

STATE OF MICHIGAN

COURT OF APPEALS

VILL KNOX and GENEVA KNOX,

UNPUBLISHED

January 29, 2002

Plaintiffs-Appellees/Cross-
Appellants,

v

No. 225320

FO FO'S RESTAURANT,

Wayne Circuit Court

LC No. 96-645691-NO

Defendant-Appellant/Cross-
Appellee.

Before: Jansen, P.J., and Doctoroff and Owens, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order granting a new trial following a jury trial that resulted in a verdict of no cause of action. We reverse and remand.

Plaintiffs, who are married, filed their complaint on November 5, 1996, alleging that they purchased two catfish dinners at defendant restaurant on May 21, 1994, and that they became very ill with food poisoning because the food was contaminated. Plaintiffs alleged breach of warranty against defendant, and a trial occurred in August and September of 1999. The issues at trial surrounded whether the fish dinners sold to plaintiffs were contaminated, whether the food eaten by plaintiff actually caused them to become ill, whether plaintiffs suffered from food poisoning or some other medical ailment, and specifically whether plaintiff Vill Knox (who was much more seriously ill than his wife) suffered from food poisoning or a bowel obstruction not caused by contaminated food. The jury found that the food sold by defendant was reasonably fit for consumption at the time that it was sold and, therefore, did not have to address any further issues because of this finding.

Before the jury's verdict, and following plaintiffs' counsel's closing argument but before defendant's closing argument, the parties entered into a "high-low" settlement agreement that was placed on the record. Under the terms of the agreement, if the jury's verdict was less than \$150,000, then the minimum amount that plaintiffs would receive would be \$150,000. If the verdict exceeded \$5,500,000, then the highest amount that the plaintiffs would receive would be \$5,500,000. Further, the settlement agreement specified that there would be no appeal and no motion for a new trial.

Shortly after the jury's verdict of no cause of action, plaintiffs filed a motion for judgment notwithstanding the verdict or a new trial, arguing that defendant's counsel committed misconduct during closing argument. The trial court, after reviewing the comments at closing argument challenged by plaintiffs, ruled that the comments were purposefully designed to prejudice the jury such that plaintiffs were not able to receive a fair trial. The trial court granted plaintiffs' motion for a new trial, and defendant appeals from this ruling contending that the settlement agreement barred plaintiffs from bringing their motion for a new trial.

A trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). We find that the trial court abused its discretion in granting a new trial to plaintiffs because the terms of the settlement agreement entered into by the parties on the record precluded them from raising a motion for a new trial.

Settlement agreements are governed by MCR 2.507(H), which provides:

Agreements to be in Writing. An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

"A settlement agreement is binding when it is made in open court." *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349; 605 NW2d 360 (1999). A settlement agreement is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts. *Id.*, quoting *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). The primary goal in the interpretation or construction of a contract is to honor the intent of the parties. *Mikonczyk, supra*, pp 349-350, quoting *Rasheed v Chrysler Corp*, 445 Mich 109, 127, n 28; 517 NW2d 19 (1994). A settlement agreement should be enforced according to its terms absent a showing of factors such as fraud or duress. *Massachusetts Indemnity & Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994). "Once a contract to settle legal claims has been entered into, a unilateral change of mind is not a ground for excusing performance." *Reed v Citizens Ins Co*, 198 Mich App 443, 447; 499 NW2d 22 (1993).

In the present case, the terms of the settlement agreement were stated on the record by both defendant's and plaintiffs' counsel and the terms are clear and unambiguous. The intent of the parties, as set forth on the record, was that neither party would move for a new trial or appeal the verdict. The settlement agreement provided that plaintiffs would be entitled to at least \$150,000, even if the jury's actual verdict was less than this, and would receive no more than \$5,500,000, even if the jury's verdict was more than this. Because the verdict was zero dollars, plaintiffs should have moved to enforce the terms of the settlement agreement for \$150,000 and they were clearly precluded by the terms of the settlement agreement to move for a new trial.

Plaintiffs attempt to repudiate the settlement agreement by arguing that defendant breached the covenant of good faith and fair dealing because of the allegedly improper and prejudicial comments made by defendant's counsel at closing argument. We note initially that the rule is that a settlement agreement should be enforced according to its terms absent fraud or

duress. *Massachusetts Indemnity, supra*. Plaintiffs have not shown that there was any fraud or duress in the making of the settlement agreement. Moreover, assuming, without deciding, that there is a covenant of good faith and fair dealing,¹ we find that such a covenant was not breached in this case. We have carefully reviewed defendant's counsel's closing argument in its entirety and find that the comments do not constitute fraud or duress or a breach of the covenant of good faith and fair dealing.² Consequently, the trial court erred in finding that defendant's counsel's misconduct at closing argument constituted a breach of the covenant of good faith and fair dealing so that the settlement agreement should be set aside.

We hold that the trial court abused its discretion in granting plaintiffs' motion for a new trial. The clear and unambiguous terms of the settlement agreement precluded the parties from bringing a motion for a new trial and there is no showing of fraud, duress, or breach of the covenant of good faith and fair dealing in the record to warrant setting aside the settlement agreement. We reverse the trial court's order granting a new trial and remand so that the terms of the settlement agreement can be enforced.

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Donald S. Owens

¹ Contrary to plaintiffs' argument, we do not believe that this Court in *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151-152; 483 NW2d 652 (1992), definitely recognized the covenant of good faith and fair dealing in every contract. Rather, this Court noted that “[i]t has been said that the covenant of good faith and fair dealing is an implied promise contained in every contract”; however, this Court refused to recognize such a cause of action in the employment context. *Id.*

² Indeed, we note that most of the comments that plaintiffs have challenged were not objected to at the time they were made.