SUMMARY
March 24, 2022

2022COA36

No. 21CA1757, *Hale v. Se. Colo. Power Ass'n* — Courts and Court Procedure — Award of Actual Costs and Fees When Offer of Settlement Was Made — Statutory Offers; Contracts — Mutual or Unilateral Mistake

In this interlocutory appeal, a division of the court of appeals considers whether a trial court is precluded by *Centric-Jones Co. v. Hufnagel*, 848 P.2d 942 (Colo. 1993), from recognizing, and taking action with respect to, a mistake in an offer of settlement made pursuant to section 13-17-202, C.R.S. 2021, after the offer has been accepted but before a judgment has been entered. The division concludes that the answer is "no." Specifically, the division concludes that, pursuant to section 13-17-202(1)(a)(IV), a court need not enforce a settlement agreement as written and may instead apply common law contract principles to alter, modify, or decline to enforce the agreement.

COLORADO COURT OF APPEALS **2022COA36**

Court of Appeals No. 21CA1757
Baca County District Court No. 20CV30001
Honorable Mike Davidson, Judge

Marjorie Mundell Hale; Justin Mundell, as Co-Trustee of the Sandra Kay Mundell Administrative Trust UAD June 19, 2013, Created Under the Sandra Kay Mundell Revocable Trust Dated June 19, 2013; Clinton Mundell, as Co-Trustee of the Sandra Kay Mundell Administrative Trust UAD June 19, 2013, Created Under the Sandra Kay Mundell Revocable Trust Dated June 19, 2013; Justin Mundell, as Personal Representative of the Estate of Sandra Kay Mundell, Deceased; and Clinton Mundell, as Personal Representative of the Estate of Sandra Kay Mundell, Deceased,

Plaintiffs-Appellees,

v.

Southeast Colorado Power Association,

Defendant-Appellant.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division A
Opinion by JUDGE RICHMAN
Navarro and Yun, JJ., concur

Announced March 24, 2022

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¶ 1 To encourage settlement in civil cases, a Colorado statute provides that a plaintiff who makes a written offer of settlement more than fourteen days before trial that is rejected by the defendant is entitled to recover his actual costs incurred after making the offer, so long as he recovers a final judgment greater than the amount offered. § 13-17-202(1)(a)(I), C.R.S. 2021. It works the other way, too: a defendant is entitled to recover his post-offer actual costs when he makes a timely offer that is rejected by the plaintiff and the plaintiff does not recover a final judgment greater than the amount offered. § 13-17-202(1)(a)(II). We refer to such offers as "statutory offers."

¶ 2 In this C.A.R. 4.2 interlocutory appeal, we have been asked to decide whether a court has authority to recognize, and take action with respect to, an alleged mistake in a statutory offer after the offer has been accepted but before a judgment has been entered. As we will explain, the answer is "yes." Accordingly, we reverse the district court's order and remand the case for further proceedings.

I. Background

¶ 3 In 2018, the Badger Hole Fire burned tens of thousands of acres in southeastern Colorado, including property owned by the

plaintiffs: a 7,800-acre ranch (the Ranch) and a separate, 200-acre parcel (the Hale Property). The plaintiffs are Marjorie Mundell Hale (Hale), the Sandra Kay Mundell Revocable Trust (the Trust), and the Estate of Sandra Kay Mundell (the Estate).[1] Hale and the Trust own equal undivided interests in the Ranch, while Hale alone owns the Hale Property. In 2020, they sued the defendant, Southeast Colorado Power Association (SECPA), alleging that its negligence caused the fire. (The Estate is a party because it claims that Sandra Kay Mundell paid for certain repairs to the Ranch.) In 2021, the parties proceeded to mediation.

¶ 4 When mediation proved unsuccessful, SECPA served the plaintiffs with the following offers, which it explained were being made "pursuant to C.R.S. 13-17-202":

> 1. To Plaintiffs JUSTIN MUNDELL AND CLINTON MUNDELL, AS CO-TRUSTEES OF THE SANDRA KAY MUNDELL ADMINISTRATIVE TRUST UAD JUNE 19, 2013, CREATED UNDER THE SANDRA KAY MUNDELL REVOCABLE TRUST DATED JUNE 19, 2013; and JUSTIN MUNDELL AND CLINTON MUNDELL, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF

[1] The Trust and the Estate are both represented by Justin Mundell and Clinton Mundell, who serve as co-trustees of the Trust and co-personal representatives of the Estate.

> SANDRA KAY MUNDELL, DECEASED[,] Defendant offers the total sum of $1,241,677.00 plus court costs incurred to date. Said Offer of Settlement shall remain open for 14 days after service and if not accepted within that time, shall be deemed withdrawn.
>
> 2. To Plaintiff MARJORIE MUNDELL HALE, Defendant offers the total sum of $15,000.00 plus court costs incurred to date. Said Offer of Settlement shall remain open for 14 days after service and[] if not accepted within that time, shall be deemed withdrawn.[2]

¶ 5 The Mundells accepted the first offer, and Hale rejected the second. SECPA then filed a motion to enforce settlement, arguing that, based on the history of negotiations, the offers it made to the plaintiffs were clearly apportioned according to the claims in the case, with the larger dollar figure accounting for all claims arising out of damage to the Ranch — Hale's included — and the smaller dollar figure accounting for all claims arising out of damage to the

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[2] SECPA now contends that these offers were in fact *not* statutory offers because they do not adequately apportion settlement amounts among multiple plaintiffs, *see Taylor v. Clark*, 883 P.2d 569, 571 (Colo. App. 1994) ("[A]n unapportioned offer to multiple plaintiffs does not invoke the cost-shifting provisions of [section] 13-17-202."), but, as we explain below, the district court did not certify that issue for interlocutory review, and in any event SECPA concedes that, for purposes of our review, we can assume without deciding that the offers were statutory offers.

Hale Property, and the plaintiffs knew it, so the court should enforce the settlement agreement resulting from the first offer (that is, resolving all claims related to the Ranch) accordingly. The plaintiffs responded with a cross-motion to enforce settlement, arguing that the Mundells' acceptance of the first offer and Hale's rejection of the second created a binding settlement agreement between SECPA and the Mundells but not between SECPA and Hale. In effect, therefore, the plaintiffs argued that all of Hale's claims — those related to the Ranch and those related to the Hale Property — remained unresolved. What is more, they asserted that the agreement is clear and unambiguous and must be enforced without reference to any extrinsic evidence.

¶ 6 In a written order, the district court denied SECPA's motion and granted the plaintiffs' cross-motion, reasoning that Hale's name was "noticeably absent" from the first offer; that the Mundells accepted that offer; that granting SECPA the relief it sought would require the court to alter or modify the terms of the agreement; and that, according to *Centric-Jones Co. v. Hufnagel*, 848 P.2d 942 (Colo. 1993), the court lacked the power to do so.

¶ 7 SECPA then moved for reconsideration and, in the alternative, for certification of an interlocutory appeal, contending that it should not have to endure a costly trial on Hale's claims just to seek review of the court's order with respect to the Mundells. The court denied SECPA's motion for reconsideration but granted its motion for certification, concluding the following questions were appropriate for interlocutory review: (1) "Does [*Centric-Jones Co.*] permit [a] trial court to alter or modify a settlement offer made pursuant to C.R.S. § 13-17-202 based on [a] mistake in the drafting of the offer by the offeror?"; and (2) "Does [*Centric-Jones Co.*] permit enforcement of a purported settlement agreement pursuant to C.R.S. § 13-17-202 to be avoided on the grounds of mistake, excusable neglect, and/or lack of authority by the offering party's counsel?"

¶ 8 SECPA then filed a petition to appeal pursuant to C.A.R. 4.2. We granted the petition because we concluded that it satisfied the requirements for an interlocutory appeal. *See* C.A.R. 4.2(b) (listing the grounds for allowing an interlocutory appeal). We now address the merits of the appeal.

II. Analysis

¶ 9 To resolve the questions in this case, we begin by looking to *Centric-Jones Co.* and the language of section 13-17-202 as it existed when that case was decided. At the time, subsection (3) provided, in pertinent part, that

> [a]t any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer of settlement to the effect specified in his offer, with costs then accrued. If within ten days after the service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance, together with proof of service thereof, and thereupon the clerk shall enter judgment.

§ 13-17-202(3), C.R.S. 1992.

¶ 10 The dispute in *Centric-Jones Co.* concerned the following sequence of events. First, the defendants made a statutory offer to the plaintiffs. *Centric-Jones Co.*, 848 P.2d at 944. Eight days later, the trial court entered summary judgment in favor of one of the defendants, and the defendants immediately attempted to withdraw their offer. *Id.* at 945. Knowing of the summary judgment (and, perhaps, of the defendants' attempted withdrawal), the plaintiffs nonetheless accepted the defendants' offer within the ten-day period

specified in subsection (3) and moved for an order directing entry of judgment. *Id.* The trial court denied the plaintiffs' motion. *Id.*

¶ 11 Reviewing the case, our supreme court explicitly addressed two issues: (1) whether an offeror can withdraw a statutory offer within ten days of making it; and (2) whether a statutory offer is automatically revoked if, within those ten days, the trial court enters summary judgment in favor of the offeror. *Id.*

¶ 12 Rejecting both propositions, the court explained that "contract principles do not control this situation. An offer of judgment pursuant to section 13-17-202(3) is not a simple private offer of settlement. Rather, it invokes a special statutory process spelled out in clear and unambiguous language which can and should be enforced without engrafting contract principles onto it." *Id.* at 946. As for a trial court's role in the process, the court continued:

> The parties, not the court, are the players under the statute, and the operation of the statute takes place largely outside the aegis of the trial court. . . . The court . . . has no discretion to alter or modify the offer of judgment if accepted by the offeree, and the clerk must enter the judgment under the plain language of the statute.

Id. at 947.

¶ 13 Accordingly, the court held that "an offer under section 13-17-202(3) is both irrevocable and absolute for the ten-day statutory period" and remanded the case to the trial court with directions to enter judgment in favor of the plaintiffs. *Id.* at 948.

¶ 14 Two years later, in *Domenico v. Southwest Properties Venture*, 914 P.2d 390 (Colo. App. 1995), a division of this court addressed a different question regarding statutory offers: Can an erroneous offer that is accepted by the offeree be set aside under C.R.C.P. 60(b)? In *Domenico*, defense counsel sent the plaintiff's counsel an offer to settle for $25,000; the plaintiff accepted the offer; and the court entered a judgment pursuant to section 13-17-202(3). *Id.* at 391. The defendant then moved to set aside the judgment, asserting that the offer contained a clear typographical error and should have only been for $2,500. *Id.* Relying on *Centric-Jones Co.*, the plaintiff argued that, mistake or not, defense counsel's state of mind was irrelevant in light of the unambiguous offer, and section 13-17-202 did not authorize *post facto* revision of a settlement offer. *Id.* The trial court determined that the judgment could be set aside under C.R.C.P. 60(b). *Id.* at 392.

¶ 15 On appeal, the division agreed, reasoning that *Centric-Jones Co.* was not dispositive because "[n]either the question of the availability of C.R.C.P. 60(b)(1) to set aside a judgment entered under § 13-17-202(3) nor the asserted presence of a typographical error was before the court in [that case]." *Id.* at 393.

¶ 16 In the decades since *Centric-Jones Co.* and *Domenico*, section 13-17-202 has been amended significantly. Two such amendments are relevant to this case.

¶ 17 First, a little over a month after *Domenico* was decided, the General Assembly enacted Senate Bill 95-217, which removed much of the language from subsection (3) and, in its place, added language to subsection (1) providing for, among other things, the withdrawal of a statutory offer by an offeror and the automatic rejection of a statutory offer that is not timely accepted. Ch. 232, sec. 1, § 13-17-202, 1995 Colo. Sess. Laws 1194-95.

¶ 18 Then, in 2003, the General Assembly enacted House Bill 03-1121, which, in addition to changing the applicable time period from ten to fourteen days and providing for a more detailed definition of "actual costs," deleted the "clerk shall enter judgment" language from the statute and replaced it with the language found

in today's subsection (1)(a)(IV) stating that a timely accepted statutory offer "constitute[s] a binding settlement agreement, fully enforceable by the court in which the civil action is pending." Ch. 187, sec. 1, § 13-17-202, 2003 Colo. Sess. Laws 1359-60.

¶ 19 SECPA contends that these changes to section 13-17-202 render *Centric-Jones Co.* inapplicable to this case, and that because accepted statutory offers now constitute settlement agreements that are "enforceable" — i.e., they may, but need not, be enforced — a court is able to construe them using ordinary principles of contract law. It further contends that the logic of *Domenico* supports the conclusion that a trial court should be able to grant a party relief from an erroneous statutory offer, regardless of whether such relief is sought before or after a judgment has been entered. The plaintiffs, for their part, contend that the reasoning and analysis of *Centric-Jones Co.* survived the 2003 amendments to section 13-17-202, while the reasoning and analysis of *Domenico* did not.

¶ 20 We agree with SECPA.

¶ 21 The current version of section 13-17-202 does not include the language at issue in *Centric-Jones Co.* Thus, we conclude that *Centric-Jones Co.*'s pronouncements that (1) common law contract

principles do not apply to statutory offers, and (2) a court has no discretion to alter or modify an accepted statutory offer, based as they are on statutory language that no longer exists, are no longer applicable statements of law. Therefore, the outcome of this case turns on our interpretation of the current version of section 13-17-202, specifically our interpretation of subsection (1)(a)(IV).

¶ 22 We interpret statutes de novo. *Dep't of Nat. Res. v. 5 Star Feedlot, Inc.*, 2021 CO 27, ¶ 20. When interpreting a statute, our primary goal is to ascertain and give effect to the legislature's intent. *McCoy v. People*, 2019 CO 44, ¶ 37. To do so, we start with the language of the statute, giving its words and phrases their plain and ordinary meanings. *Id.* We read those words and phrases in context, giving consistent effect to all parts of the statute and construing each provision in harmony with the overall statutory design. *People v. Harrison*, 2020 CO 57, ¶ 17. If the language is clear and unambiguous, we apply it as written. *Id.* at ¶ 18.

¶ 23 Subsection (1)(a)(IV) is clear and unambiguous. To reiterate, it provides that a timely accepted statutory offer becomes a "settlement agreement" that is "fully enforceable" by the court. As a general matter, courts interpret settlement agreements, including

accepted statutory offers, according to common law contract principles. *St. Jude's Co. v. Roaring Fork Club, L.L.C.*, 2015 CO 51, ¶ 29; *see also Miller v. Hancock*, 2017 COA 141, ¶ 35 ("We interpret the meaning of a statutory offer of settlement de novo, applying ordinary principles of contract interpretation."); *Bumbal v. Smith*, 165 P.3d 844, 845-46 (Colo. App. 2007) (construing the meaning of the phrase "all claims" in a statutory offer). And we see no reason why disputes about the *enforceability* of an accepted statutory offer based on mistake, excusable neglect, or lack of authority should not also be subject to common law contract principles. *See Yaekle v. Andrews*, 195 P.3d 1101, 1107 (Colo. 2008) (noting "the long-standing common law rule that a settlement agreement can be governed by and found enforceable under common law contract principles"). Accordingly, courts are free to apply common law contract principles when determining whether an accepted statutory offer is enforceable.[3]

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[3] Among such principles is that an agreement may be avoided or reformed due to the unilateral mistake of a contracting party. *See Sumerel v. Goodyear Tire & Rubber Co.*, 232 P.3d 128, 135-36 (Colo. App. 2009) (explaining that, in general, a mistaken party can avoid a contract when his mistake was material and either known by the

¶ 24 Further, our conclusion is consistent with the logic of *Domenico*. If a party can seek to set aside a judgment based on an erroneous statutory offer, it makes little sense to force a party to go to trial before seeking what is, in effect, the same relief.

¶ 25 We are not, as the plaintiffs suggest, required to reach a different conclusion because of *Morgan v. Genesee Co.*, 86 P.3d 388 (Colo. 2004). While we recognize that *Morgan* — which was announced after the 2003 amendments to section 13-17-202 — quotes from *Centric-Jones Co.* to support the proposition that "a trial court has a small role in the offer of settlement process," *Morgan*, 86 P.3d at 393, it is not clear to us which version of the statute the court was construing. On the one hand, the opinion cites to the then-current version of the statute, which included the 2003 amendments. *Id.* On the other hand, it is the pre-2003 version of the statute that applied in the case because the case was commenced before the amendments became effective. *See id.* at

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other party or was of such character and accompanied by such circumstances that the other party had reason to know of it); *see also Poly Trucking, Inc. v. Concentra Health Servs., Inc.*, 93 P.3d 561, 563 (Colo. App. 2004) ("Reformation is generally permitted when . . . one party made a unilateral mistake and the other engaged in fraud or inequitable conduct.").

390; Ch. 187, sec. 2, § 13-17-202, 2003 Colo. Sess. Laws 1360 ("This act shall take effect July 1, 2003, and shall apply to actions commenced on or after said date."). In either instance, however, *Morgan* does not apply the reasoning of *Centric-Jones Co.*

¶ 26 Moreover, given the court's conclusion that the purported statutory offer in *Morgan* was not a statutory offer at all, 86 P.3d at 393, we conclude that the language quoting from *Centric-Jones Co.* is dicta. *See People v. Vigil*, 127 P.3d 916, 934 (Colo. 2006) (defining "dicta" as statements that are "not essential" to a case's holding); *accord* Black's Law Dictionary 569 (11th ed. 2019) (defining "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential . . . ."). Therefore, *Morgan* has no precedential value in this case.

¶ 27 Returning, finally, to the questions certified by the district court, we answer them as follows: (1) *Centric-Jones Co.* does not forbid a trial court from altering or modifying an accepted statutory offer based on a mistake in the drafting of the offer by the offeror; and (2) *Centric-Jones Co.* does not forbid a trial court from declining

to enforce an accepted statutory offer based on mistake, excusable neglect, or lack of authority.

III. Conclusion

¶ 28 The district court's order granting the plaintiffs' cross-motion to enforce settlement is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUDGE NAVARRO and JUDGE YUN concur.