that they did not give their consent to Mr. McConkie to settle their claims. (R. 180 at 29-42, 48-49)

21. Based on the evidence presented at the hearing – in particular the testimony of Plaintiffs' original attorney – the Court found Plaintiff had authorized Mr. McConkie to settle on his behalf, that such a settlement had been effected, and ordered Plaintiff to comply with the settlement agreement and otherwise granted Defendants' Motion to enforce the settlement agreement. (R. 53-54) The Court signed the Order on June 22, 2010. (R. 125)

22. On October 21, 2010, Plaintiffs filed a Notice of Appeal. (R. 156) Plaintiffs' appeal was eventually transferred to the Utah Court of Appeals. (R. 158)

23. On April 11, 2011, Plaintiffs' filed their Brief with the Court of Appeals. (See Appellant's Brief dated April 11, 2011, on file with the Court)

SUMMARY OF THE ARGUMENTS

Plaintiff's appeal comprises three arguments: Plaintiff asserts that the attorney-client privilege allows him to prevent his counsel from testifying that Plaintiff agreed to settle a litigation where that agreement was then communicated to and accepted by

Defendants and subsequently repudiated by Plaintiff. Second, Plaintiff asks the Court to declare that all settlements in the arbitration context should be reduced to writing before they are effective and legally enforceable, thereby relieving him of the effect of his decision to settle his claims against Defendants. Finally, Plaintiff asserts his decision to settle "shocks the Court's conscience," should act to relieve him of his related contractual obligations, and should allow him to try and obtain a better outcome regarding his claims against Defendants. Defendants oppose all three arguments.

Plaintiff may not argue both that his attorney was not authorized to settle this litigation on his behalf and that the attorney-client privilege precludes his counsel from disclosing the extent of Plaintiff's settlement authorization. Rather, Plaintiff's own actions and fundamental notions of fairness require that Plaintiff and his counsel disclose otherwise protected communications to the extent that they reflect on Plaintiff's claim that he did not authorize his counsel to settle the litigation. To hold otherwise would allow Plaintiff to impermissibly use the attorney-client privilege as both a "shield and a sword."

The panel should not determine that all settlements occurring in arbitration or trial proceedings be reduced to writing before becoming effective. Plaintiff did not raise this argument before the trial court and it is therefore an inappropriate subject of appeal. Moreover, to require the parties to reduce all arbitration settlements to writing before they are judicially enforceable runs contrary to well-established caselaw providing that

freedom of contract and judicial economy allow for judicially enforceable oral settlement agreements in those contexts. While written settlement agreements are required by statute in the context of mediation, distinct policy considerations mandate that result in the mediation context that do not apply to arbitrations or other litigation circumstances.

Finally, Plaintiff's claims that the terms of his settlement agreement were so disadvantageous that he should be relieved of those terms is anathema to principles undergirding parties' freedom to contract, offends notions of judicial economy, and would have far-reaching policy implications were such a result permitted for other parties going forward. Plaintiff, through his appointed counsel, agreed to a settlement with Defendants that constituted a legal offer and acceptance and was accompanied by valid consideration. Plaintiff should not now be allowed to unilaterally void that agreement merely because he has reconsidered and wishes to pursue the litigation further.

For all of these reasons that are more fully set forth below, the trial court properly found that Plaintiff was subject to the settlement agreement Mr. McConkie agreed to on his behalf, and Plaintiff's various arguments as to why he should be relieved of that finding should be denied with prejudice.

ARGUMENT

I. BY DISPUTING MR. MCCONKIE WAS NOT AUTHORIZED TO SETTLE ON BEHALF OF PLAINTIFF, PLAINTIFF HAS WAIVED THE ATTORNEY-CLIENT PRIVILEGE REGARDING THE EXTENT OF HIS AUTHORIZATION TO MR. MCCONKIE TO SETTLE PLAINTIFFS' CLAIMS

Plaintiff asserts that the attorney-client privilege allows him to prevent his former counsel, Mr. McConkie, from divulging whether Plaintiff authorized Mr. McConkie to settle his claims against Defendants. Plaintiff further asserts that only where one of the exceptions outlined in Utah Rule of Evidence 504(d) or where Plaintiff "affirmatively attacks" his former counsel's conduct should the Court permit Mr. McConkie to discuss the extent of the settlement authority granted to him by Plaintiff. Plaintiff argues that he has not affirmatively attacked Mr. McConkie's representation, but rather Mr. McConkie has attacked Plaintiff's recollection of events in conjunction with Defendant's motion to enforce the settlement agreement. In such circumstances, Plaintiff argues he has not waived the attorney-client privilege and is able to prevent Mr. McConkie from testifying regarding his settlement authority.

Plaintiff's reading of the caselaw and exceptions to the general principles of attorney-client privilege ignores the contours of well-established caselaw addressing these issues. Utah's articulation of the attorney-client privilege is found at Utah Rule of Evidence 504(b) and provides generally that a client has a privilege to refuse to disclose and to prevent any other person – including counsel – from disclosing confidential communications made in conjunction with providing legal services to the client. However, the privilege is not absolute and may be waived by the client. Courts have generally found that a party impliedly waives his right to assert the privilege "by putting the lawyer's performance at issue during the course of litigation," Bittaker v. Woodford,

331 F.3d 715, 718 (9th Cir. Cal. 2003) (citing Hunt v. Blackburn, 128 U.S. 464 (1888)), or "where the client asserts a claim or defense that places at issue the nature of the privileged material," Christopher B. Mueller & Laird C. Kirkpatrick, Evidence: Practice Under the Rules § 5.30, at 549 (2d ed. 1999).[1]

This general rule is well-founded in that it prevents

> a party from using the privilege as both a shield and a sword. In practical terms, this means that parties in litigation may not abuse the privilege by asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials. . . . The court imposing the waiver does not order disclosure of the materials categorically; rather, the court directs the party holding the privilege to produce the privileged materials if it wishes to go forward with its claims implicating them. The court thus gives the holder of the privilege a choice: If you want to litigate this claim, then you must waive your privilege to the extent necessary to give your opponent a fair opportunity to defend against it.

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[1] See also In re Lott, 424 F.3d 446, 452-53 (6th Cir. 2005) ("The [attorney-client] privilege may be implicitly waived by . . . raising issues regarding counsel's performance."); Beery v. Thomson Consumer Electronics, Inc., 218 F.R.D. 599, 604 (S.D. Ohio 2003) (holding an attorney-client communication is placed at issue "when a party affirmatively uses privileged communications to defend against or attack the opposing party. . . . Waiver therefore stops a party from manipulating an essential component of our legal system – the attorney client privilege – so as to release information favorable to it and withhold anything else" (citations and quotations omitted); In re Kidder Peabody Sec. Litig., 168 F.R.D. 459, 470 (S.D.N.Y. 1996) (party "may waive the privilege if [it] makes factual assertions the truth of which can only be assessed by examination of the privileged communication"); United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1992) (finding communications are at issue when the party makes an assertion "that in fairness requires examination of protected communications"); Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974) ("When a client calls into public question the competence of his attorney, the privilege is waived."); Utah R. Evid. 504(d)(3) (stating "[n]o privilege exists under this rule . . . (3) [a]s to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer."

Bittaker, 331 F.3d at 719-720.[1]

Here, Plaintiff attempts to use the attorney-client privilege as a sword and a shield by preventing Defendants from establishing that Plaintiff authorized his counsel to enter into the settlement that is the subject of this litigation. Nor should Plaintiff's assertion that he has not affirmatively attacked Mr. McConkie's representation and thus has not waived the privilege hold any weight. After counsel for Defendants and Plaintiff entered into settlement of this matter for $15,000, Plaintiff repudiated the settlement by obtaining new counsel and refusing to sign settlement documents. This forced Defendants to file a motion to enforce the settlement agreement and related motion practice, a hearing on Defendants' motion, a second evidentiary hearing regarding Plaintiff's interaction with counsel, subsequent briefing on the status of Plaintiff's wife's asserted claims in light of the settlement agreement, and finally this appeal.

In conjunction with this rearguard effort, Plaintiff has steadfastly maintained that Mr. McConkie's version of events is false. Plaintiff submitted his affidavit to the Court on September 4, 2009, and therein asserted that "I have never told anyone that I would accept $15,000 to settle my case and [defendants]" and "I have never agreed to settle my case for $15,000 nor would I ever settle for this amount." (R. 90-91) At the evidentiary

[1] Defendants acknowledge that this caselaw is generally in the context of claims made by the state against defendants relying on the "good faith" advice of their lawyers or in the context of legal malpractice suits. However, Defendants submit that the rationale and language of these two scenarios apply intuitively and with equal force to the instant facts, viz., where a plaintiff continues to pursue litigation by denying that his counsel had authority to previously settle the litigation and where counsel did in fact settle the litigation.

hearing held on May 10, 2010, Mr. McConkie testified that on December 29, 2008 he explained the status of the case to Mr. Terry and that Mr. Terry gave him permission to settle the case for $15,000. (R. 180 at 20) Mr. Terry subsequently testified at the hearing and repudiated Mr. McConkie's version of events, stating consistent with his affidavit that he told Mr. McConkie that he could not settle in light of all of his injuries. (R. 180 at 40-41) Plaintiff subsequently stated that he was dissatisfied with Mr. McConkie and the settlement discussions, and for that reason obtained new counsel. (R. 180 at 42) Mr. McConkie then reaffirmed his earlier testimony that he obtained informed permission from Plaintiff to settle the matter in December 2008. (R. 180 at 45-47)

Semantics aside, Plaintiff has clearly placed his lawyer's conduct at issue in this matter. While Plaintiff has not yet filed a legal malpractice action against Mr. McConkie, Plaintiff's refusal to sign settlement documents, filing of an affidavit disputing Mr. McConkie's authorization to settle the claims, and evidentiary testimony that Mr. McConkie's testimony regarding settlement authorization is false clearly "raise issues regarding his counsel's performance." In re Lott, 424 F.3d at 453. Moreover, Plaintiff is expressly "us[ing] privileged communications to defend against or attack the opposing party," Beery, 218 F.R.D. at 604, and "makes factual assertions the truth of which can only be assessed by examination of the privileged communication," In re Kidder Peabody, 168 F.R.D. at 470. Given those circumstances, "fairness requires examination of protected communications." United States v. Bilzerian, 926 F.2d at 1292.

II. PLAINTIFF'S ORAL SETTLEMENT AGREEMENT WAS VALID AND THE COURT SHOULD NOT EXTEND TO ARBITRATIONS THE REQUIREMENT THAT SETTLEMENTS BE REDUCED TO WRITING

Plaintiff next asks the Court to disregard well-established precedents by extending the Utah Supreme Court's holding in Reese v. Tingey, 177 P.3d 605 (Utah 2008) to provide that settlements in arbitrations must be reduced to writing before becoming legally binding.

While Plaintiff alleged below that there was no meeting of the minds and no memorialization of the settlement reached between Mr. McConkie and Defendants' counsel, Plaintiff never argued that the agreement was invalid because it was oral and not written, and never argued for extending the holding in Reese or even mentioned the opinion. Accordingly, the Court should not consider this newly raised argument for the first time on appeal. See Smith v. Four Corners Mental Health Ctr., Inc., 70 P.3d 904, 911 (Utah 2003) (quoting Treff v. Hinckley, 26 P.3d 212, 215 n.4 (Utah 2001) for the proposition that "[w]e will not address any new arguments raised for the first time on appeal" and Ong Int'l (U.S.A.), Inc. v. 11th Ave. Corp., 850 P.2d 447, 455 (Utah 1993) for the holding that "[w]ith limited exceptions, the practice of this court has been to decline consideration of issues raised for the first time on appeal").

Should the Court reach the merits of the argument, trial courts can enforce oral settlement agreements so long as there is an enforceable contract, i.e., a valid "meeting of the minds." In Murray v. Utah, 737 P.2d 1000 (Utah 1987), defendant State of Utah made an oral settlement offer to decedent's estate in a wrongful death action, and

plaintiff's counsel spoke with defendant by phone and indicated plaintiff accepted the offer. Plaintiff later changed her mind and reneged on the settlement offer, and the Court held the oral agreement was nonetheless enforceable.[3] The Murray Court noted that so long as the statute of frauds is not implicated, the Court enforced the "basic and long-established principle of contract law that agreements are enforceable even though there is neither a written memorialization of that agreement nor the signature of the parties," and ruled that "the fact that plaintiffs had not yet signed a written agreement is of no legal consequence." Id. at 1000. The Court of Appeals subsequently held that this result obtains whether or not a party is directly involved so long as the party's attorney has been duly authorized to enter into a settlement.[4]

Given Plaintiff's arguments, a closer look at Reese is warranted. Therein, plaintiff attempted to mediate a suit involving a defendant and a worker's compensation insurer with a subrogation interest. During mediation, plaintiff asserted he reached two separate

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[3] Contrary to Plaintiff's argument, the fact that plaintiff acknowledged her earlier agreement and then attempted to back out does not modify or inform the Court's ultimate ruling in any meaningful way, and will not be addressed herein.

[4] See also John Deere Co. v. A & H Equip., 876 P.2d 880, 887 (Utah App. 1994) (holding that "[i]f a client authorizes the attorney to settle the matter and has expressed an intent to be bound by the attorney's acts, absent a statute of frauds issue, an oral or privately negotiated settlement agreement is as valid as a signed, written settlement agreement that has been entered on the minutes of the court"); Goodmansen v. Liberty Vending Systems, Inc., 866 P.2d 581, 585 (Utah App. 1993) ("It is a basic and long-established principle of contract law that agreements are enforceable even though there is neither a written memorialization of that agreement nor the signatures of the parties, unless specifically required by the statute of frauds. Parties have no right to Welch on a settlement deal during that sometimes substantial period between when the deal is struck and when all necessary signatures can be garnered on a stipulation.").

oral settlement agreements with both defendant and the insurer. When the mediator attempted to reduce the agreements to writing in a single document, the insurer representative balked at one of the terms and refused to sign. Plaintiff then sought to enforce the terms of the oral settlement agreement with insurer, and insurer refused to discuss the oral agreement, relying on the mediation statutes' language regarding non-disclosure of settlement discussions.

Against that backdrop, Reese is not focused on preventing the danger of "plaintiff's attorney testifying against them and on behalf of their opponents," as Plaintiff asserts (see Appellant's Brief at 25); rather, the Reese Court's entire focus is on preserving privacy in the mediation context through requiring that settlement agreements be reduced to writing. Several factors regarding mediation militate in favor of treating it differently than arbitration with respect to the requirement that mediated settlements be reduced to writing to become judicially enforceable.

In contrast with arbitration and formal litigation proceedings, mediations are one-off attempts to settle the parties' dispute and avoid further litigation; this process involves candidly discussing the strengths and weaknesses of the parties' respective positions, sensitive interaction with a trusted intermediary, and hypothetical settlement values and obligations in an informal atmosphere. To facilitate these sensitive discussions and mediation's narrow time frame, the courts and legislature are particularly sensitive to encouraging open and informal exchange between mediation participants that is only

possible in a confidential environment.[5] To that end, the legislature codified the mediating parties' privilege to enforce the confidentiality of mediation discussions regarding settlement.[6] Moreover, the legislature mandated that mediated settlements be reduced to writing in order to be legally enforceable, with the purpose of making such agreements enforceable without having to resort to testimony to determine the substance of mediation discussions.[7] No such requirements exist for settlements in the arbitration context.[8]

Utah caselaw is clear in confirming that oral settlement agreements are acceptable outside of the mediation context; in fact, only settlement agreements reached in mediation or that implicate the statute of frauds are required to be reduced to writing in any other

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[5] See Reese, 177 P.3d at 680 ("This candid exchange of information and ideas can be achieved only when the parties are assured that their communications will be protected from post-mediation disclosure.").

[6] See Utah Code Ann. 78B-10-104.

[7] See Utah Code Ann. 78B-6-207(3)(a); Reese, 177 P.3d at 609 ("A rule permitting courts to enforce only written mediation agreements operates in tandem with the rules providing mediation confidentiality. The existence of an executed agreement provides a court with the means to use its power to enforce the terms of a written agreement or to determine whether the terms of the written agreement have been violated without requiring it to delve into the confidential process that led to the creation of the agreement.").

[8] See Utah Code Ann.78B-6-206, 78B-11-101 et seq. In Appellant's Brief, Plaintiff asserts briefly that the arbitration scheme's requirement that "awards" be in writing and signed or otherwise authenticated is analogous to a reduced mediation settlement agreement, such that the legislative requirement that mediated settlements be in writing should extend to settlements in the arbitration context. That argument misrepresents the nature of an arbitration award. The award is an arbitration proceeding's fact-finder's verdict, and is intended to be a final and appealable determination by the arbitration panel. See Utah Code Ann. 78B-6-206. It therefore requires more formality in its creation and finalization than would a settlement agreement, and the two are distinct and separate in form and function.

litigation context. Given that fact and the substantive differences and policy purposes between mediation settlement discussions and those in arbitration or formal litigation, Plaintiff's request that the court require without legislative direction that settlements in the arbitration context be reduced to writing to be enforceable is unfounded and should be denied by the Court.

III. PLAINTIFF SHOULD NOT BE RELIEVED FROM HIS CONTRACTUAL OBLIGATIONS BECAUSE HE ENTERED INTO THE SETTLEMENT UNDERSTANDING ITS CONSEQUENCES AND THERE IS NO EVIDENCE THAT THE TERMS OF THE SETTLEMENT ARE INAPPROPRIATE OR OTHERWISE SHOCK THE CONSCIENCE

The final two arguments in Appellant's brief assert both that there was no actual meeting of the minds regarding settlement and that the terms of the settlement Plaintiff agreed to are so disadvantageous that they should "shock the conscience" of the Court and allow Plaintiff to renew his claims against Defendants. Plaintiff offers as evidentiary support for each allegation the same assertion, i.e., he didn't make very much money on the settlement.

A. The Parties Reached a Meeting of the Minds with Regard to the Settlement Agreement.

"In order for parties to form a binding contract there must be a meeting of the minds on all the essential terms thereof. To constitute a meeting of the minds there must be a fair understanding between the parties which normally accompanies mutual consent

and the evidence must show with reasonable definiteness that the minds of the parties met upon the same matter and agreed upon the terms of the contract." Steele v. Harrison, 552 P.2d 957, 962 (Kan. 1976). That some party changes his or her mind about the settlement terms does not amount to allegations of fraud or bad faith. Woods v. Denver Dept. of Revenue, Treasury Div., 45 F.3d 377, 378 (10th Cir. 1995) ("Ordinarily, a party who knowingly and voluntarily authorizes the settlement of her claims cannot avoid the terms of the settlement simply because she changes her mind." (citation omitted)). "Whether the parties had a meeting of the minds sufficient to create a binding contract is an issue of fact which we review for clear error, reversing only where the finding is against the clear weight of the evidence, or if we otherwise reach a firm conviction that a mistake has been made." LD III, LLC v. BBRD, LC, 221 P.3d 867, 871 (Utah App. 2009) (internal citation, quotation, and punctuation omitted).

Plaintiffs' argument that there was no "meeting of the minds" is essentially a request that the Court of Appeals consider de novo factual determinations that were made by the trial court after an evidentiary hearing regarding the same, where the standard for this Court is to review for clear error only. Following a hearing where Plaintiff, Plaintiff's wife, and Mr. McConkie all testified under examination by counsel, the Court concluded that Mr. McConkie's testimony was credible that he communicated the terms of the settlement offer to Plaintiff, and Plaintiff consented to the settlement. The Court found Mr. McConkie's testimony was corroborated by his own recollection, notes, a

subsequent phone call to Defendants' counsel, and the contemporaneous remittance of a settlement check. (R. 180 at 54).[9] The Court also considered whether Plaintiff was competent, in light of potential pain medication usage, to have consented, and determined that he was. (R. 180 at 55). Plaintiff's instant claim that there was no "meeting of the minds" asks the Court to invalidate these findings and substitute its own.

The fact that Plaintiff would have only taken $6,000 after Mr. McConkie recouped his costs had he accepted and finalized the settlement offer in December 2008 (and substantially less at this point) can hardly be taken as proof that there was no meeting of the minds. Defendants contend that this was intended to be a settlement of a doubtful and disputed claim, such that they did not anticipate paying much more than a nuisance value to Plaintiff in exchange for his dropping the suit.[10] While the trial court found corroborating evidence and circumstances indicating Mr. McConkie obtained Plaintiff's consent to settle as he said he did, various factors motivate parties to settle, and may have motivated Plaintiff in this case. As has been aptly articulated,

> [T]he function of the reviewing court is not to substitute its judgment for that of the parties to the decree. Naturally, the agreement reached normally embodies a

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[9] And, by extension, the Court found Plaintiff's version of events incredible and uncorroborated. In his brief, Plaintiff asserts that because the trial court did not make a specific finding that any party was "disingenuous, lying, or acting in bad faith relating their sworn recollection concerning settlement discussions," it was clear error to conclude Plaintiff agreed to the settlement. Plaintiff provides no caselaw in support of this naked argument, and Defendants rely on the caselaw and fact findings cited above that supports the trial court's finding was appropriate and should not be overturned by the Court.

[10] Plaintiff asserts that the "material allegations contained in the Complaint in this case stand undenied by the Defendants." This is an odd assertion, given the parties ultimately proceeded in arbitration such that no answer to Plaintiff's Complaint was required.

> compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy. It is precisely the desire to avoid protracted examination of the parties' legal rights which underlies consent decrees. It is therefore inappropriate for the judge to measure the remedies in the decree as if they were fashioned after trial. Remedies which appear less than vigorous may well reflect an underlying weakness in the [party's] case, and for the district judge to assume that the allegations in the complaint have been formally made out is quite unwarranted.

Northeast Iowa Citizens for Clean Water v. AgriProcessors, Inc., 469 F. Supp. 2d 666, 676-77 (N.D. Iowa 2006) (citations, quotations, and punctuation omitted). Given that Plaintiff's only support that there was no "meeting of the minds" consists of the fact he would have received only $6,000 after costs (and now substantially less these years later), Plaintiff has no valid argument that the trial court's determination that there was a meeting of the minds was "clear error" or "against the clear weight of the evidence." LD III, LLC, 221 P.3d at 871.

B. Plaintiff's Settlement Agreement Does Not "Shock the Conscience"

Plaintiff also asserts that given the actual amount of money he would/will receive under the settlement when compared to the merits of his claims, the "concession of the case" by Mr. McConkie is an "outrageous injustice which ought to shock the conscience of the court, permit the decision below to be vacated, and allow the parties to pursue their remedies in mediation." (Appellant's Brief at 29).

As a threshold matter, Plaintiff raises the "shocks the conscience" argument for the first time on appeal and, accordingly, the Court should disregard the argument. See, e.g., Smith v. Four Corners Mental Health Ctr., Inc., 70 P.3d 904, 911 (Utah 2003) (quoting Treff v. Hinckley, 26 P.3d 212, 215 n.4 (Utah 2001) for the proposition that "[w]e will not address any new arguments raised for the first time on appeal" and Ong Int'l (U.S.A.), Inc. v. 11th Ave. Corp., 850 P.2d 447, 455 (Utah 1993) for the holding that "[w]ith limited exceptions, the practice of this court has been to decline consideration of issues raised for the first time on appeal").[11]

Should the Court proceed to determine the merits of this allegation, Plaintiff's assertions are unsupported by the law. Defendants argue that "The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties." Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1126 (D.C. 1983). After a compromise has been entered into in good faith, in an action to enforce the satisfaction,

> the merits of the original controversy cannot be called into question. The law favors the avoidance or settlement of litigation, and compromises in good faith for such purposes will be sustained as based upon a sufficient consideration, without regard to the merits of the controversy or the character or validity of the claims of the parties,

[11] Plaintiff did assert that the fact that Plaintiffs would not be receiving much in the way of settlement funds supported their assertion that there was no "meeting of the minds." (See R. 51-52). However, there was no discussion that the settlement result otherwise offended equity or otherwise shocked the conscience.

> or even though a subsequent judicial decision may show the rights of the parties to have been different from what they at the time supposed. The real consideration which each party receives under such a compromise is, according to some authorities, not the sacrifice of the right, but the settlement of the dispute.

Utah Nat'l Bank v. Nelson, 38 Utah 169, 194 (Utah 1910) (citations and quotations omitted); see also Sofco, LLC v. Nat'l Bank, No. 08-2366-JAR, 2010 U.S. Dist. LEXIS 78823, **8-9 (D. Kan. Aug. 3, 2010) ("Nor will a court inquire into the merits of the underlying suit after a valid settlement agreement absent fraud or bad faith. That some party changes his or her mind about the settlement terms does not amount to allegations of fraud or bad faith.").

Here, the trial court found Plaintiff had given his consent to settle to Mr. McConkie. (R. 180 at 54-55) Plaintiff was originally to receive $6,000, a not insubstantial sum and which would clear his costs with Mr. McConkie. On those facts – and, again, given that Defendants viewed his claims as doubtful and disputed – there is nothing in Plaintiff's decision to settle that would "shock the conscience" of the Court. Nor does Plaintiff's cited caselaw help him or establish in any way the proposition that courts have not hesitated to invalidate parties' settlement agreements "where the disparity between the injuries suffered and the actual recovery for those injuries is outrageously less than would be necessary to make the plaintiff whole." (Appellant's Brief at 29).[12]

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[12] See, e.g., Young Candy & Tobacco Co. v. Montoya, 372 P.2d 703, 707 (Ariz. 1962) (defendants tried to avoid jury award by arguing it was excessive; court denied, holding "The jury and the trial court are in a much better position than the appellate judges to measure and determine the damages that will compensate the plaintiff for his injuries. They have an opportunity of seeing him and to discern his manner of testifying, his intelligence and capacity, to note his physical condition and other living evidences bearing upon the issue, including the attending circumstances, the larger part of which the appellate court is deprived."); United Oklahoma Bank v. Moss, 793 P.2d 1359, 1364 (Okla. 1990) (involved, inter alia, sheriff's sale of property on which fraudulent

CONCLUSION

Under well-established precedents, Plaintiff waived the attorney-client privilege with regard to whether he gave his consent to his counsel to settle Plaintiffs' claims. The oral settlement agreement was likewise effective under the caselaw, and there is no basis for requiring that such agreements in the arbitration context be first reduced to writing before becoming judicially enforceable. Finally, there are no equitable exceptions that apply to relieve Plaintiff from the consequences of his decision to settle this litigation. Accordingly and based on the foregoing argument and authority, Defendants respectfully request this Court to deny Plaintiff's appeal and uphold Judge McVey's rulings below.

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mortgages were obtained and admission by all parties that the sale was irregular and without appropriate preparation such that the properties were underpriced); Four B. Corp. v. Food Barn Stores (In re Food Barn Stores), 107 F.3d 558, 564 (8th Cir. 1997) (denying claim by would-be buyer that judicial sale of debtor's assets should be nullified because it "shocked" the court's conscience); Advocat, Inc. v. Sauer, 111 S.W.3d 346, 356 (Ark. 2003) (reducing non-economic damages awarded by a jury in a wrongful death case from $15m to $5m where three defendants were in actuality operating as a single entity); Am. Trim, L.L.C. v. Oracle Corp., 383 F.3d 462, 475 (6th Cir. 2004) (upholding $3 million compensatory damages award and $10 million punitive damages award in a software fraud litigation after defendant unsuccessfully argued that these values "shocked the court's conscience").

DATED this 25 day of May, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25 day of May, 2011, two true and correct copies of the foregoing BRIEF OF THE APPELLEES WILLIAM BACON, M.D. and CENTRAL UTAH CLINIC, P.C. were sent via first-class mail, postage pre-paid, and were also emailed to the following:

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