NOT DESIGNATED FOR PUBLICATION

MILTON CROSS, JR.	*	**NO. 2001-C-0632**
VERSUS	*	**COURT OF APPEAL**
THE LOUISIANA COCA COLA BOTTLING COMPANY, LTD., CONSTITUTION STATE INSURANCE COMPANY, AND MARK T. OWEN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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ON APPLICATION FOR SUPERVISORY WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 95-6283, DIVISION "N"
Honorable Ethel Simms Julien, Judge
* * * * * *
Judge Miriam G. Waltzer
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge Terri F. Love and Judge David S. Gorbaty)

Raymon G. Jones
DEUTSCH, KERRIGAN AND STILES
755 Magazine Street
New Orleans, LA 70130
COUNSEL FOR RELATOR

WRIT GRANTED. RELIEF DENIED.

STATEMENT OF THE CASE

Defendant, the Louisiana Coca-Cola Bottling Company, Ltd., seeks supervisory review of the trial court's 16 February 2001 judgment denying its Motion to Enforce Settlement.

FACTS

On 12 May 1994, plaintiff Milton Cross Jr., a Regional Transit Authority (RTA) bus driver, was allegedly sitting in his parked RTA bus on Tulane Avenue, near its intersection with South Pierce Street, when one of defendant's delivery trucks struck the bus from behind, injuring plaintiff. Plaintiff began collecting worker's compensation benefits, and retained Michael Fenasci to file the instant suit for personal injuries. Transit Management of Southeast Louisiana ("TMSEL") intervened to recover $103,000 in worker's compensation and medical benefits it had paid to or on behalf of plaintiff. Defendant claimed a settlement agreement was confected. Plaintiff would not sign the release or endorse the settlement check, and defendant filed the instant motion to enforce.

At the hearing on the motion, Carl Butler, former counsel for defendant, identified several letters evidencing what purported to be an agreement between him and plaintiff's attorney. On 21 June 1999 (the scheduled trial date), Butler wrote to Fenasci and, referring to settlement negotiations that occurred earlier in the day between them, made an offer to settle the case for $60,000. This letter was sent by FAX, and Fenasci admitted having received it. In a second letter faxed that day from Butler to Fenasci, Butler confirmed Fenasci's telephone call to him with the plaintiff's agreement to accept the $60,000 settlement offer. Butler also confirmed that plaintiff would satisfy the TMSEL worker's compensation lien, and that defendants would have no further obligation to plaintiff for any related claims or liens over and above $60,000. Fenasci testified that he

received Butler's second letter of June 21, and said it "accurately portrayed" the status of the settlement negotiations at that time. Butler testified that the second letter confirmed an agreement that the plaintiff would accept the settlement offer that had been made that morning. However, he admitted that he never received anything in writing stating that the case was settled. He said that on the morning he and Fenasci had negotiated in the courthouse, he had observed Fenasci and plaintiff having a discussion. He said that he and Fenasci talked about putting the settlement agreement on the record that morning, but the court reporter had not been available. However, Butler also admitted that he believed there were some "continuing discussions" between Fenasci and plaintiff. He further admitted that he was not aware of any agreement between plaintiff and TMSEL regarding the worker's compensation lien, although he knew the two parties were working toward resolving that matter. Butler's representation of Coca-Cola ended in late June or early July 1999.

Fenasci admitted receiving a third letter from Butler, dated 22 June 1999, in which Butler reiterated the terms of the settlement offer. Subsequently, with a cover letter dated **9 July 1999**, defendant's then counsel Robert Kerrigan mailed Fenasci a draft in the amount of $60,000, made payable to Fenasci, plaintiff, and TMSEL, along with a release and joint order of dismissal. Fenasci testified that he received this letter. Fenasci identified a **2 March 2000** letter he wrote to plaintiff, directing him to sign the release and endorse the check, after which he would deposit it and disburse the funds to him. Fenasci's paralegal/investigator, Christopher Ezzell, testified that he telephoned plaintiff and informed him that he was coming over with a $60,000 check, and hand-delivered the cover letter, check and release. He stated that plaintiff asked why there were other

payees listed on the check, said he "wanted all of it," and refused to endorse the check or sign the release. Fenasci identified an 11 May 2000 letter he wrote to Kerrigan informing him that plaintiff refused to execute the settlement documents or endorse the settlement check. Fenasci noted in the letter that the settlement "was bound" by writings exchanged between him and Butler, and that it was his opinion that a settlement had been "properly confected," "authorized" by plaintiff and defendant, and then "reduced to writing."

Pamela Moran, former counsel for intervenor TMSEL, testified at the hearing that TMSEL had paid $103,000 in worker's compensation and medical benefits to and on behalf of plaintiff. She testified that it was her understanding that Fenasci had settled the case for $60,000. TMSEL had offered to accept $20,000 in full payment of its lien, on the condition that plaintiff waive his right to future compensation benefits. She said it was her understanding that plaintiff had rejected that offer, and Fenasci made a counter offer of $5,000. She said TMSEL never authorized her to accept that $5,000 counter offer. The trial court took notice of its minute entry from the date trial had been scheduled, 21 June 1999, indicating that the case had settled. The court noted that this was based on information it had received from Fenasci.

Plaintiff testified that on the morning of trial Fenasci confronted him in the courthouse hallway with information about a twelve-year old military accident, and said this information "blew" his case. Fenasci walked away, and returned to advise plaintiff that defendant was offering to settle the case for $60,000. He claimed Fenasci informed him that he would have to find another attorney if he did not accept the offer. Plaintiff said he informed the trial judge that he could not accept $60,000, expressing concerns about his continuing lower back problems, his medical bills and his worker's compensations benefits. Plaintiff testified that he informed Fenasci that he would not

accept the offer, and walked away. He said at some point Fenasci had someone telephone him, who informed him that he had a document for him to sign. That person arrived at plaintiff's home with a $60,000 check. Plaintiff said he informed the person that he never made any agreement, and refused to sign anything. Plaintiff claimed he sent Fenasci a letter by certified mail dismissing him as his attorney, and Fenasci wrote back saying that he could not dismiss him because the case had been settled. Fenasci testified that he had telephoned plaintiff to verify that he would accept Butler's offer to settle for $60,000, and said he heard plaintiff in the background answer "Yes" when plaintiff's girlfriend relayed Fenasci's question to him. Plaintiff denied having said that he accepted the settlement offer on that occasion, testifying that he told his girlfriend to advise Fenasci that he did not want to talk to him. Plaintiff said he would not waive his right to worker's compensation benefits. Plaintiff noted that a recent MRI revealed another disc problem, and said that he needed another surgery. He said he was still receiving medical treatment and worker's compensation benefits as a result of the 1994 accident at the time of the 16 February 2001 hearing, and had not attempted to work at any time since the accident. Plaintiff flatly denied ever having agreed to settle his claim against defendant for $60,000.

ANALYSIS

La. C.C. art. 3071 provides for transaction or compromise, and states:

> A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.
>
> This contract must be either reduced into writing or recited in open

> court and capable of being transcribed from the record of the proceeding. The agreement recited in open court confers upon each of them the right of judicially enforcing its performance, although its substance may thereafter be written in a more convenient form.

Defendant argues that "clearly," the "letter agreement" of 22 June 1999, confirming the settlement, fulfilled the legal requirements of a settlement agreement. A compromise is a contract between the parties and is governed by the general rules of construction applicable to contracts. Addison v. Regional Transit Authority, 97-2289, p. 4 (La. App. 4 Cir. 12/3/97), 703 So. 2d 810, 812. When the scope of a compromise agreement is in dispute, extrinsic evidence can be considered to determine exactly what differences the parties intended to settle. Ortego v. State, Dept. of Transp. and Development, 96-1322, p. 7 (La. 2/25/97), 689 So.2d 1358, 1363-1364. A compromise is valid if there is a meeting of the minds between the parties as to exactly what they intended when the compromise was reached. Pat O'Brien's Bar, Inc. v. Franco's Cocktail Products, Inc., 615 So.2d 429, 432 (La. App. 4 Cir. 1993). A letter by one of the parties setting forth their understanding of the agreement is not an agreement of the parties reduced to writing as required by La. C.C. art. 3071. Coleman on Behalf of Coleman v. Academy of the Sacred Heart, 93-2015, p. 3 (La. App. 4 Cir. 3/29/94), 650 So. 2d 265, 267. However, the writing evidencing the compromise agreement required by La. C.C. art. 3071 need not be contained in one document. Townsend v. Square, 94-0758, p. 4 (La. App. 4 Cir. 9/29/94), 643 So. 2d 787, 789. When two instruments read together outline the obligations each party has to the other, and evidence each party's acquiescence in the agreement, a written compromise agreement, as contemplated by La. C.C. art. 3071, has been perfected. Brasseaux v. Allstate Ins. Co., 97 0526, pp. 5-6 (La. App. 1 Cir. 4/8/98), 710 So. 2d 826, 829. There can be no binding compromise where

the terms of the release from liability are unknown. Townsend, 94-0758 at p. 7, 643 So. 2d at 790. Attorneys may not enter a binding agreement to settle a client's claim without the client's clear and express consent. Townsend, 94-0758 at p. 8, 643 So. 2d 790.

In the instant case, the settlement agreement was a three-party agreement between defendant, plaintiff and TMSEL, the workers' compensation intervenor. The settlement check was made payable not just to plaintiff and his counsel, but also to TMSEL. The release from liability defendant sent to plaintiff's counsel was a release by plaintiff and TMSEL, and was to be signed by both of those parties. In denying defendant's motion to enforce the compromise agreement, the trial court noted that there was never any agreement reached with TMSEL as to the settlement. Pamela Moran, counsel for TMSEL, testified that it was her understanding that plaintiff never agreed to waive his right to worker's compensation and medical benefits and settle the claim for $60,000, with $20,000 of that going to TMSEL. Michael Fenasci simply testified that while he thought that the $20,000 TMSEL agreed to accept was a significant drop from the amount TMSEL had paid out, "we tried to negotiate even further." He further stated that he believed he was "close to settling [with TMSEL] for $5,000.00." Clearly, there was no meeting of the minds as to the amount for which TMSEL would settle, and therefore there was no three-party settlement agreement.

Furthermore, the evidence shows that plaintiff never consented to the purported settlement. The contingency agreement between Fenasci and plaintiff expressly states that neither party may settle, compromise, dispose of or in any way discontinue the claim without the consent of the other. Plaintiff denies that any settlement agreement was reached, and that he refused to settle because he did not want to waive his right to worker's compensation and medical benefits. He testified that he continued to receive

medical care paid for by TMSEL after Fenasci attempted to get him to settle, 21 June 1999, as well as worker's compensation benefits in the amount of $236.00 per week. As of the date of the hearing on the motion to enforce, 16 February 2001, the worker's compensation benefits alone would have amounted to over $16,500. As stated above, there had been no agreement between Fenasci and TMSEL as to how much TMSEL would have accepted out of a $60,000 settlement. Absent this determination, plaintiff was unable to settle his case.

Although counsel for defendant mailed the settlement check and release to Michael Fenasci on or about 9 July 1999, Fenasci did not send these documents to plaintiff until at the earliest 2 March 2000, almost eight months later. This indicates that something was amiss, and that plaintiff had not agreed to a settlement at the time defendant claims the agreement was confected.

Considering these facts and circumstances, the trial court correctly denied defendant's motion to enforce the settlement agreement.

WRIT GRANTED. RELIEF DENIED.