2005

Jillene Barnes v. Lagoon Corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JILLENE BARNES,

Plaintiff/Appellant,

vs.

Case No. 20050213-CA

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

ORAL ARGUMENT REQUESTED

Defendants/Appellees.

BRIEF OF APPELLEE LAGOON CORPORATION

APPEAL FROM JUDGMENT
SECOND DISTRICT COURT, DAVIS COUNTY, UTAH
JUDGE MICHAEL G. ALLPHIN

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j)(2004).

STATEMENT OF THE ISSUES

1. Has plaintiff properly marshaled the evidence in support of the trial court's ruling?

Standard of Review: The appealing party has the burden of marshaling the evidence in support of the verdict and then showing that it is insufficient. *Fitz v. Synthes (USA)*, 1999 UT 103, ¶ 8, 990 P.2d 391. If an appellant fails to properly marshal the evidence, appellate courts must assume the findings are correct, and the appeal fails. *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998); *Child v. Gonda*, 972 P.2d 425, 434 (Utah 1998); *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985); *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1313 (Utah Ct. App. 1991).

2. Did the trial court err in ruling that plaintiff and Lagoon entered into a valid settlement agreement?

Standard of Review: The issue of whether an oral contract or agreement exists presents questions of both law and fact. *In re Estate of Flake*, 2003 UT 17, ¶ 27, 71 P.3d 589. "Whether a contract has been formed is ultimately a conclusion of law, but that ordinarily depends on the resolution of subsidiary issues of fact." *Id.* (citing *Nunley v. Westates Casing Serv., Inc.*, 1999 UT 100, ¶ 17, 989 P.2d 1077). The appellate court will

defer to the trial court's factual findings and will not set them aside unless they are clearly erroneous. *Reliance Ins. Co. v. Utah Dep't of Transp.*, 858 P.2d 1363, 1366 (Utah 1993). A trial court's finding of fact is not clearly erroneous unless it is against the clear weight of the evidence or the appellate court reaches a definite and clear conclusion that a mistake has been made. *Dep't of Human Serv. v. Irizarry*, 945 P.2d 676, 682 (Utah 1997).

3. Did the trial court abuse its discretion by enforcing the settlement agreement between plaintiff and Lagoon?

Standard of Review: The decision of a trial court to summarily enforce a settlement agreement will not be reversed on appeal unless it is shown that there was an abuse of discretion. *Mascaro v. Davis*, 741 P.2d 938, 942 n. 11 (Utah 1987).

DETERMINATIVE LAW

There are no determinative constitutional provisions, statutes, ordinances or rules.

STATEMENT OF THE CASE

On or about April 6, 2004, plaintiff Jillene Barnes ("plaintiff") filed this lawsuit, asserting a claim of negligence against Lagoon Corporation, Inc. ("Lagoon"). R. at 1-4. In the Complaint, Plaintiff alleges that she was injured while on a water slide at Lagoon on July 1, 2000 and incurred over $21,000 in special damages as a result of those injuries. R. at 2-3.

On May 21, 2004, Lagoon filed a Motion to Enforce Settlement Agreement with accompanying memorandum and affidavits, arguing that before filing suit plaintiff entered into an enforceable settlement agreement with Lagoon. R. at 15-51. On August 4, 2004, plaintiff filed her Memorandum in Opposition with accompanying affidavit. R. at 52-62. In her affidavit, plaintiff claims to have incurred in excess of $50,000 in special damages. R. at 60-61. On August 31, 2004, Lagoon filed a Reply Memorandum in Support of its Motion to Enforce Settlement Agreement. R. at 63-73.

On November 22, 2004, the trial court held a hearing on Lagoon's Motion to Enforce Settlement Agreement and heard oral argument from both parties. R. at 80-81, 102. After taking the matter under advisement, the trial court granted Lagoon's motion and held that the parties entered into an enforceable settlement agreement. The ruling is dated December 8, 2004. R. at 82-88, a copy of which is attached hereto as Exhibit A.

As part of its ruling, the trial court ordered Lagoon to reissue a check to plaintiff for the full amount of $2,500 within thirty days and also ordered plaintiff to execute and deliver to Lagoon a release within two weeks of receipt of the check. R. at 82. On December 22, 2004, Lagoon mailed a $2,500 check to plaintiff's counsel, R. at 93-94, however, Plaintiff refused to accept the check.

On January 31, 2005, the trial court entered a final order, dismissing plaintiff's Complaint with prejudice. R. at 89-97, a copy of which is attached hereto as Exhibit B. On March 2, 2005, plaintiff filed her Notice of Appeal. R. at 98-99.

STATEMENT OF FACTS

1. This is an action for negligence concerning injuries that plaintiff allegedly sustained while a patron of Lagoon. (R. at 2-3.)

2. On July 1, 2000, plaintiff claims that she was injured while on a waterslide at Lagoon. Plaintiff alleges that before she reached the bottom of the waterslide another patron struck her from behind, causing serious and permanent injury (the "Incident"). Plaintiff contends that the other patron entered the slide at the direction of a Lagoon employee. (R. at 2-3.)

3. On July 7, 2000, plaintiff contacted Lagoon concerning the Incident and her alleged injuries. Plaintiff inquired as to whether Lagoon would pay for the medical expenses that allegedly resulted from the Incident. (R. at 27, 30, 59-60.)

4. On October 4, 2000, plaintiff mailed a letter to Lagoon containing her account of the Incident and detailing her medical expenses ($1,641) that allegedly resulted from the Incident, stating that she was "...anxious to resolve this [claim]." (R. at 33-36, 83.)

5. On October 10, 2000, R.C. Fussner contacted plaintiff on behalf of Lagoon concerning her letter and her alleged injuries from the Incident. Mr. Fussner offered plaintiff $2,000 to settle any claims arising out of the Incident. Plaintiff accepted Lagoon's offer and agreed to execute a release. The following day, Mr. Fussner mailed plaintiff a $2,000 check and an accompanying release. (R. at 39, 42, 45-46, 83-86.)

6. On October 20, 2000, plaintiff contacted Mr. Fussner and indicated that she now considered $2,000 to be insufficient. Instead, plaintiff stated that $5,000 would be an acceptable amount. (R. at 39, 42, 60, 83.)

7. On October 23, 2000, Mr. Fussner contacted plaintiff in response to her demand. Instead of seeking to enforce the original agreement, Mr. Fussner offered plaintiff an additional $500 to once again settle any claims arising out of the Incident–$2,500 in total. Plaintiff accepted Lagoon's offer as full and complete satisfaction of her claims against Lagoon. (R. at 39-40, 43, 60, 72, 83-86.)

8. Because Lagoon had already mailed plaintiff a check in the amount of $2,000 and an accompanying release, the parties agreed that Lagoon would send plaintiff the remaining $500 once it had received a copy of the executed release from plaintiff. (R. at 40, 43, 60, 83-86.)

9. Despite the agreement, plaintiff never mailed a copy of the executed release to Lagoon or deposited the $2,000 check. Lagoon did not hear from plaintiff until it received a letter on February 1, 2001 from an attorney in Idaho, Greg Maeser, who purported to represent plaintiff. (R. at 40, 83.)

10. Lagoon's counsel notified Mr. Maeser that plaintiff had personally reached a settlement agreement with Lagoon and that Lagoon intended to hold plaintiff to that agreement.[1] (R. at 48.)

11. Plaintiff later retained local counsel, Daniel Bertch, who contacted Lagoon's counsel to negotiate a possible settlement. Mr. Bertch argued that "[plaintiff] could not cash the $2,000 check, because in so doing, she would settle for less than the $2,500 agreed upon," and also claimed that "...Lagoon has failed to perform the settlement." (R. at 72.)

12. As before, Lagoon's counsel notified Mr. Bertch that plaintiff had personally reached a settlement agreement with Lagoon and that Lagoon intended to hold plaintiff to that agreement. (R. at 50-51.)

13. Plaintiff ignored the enforceable settlement agreement and brought suit against Lagoon on April 6, 2004. (R. at 1-4.)

SUMMARY OF ARGUMENT

This case involves a straight forward application of Utah law concerning oral agreements. After reviewing the evidence, the trial court properly concluded that plaintiff entered into an enforceable settlement agreement with Lagoon. In light of the factual findings of the trial court, the record demonstrates that plaintiff engaged Lagoon in

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[1]In her opening brief, plaintiff disclosed that "[b]ecause Mr. Maeser and present counsel did not agree that there was an enforceable settlement agreement, this action was filed." Appellant Brief at 4.

negotiations with the intent of reaching a settlement, that plaintiff deliberatively and carefully negotiated her claims with Lagoon, and that plaintiff agreed to settle any claims stemming from the Incident against Lagoon in exchange for $2,500.[2]

The settlement agreement between plaintiff and Lagoon remains enforceable regardless of the fact that plaintiff was not represented by counsel, that plaintiff did not cash the $2,000 check, that plaintiff did not execute the release, and that Lagoon did not send plaintiff a $500 check. Accordingly, the Court should affirm the ruling of the trial court and hold that plaintiff entered into an enforceable settlement agreement.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DECISION BECAUSE PLAINTIFF FAILED TO PROPERLY MARSHAL THE EVIDENCE.

The trial court's decision in this matter, while not complex, involved a fact intensive analysis. *See In re Estate of Flake*, 2003 UT 17, ¶ 27, 71 P.3d 589 (determining whether an oral contract or agreement exists presents questions of both law and fact). It is well established that in order to successfully challenge a trial court's findings of fact on appeal, "[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support

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[2]In fact, plaintiff entered into an enforceable settlement agreement on two occasions. The original agreement was reached when plaintiff accepted Lagoon's offer for $2,000. Instead of seeking to enforce that agreement, however, Lagoon agreed to pay plaintiff an additional $500 in an effort to resolve the matter. Lagoon will only address the existence and enforceability of the $2,500 settlement agreement.

as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1997) (citations omitted).

An appellant cannot avoid its duty to marshal the evidence simply by labeling fact sensitive issues as legal issues. In *Chen v. Stewart*, 2004 UT 82, 100 P.3d 1177, the Utah Supreme Court recently held:

> If the application of the standard is extremely fact sensitive, then the reviewing court should generally give the trial court considerable discretion in determining whether the facts of a particular case come within the established rule of law. Even where the defendants purport to challenge only the legal ruling, as here, if a determination of the correctness of a court's application of a legal standard is extremely fact-sensitive, the defendants also have a duty to marshal the evidence.

Id. at ¶ 20 (emphasis added) (citations omitted)

When a party fails to marshal the evidence supporting a challenged factual finding, the court rejects the challenge as "nothing more than an attempt to reargue the case before [the appellate] court." *ProMax Dev. Corp. v. Mattson*, 943 P.2d 247, 255 (Utah Ct. App. 1997), *cert. denied*, 953 P.2d 449 (Utah).

Thus, the appellate court "'assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case.'" *Heber City Corp. v. Simpson*, 942 P.2d 307, 312 (Utah 1997) (quoting *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991)). Accordingly, when an appellant fails to marshal the evidence, its appeal fails and must be rejected. *See, e.g., Child v. Gonda*, 972 P.2d 425, 434 (Utah 1998); *Scharf v. BMG Corp.*,

700 P.2d 1068, 1070 (Utah 1985); *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1313 (Utah Ct. App. 1991).

In the present case, instead of properly marshaling the evidence, plaintiff recites each party's version of the facts as presented before the trial court. Appellant Brief at 2-5. By doing so, plaintiff completely ignores the ruling of the trial court and attempts to reargue the case to the appellate court. Plaintiff's failure to properly marshal the evidence is a sufficient basis alone to reject its appeal and affirm the decision of the trial court.

II. THE TRIAL COURT PROPERLY HELD THAT PLAINTIFF ENTERED INTO AN ENFORCEABLE SETTLEMENT AGREEMENT WITH LAGOON.

The issue of whether an oral contract or agreement exists presents questions of both law and fact. *In re Estate of Flake*, 2003 UT 17, ¶ 27, 71 P.3d 589. "Whether a contract has been formed is ultimately a conclusion of law, but that ordinarily depends on the resolution of subsidiary issues of fact." *Id.* (citing *Nunley v. Westates Casing Serv., Inc.*, 1999 UT 100, ¶ 17, 989 P.2d 1077).

While the appellate court does not defer to the trial court's legal conclusions in reviewing them for correctness, it does defer to the trial court's factual findings and will not set them aside unless they are clearly erroneous. *Reliance Ins. Co. v. Utah Dep't of Transp.*, 858 P.2d 1363, 1366 (Utah 1993). A trial court's finding of fact is not clearly erroneous unless it is against the clear weight of the evidence or the appellate court

reaches a definite and clear conclusion that a mistake has been made. *Dep't of Human Serv. v. Irizarry*, 945 P.2d 676, 682 (Utah 1997).

Settlement agreements are favored by law and may be summarily enforced if there is a binding settlement agreement and the excuse for nonperformance is comparatively unsubstantial. *Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc.*, 781 P.2d 478, 479 (Utah Ct. App. 1989). Settlement agreements are governed by the rules applied to general contract actions. *Butcher v. Gilroy*, 744 P.2d 311, 312 (Utah Ct. App. 1987).

It is fundamental that a meeting of the minds on the integral features of an agreement is essential to the formation of the contract. *Nielsen v. Gold's Gym*, 2003 UT 37, ¶ 11, 78 P.3d 600; *see also Golden Key Realty v. Manta*, 699 P.2d 730, 732 (Utah 1985) (stating that essential elements of a contract include offer, acceptance, competent parties, and consideration). Additionally, the terms and conditions of an oral agreement must be sufficiently definite to allow it to be enforced. *In re Estate of Flake*, 2003 UT 17, ¶ 28, 71 P.3d 589.

In the present case, there is no question that Lagoon made an offer to settle the plaintiff's claims. As noted by the trial court, in response to the plaintiff's inquiry, Lagoon contacted plaintiff and offered her $2,500 to settle any claims arising out of the Incident. R. at 84; *see DCM Inv. Corp. v. Pinecrest Inv. Co.*, 2001 UT 91, ¶ 12, 34 P.3d 785 (a bona fide offer is one made in good faith which, on acceptance, would be a valid and binding contract).

Although plaintiff continues to deny it, the record demonstrates that she accepted Lagoon's offer. The trial court found that plaintiff "...intended to settle [her claims against Lagoon and] intended the terms of the settlement to include merely the expenses she had detailed because she was 'anxious to resolve' the matter." R. at 84-85. In fact, the trial court detailed the plaintiff's own statements that establish her acceptance of the offer. R. at 84-87.

The trial court focused on a significant admission made by plaintiff in her affidavit. Specifically, plaintiff acknowledged that "[Lagoon] did not uphold their verbal agreement...I was never sent an additional $500...after [Lagoon] agreed to the $500." R. at 60, 85. Interestingly, plaintiff's counsel made a similar admission when he argued that "[plaintiff] could not cash the $2,000 check, because in so doing, she would settle for less than the $2,500 agreed upon," and also claimed that "...Lagoon has failed to perform the settlement." R. at 72 (emphasis added).

Both admissions attempt to excuse plaintiff from honoring any claimed agreement by arguing that Lagoon did not perform its obligations. As concluded by the trial court, however, by arguing that Lagoon's non-performance excuses plaintiff from honoring the settlement agreement, plaintiff presumes and admits the existence of an underlying agreement. R. at 85-86. Without question, the plaintiff's conduct, her letter to Lagoon, her affidavit, and even her attorney's correspondence demonstrate plaintiff's intention to settle with Lagoon and the subsequent acceptance of its offer.

The record demonstrates that the terms and conditions of the agreement were clear to both parties–plaintiff agreed to settle any claims stemming from the Incident against Lagoon in exchange for $2,500. As stated by the trial court, "[i]n sum, the terms of the oral agreement are sufficiently definite to be enforced." R. at 86.

There is no dispute that the settlement agreement between plaintiff and Lagoon satisfies the requirement for consideration. The trial court found that there was valid consideration for both parties. R. at 84. By releasing any claims against Lagoon arising from the Incident, plaintiff would receive $2,500. *See Kraatz v. Heritage Imports*, 2003 UT App 201, ¶ 40, 71 P.3d 188 (giving up value to which one is legally entitled constitutes sufficient consideration to support a contract).

Plaintiff claims that an agreement was not reached because she did not receive a check for $500 from Lagoon. Appellant Brief at 8-10. Similarly, plaintiff also contends that, even if there was an oral agreement to settle for $2,500, Lagoon waited an unreasonable amount of time to tender the check. *Id.* Both arguments address the same issue, namely whether the fact that plaintiff did not receive the $500 check affected the settlement agreement.

The trial court determined that the plaintiff's obligation to send Lagoon an executed release was a condition precedent to Lagoon sending plaintiff a $500 check. *See Foster v. Montgomery*, 2003 UT App 405, ¶ 23, 82 P.3d 191 ("[c]onditions precedent may be waived by the party in whose favor they are made"); *Harper v. Great Salt Lake*

Council, Inc., 1999 UT 34, ¶ 14, 976 P.2d 1213 ("[f]ailure of a material condition precedent relieves the obligor of any duty to perform"). Thus, the fact plaintiff did not send Lagoon an executed release excused Lagoon from sending the $500 check, but it did not negate the underlying settlement agreement. Furthermore, the trial court found that Lagoon did not wait an unreasonable amount of time, from October 2000 until February 2001, without attempting to enforce the settlement agreement. R. at 86-87; *see Brown v. Brown*, 744 P.2d 333, 336 (Utah Ct. App. 1987) (Orme, J., dissenting) ("Parties have no right to welch on a settlement deal during the sometimes substantial period between when the deal is struck and when all necessary signatures can be garnered on a stipulation").

Plaintiff argues that an agreement was not reached because she did not cash the $2,000 check or execute a release. Such a position, however, is contrary to law. It is of no legal consequence that the parties have not signed a settlement agreement. *Goodmansen v. Liberty Vending Sys., Inc.*, 866 P.2d 581, 584 (Utah Ct. App. 1993). Similarly, "[i]f a written agreement is intended to memorialize an oral contract, a subsequent failure to execute the written document does not nullify the oral contract." *Lawrence Constr. Co. v. Holmquist*, 642 P.2d 382, 384 (Utah 1982). "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...." *Murray v. State*, 737 P.2d 1000, 1001 (Utah 1987). Accordingly, the

settlement agreement between plaintiff and Lagoon was unaffected by the fact plaintiff did not cash a check or execute a release.

In sum, plaintiff cannot show that the trial court's factual findings were against the clear weight of the evidence. The record demonstrates that plaintiff and Lagoon entered into an enforceable settlement agreement, and plaintiff does not have the right to renege on the agreement simply because she changed her mind. To allow such a result would undermine the policy of encouraging the voluntary settlement of disputes–and judicial efficiency at the same time–because either party could rescind an oral settlement agreement simply by changing their mind. Lagoon and similarly situated businesses would be unable to resolve minor claims if an individual could welch on an oral agreement before memorializing the settlement.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY SUMMARILY ENFORCING THE SETTLEMENT AGREEMENT BETWEEN PLAINTIFF AND LAGOON WITHOUT AN EVIDENTIARY HEARING.

The decision of a trial court to summarily enforce a settlement agreement will not be reversed on appeal unless it is shown that there was an abuse of discretion. *Mascaro v. Davis*, 741 P.2d 938, 942 n. 11 (Utah 1987) (citing *Millerberg v. Steadman*, 645 P.2d 602, 604 (Utah 1982).

While plaintiff claims it was error for the trial court not to hold an evidentiary hearing, it is well established that a court may summarily enforce a settlement agreement without an evidentiary hearing when the case "...is not one in which complex factual

issues are presented." *Tracy-Collins Bank & Trust Co. v. Travelstead*, 592 P.2d 605, 609 (Utah 1979).

At the conclusion of oral argument on November 22, 2004, counsel for Lagoon suggested holding an evidentiary hearing to address any factual issues which remained surrounding the settlement agreement. R. at 81, 102. The trial court declined to hold the evidentiary hearing, suggesting that it believed the case to be one without complex factual issues.

In fact, in its December 8, 2004 ruling, the trial court stated that "[a]fter reviewing the pleadings and supporting documents, and hearing oral arguments, it is apparent to the Court that the plaintiff entered into a valid settlement agreement." R. at 83-84. The "supporting documents" referred to by the trial court include the affidavit of plaintiff and Lagoon officials. These affidavits provided the trial court with sworn testimony of the events at issue and justified the trial court's decision not to have an evidentiary hearing, which would have only elicited similar testimony.

The trial court's ruling and decision not to hold an evidentiary hearing demonstrate that the trial court clearly believed this case was uncomplicated factually and such a hearing was unnecessary. Therefore, the trial court properly exercised its discretion in summarily enforcing the settlement agreement between plaintiff and Lagoon.

CONCLUSION

For these reasons, the trial court's Ruling on Lagoon's Motion to Enforce Settlement Agreement and the trial court's Final Order, dismissing plaintiff's Complaint with prejudice, should be affirmed.

DATED this 29th day of September, 2005.

SNOW, CHRISTENSEN & MARTINEAU

By _____
Brian P. Miller
Sam Harkness
Attorneys for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of September, 2005, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEE LAGOON** to be mailed to the following:

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Kevin R. Robson
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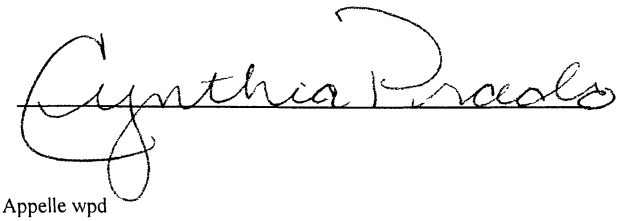

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Exhibit A

IN THE SECOND DISTRICT COURT, DAVIS COUNTY
STATE OF UTAH

JILLENE BARNES, Plaintiff, **vs.** LAGOON CORPORATION, INC., a Utah Corporation, and JOHN DOES I-V, Defendants.	**RULING ON DEFENDANT LAGOON'S MOTION TO ENFORCE SETTLEMENT AGREEMENT** Case No. 040700166 Judge MICHAEL G. ALLPHIN

This matter is before the Court on defendant Lagoon Corporation's Motion to Enforce Settlement Agreement. The Court has reviewed the moving and responding papers and heard oral arguments from attorneys for both parties. For the following reasons, the Court finds that the parties entered into an enforceable settlement agreement. The Court orders the defendant to reissue to the plaintiff a new check for the full amount of $2500 within thirty days of this Order and also orders the plaintiff to execute and deliver to the defendant a release in defendant's favor within two weeks of receipt of the check.

BACKGROUND

This concerns injuries the plaintiff allegedly sustained while a patron at the defendant's water slide. On July 1, 2000, the plaintiff was waiting to slide down the water slide while

another patron waited to go down after her. At the defendant's employee's direction, the plaintiff began down the slide. Before the plaintiff reached the bottom of the slide, the patron who had been standing behind her at the top of the slide, collided with the plaintiff, sliding into her from behind.

On July 7, 2000, the plaintiff phoned Lynette Small, defendant's employee in the Loss Prevention Office, and explained her allegations and claimed injuries. On October 4, 2000, about three months after calling the defendant, the plaintiff sent a letter to the defendant detailing her account of the events and injury-related expenses. On October 10, 2000, R.C. Fussner, defendant's Director of Loss Prevention, called the plaintiff after receiving a copy of her letter. The plaintiff and Mr. Fussner discussed the plaintiff's allegations and he offered to settle the matter for $2000 to which the plaintiff agreed. He stated he would send her a check for $2000 and a release for her to execute.

On October 20, 2000, however, the plaintiff called Mr. Fussner and stated that $2000 would no longer be enough, but that $5000 would be acceptable. Despite the plaintiff's previous agreement to settle for $2000, Mr. Fussner offered an additional $500 to settle. The plaintiff accepted the additional $500, whereupon Mr. Fussner said he would send the additional $500 upon receipt of her release. The plaintiff said she would sign the release and return a copy to him; she never cashed the $2000 check nor signed a release. The next contact the defendant had with the plaintiff was when her attorney contacted the defendant on February 1, 2001.

ANALYSIS

A court may summarily enforce a settlement agreement without an evidentiary hearing. *Tracy-Collins Bank & Trust Co. v. Travelstead*, 592 P.2d 605, 609 (Utah 1979). After reviewing

the pleadings and supporting documents, and hearing oral arguments, it is apparent to the Court that the plaintiff entered into a valid settlement agreement. The defendant made an offer to settle the plaintiff's alleged claims, the plaintiff accepted the defendant's offer, there was valid consideration on the part of both parties, *see Golden Key Realty v. Manta*, 699 P.2d 730, 732 (Utah 1985) (holding that essential elements of a valid contract include "offer and acceptance, competent parties, and consideration."), and the terms and conditions of their oral agreement were "sufficiently definite to allow it to be enforced." *Flake v. Flake*, 2003 UT 17, ¶¶ 28, 71 P.3d 589.

In his affidavit, Mr. Fussner affirms that when the plaintiff spoke with him, she expressed a desire to "resolve the matter quickly." He offered to settle all of her claims for $2000, to which the plaintiff agreed. Later, he offered an additional $500, despite the plaintiff having previously agreed to settle for $2000. He affirms that the plaintiff agreed to those terms–$2500 in exchange for a release of all of the plaintiff's claims allegedly arising from the July 1, 2000 incident. The parties' oral agreement has the essential elements of a binding settlement.

The plaintiff claims that she did not agree to nor intend to settle for $2500 and that she merely agreed to "think about it." This claim is unlikely given the plaintiff's own statements. In her letter of October 4, 2000, she wrote: "I am asking that Lagoon cover my expenses for this preventable accident"; "I am submitting these bills to you in hope that we can resolve this matter"; and "I am anxious to resolve this. Please contact me . . . ." It is clear that the plaintiff intended to settle. Also, in her own affidavit, she contradicts her claims that she did not intend to settle. She first affirms that the defendant "kept steering the conversation to settling the claim on a final basis. This was never my intention when I first contacted Lagoon." She later states,

however, that "I *offered to settle* with Lagoon if they would agree to pay my expenses, including medical bills and loss of wages. *This is what I wanted, was an agreement from Lagoon to pay these expenses.*" That is exactly what Lagoon agreed to pay. The October 4, 200 letter listed some $1,640.62 in expenses for doctors' bills, hospital and ambulance bills, x-ray bills, and amounts for her co-pays. She also included $893 for lost wages and clearly stated she was "anxious to resolve this." Her affidavit also shows she intended to and did settle.

The plaintiff argues that the terms of the oral contract are not clear. She claims that when she stated she wanted the defendant to pay her "expenses, including medical bills", she meant not the limited amount she set forth in her letter, but all of her medical bills, including those which she incurred after October and those in the future. This, however, appears an incredible explanation. Her own attorney's letter shows she indeed settled for a sum at least near the $1,640.62 for which she asked. In his letter of March 10, 2003 to Lagoon, he states that if the plaintiff had cashed the $2000 check, then "she would settle for less than the $2500 *agreed upon.*" He states that she sought legal counsel because Lagoon "failed to perform the settlement. She assume[d] that Lagoon decided not to *settle for $2500* . . . ." The plaintiff's own letter shows she intended the terms of the settlement to include merely the expenses she had detailed because she was "anxious to resolve" the matter. If she was anxious to resolve the matter, it seems reasonable that she would not want to drag out her dealings with the defendant by asking them to continually pay for her expenses. Finally, in her own affidavit, she admits that the defendant was to send a second check for $500, that it never sent the additional $500, and that Lagoon "did not uphold their verbal agreement", etc. The defendant argues, and the Court

agrees, that the defendant would not send–and the plaintiff would not expect, checks for $2000 and $500 without there having been a clear and definite settlement agreement.

It also seems apparent that the defendant was to send the additional $500 once it received the plaintiff's executed release. This was merely a condition precedent the parties set prior to the defendant assenting to a new contract with an additional $500; if the plaintiff did not follow through, then she would not get the extra $500 and stay with the original $2000. As it was a condition precedent in favor of the defendant, it could only be waived by the defendant. *Foster v. Montgomery*, 2003 UTApp 405, ¶¶ 23, 82 P.3d 191. In sum, the terms of the oral agreement are sufficiently definite to be enforced.

The plaintiff argues that she did not sign a release and so the contract is not binding. "[I]f a written agreement is intended to memorialize an oral contract," however, "a subsequent failure to execute the written document does not nullify the oral contract." *Lawrence Constr.Co. v. Holmquist*, 642 P.2d 382, 384 (Utah 1982). Also, the plaintiff argues that even if the Court finds that she was to send the release before the defendant was to send the additional $500, too long of a time has run to enforce the agreement. "Parties have no right," however, "to welch on a settlement deal during the sometimes substantial period between when the deal is struck and when all necessary signatures can be garnered on a stipulation." *Brown v. Brown*, 744 P.2d 333, 336 (Utah Ct. App. 1987). Given the length of time that passed from the time of the accident to the first letter the plaintiff sent to the defendant, the fact that the defendant waited from mid-October 2000 until the plaintiff's attorney contacted it in February 2001 for the plaintiff's release

does not seem like an unreasonable time to wait for the plaintiff to perform her side of the agreement.

Signed this December 3rd, 2004.

DISTRICT COURT JUDGE
MICHAEL G. ALLPHIN

CERTIFICATE OF MAILING

I certify that I sent a copy of the foregoing RULING ON DEFENDANT LAGOON'S MOTION TO ENFORCE SETTLEMENT AGREEMENT to the following, postage pre-paid, on December 7, 2004:

DANIEL F BERTCH
BERTCH ROBSON
1996 EAST 6400 SOUTH SUITE 100
SALT LAKE CITY UTAH 84121

BRIAN P MILLER
SAM HARKNESS
SNOW CHRISTENSEN & MARTINEAU
10 EXCHANGE PLACE 11TH FLOOR
POB 45000
SALT LAKE CITY UT 84145

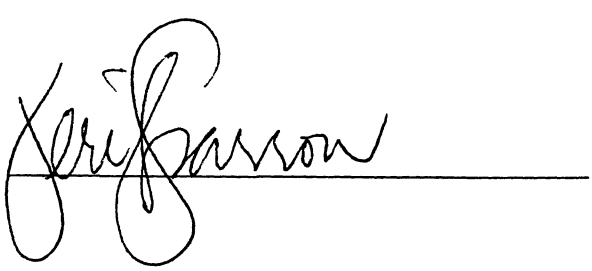

Exhibit B

BRIAN P. MILLER (6933)
SAM HARKNESS (9448)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Lagoon Corporation, Inc.
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE SECOND JUDICIAL DISTRICT COURT

OF DAVIS COUNTY, STATE OF UTAH

JILLENE BARNES,

Plaintiff,

vs.

LAGOON CORPORATION, INC., a Utah Corporation, and JOHN DOES 1 through 4,

Defendants.

FINAL ORDER

Civil No. 040700166

Judge Michael G. Allphin

On November 22, 2004, the Court held a hearing on Lagoon's Motion to Enforce Settlement. In addition to reviewing the moving and responding papers, the Court heard argument from counsel for Plaintiff and for Lagoon Corporation, Inc. ("Lagoon").

On December 8, 2004, having been fully apprised of the relevant law and facts, the Court issued its Ruling on Defendant Lagoon's Motion to Enforce Settlement Agreement. The Court

granted Lagoon's motion, holding that Plaintiff and Lagoon entered into an enforceable settlement agreement. Accordingly, the Court ordered that Lagoon reissue a new check to Plaintiff for the full amount within thirty days of its Order and also ordered Plaintiff to execute and deliver to Lagoon a release in its favor within two weeks of receipt of the check.

On December 22, 2004, Lagoon mailed a check to Plaintiff's counsel in the amount of $2,500 made payable to Plaintiff along with a Stipulation demonstrating Lagoon's compliance with the Court's decision. *See* Exhibit A. As Lagoon has fully complied with the Court's ruling, it is hereby

ORDERED that Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

DATED this 28th day of January, 2005.

BY THE COURT:

DISTRICT COURT JUDGE
MICHAEL G. ALLPHIN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **FINAL ORDER** was mailed, first-class, postage prepaid, on this 26th day of January, 2005, to the following counsel of record:

Daniel F. Bertch
BERTCH ROBSON
1996 East 6400 South, Suite 100
Salt Lake City, Utah 84121
Attorney for Plaintiff

Kay Brown

EXHIBIT A

SNOW, CHRISTENSEN & MARTINEAU

Reed L. Martineau
David W. Slagle
A. Dennis Norton
Allan L. Larson
John E. Gates
R. Brent Stephens
Kim R. Wilson
Michael R. Carlston
David G. Williams
Rex E. Madsen
Max D. Wheeler
David W. Slaughter
Stanley J. Preston
Shawn E. Draney
John R. Lund
Rodney R. Parker
Richard A. Van Wagoner
Andrew M. Morse
Camille N. Johnson
Dennis V. Dahle
Korey D. Rasmussen
Terence L. Rooney
David L. Pinkston
Julianne Blanch
Brian P. Miller
Judith D. Wolferts
Keith A. Call
Kara L. Pettit
Elizabeth L. Willey
Heather S. White
Robert R. Harrison
Robert W. Thompson
Jill L. Dunyon
Scott H. Martin
Trystan B. Smith
Maralyn M. Reger
Kenneth L. Reich
Joseph P. Barrett
Rebecca C. Hyde
D. Jason Hawkins
Richard A. Vazquez
Bradley R. Blackham
Sam Harkness
David F. Mull
Bryan M. Scott
P. Matthew Cox
Ryan B. Bell

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10 Exchange Place, Eleventh Floor
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Salt Lake City, Utah 84145-5000
Telephone (801) 521-9000
Facsimile (801) 363-0400
www.scmlaw.com

Thurman & Sutherland 1886
Thurman, Sutherland & King 1888
Thurman, Wedgwood & Irvine 1906
Irvine, Skeen & Thurman 1923
Skeen, Thurman, Worsley & Snow 1952
Worsley, Snow & Christensen 1967

John H. Snow 1917–1980

Of Counsel
Harold G. Christensen
Joseph Novak

December 22, 2004

Writer's Direct Number:

(801) 322-9149

Daniel Bertch
Bertch Robson
1996 East 6400 South, Suite 100
Salt Lake City, Utah 84121

Re: Jillene Barnes v. Lagoon Corporation

Dear Dan:

Please find enclosed a check in the amount of $2,500.00 made payable to your client, Jillene Barnes. In addition, please find enclosed three original releases which are acceptable to Lagoon. Finally, please find enclosed a Stipulation Regarding Lagoon's Compliance with Court's December 3, 2004 Order Related to Motion to Enforce Settlement Agreement. Please sign the Stipulation and return it to me at your earliest convenience. I will then look forward to receiving two of the signed Releases or your indication that your client wishes to appeal this case.

Please call if you have any questions.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU

Brian P. Miller

BPM:mhn
Enclosure
cc: R.C. Fussner
N:\5433\254\Bertch-bpm-L06.wpd

ORIGINAL DOCUMENT IS PRI ON WATERMARKED PAPER HOLD GHT TO VERIFY WATERMARK.

Jillene Barnes

LAGOON CORPORATION INC.

P O Box 696 - Farmington, Utah 84025 • Phone (801) 451-8000

97227

Wells Fargo Bank, NA 31-1
1240(2)

PAY

TO THE ORDER OF Jillene Barnes

FARMINGTON, UTAH 15 December 200

$ *2,500.00

Paul E. Best

⑈97227⑈ ⑆124000121⑆061 01964 12⑈

IN PAYMENT OF YOUR INVOICES AS FOLLOWS

PLEASE DETACH BEFORE DEPOSITING

LAGOON CORPORATION

Per claim Jillene Barnes

1536000

BRIAN P. MILLER (A6933)
SAM HARKNESS (A9448)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Lagoon Corporation, Inc.
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE SECOND JUDICIAL DISTRICT COURT

OF DAVIS COUNTY, STATE OF UTAH

JILLENE BARNES,

Plaintiff,

vs.

LAGOON CORPORATION, INC., a Utah Corporation, and JOHN DOES 1 through 4,

Defendants.

STIPULATION REGARDING LAGOON'S COMPLIANCE WITH COURT'S DECEMBER 3, 2004 ORDER RELATED TO MOTION TO ENFORCE SETTLEMENT AGREEMENT

Civil No. 040700166

Judge Michael G. Allphin

Counsel for Jileen Barnes, Daniel F. Bertch, hereby stipulates and agrees that Lagoon Corporation, Inc. has provided his client with a new check in the full amount of $2,500.00 within

the thirty days required by this Court's Order related to Lagoon's Motion to Enforce Settlement Agreement. Lagoon has also provided plaintiff with a form of release acceptable to Lagoon.

DATED this _____ day of December, 2004.

BERTCH & ROBSON

By_____
Daniel F. Bertch
Attorneys for Jilleen Barnes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **STIPULATION REGARDING LAGOON'S COMPLIANCE WITH COURT'S DECEMBER 3, 2004 ORDER RELATED TO MOTION TO ENFORCE SETTLEMENT AGREEMENT** was mailed, first-class, postage prepaid, on this _____ day of December, 2004, to the following counsel of record:

Daniel F. Bertch
BERTCH ROBSON
1996 East 6400 South, Suite 100
Salt Lake City, Utah 84121
Attorney for Plaintiff

N:\5433\254\Pleadings\Stip re Compliance Court's Order.wpd