

No. 41866-5-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

EDWARD H. PIETZ, d/b/a EP PROPERTIES,

Respondent,

Vs.

ROBERT T. FIREBAUGH

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF CLARK COUNTY

Cause No. 09-2-04603-8

OPENING BRIEF OF APPELLANT

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WSB #17283

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**A. THE TRIAL COURT ERRED WHEN IT DENIED THE MOTION TO VACATE THE
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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to vacate the Confession of Judgment.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it denied appellant's motion to vacate the Confession of Judgment when it was void as it was based upon mutual mistake? (Assignments of Error #1)

III. STATEMENT OF THE CASE

A. Procedural History

On February 12, 2009, respondent filed a civil complaint against appellant, Robert Firebaugh, for a variety of claims alleging misappropriation of funds from respondent. CP 1-8. On or about December 13, 2010, Mr. Firebaugh entered into a Confession of Judgment to the complaint. CP 17-29.

On January 27, 2011, Mr. Firebaugh filed a motion to stay enforcement of the judgment and a motion to vacate the Confession of Judgment and filed a declaration. CP 30-71, 72-76, 77-78.

The respondent filed a memorandum in opposition as well as a declaration. CP 79-116, 117-125. On February 4, 2011, after argument, the court denied the motion. CP 131-32. Mr. Firebaugh appealed the court's decision on March 7, 2011.

B. Facts

As set forth within the Confession of Judgment, Mr. Firebaugh admitted to all of the allegations contained within the complaint, and, further, he waived any defenses and counterclaims raised in defense to the claims. CP 17-29.

Importantly, the Confession of Judgment stated "this document is for the purposes of settling and resolving all the civil claims herein and

shall not be admissible for any other purpose or as an admission of liability in any other case, pursuant to the Rules of Evidence in any other proceeding . . .” CP 20. Further, the Confession of Judgment stated that defendant “expressly reserves the right to assert any and all defenses he may have against Edward Pietz and EP Properties in and only in the event that any criminal prosecution is commenced against him arising out of the facts of this case.” CP 20.

At the time the Confession of Judgment was entered, the following colloquy occurred between the court and Mr. Firebaugh:

Judge: Mr. Firebaugh, raise your right hand. Do you solemnly swear or affirm the testimony you’re about to give is the truth, the whole truth and nothing but the truth?

Robert Firebaugh: Yes I do.

Judge: And have you had the opportunity to go over these terms and conditions of the Confession of Judgment?

Robert Firebaugh: Yes sir.

Judge: Do you understand their content?

Robert Firebaugh: Not fully but yes.

Judge: You’ve read it?

Robert Firebaugh: Yes.

Judge: You’ve read it and it’s been explained to you by your attorney?

Robert Firebaugh: Yes.

RP 13:18-14:10. Because of a concern that respondent's counsel raised regarding Mr. Firebaugh's understanding of this document, the following discussion occurred:

Doug Foley: Well when he says he doesn't fully understand, I want to make sure that he's not asserting or suggesting that he has a defense because he's not comprehending the document and I – maybe if the court would inquire about that statement.

Judge: Again, you have – you understand what this involves? You understand you're bound by this agreement?

Robert Firebaugh: Yes.

Judge: And you may not understand the Rules of Evidence but you understand the contents contained in here about your obligations and your admission as to the liability?

Robert Firebaugh: Yes.

RP 14:21-15:11. After the colloquy, the court signed the Confession of Judgment. RP 14:25-15:1.

IV. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT DENIED THE MOTION TO VACATE THE CONFESSION OF JUDGMENT PURSUANT TO CR 60(b)(1), (5) AND (11).

CR 60(b), upon motion, allows the court to relieve a party from a final judgment pursuant to the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in paying a judgment or order; . . .
- (5) The judgment is void; and . . .
- (11) Any other reason justifying relief from the operation of the judgment.

CR 60(b)(1),(5) and (11). For the court to entertain a motion to vacate, it must be supported by the affidavit of the applicant or his attorney and set forth facts constituting a defense to the action or proceeding. CR 60(c)(1).

Here, the facts set forth by Mr. Firebaugh establish why the trial court should have granted the motion. The Confession of Judgment sought to preclude its admissibility against Mr. Firebaugh in a criminal prosecution while preserving defenses for Mr. Firebaugh if charged with crimes arising from the claims made in the civil case.

Any suggestion that the Confession of Judgment, as an agreement, benefited Mr. Firebaugh by preserving to him any defenses if Mr. Firebaugh was criminally charged is flawed. Counsel is unaware of any evidence rule or statute that would preclude the State from admitting this document, pursuant to ER 801(d)(2) as an admission, against Mr. Firebaugh.

The manner in which this can be analogized would be under the collateral estoppel or res judicata rules. As this court is aware, for either of those doctrines to apply, four factors must be analyzed, the first being that the persons and parties to the litigation must be identical. Pederson v.

Potter, 103 Wn.App. 62, 72, 11 P.3d 833 (2000) (res judicata requires that both causes of action have identity in persons and parties).

Here, no identity of persons and parties is met because the State of Washington was not a party to the civil litigation and would not be bound by anything the civil litigants agreed to in the civil case. As such, nothing within the pleading binds the State from using this Confession of Judgment as an admission of liability in the criminal case. Further, given the language of the Confession of Judgment and the contemplated limitation on its use in a criminal case, it was based upon a mutual mistake.

When raising the defense of mutual mistake, the party seeking to rescind an agreement “must show by clear, cogent and convincing evidence that the mistake was independently made by both parties. Beaver v. Estate of Harris, 67 Wn.2d 621, 409 P.2d 143 (1965); Carson v. Isabel Apartments, Inc., 20 Wn.App. 293, 296, 579 P.2d 1027 (1978).” Chemical Bank v. Washington Public Power Supply System, 102 Wn.2d 874, 691 P.2d 524 (1984).

A mistake is a belief not in accord with the facts. Restatement (Second) of Contracts § 151 (1981).

Restatement (Second) of Contracts § 152 (1981) notes that a contract is voidable for mutual mistake when

(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

(2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.

Id. Significantly, however, no evidence exists that, aside from reading this document, Mr. Firebaugh had any understanding of this document's legal effect, particularly with regard to its use in a criminal prosecution.

As set forth by Mr. Firebaugh's declaration, he had no concept or understanding of what he was doing despite what he said to the judge. CP 74-76. Further, Mr. Firebaugh respectfully urges that despite the language in the Confession of Judgment, this document is clearly admissible in a criminal prosecution, and no language in the document precludes the State from admitting this document against Mr. Firebaugh as an admission. The State was not a party to the Confession of Judgment, and, therefore, was not bound by its contents.

Respectfully, the trial court should have granted the motion to vacate the Confession of Judgment based upon mutual mistake as both parties asserted that the Confession of Judgment could not be used in a criminal case, and Mr. Firebaugh could raise defenses to a criminal charge. Clearly, both parties were mistaken. As a result, the trial court erred when it denied the motion as the court should have determined that, based upon the mutual mistake, the Confession of Judgment was void. As such, pursuant to CR 60(b)(1) and (5) this court should vacate the judgment.

Further, in the interest of justice, and pursuant to CR 60(b)(11), and given Mr. Firebaugh's lack of understanding of the legal effect of the Confession of Judgment and its admissibility in a criminal case, the trial court should have also vacated the Confession of Judgment on this independent basis, and re-set this matter for trial.

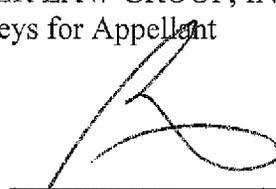
V. **CONCLUSION**

Based upon the aforementioned, Mr. Firebaugh respectfully urges this Court to reverse the trial court's order denying the motion to vacate the entry of the Confession of Judgment and remand this matter for trial.

Respectfully submitted this 8th day of August, 2014.

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant

By:



Brett A. Purtzer
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CERTIFICATE OF SERVICE

Kathy Herbstler, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the opening brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Robert Firebaugh
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Signed at Tacoma, Washington, this 8th day of August, 2014.



Kathy Herbstler

HESTER LAW OFFICES

August 08, 2014 - 4:13 PM

Transmittal Letter

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Comments:

No Comments were entered.

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