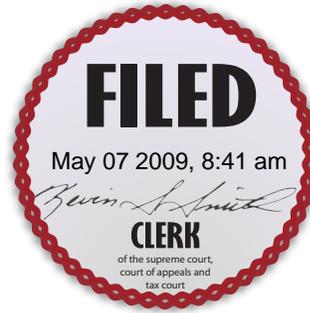


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

SARAH T. STARKEY
JOHN H. LEWIS
Lewis and Wilkins LLP
Indianapolis, Indiana

PETER CAMPBELL KING
J. KEVIN KING
TAMARA BOYAR WILSON
Cline, King & King, PC
Columbus, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DAEMEN SAMPSON,)
)
Appellant-Defendant,)
)
vs.)
)
ESTATE OF THOMAS LYNN MORRIS By)
and Through his Personal Representative,)
Tommy Lynn Morris,)
)
Appellee-Plaintiff.)

No. 03A04-0812-CV-721

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Roderick D. McGillivray, Judge
Cause No. 03D02-0501-CT-11

May 7, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Daemen Sampson appeals the trial court's enforcement of a purported settlement agreement between Sampson and appellee-plaintiff, the Estate of Thomas Lynn Morris (Thomas) in accordance with a wrongful death action that was brought against Sampson by Thomas's father and personal representative of the estate, Tommy Lynn Morris (Morris). Specifically, Sampson argues that the requirements for a valid contract were not satisfied because the evidence failed to establish that there was a meeting of the minds regarding a settlement of the claim. Concluding that the trial court erred in ordering enforcement of the purported settlement agreement, we reverse and remand for trial on the underlying claims.

FACTS

On December 2, 2004, Thomas was a passenger in a vehicle that Sampson was driving on State Road 46 in Nashville. Sampson was under the influence of marijuana and, at some point, he lost control of the vehicle and crashed. Thomas died as a result of injuries that he sustained in the accident.

Sampson was arrested and later convicted of causing death while operating a motor vehicle with a schedule I or II controlled substance in the body. The charge was elevated to a class B felony because this was Sampson's second conviction of driving while intoxicated within five years. We affirmed Sampson's conviction on direct appeal.¹

On January 18, 2005, Morris filed a wrongful death action against Sampson as

¹ Sampson v. State, No. 07A01-0803-CR-147 (Ind. Ct. App. Nov. 13, 2008).

personal representative of Thomas’s estate. At the time of the accident, Farmers Insurance Group (Farmers) was Sampson’s insurer. At some point in the proceedings, Mid-Century Insurance Company (Mid-Century)—Farmers’s parent company—intervened in the action.²

The matter proceeded to mediation without success. Following Sampson’s conviction, Morris’s counsel offered Sampson an opportunity to settle the claim on the same terms that were previously offered during mediation. In particular, Morris offered to settle his claims against Sampson for \$850,000, along with an assignment of all claims and a covenant not to execute.

On February 18, 2008, Morris’s counsel sent a letter to Raymond Seach—Sampson’s insurance defense counsel—to “once again provide Mr. Sampson an opportunity to sign the proposal from the mediation.” Appellant’s App. p. 87. Thereafter, on February 26, 2008, Seach wrote Morris’s counsel a letter stating

I have met with Daemen Sampson at the Brown County jail and thoroughly reviewed Plaintiff’s renewed settlement proposal with him. Mr. Sampson has advised us that although he may be interested in Plaintiff’s settlement offer, he cannot agree to accept it at this time. . . . In any event, Mr. Sampson advised us that in order for him to accept any settlement offer from Plaintiff that included an Agreed Judgment, the settlement would need to include a provision that after the assigned claim has been concluded, Plaintiff would withdraw and show as satisfied in full the Agreed Judgment against Mr. Sampson.

Id. at 194. On March 10, 2008, Morris’s counsel wrote Seach indicating that he agreed to “extend the settlement offer . . . an additional 7 days from today’s date (March 17, 2008).”

² Mid-Century was ultimately dismissed from the action. Appellant’s App. p. 108.

Id. at 96. Additional correspondence ensued between counsel regarding the proposed settlement. On May 6, 2008, Seach sent a letter to Morris's counsel, indicating that

we have been informed by Mr. Maternowski, the attorney for Daemen Sampson in Mr. Sampson's pending criminal appellate proceedings, that Mr. Sampson has agreed to accept Plaintiff's settlement offer. It is our understanding that Mr. Sampson's acceptance of Plaintiff's settlement offer has already been communicated to you by Mr. Maternowski.

Id. at 95.

Thereafter, on June 3, 2008, Morris's counsel reviewed and revised the various settlement documents and forwarded them to Seach. In the proposed assignment of claims, Morris's counsel made no changes to the terms that involved Sampson, but it included a paragraph providing options for how the Farmer's insurance policy payment could be structured:

The Estate with respect to the . . . \$50,000 shall have the sole discretion of how it is to be made, specifically whether the settlement amount will be all cash or a blend of cash and structured payments. The Estate will determine, in its sole discretion, the identity of any insurance companies and brokers to be involved in any structuring of payments. Farmers shall pay the . . . \$50,000 within 14 days of receiving instructions from Plaintiff's counsel as to whether any portion will be structured.

Id. at 103.

On June 25, 2008, Morris's counsel received a letter from a Chicago law firm that had been retained to represent Mid-Century's interests in the case. Mid-Century took the position that it was required to consent to the settlement agreement with Sampson. On June 30, 2008, Seach wrote Morris's attorney and advised as follows:

As you know, we have no authority on behalf of Mid-Century to bind it to any settlement in this case; however, Mr. Sampson has indicated to us that he

would like to settle. If you wish for us to be involved in presenting any agreed judgment to the Court, you will need to remove the paragraph recently added to page two of the Assignment of All Claims and Covenant Not to Execute, which purports to require payment of \$50,000 by Mid-Century within fourteen days of execution. Also, we will need to advise the Court on the record that neither our firm nor its attorneys has authority to bind Mid-Century with regard to the settlement terms. If these conditions are acceptable, please revise the Assignment of All Claims and Covenant Not to Execute to remove to your new paragraph on page two and forward the Assignment of All Claims and Covenant Not to Execute to us and Mr. Maternowski so that we may forward it to Mr. Sampson.

Id. at 173.

Morris's counsel subsequently deleted that provision and forwarded the revised settlement documents to Seach on July 21, 2008 for execution. That same day, Morris filed a motion in the trial court to enforce the settlement agreement. In relevant part, the motion provided that

On February 18, 2008, undersigned counsel forwarded the following documents to Defendant's counsel:

1. Assignment of All Claims and Covenant Not to Execute
2. Parties' Joint Motion for Entry of Agreed Judgment, and
3. Agreed Judgment.

From February 18, 2008 through May 6, 2008, the Plaintiff allowed numerous extensions of time for the Defendant to respond.

On May 6, 2008, Defendant's counsel specifically stated, in writing, ". . . Mr. Sampson has agreed to accept Plaintiff's settlement offer. . . We are writing to request and ensure that the settlement terms proposed by Mr. Sampson and agreed to in your correspondence dated March 10, 2008 are inserted into the settlement documents provide[d] to Mr. Sampson for his execution . . . attached . . .," which the Plaintiff agreed.

On May 23, 2008, Defendant's counsel requested the settlement documents be forwarded, which the Plaintiffs complied on June 3, 2008. In said documents, the Plaintiffs discussed the possibility of a structure.

However, everything else remained the same, as agreed by Defendant's counsel on May 6, 2008.

On June 25, 2008, Mid-Century, Defendant's insurer, prevented the consummation of the May 6, 2008 agreement by maintaining (for the first time) that signing the settlement agreement "without Mid-Century's consent would be a violation of the terms and conditions of his policy." Mid-Century has no standing in this action to maintain that the Defendant cannot sign the settlement agreement. As the Court may recall, Mid-Century sought an order from this Court exiting the litigation in January 2007, which was granted.

Indiana case law is clear [that] representations of an attorney on behalf of a client bind the client. Guydon v. Taylor 60 N.E.2d 750, 751 (Ind. Ct. App. 1945).

The judicial policy of Indiana strongly favors settlement agreements. "If a party agrees to settle a pending action, but then refuses to consummate the settlement agreement, the opposing party may obtain judgment enforcing the agreement from the Court before which action is pending." Scott v. Randle, 697 N.E.2d 60, 66 (Ind. Ct. App. 1998).

WHEREFORE, the Plaintiffs, by counsel, respectfully request the Court for an Order enforcing the settlement agreement between the parties as represented by counsel for the Defendant on May 6, 2008.

Id. at 84-86.

Although there was no response to the motion, Sampson's counsel requested oral argument. At a hearing that commenced before the trial court on September 24, 2008, Seach asserted that he had not been retained to settle the claim on Sampson's behalf. Rather, Seach maintained that he was hired to defend the claim and, therefore, would not argue a position on the motion to enforce the settlement. Attorney John Lewis, who entered his appearance for Sampson shortly before the hearing, argued on Sampson's behalf. Lewis asserted that the parties had not reached an agreement on May 6, 2008, or at anytime thereafter for numerous

reasons including Morris's July 21, 2008, letter proposing that the parties return to the original terms that were set forth on May 6, 2008. Thus, Lewis argued that a meeting of the minds had never been achieved and the settlement agreement was not enforceable. After taking the matter under advisement, the trial court granted Morris's motion to enforce the settlement agreement. In relevant part, the trial court's order provided that

Raymond Seach had the expressed, implied, or apparent authority to enter into the settlement agreement of May 6, 2008 wherein it was stated ". . . Mr. Sampson has agreed to accept Plaintiff's settlement offer. . ." As a result of said statement, the Court supports the judicial policy of Indiana strongly favoring settlement agreements. The Court further FINDS that the provisions provided by Plaintiffs' counsel to the Defendant for which the Defendant agreed as of May 6, 2008 are the terms of the agreement between the parties. If a party agrees to settle a pending action, but then refuses to consummate the settlement agreement, the opposing party may obtain a judgment enforcing the agreement.

Id. at 21. Sampson now appeals.

DISCUSSION AND DECISION

Sampson argues that the trial court erred in enforcing the purported settlement because there was no meeting of the minds as to the essential terms and provisions of the proposed agreement. Although Sampson acknowledges that an initial settlement offer was made, he claims that there was no acceptance of any final offer and, therefore, no contract was ever formed.

In resolving this issue, we initially observe that general rules applicable to the construction of contracts govern the construction of settlement agreements. Niccum v. Niccum, 734 N.E.2d 637, 639 (Ind. Ct. App. 2000). Specifically,

[a] contract is based upon an offer, acceptance and consideration. An offer must be extended and the offeree must accept it, the communication of acceptance being crucial. Bain v. Board of Trustees of Starke Mem'l Hosp., 550 N.E.2d 106, 110 (Ind. Ct. App. 1990). It is well settled that in order for an offer and an acceptance to constitute a contract, the acceptance must meet and correspond with the offer in every respect. Gates v. Petri, 127 Ind. App. 670, 143 N.E.2d 293, 297 (1957). This rule is called the “mirror image rule.” Radio Picture Show Partnership v. Exclusive Int'l Pictures, Inc., 482 N.E.2d 1159, 1166 (Ind. Ct. App. 1985). An acceptance which varies the terms of the offer is considered a rejection and operates as a counteroffer, which may be then accepted by the original offeror. Uniroyal, Inc. v. Chambers Gasket & Mfg. Co., 177 Ind. App. 508, 380 N.E.2d 571, 575 (1978).

I.C.C. Protective Coatings, Inc. v. A.E. Staley Mfg. Co., 695 N.E.2d 1030, 1034-35 (Ind. Ct.

App. 1998). Moreover, this court has held that

[a] meeting of the minds of the contracting parties, having the same intent, is essential to the formation of a contract. Wallem v. CLS Indus., Inc., 725 N.E.2d 880, 883 (Ind. Ct. App. 2000). The intent relevant in contract matters is not the parties' subjective intents but their outward manifestation of it. Centennial Mortgage, Inc. v. Blumenfeld, 745 N.E.2d 268, 277 (Ind. Ct. App. 2001). A court does not examine the hidden intentions secreted in the heart of a person; rather it should examine the final expression found in conduct. Id. The intention of the parties to a contract is a factual matter to be determined from all the circumstances. Ochoa v. Ford, 641 N.E.2d 1042, 1044 (Ind. Ct. App. 1994).

Zimmerman v. McColley, 826 N.E.2d 71, 77 (Ind. Ct. App. 2005).

In this case, the record demonstrates that Morris made the initial offer of settlement to Sampson—through Seach—on February 18, 2008. Appellant's App. p. 87. Thereafter, the letter of February 26, 2008, from Seach to Morris's counsel represents a counter-offer because he changed the initial terms and requested that an additional provision be added to the proposed agreement. Thus, it is apparent that the parties were still negotiating the specific terms of the proposed settlement agreement. Although Morris's counsel sent a letter

to Seach on March 10, 2008, indicating that he agreed to the additional provision that was requested in the February 26, 2008, correspondence, it is apparent that both parties were awaiting confirmation of the finalized settlement terms through the receipt of the completed documents. Thereafter, on May 6, 2008, Seach wrote Morris's counsel informing him that although Sampson had agreed to accept the settlement offer, the agreement was to include the additional provisions discussed in the prior correspondence. Id. at 207.

As discussed above, Morris sent Seach a letter on June 3, 2008, with the proposed settlement documents, but Morris had added a new term relating to the Farmer's insurance policy proceeds. Id. at 209. That term was not included in the settlement documents when they were originally presented to Sampson on February 18, 2008. Id. at 103. And, after Sampson failed to sign and return the proposed settlement documents, Morris again changed the terms of the agreement by removing the paragraph and submitting the proposed settlement documents and filing the motion to enforce the settlement agreement with the trial court. Id. at 92. Ultimately, on June 30, 2008, Seach advised Morris's counsel that

we note that the July 31, 2008 deadline for concluding depositions in this matter is approaching. We understand that the parties are continuing their attempts to finalize settlement. However, it is necessary that we either schedule the depositions of all of your experts . . . or alternatively, agree to extend the deadline of taking the depositions so that the deadlines are preserved in the event that an agreeable settlement is not reached before July 31, 2008.

Id. at 213 (emphases added). Finally, on July 9, 2008, Seach sent another letter to Morris's counsel requesting confirmation as to whether he would agree to continue the discovery deadline in the case. Id. at 175.

In examining the parties' correspondence, we cannot agree with Morris's contention that Sampson formally accepted the offer to settle the matter. Although we acknowledge that settlement agreements are strongly favored, none of the correspondence that was exchanged between the parties contains language allowing one to conclude that there was a meeting of the minds as to the final essential terms of a settlement agreement. At no point were the required components of offer and acceptance both demonstrated. See *Martinez v. Belmonte*, 765 N.E.2d 180, 182 (Ind. Ct. App. 2002) (concluding that an insurance company's response to the plaintiff's offer to settle the matter varied from the terms of the original offer and, therefore, operated as a rejection and counteroffer, which the plaintiff never accepted).

Although Morris's reliance on the May 6, 2008, correspondence from Seach indicated that the parties were close to finalizing a settlement, we cannot say that this correspondence "sealed the deal." Rather, the continued correspondence that was exchanged by counsel amounted to further acts of negotiation and discussion as to the specific terms of a possible agreement.

Finally, it is apparent that Morris's repeated attempts to execute the settlement documents demonstrate that both parties were operating under the assumption that the execution of finalized settlement documents was to occur. The fact that Sampson never returned executed settlement documents to Morris establishes that settlement negotiations were not finalized. As a result, we conclude that the trial court erred in enforcing the purported settlement agreement.

The judgment of the trial court is reversed and this cause is remanded for trial on the

merits of Morris's claims.

MAY, J., concurs.

BARNES, J., dissents with opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

DAEMEN SAMPSON,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 03A04-0812-CV-721
)	
ESTATE OF THOMAS LYNN MORRIS)	
By and Through his Personal Representative)	
Tommy Lynn Morris,)	
)	
Appellee-Plaintiff.)	

BARNES, Judge, dissenting

I respectfully dissent. Although Sampson never signed a written settlement agreement, I believe it is clear nonetheless that he agreed to settle this case on readily identifiable terms.

My view of the timeline in this case is as follows. On February 18, 2008, counsel for Morris offered to settle with Sampson for an agreed judgment of \$850,000, with Morris only seeking to collect the \$50,000 policy limits from Farmers Insurance and nothing from Sampson’s personal assets. On February 26, 2008, counsel for Sampson responded that he

could not accept any settlement offer unless it included a provision that after the assigned claim for \$50,000 against Farmers was concluded, Morris would withdraw and show as satisfied the \$850,000 agreed judgment against Sampson. On March 10, 2008, counsel for Morris responded that it would be agreeable to withdrawing the judgment against Sampson after the \$50,000 assigned claim is satisfied, provided Sampson cooperates in the assigned claim proceedings.

On May 6, 2008, counsel for Sampson wrote counsel for Morris and stated, “Mr. Sampson has agreed to accept Plaintiff’s settlement offer. . . . We are writing to request and ensure that the settlement terms proposed by Mr. Sampson and agreed to in your correspondence dated March 10, 2008 are inserted into the settlement documents” App. p. 95. In my view, the May 6 letter represented a clear, unequivocal, “mirror image” agreement to settle by Sampson, not a rejection of an offer or a counteroffer. It did not request any further alterations to the terms of settlement, but instead represented acceptance of the terms Morris already offered, namely, the terms from the February 18 correspondence and the additional term from the March 10 letter.

I am guided by the general principle that the judiciary of Indiana strongly favors settlement agreements. Scott v. Randle, 697 N.E.2d 60, 65 (Ind. Ct. App. 1998), trans. denied. Moreover, it is axiomatic that if a party agrees to settle a pending action, but then refuses to consummate the settlement agreement, the opposing party may obtain a judgment enforcing the agreement. Zimmerman v. McColley, 826 N.E.2d 71, 76 (Ind. Ct. App. 2005). The majority contends, “The fact that Sampson never returned executed settlement

documents to Morris establishes that settlement negotiations were not finalized.” Slip op. p. 10. This circumvents the well-established rule in Indiana that ““in general, settlement agreements need not be in writing to be enforceable.”” Id. at 77 n.2 (quoting Vernon v. Acton, 732 N.E.2d 805, 809 (Ind. 2000)).³ Sampson did not have to execute the settlement documents in order for his clearly-stated agreement to settle to be enforceable. Morris had an enforceable expectation that the claim had been settled based on the May 6 letter. See id. at 77.

What transpired after May 6, including the June 3, 2008 settlement documents that added a term regarding possible structuring of the \$50,000 payment Morris intended to recover from Farmers, does not alter this fact. With respect to that provision, I make two observations. First, it in no way affected the bargain between Sampson and Morris; it only purported to affect how Morris would collect payment from Farmers. Second, Zimmerman addressed a very similar scenario, i.e. after there was an offer and acceptance as to the amount of settlement, one of the parties raised the possibility that the payment would be structured. This court held that this attempt to add a structured payment provision did not affect or negate the original settlement agreement, nor did it become part of the agreement. Id. at 78 n.5. The original settlement agreement still was fully enforceable. See id. The same should be true here.

I also find irrelevant the June 30, 2008 letter from Sampson’s counsel to Morris’s

³ The exception to this rule applies to agreements reached during mediation. See Vernon, 732 N.E.2d at 809 (citing Ind. Alternative Dispute Resolution Rule 2.7(E)(2)). This settlement was not reached during mediation.

counsel stating in part, “We understand that the parties are continuing their attempts to finalize settlement.” App. p. 173. This should only be read as referring to attempts to execute an acceptable written settlement agreement. It does not change the fact that Sampson already had expressed his acceptance of a settlement offer.

I vote to affirm the trial court’s order enforcing the parties’ settlement as accepted by Sampson through the May 6, 2008 correspondence from his counsel to Morris’s counsel.