IN THE COURT OF APPEALS OF TENNESSEE

JAMES B. JOHNSON,	)	C/A NO. 03A01-9506-CV-00175
Plaintiff-Appellant,	)	KNOX COUNTY CIRCUIT COURT
v.	)	
	)	HONORABLE HAROLD WIMBERLY, JUDGE
GLENN A. McCARTY[1],	)	
Defendant,	)	
and	)	
CONTINENTAL BAKING COMPANY,	)	
Defendant-Appellee.	)	REVERSED AND REMANDED

FILED
January 10, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

GEORGE W. MORTON, JR., of MORTON & MORTON, Knoxville, for Appellant

JANET L. HOGAN of HOGAN & HOGAN, Knoxville, for Appellee Continental Baking Company

O P I N I O N

Susano, J.

[1]On May 10, 1994, prior to the settlement in this case, the plaintiff took a voluntary non-suit as to the defendant Glenn A. McCarty. He is not a party to this appeal.

This T.R.A.P. 9[2] interlocutory appeal involves a dispute between the parties regarding a settlement agreement. The agreement at issue ostensibly settled a tort action brought by the appellant James B. Johnson (Johnson) for serious injuries arising out of an automobile accident, the facts of which are not pertinent to this appeal. Although the parties agree that they entered into an oral settlement and also agree that they advised the trial court that they had settled the plaintiff's suit[3], they are now in dispute as to the terms of the settlement. The trial court found that there was a mutual mistake of fact in the negotiations leading up to the settlement, and consequently refused to enforce the more generous settlement argued for by Johnson. Johnson filed a T.R.A.P. 9 application for permission to appeal, and in the interest of judicial economy and efficiency, this court agreed to hear his appeal. Johnson raises as the sole issue whether the trial court erred in its determination that the settlement agreement argued for by Johnson was unenforceable due to mutual mistake.

[2]T.R.A.P. 9 states, in pertinent part, that "an appeal by permission may be taken from an interlocutory order of a trial court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals only upon application and in the discretion of the trial and appellate court." Pursuant to this rule, the trial court granted the appellant a discretionary appeal.

[3]The details of the settlement were not then communicated to the trial court.

I

On May 16, 1994, a jury was empaneled to determine Johnson's damages, the trial court having earlier granted a partial summary judgment on the issue of liability. On the morning of May 17, before the parties started their second day of trial, one of the defendant's attorneys, Clifford C. Cruze, received a telephone call from an agent of the defendant, who advised him that the defendant Continental Baking Company wanted to extend a settlement offer to Johnson. At some earlier time in this litigation, Johnson had informed the defendant that for several reasons, including beneficial tax consequences, he was interested in a structured settlement rather than one in the form of a lump sum payment. Thus, Cruze was directed by the agent to present three structured settlement options, which, according to Cruze, were presented by the agent in the following form:

> Option No. 1: $400,000 cash plus $2,969 per month for life, guaranteed for 20 years.
>
> Option No. 2: $450,000 cash plus $1,722 per month for life, guaranteed for 20 years.
>
> Option No. 3: $500,000 cash plus $1,435.49 per month for life, guaranteed for 20 years.

Cruze testified that he asked the defendant's agent to repeat the monthly payment in Option No. 1, to insure that he had heard and written down the amount correctly. He also testified that

the agent told him that the defendant's cost of procuring each of the three options was $750,000.

Cruze then called Richard W. Krieg, one of Johnson's attorneys, and relayed the three settlement options exactly as he had received them. Shortly thereafter, the parties asked the trial court to delay the continuation of the trial to give Johnson time to consider the defendant's offer of settlement. The trial judge agreed. Krieg advised his client of the three settlement options, and for most of the remainder of the morning, Johnson, members of his family, and his attorneys discussed the three settlement options. Those involved in the discussions, Johnson, his father, and the three attorneys representing Johnson, i.e., Krieg, Ellis A. Sharp, and Charles B. Lewis, testified that they never had any reason to question the accuracy of any of the numbers in the offer, and that at all times they assumed that Cruze communicated the options correctly. At one point in the morning, Krieg went to Cruze and the two compared their numbers to make sure they were the same. Each of the plaintiff's attorneys testified that they were under the impression that the cost to the defendant for each option would be $750,000, simply because that was the representation by the defendant's counsel.

Shortly before the parties agreed to settle the case, Krieg inquired whether the defendant would pay $750,000 in one lump sum and received an affirmative answer. Krieg testified

that the only reason he asked this question was to confirm that the options presented to Johnson were really worth $750,000, because he knew that if they were not, the defendant would refuse to pay it in a lump sum. Satisfied that the defendant was not, using his word, "fudging," and having been advised that his client wished to accept Option No. 1, Krieg told opposing counsel that the case was settled. Krieg testified, and he was supported by the testimony of Ellis and Lewis, that at that time, in the courtroom, he specifically told the defendant's attorneys that his client accepted Option No. 1. The defendant's attorneys, Cruze and Steven G. Shope, testified that they were not informed that Option No. 1 was Johnson's choice until *after* the trial court was advised the case was settled; but in any event, it is clear that all the parties knew and understood that Johnson had accepted Option No. 1 by the time the parties and their counsel left the courthouse that same day.

After the parties informed the trial court that the case had been settled, the court, in the parties' absence, dismissed the jury.

The problem arose later that afternoon, when the actual paperwork for the settlement was sent to Krieg's office. When Krieg received the paperwork, he noticed that it did not contain the same terms upon which the parties had agreed; specifically, that it did not contain the $2,969 per month figure. He called the defendant's attorneys, and it then became apparent that an

error had been made on the defendant's side, at some point that is not clear from the record[4], in the communication of Option No. 1. The defendant apparently had intended the monthly payments in that option to be $2,009.69 rather than $2,969; because the cost of a structured settlement with monthly payments of $2,969, when coupled with the "front-end" payment of $400,000, was considerably higher than $750,000. Krieg advised Cruze that while any transmission error was unfortunate, his client had accepted a valid offer including the $2,969 monthly figure, and he expected the defendant to honor the settlement as agreed to by the parties.

Johnson shortly thereafter filed a Motion to Enforce Specific Performance of Settlement Agreement, and the defendant countered by filing a Motion to Enforce a $750,000 Settlement. The trial court found that there was a mutual mistake of fact which rendered the settlement agreement with the $2,969 figure unenforceable. The trial court further ruled that

> because the mistake was initiated by the defendant, the plaintiff shall have the option of taking the structured settlement of $400,000.00 in cash and a monthly payment for life, twenty years guaranteed, at a sum which can be purchased by defendant for $350,000.00 plus interest on $750,000.00 at the legal rate since July 1, 1994, or the plaintiff may elect to retry the case and receive an amount to be determined by the Court as damages for the expenses duplicated by the second trial.

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[4] As we understand Cruze's testimony, he is certain that the figure communicated to him on the phone was $2,969.

This interlocutory appeal followed.

II

This case is before us for a *de novo* review. The record comes to us accompanied by a presumption of correctness that we must honor unless the evidence preponderates against the trial court's findings. T.R.A.P. 13(d).

Although the motion filed by the defendant is entitled "Motion to Enforce a $750,000 Settlement," the defendant does not deny that the settlement offer made and accepted was Option No. 1, i.e., $400,000 plus $2,969 per month for life, 20 years guaranteed. Thus, it is clear that the remedy sought by the defendant is an equitable rescission, or, at a minimum, reformation of the settlement agreement. The defendant contends that all the parties were mistaken that the settlement package could be purchased by the defendant for $750,000, and that this "mutual mistake" rendered the settlement, as originally agreed upon, unenforceable.

It is the rule in Tennessee that "[t]o be the subject of correction, a mistake in an instrument must have been mutual or there must have been a mistake of one party induced by the fraud of the other." ***Kozy v. Werle,*** 902 S.W.2d 404, 411 (Tenn.App. 1995); ***Pierce v. Flynn,*** 656 S.W.2d 42, 46 (Tenn.App.

1983); *see also* ***City of Memphis v. Moore***, 818 S.W.2d 13, 16 (Tenn.App. 1991) ("To form the basis for the equitable remedy of reformation there must have been a mutual mistake or a mistake by one party induced by the other's fraud.") Since the defendant does not argue that the "mistake" was induced by Johnson or his counsel, our focus is on the other part of the rule, i.e., mutuality of mistake. In our judgment, the mistake here was not mutual, but rather unilateral in nature. It is true that Johnson and his counsel were advised by defendant's counsel that the cost to the defendant of each of the three settlement options would be $750,000. This "mistake," however, was clearly initiated and perpetuated by the defendant. Generally speaking, a unilateral mistake is insufficient to invalidate an otherwise valid compromise and settlement. ***City of Memphis***, 818 S.W.2d at 17; ***Mullins v. Parkey***, 874 S.W.2d 12, 15 (Tenn.App. 1992).

Both Johnson and his attorneys testified that they did not approach the settlement offer from a cost basis, but rather focused upon whether the lump sum amount and the monthly payments would be sufficient to satisfy Johnson's present and future needs. Attorney Lewis testified as follows:

> I never had a $750,000 offer. Seven hundred and fifty thousand was mentioned only once. That was when I was in the room with Mr. Johnson. And I said, "guys, if we can--if we're going to be able to tell Jim what he will get, I'm going to have to know how much in value this is." And they said, "seven hundred and fifty thousand." And [attorney Sharp] said, "they're saying they got this amazing deal from the structure company due

> to the fact that the interest rate had changed and some other things." And I never knew what those were.

To the extent that the offer was couched in terms of "up front" money and monthly payments, and that Johnson's focus was upon those numbers, the total cost of the settlement to the defendant was largely immaterial to Johnson. As Lewis testified, the primary reason they were concerned with the $750,000 figure was so that the attorneys' contingent fee could be calculated:

> Q: Did you make any assumption whether 750 would buy these packages or not?
>
> A: The thought never crossed my mind.
>
> Q: Now, why was the $750,000 information that you needed?
>
> A: I needed that to know what a third of what figure to take. That was our fee. That's the only reason.

We believe the fact that all of the parties were mistaken about the total cost to the defendant (where the offer did not consist of one lump sum but rather several structured settlement options) is insufficient to compel the conclusion that the settlement agreement should be rescinded or reformed. The plaintiff did not settle for $750,000; he settled for $400,000 lump sum and $2,969 per month for life, guaranteed for 20 years. The mistake in this case is that the defendant apparently intended for their counsel to propose an option with a $2,009.69 monthly payment rather than a $2,969 monthly payment. This mistake was entirely unknown to

the plaintiff until *after* this case had been concluded by settlement and the jury dismissed. There was no mutuality regarding this mistake. It was a unilateral mistake on the part of the defendant.

The defendant's reliance on the case of ***Vakil v. Idnani***, 748 S.W.2d 196 (Tenn.App. 1987), is misplaced. In the ***Vakil*** case, the court granted reformation of a real estate deed where the deed erroneously placed additional monetary obligations on the buyer, making the effective total price of the real property $600,000. *Id.* at 199. It was undisputed, and the sellers frankly admitted, that the parties had previously agreed to and contracted for a total price of $450,000. *Id.* In the case at bar, however, there was no contradictory prior agreement, but rather an offer, albeit an incorrectly presented one, which was duly accepted. ***Vakil*** is readily distinguishable from the present case.

The defendant also asserts that the $2,969 monthly payment figure was so clearly and palpably erroneous on its face that Johnson should be considered to have been put on notice of its existence. In so arguing, the defendant attempts to analogize the present facts to those in the case of ***Cofrancesco Const. Co. v. Superior Components, Inc.,*** 371 S.W.2d 821 (Tenn.App. 1963). In the ***Cofrancesco*** case, the contractor defendant, Cofrancesco, accepted bids for a construction job which required roughly 25,000 board feet of lumber. *Id.*

Cofrancesco received two bids on the lumber; one was for $4,015.50, and the other, the one at issue in the case, was for $1,310. *Id.* at 822. It was shown that the "low" bidder, Superior Components, Inc. had made a clerical error of $4,000 in the bid, and the correct bid should have been $5,310. *Id.* at 823.

The ***Cofrancesco*** court provided the following rationales for allowing reformation of the contract:

> Cofrancesco, though it did not participate in or cause Superior's mistake, had good reason to believe, in our opinion, that Superior had made a mistake in its bid quotation as (1) the bid of Buttram-Graves Lumber Company, which was under consideration at the same time as the Superior bid, quoted the cost of #1 yellow pine decking at a price more than 3 times the quoted price of Douglas Fir, normally a more expensive lumber; (2) Cofrancesco, of necessity, had figured the amount of roof decking needed and its cost in order to make its original contract with the church; and (3) the quoted price of the #1 Douglas Fir quoted by Superior was so out of proportion to its actual cost, or for that matter the cost of any lumber, that Cofrancesco, as an experienced contracting firm, should have been put on notice that something was wrong.

Id. at 824. As is apparent from the above quotation, the ***Cofrancesco*** court was presented with a much more compelling factual case for reformation than are we. There are no facts in the present case analogous to the three factors described above, and relied upon by the ***Cofrancesco*** court, and we therefore find that case distinguishable.

As was frankly admitted by Johnson's attorneys at the hearing below, there is a fairly clear discrepancy between the monthly payment figures in the three presented options *if* one engages in the appropriate mathematical analysis. *In this case, none of the attorneys involved in this case, including defense counsel, made a mathematical analysis of the three options in terms of what each structured settlement would cost*. Futhermore, we do not think the error, i.e., that the monthly figure should have been $2,009.69 instead of $2,969, is so obvious on the face of the three options that Johnson should be held to constructive knowledge of it. In the first place, we have the sworn and unequivocal testimony of all three of Johnson's then-attorneys, of Johnson himself, and of his father, that the possibility of error in the settlement offer was never discussed or even considered by any of them. We are not inclined to lightly disregard this uncontradicted testimony. Second, and more importantly, the defendant's assertion that the error is so obvious on its face that it should have been immediately noticed is seriously undermined by the fact that the defendant's *own* attorneys received, documented and relayed the numbers without ever questioning them or suspecting that an error had occurred.

We are certainly not without sympathy for the plight of the defendant, for there is now little doubt that a mistake was made on their side of the settlement negotiations. However, as between the two parties, it seems equitable that the party who initiated and perpetuated the error should bear the

responsibility for it. The following words of the Supreme Court, written over a century ago, are appropriate here:

> It seems to be well settled, that, if a party innocently misrepresents a material fact by mistake, upon which another is induced to act, it is as conclusive a ground of relief in equity, as a willful and false assertion, for it operates as a surprise and imposition on the other party. In such a case, the party must be held to his representations.

Bankhead v. Alloway, 46 Tenn. 56, 75 (1868). Also appropos here are the words of this court taken from the case of ***Pipkin v. Lentz***, 354 S.W.2d 87:

> The Courts should not assume a paternalistic role when the rights of persons who are sui juris are involved.

Id. at 92.

We find and hold that the evidence preponderates against the trial court's determination that a *mutual* mistake occurred in the parties' settlement negotiations.

The judgment of the trial court is reversed. This case is remanded to the trial court for the entry of an order enforcing a settlement of the underlying tort action for $400,000, and $2,969 per month for life, guaranteed for 20 years. Exercising our discretion, the plaintiff-appellant is awarded pre-judgment interest of 10% per annum on the $400,000 front-end

payment from and after June 16, 1994, the thirtieth day following the settlement. Costs on appeal are taxed and assessed to the Appellee.

Charles D. Susano, Jr., J.

CONCUR:

Houston M. Goddard, P.J.

Herschel P. Franks, J.