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THE EHRLICH LAW FIRM

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2019 Issue

Appellate Reports

ATTORNEY'S POTENTIAL LIABILITY UNDER SETTLEMENT SIGNED BY ATTORNEY WITH NOTATION "APPROVED AS TO FORM AND CONTENT"

Monster Energy Co. v. Schecter (2019) 7 Cal.5th 791

The parties to a tort action agreed to settle their lawsuit. Their agreement was reduced to writing and included several provisions purporting to impose confidentiality obligations on the parties as well as on their counsel. All parties signed the agreement and their lawyers signed under a notation that they approved the written agreement as to form and content.

Counsel allegedly violated the agreement by making public statements about the settlement and were sued, *inter alia*, for breach of contract. Counsel urged they were not personally bound by the confidentiality provisions and moved to dismiss the suit under the anti-SLAPP statutes. As to the cause of action for breach of contract, the trial court denied counsels' motion. The Court of Appeal reversed that ruling, concluding the notation meant only that counsel recommended their clients sign the document. The Supreme Court concluded the notation does not *preclude* a factual finding that counsel both recommended their clients sign the document *and* intended to be bound by its provisions.

Here, there is no question that the language of the settlement agreement generally, and the confidentiality provisions in particular, purported to encompass not only the underlying parties but also their respective counsel.

It was on that basis that the Court distinguished two earlier cases that had held that counsel's signature with the "approved as to form and content" notation did not bind counsel. In *Freedman v. Brutzkus* (2010) 182 Cal.App.4th 1065, 1070, the court stated, "the only reasonable meaning to be given to a recital that counsel approves the agreement as to form and content, is that the attorney, in so stating, asserts that he or she is the attorney for his or her particular party, and that the document is in the proper form and embodies the deal that was made between the parties." The Nebraska Supreme Court in *RSUI Indem. Co. v. Bacon* (2011) 282 Neb. 436, applied similar reasoning with respect to a breach of contract claim.

The *Monster Energy* court agreed with *Freedman*'s characterization of what the notation "approved as to form and content" means. The notation affirms that counsel has read the document, it embodies the parties' agreement, and counsel perceives no impediment to his client signing it. But that did not end the inquiry. The legal question is whether counsel's signature approving an agreement as to form and content for his clients' signature *precludes*, as a matter of law, a finding that he also intended to be bound by the agreement. If, as in *Freedman*, the agreement contains no provision purporting to bind counsel or otherwise impose any obligation on him, the question is easily answered. In that circumstance, counsel's signature that he approved the agreement as to form and content could *only* mean he is approving it for his client's signature.

But that will not always be the case. An attorney's signature on an agreement containing substantive provisions imposing duties on counsel may reflect an intent to be bound even though counsel also approves the document for his client's signature. In *RSUI*, the court did not rely solely on the signature notation. Instead, it examined the substance of the provisions at issue and reasoned that, at most, the agreement "governs the manner by which payment under the contract was to be made, not the parties which were to be liable for such payment."

Here, a factfinder considering all the circumstances could reasonably conclude attorney Schechter agreed to be bound. The confidentiality provisions are not only extensive but repeatedly refer both to the parties and their counsel. It states, "Plaintiffs *and their counsel* agree that they will keep completely confidential all of the terms and contents of this Settlement Agreement, and the negotiations leading thereto, and will not publicize or disclose the amounts, conditions, terms, or contents of this Settlement Agreement in any manner," and "without limitation, Plaintiffs *and their counsel of record* ... agree and covenant,

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absolutely and without limitation, to not publicly disclose to any person or entity" facts related to the settlement, specifically identifying "Lawyers & Settlements" as an entity to whom counsel should not disclose such facts.

The Court's conclusion also recognized the role that confidentiality plays in facilitating settlement agreements. "The privacy of a settlement is generally understood and accepted in our legal system, which favors settlement and therefore supports attendant needs for confidentiality." Excluding counsel from the scope of the confidentiality clause would risk undermining an important term of the agreement.

Ultimately, the parties' intent with respect to whether counsel was bound by the contract will often be a question for the trier of fact. But if, as in *Freedman*, the contract is clear that there was no intent to bind counsel, a court can resolve that issue as a matter of law.

Americans with Disabilities Act (ADA); Unruh Act; applicability to business's websites: *Thurston v. Midvale Corporation* (2019) __ Cal.App.5th __ (Second Dist., Div. 8)

Cheryl Thurston is blind and uses screen reader software (a screen reader) to access the Internet and read website content. Among other functions, a screen reader vocalizes invisible code (alternative text) embedded beneath graphics on the website and describes the content of the webpage. In her complaint, Thurston identified significant barriers when she tried to use appellant's website for its restaurant, The Whisper Lounge: With her software she could not read the menu or make reservations. In addition, the graphics were either inadequately labeled or not labeled at all, so her screen reader could not discern what information the graphics purported to present. Thurston stated this unsuccessful encounter caused her difficulty, discomfort, and embarrassment. The website, however, did list a telephone number for The Whisper Lounge. Thurston was unaware the website listed a telephone number. Nonetheless, she stated that using the telephone number as an alternative would not have provided her with the same privacy and independence that a fully accessible website offered or that the non-accessible website offered a sighted person. The website's reservation system was accessible 24 hours per day every day to sighted individuals, but reserving a table by calling the restaurant could only be done during the restaurant's operating hours.

Thurston filed a complaint against the owner of The Whisper Lounge, Midvale Corporation, alleging that the inaccessible website violated the Unruh Act (Civ. Code, § 51 et seq.) which mandates "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (a).) The Unruh Civil Rights Act also provides that a "violation of the federal American with Disabilities Act of 1990 [(ADA)] shall also constitute a violation of this section." (Civ. Code, § 51, subd. (f).) It was under subdivision (f) that Thurston brought her lawsuit.

The trial court granted summary judgment in Thurston's favor. Affirmed.

Title III of the ADA provides: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." (42 U.S.C. § 12182(a).)

Discrimination includes "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden." (42 U.S.C. § 12182(b)(2)(A)(iii).) DOJ regulations require that a public accommodation "furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." (28 C.F.R. § 36.303(c)(1).) "Auxiliary aids and services" includes "accessible electronic and information technology" and "other effective methods of making visually delivered materials available to individuals who are blind or have low vision." (28 C.F.R. § 36.303(b)(2).) A screen reader is an auxiliary aid. (*Ibid*.)

It is undisputed that appellant's physical location – the restaurant – is a place of public accommodation within the meaning of Title III. (42 U.S.C. § 12181(7)(B) ["a restaurant, bar, or other establishment serving food or drink" is a place of public accommodation].)

There is essentially a three-way split in the federal circuit courts about whether websites qualify as places of public accommodation within the meaning of Title III. One court has excluded websites from coverage,

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holding "[t]he plain meaning of Title III is that a public accommodation is a place" and "public accommodation" does not "refer to non-physical access." (*Ford v. Schering-Plough Corp*. (3rd Cir. 1998) 145 F.3d 601, 612, 614 (Ford).)

The intermediate position holds that websites are covered by the ADA only if there is a nexus between the website and access to a physical place of public accommodation. The nexus courts explain that discrimination occurring "offsite" violates the ADA if it prevents disabled individuals from enjoying services a defendant offers from a physical place of public accommodation.

The third and most expansive holdings have found that a "place of public accommodation" need not be a physical space and a nexus to physical space is not required.

The court adopted the intermediate position, holding that including websites connected to a physical place of public accommodation is not only consistent with the plain language of Title III, but it is also consistent with Congress's mandate that the ADA keep pace with changing technology to effectuate the intent of the statute. The trial court's ruling that the ADA applies to appellant's website is consistent with our holding. The court did not reach the plaintiff's arguments to adopt the most expansive view, since the website at issue is connected to a physical space.

Rebuttal testimony by non-disclosed experts; Code Civ. Proc. § 2034.310, subd. (b); prejudicial error: *Pina v. County of Los Angeles* (2019) 38 Cal.4th 531 (Second Dist., Div. 4.)

Pina sued LA County alleging that in 2013, a sheriff negligently caused a bus he was riding to strike a pillar, injuring him. At trial, he admitted that he had sustained injuries in a separate bus accident in 2016. The County also introduced evidence that he had been struck by a car in 2010. Nevertheless, his treating doctor, Dr. Chen, offered the opinion that the 2013 incident caused the injuries for which Pina claimed damages, including a need for future surgery.

Pursuant to Code of Civil Procedure section 2034.310, subdivision (b), the trial court allowed the County to call Robert Wilson, M.D. – whom the MTA had retained to examine appellant in his separate lawsuit, but whom the County failed to designate as an expert in this case – for the purpose of impeaching Dr. Chen. Dr. Wilson testified that Dr. Chen was wrong about the cause of appellant's injuries and the need for surgery.

The jury found the County liable and awarded appellant $5,000 in damages. The trial court denied appellant's motion challenging the adequacy of the damages, relying in part on its conclusion that the jury believed Dr. Wilson's opinion that appellant would not require future surgery. The court also awarded the County costs and attorney's fees and entered a second judgment in the County's favor. Reversed.

The Code of Civil Procedure generally excludes the testimony of expert witnesses who have not been designated as required by the Discovery Act, but allows a party to "call as a witness at trial an expert not previously designated by that party ... [¶] ... [¶] ... to impeach the testimony of an expert witness offered by any other party at the trial." (Code Civ. Proc., § 2034.310, subd. (b).) Although the term "impeach[ ]" is susceptible to an interpretation encompassing the offering of contrary opinion, permissible impeachment by an undesignated expert is narrower in scope. Indeed, the Legislature has codified the distinction between permissible impeachment and contrary opinion: "This impeachment may include testimony to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion." (Code Civ. Proc., § 2034.310, subd. (b).) Courts applying this limitation have consistently affirmed the exclusion of testimony opining that an opposing expert misunderstood or misapplied the relevant body of expert knowledge.

The court exceeded its discretion in applying that limitation, liberally construing the term "foundational fact[ ]" in a manner that allowed the County to offer contrary opinions under the guise of impeachment. Dr. Wilson contradicted Dr. Chen's causation opinion – viz., that the 2013 accident caused appellant significant injury – by opining that it was not medically substantiated by the X-rays, the MRI results, and the presentation of appellant's injuries. Dr. Wilson supported this contrary causation opinion with two additional opinions, testifying (1) that "medical knowledge [and] medical literature" supported neither Dr. Chen's finding (in support of his causation opinion) of a significant change between the 2013 and 2016 X-rays, nor his interpretation of that change as reflecting a traumatic event; and (2) that the force applied to appellant's body in the 2013 accident was insufficient to cause appellant's injuries.

These contrary opinions did not concern the falsity or non-existence of foundational facts on which Dr. Chen relied. Dr. Chen expressly disclaimed any opinion on the degree of force

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involved in the 2013 accident, admitting he did not know how hard the bus struck the pillar. Thus, Dr. Wilson's opinion regarding the degree of force had no relation to the factual foundations of Dr. Chen's opinions. In delivering his other causation opinions, Dr. Wilson similarly failed to challenge the veracity of the facts on which Dr. Chen relied. Instead, he testified to the effect that Dr. Chen misunderstood or misapplied medical science; Dr. Wilson then advanced a contrary understanding of that science based, inter alia, on research studies purportedly establishing that 99 percent of disc protrusions are caused by degenerative change and unspecified sources establishing that a bone fracture or major ligament disruption is necessary to find a significant change between X-rays. This testimony exceeded the scope of permissible impeachment.

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