CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Settlement and Release; "Affiliates"; Extrinsic Evidence

In 2011, plaintiff sued Yosemite Auto Sales, Inc. (Yosemite Auto), its owner Eyad Kaid, and Alla Abuziadeh, individually and doing business as Jimmy's Tow (collectively, the former defendants), for personal injuries. He alleged Yosemite Auto retained him to determine why a vehicle it owned would not start. Unknown to plaintiff, Abuziadeh earlier towed the vehicle to Yosemite Auto and disconnected the transmission shift linkage to do so. He allegedly did not reconnect the shift linkage after towing the car.

Plaintiff alleged he confirmed the vehicle was in "park," and he went underneath it to determine why it would not start. When he tested the electrical connection to the starter, the vehicle immediately ran over him and dragged him through Yosemite Auto's parking lot. Plaintiff's spine was crushed.

Plaintiff and the former defendants reached a settlement. Kaid and Yosemite Auto tendered their insurance policy limit of $1,000,000. Plaintiff dismissed the action with prejudice as to Yosemite Auto and Kaid and **released** all former defendants from liability "including, without limitation, any and all known or unknown claims . . . ." Of significance here, **the release included within its scope the former defendants' "affiliates" and "all other persons, firms, or corporations, with whom any of the former have been, are now or may hereafter be affiliated."**

In 2012, and more than three months after he settled the first action, plaintiff brought this action against defendant Imran Ziadeh. At the time of the accident, former defendants Kaid and Yosemite Auto **leased the land for their business from defendant Ziadeh.** Defendant had previously operated a used car dealership on the property. Upon leasing the property to Kaid and Yosemite Auto, defendant entered into an agreement with Yosemite Auto under which he left several vehicles from his used car dealership on the property on a consignment basis for Yosemite Auto to sell. The vehicle that injured plaintiff was one of those vehicles. Defendant was the person who recommended plaintiff to Yosemite Auto to fix that vehicle. Plaintiff based this action on the same facts as his first action, and he sued defendant for negligence and premises liability.

Defendant filed a motion for summary judgment. **He claimed he was an "affiliate" of Yosemite Auto for purposes of the release in the first action's settlement agreement**, and thus he could not be held liable for any claim arising out of the accident. He submitted extrinsic evidence to support his interpretation of the release. That evidence consisted in pertinent part of a declaration by defendant's counsel who also represented Yosemite Auto in the first action. Counsel stated he intended the release in the first action's settlement agreement to be a general release applicable to all persons, known and unknown, who were associated in any manner with the accident, including defendant.

Plaintiff opposed the motion for summary judgment. He contended the release was ambiguous and there were disputed issues of material fact regarding the release's intent. He submitted extrinsic evidence to establish the parties to the release did not intend for it to apply to defendant because defendant was never a contemplated or known party. Plaintiff's counsel stated he was never aware of defendant's potential liability or that defendant and Yosemite Auto "were affiliated" because Yosemite Auto never disclosed the relationship during discovery in the first action. Nor did Yosemite Auto or its insurer disclose that

defendant maintained a $1,000,000 insurance policy with the same insurer who insured Yosemite Auto. Counsel also submitted copies of correspondence between him and counsel representing the former defendants showing no one expressly mentioned or considered defendant during the negotiations over the release.

The trial court granted defendant's motion for summary judgment, concluding defendant was an affiliate for purposes of the release as a matter of law. The court stated: "To me, the analysis begins and ends with whether or not defendant has produced evidence showing that he is an affiliate of or affiliated with the business that has already sued or been sued and tendered policy limits. Under that declaration, it appears that defendant owns the property at 777 East Yosemite Avenue, and pursuant to a lease agreement, Yosemite Auto Sales conducts its business on that property. He entered into an agreement. Defendant entered into the agreement with Yosemite Auto whereby his dealership consigned several vehicles to Yosemite Auto to sell. As such, I think that within the clear definition of 'affiliate' found in any dictionary, he was included or contemplated within the language of the release."

Plaintiff contends the trial court erred in granting summary judgment. He argues (1) the **extrinsic evidence** he submitted established a disputed issue of material fact regarding the meaning of the words "affiliates" and "affiliated" as used in the release; (2) the court erred in admitting defendant's extrinsic evidence; and (3) the court erred in concluding as a matter of law that defendant was a third party beneficiary of, and immunized by, the release.

At issue is whether plaintiff and the former defendants intended the release to immunize defendant, a third party, against liability arising from the accident as an affiliate of Yosemite Auto. Accordingly, the Third District Court of Appeal began its opinion by noting that, "Under subdivision (a) of section 877 of the Code of Civil Procedure, a release given in good faith to a tortfeasor 'shall

not discharge any other such party from liability unless its terms so provide . . . .' In determining whether the 'terms so provide', we apply the same rules that govern any other contract. (see *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348; *Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554.)

A third party beneficiary may enforce a contract made for its benefit. (Civ. Code, § 1559.) However, 'a putative third party's rights under a contract are predicated upon the contracting parties' intent to benefit' it. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 436) Ascertaining this intent is a question of ordinary contract interpretation. Thus, 'the circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement.' (*Neverkovec,* at p. 348.)

"Under long-standing contract law, **a 'contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.**' (Civ. Code, § 1636.) Although 'the intention of the parties is to be ascertained from the writing alone, if possible', 'a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates'. 'However broad may be the terms of a contract, it extends only to those things . . . which it appears that the parties intended to contract.' (Civil Code § 1648.)" (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524)

"Extrinsic evidence is admissible to prove a meaning to which the contract is reasonably susceptible. (*Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1111; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.) If the trial court decides, after receiving the extrinsic evidence, the language of the contract is reasonably susceptible to the interpretation urged, the evidence is admitted to aid in interpreting the contract. (*Powers v. Dickson, Carlson & Campillo, supra,* 54 Cal.App.4th 1102, 1111; *Appleton v. Waessil*, 27 Cal.App.4th 551, 554;) Thus, '**the test of admissibility of extrinsic evidence to explain the meaning of a written**

instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.' (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37.)

"The ultimate construction placed on the contract might call for different standards of review. When no extrinsic evidence is introduced, or when the competent extrinsic evidence is not in conflict, the appellate court independently construes the contract. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; *Winet v. Price,* at p. 1166.) When the competent extrinsic evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction following a trial will be upheld if it is supported by substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632; *Winet v. Price,* at p. 1166.)

"California recognizes the **objective theory of contracts** (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 948), under which '**it is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation'** (*Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.* (1985) 164 Cal.App.3d 1122, 1127). The parties' undisclosed intent or understanding is irrelevant to contract interpretation. (*Winograd v. American Broadcasting Co., supra,* 68 Cal.App.4th at p. 632; *Berman v. Bromberg,* at p. 948.)" (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955-956.)

With these principles in mind, the Court turns first to the **language of the release**. It states in pertinent part: "Plaintiff hereby completely releases and forever discharges the former Defendants from any and all past, present or future claims . . . of any damages . . . of any nature whatsoever, whether based on a tort, contract or other theory of recovery, which the Plaintiff now has, or which may hereafter accrue or otherwise be acquired, on account of, or in any way

grow out of the accident . . . including, without limitation, any and all known or unknown claims for bodily and personal injuries to the Plaintiff . . . which have resulted or may result from the alleged acts or omissions of the former Defendants. . . . This release and discharge shall inure to the benefit of the former Defendants' present and future officers, directors, stockholders, attorneys, agents, servants, representatives, employees, subsidiaries, *affiliates*, partners, predecessors and successors in interest, and assigns and all other persons, firms, or corporations, with whom any of the former have been, are now or may hereafter be *affiliated*." (Italics added.)

Defendant is protected against liability under this release only if plaintiff and the former defendants intended to consider him as one of the parties' affiliates or as a person with whom any of the signing parties' officers, directors, etc., were affiliated. Defendant argues the terms "affiliates" and "affiliated" are not ambiguous and the trial court correctly found he was an affiliate of Yosemite Auto. Without citing to any authority, he asserts an affiliate is "one who is in close association or connection with another" or "in legal or factual association or affiliation with" another. He contends the undisputed evidence demonstrated he was an affiliate of or affiliated with Yosemite Auto because he leased property to Yosemite Auto and because Yosemite Auto agreed to sell his cars on consignment.

The Justices agree the term "affiliate" is unambiguous, but disagree with defendant and the trial court's interpretation of the term. The word refers to a relationship that is closer than a mere arm's length contractual relationship. The ordinary and usual meaning of the noun "affiliate" is "an affiliated person or organization." (Merriam-Webster's Collegiate Dict. (11th ed. 2003) p. 21, col. 2.) The adjective "affiliated" means "closely associated with another *typically in a dependent or subordinate position* <the university and its ~ medical school>." (italics added.)

Other sources note an affiliate is one who has a dependent relationship with another. Black's Law Dictionary defines an "affiliate" outside of the securities context as "a corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation." (Black's Law Dict. (10th ed. 2014) p. 69, col. 2.)

The online Oxford English Dictionary defines the *noun* "affiliate" as "a person or organization that is affiliated with a larger body; a member. Also: an associate of another person or organization; a fellow member of a larger body." It defines "affiliated" as being "connected with a larger or more established body, often as a branch or subsidiary part; that is associated with a main or major group; that is an affiliate or member."

The online Oxford English Dictionary defines the *verb* "affiliate" in similar ways: "To be connected with a larger or more established organization, as a branch or subsidiary part; to adhere or belong to an organization or group; to be a member or affiliate of a certain body. Also more generally: to be a part of something. . . . To join or unite with an organization or group; *esp.* to connect or align oneself with a larger or more established group of people; to attach oneself to an organization as a branch, subsidiary part, or affiliate. . . . To connect or align (a group, institution, etc.) with another body, typically one that is larger or more established; to cause to become a branch, subsidiary part, or affiliate of such a body. Also: to cause (an individual) to be a member or part of any group or organization."

These sources indicate the common meaning of an affiliate generally is one who is dependent upon, subordinate to, an agent of, or part of a larger or more established organization or group. This is a closer association than that of defendant's, who had only a contractual relationship with Yosemite Auto. There is no evidence those contracts, a lease and a consignment agreement, made

defendant dependent upon, under the control of, an agent of, or a part of Yosemite Auto.

The attempt to define "affiliate" does not end here. " 'The character of a contract is not to be determined by isolating any single clause or group of clauses . . . .' (*Transportation Guarantee Co. v. Jellins* (1946) 29 Cal.2d 242, 247-248.) **On the contrary, 'a contract is to be construed as a whole, "so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." '** (*McCaskey v. California State Auto. Assn.* (2010) 189 Cal.App.4th 947, 970, quoting Civ. Code, § 1641; *Epic Communications, Inc. v. Richwave Technology, Inc.* (2015) 237 Cal.App.4th 1342, 1349.)

Other provisions in the settlement agreement reinforce the Appellate Court's interpretation of "affiliate" as the interpretation plaintiff and the former defendants intended. First, the release extends primarily to persons or entities who are owners, fiduciaries, employees, or agents of the former defendants. The release benefits the former defendants' "present and future officers, directors, stockholders, attorneys, agents, servants, representatives, employees, subsidiaries, affiliates, partners, predecessors and successors in interest, and assigns and all other persons, firms, or corporations, with whom any of the former have been, are now or may hereafter be affiliated." To interpret "affiliate" as meaning one who has only a contractual relationship with the former defendants is inconsistent with the intent demonstrated by the remainder of the release. The Third DCA notes it should avoid interpretations that create such inconsistencies. "Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected." (Civ. Code, § 1653.)

Second, **plaintiff and the former defendants agreed to keep the settlement terms confidential**. They agreed neither they nor their attorneys or representatives would reveal "to anyone" any terms of the settlement agreement,

including the release, unless otherwise mutually agreed in writing. "The contracting parties could hardly expect that persons thus barred from knowledge of the agreement . . . would be able to take advantage of the release, or any other provision of the agreement. One cannot enforce a contract of which one is ignorant, and if the contracting parties have deliberately undertaken to hold their agreement in confidence, they cannot be supposed to have meant to confer enforcement powers on those deliberately kept in the dark. That contracting parties have bound themselves not to disclose their contract to third persons is strong evidence that they intended not to invest such persons with rights under it." (*Epic Communications, Inc. v. Richwave Technology, Inc.,* at pp. 1352-1353.)

The objective evidence before us thus demonstrates plaintiff and the former defendants did not intend for defendant to be protected under the release. Defendant was not an affiliate of Yosemite Auto as that term is commonly understood. Plaintiff and the former defendants intended the release to apply only to those who had some type of ownership, fiduciary, agency, or dependent relationship to the former defendants, and defendant had no such relationship. Indeed, the parties intended that defendant and other third parties would never know of the release, and thus would not be in a position to enforce it.

Considering the extrinsic evidence defendant submitted to the trial court, it is clear that defendant's evidence of intent consisted only of a declaration by his attorney, that when he, as counsel for the former defendants, drafted the release, he intended it to apply to any persons, known and unknown, including defendant. There is no evidence counsel expressed this intention to anyone. Counsel's undisclosed, subjective intent is irrelevant to interpreting the release's language objectively. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.,* at p. 956.)

For additional support of his position, defendant points to plaintiff's express acknowledgment in the settlement agreement that the release was a general release, and to plaintiff's express waiver of his rights against a general release granted him under Civil Code section 1542. But these general provisions do not take precedence over the specific provisions of the release, which limited its scope to certain enumerated classes of persons, of which defendant was not one. Where general and specific provisions are inconsistent, the specific provision controls. (Code of Civil Procedure, § 1859; *Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1235.)

Plaintiff also submitted extrinsic evidence, and it does not conflict with the interpretation of the release. The most relevant of this evidence consists of correspondence between his attorney and the former defendants' attorney as they negotiated the terms of the settlement agreement. Nowhere in this correspondence did either counsel suggest or indicate the release would apply to persons other than the negotiating parties or those groups of persons specified in the release.

In addition, plaintiff sent a copy of the complaint in this action to defendant's insurance carrier notifying it of the complaint and the allegations against defendant. In response, the insurer stated the complaint was "the first notice to it of a potential claim against defendant." This evidence does not conflict with the common meaning of the term "affiliate." Rather, it suggests the parties did not intend to immunize defendant.

Because there is no conflict in the admissible extrinsic evidence, the Justices interpret the release as a matter of law. Defendant was not an affiliate of the former defendants for purposes of the release agreement, and thus summary judgment should not have been granted in his favor.

The summary judgment is reversed and the matter is remanded for further proceedings consistent with this opinion. Costs on appeal are awarded to plaintiff.

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