Filed 3/1/17 National Fire Ins. Co. etc. v. Great American Ins. Co. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,

Plaintiff and Respondent,

v.

GREAT AMERICAN INSURANCE COMPANY,

Defendant and Appellant.

2d Civil B264238
(Super. Ct. No. CIV236710)
(Ventura County)

This is a dispute between two insurance companies, National Fire Insurance Company of Hartford (National Fire) and Great American Insurance Company (Great American), over the interpretation of a written Tender Agreement. The parties disagree over whether the Tender Agreement required Great American to defend and indemnify certain claims asserted by Sysco Corporation (Sysco). In a prior appeal, we concluded the Tender Agreement is ambiguous and that triable issues of

material fact as to the parties' intent precluded the trial court's grant of summary adjudication in Great American's favor. (*National Fire Ins. Co. of Hartford v. Great American Ins. Co.* (Jan. 24, 2012, B225270) [nonpub.] (*National Fire I*).)

On remand, the trial court independently determined that portions of the Tender Agreement are ambiguous and impaneled a jury to resolve those ambiguities. The jury construed the Tender Agreement in National Fire's favor, awarding it $3.5 million in damages, representing monies National Fire paid to settle a lawsuit brought against it by American Guarantee & Liability Insurance Company (American Guarantee) on Sysco's behalf. Great American argues that the evidence is insufficient to support the verdict and that the court erred by denying its motion for judgment notwithstanding the verdict (JNOV) or, alternatively, its motion for new trial. We conclude substantial evidence supports the jury's verdict and affirm.

FACTS AND PROCEDURAL BACKGROUND[1]

National Fire and Great American were the primary and excess insurers of Castellini Company (Castellini), a wholesale supplier of food products. The National Fire policy had limits of $1 million per occurrence and $2 million in the aggregate. Great American's policy was an umbrella policy with limits of $20 million per occurrence and in the aggregate.

In 2003, an outbreak of Hepatitis A occurred in Pennsylvania injuring or killing more than 600 people. The source of the outbreak was traced to green onions used by Chi-

[1] We take portions of the facts and procedural background from our opinion in *National Fire I*, *supra*, B225270, slip opn. at pages 2-5.)

Chi's Mexican restaurant (Chi-Chi's). The onions were grown in Mexico and shipped to Californian growers, who sold them to Castellini. Sysco, a distributor of food products to restaurants, delivered the onions to Chi-Chi's.

As a result of the outbreak, Chi-Chi's received hundreds of bodily injury claims. Chi-Chi's tendered these claims to its own insurance carriers and to the insurers of Sysco and Castellini. Castellini, in turn, tendered the claims asserted against it to National Fire and Great American. National Fire, as the primary insurer, assumed Castellini's defense subject to a reservation of rights. It further determined that Sysco was an "additional insured" under the National Fire policy (also known as the "CNA policy").

Tender Agreement

After months of negotiations, on November 30, 2005, National Fire sent an e-mail to Great American in which National Fire offered to pay $1,250,000 in exchange for Great American's agreement to take over the defense and indemnity of the "Chi-Chi's claims." The e-mail (trial exhibit (TE) 53), which was sent by National Fire's claims counsel, Wendy E. Witten, stated in full:[2]

"This will confirm our *ongoing discussions* regarding National Fire Insurance Company of Hartford ('CNA') offer to tender the primary limits of its policy in effect from September 1, 2003 to September 1, 2004 with regard to the *claims against Castellini* stemming from the Hepatitis A outbreak at the Beaver County, Pennsylvania Chi-Chi's restaurant (collectively the '*Chi-Chi's claims*'). As you know we have differing opinions on the

[2] For ease of reference, the specific terms the trial court found ambiguous on remand are in italics.

number of occurrences that exist as to the *Chi-Chi's claims*. This offer is made in order to compromise and resolve that issue and to allow Great American to take over and direct the ongoing defense of the *Chi-Chi's claims*, the majority of which are now asserted as subrogation and contribution actions by Chi-Chi's carriers against Castellini and its suppliers and proceeding in Ventura County, California state court.

"For the above reasons, and those set forth in *Sean Hanifin's letter* to Peter Whalen dated August 25, 2005, and based on our *ongoing discussions*, CNA hereby tenders - and Great American has indicated it will accept - $1,250,000.

"We agree that this tender is limited to and encompasses the entire remaining limits of primary coverage available to Castellini for claims arising out of the Pennsylvania Hepatitis A outbreak, whether those claims are asserted by injured patrons of Chi-Chi's, by Chi-Chi's directly, by any of Chi-Chi's carriers seeking subrogation, contribution or indemnity, or by *any other entity claiming the benefit of said primary coverage*.

"It is agreed that this payment will exhaust the available primary coverage for the *Chi-Chi's claims*, thereby removing CNA from any ongoing defense obligations arising out of the *Chi-Chi's claims* from the date of payment of the tender.

"CNA will pay defense fees and costs incurred for Castellini, and will also resolve those claims for reimbursement of defense cost and expenses for any entity which CNA has accepted as an 'additional insured' under its primary policy, until the date Great American receives CNA's payment. It is understood that Great American may have different opinions with regard to coverage for various entities seeking additional insured status by contract or under its policy.

"CNA will not agree to any settlements, make or authorize any settlement offers or be involved in any settlement discussions, other than settlements as to which binding agreements already have been reached ($90,500 have been paid in settlements to date). Please note that several claims are presently scheduled to be mediated with codefendant suppliers in Pittsburgh on December 20, 2005. You may wish to contact defense counsel Gary Becker to discuss how you wish to proceed at those mediations.

"Claims stemming from the Hepatitis A outbreak at the Knoxville, Tennessee O'Charley's restaurant (the 'Tennessee claims') are not part of this proposal. CNA will continue to provide defense and indemnity to Castellini for the Tennessee claims until such time as those claims are resolved, or in the event they exhaust the remainder of the $1 million 'each occurrence' limit applicable there.

"Please respond with your acceptance of this offer, and we will arrange for payment, and advise the necessary parties accordingly."

Ellen Biondo of Great American e-mailed her reply: "Agreed." National Fire paid Great American the negotiated sum of $1,250,000.

Pre-Remand Proceedings

Chi-Chi's and its insurance carriers paid tens of millions of dollars in damages to settle claims and lawsuits arising out of the outbreak. Thereafter, they filed a lawsuit in Ventura County Superior Court against Castellini, Sysco and others. Chi-Chi's also initiated arbitration proceedings against Sysco in Pennsylvania in 2005. That arbitration resulted in an award against Sysco in the sum of $50,472,801.91.

In May 2008, American Guarantee, one of Sysco's insurance carriers, filed a complaint in intervention against Castellini, National Fire and Great American in the Ventura lawsuit, seeking contractual and equitable indemnity and other relief. National Fire responded by filing a cross-complaint against American Guarantee, Castellini and Great American. American Guarantee subsequently settled with Great American and dismissed it from the action. American Guarantee continued to pursue National Fire for over $900,000 in indemnity and at least $10 million in defense and supplementary payments for its alleged breach of duty to Sysco.

National Fire filed summary judgment motions against American Guarantee and Great American contending that it had discharged its duties to defend and indemnify Sysco through its Tender Agreement with Great American. American Guarantee and Great American responded by filing summary judgment motions against National Fire contending that the Tender Agreement did not relieve National Fire of its duties of defense and indemnification.

Shortly thereafter, American Guarantee and National Fire settled American Guarantee's claims for $3.5 million. The trial court subsequently granted Great American's motion for summary adjudication on all but one of the causes of action in National Fire's cross-complaint. Once that cause of action was resolved, National Fire appealed, contending the trial court erred as a matter of law by construing the Tender Agreement in Great American's favor.

In January 2012, we reversed the trial court's judgment and remanded the matter for further proceedings regarding the meaning of the Tender Agreement. (*National Fire*

I, supra, B225270, slip opn. at p. 9.) We concluded that "[t]he scope and effect of the Tender Agreement depend for resolution on the weight and credibility to be given to conflicting extrinsic evidence." (*Ibid.*)

Post-Remand Proceedings

On remand, the trial court followed the two-step process set forth in *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39-41, and *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165 (*Winet*). Under Step 1, it held a court trial to identify the ambiguities in the Tender Agreement. National Fire argued the Tender Agreement was comprised of three documents (TE 40, 51 and 53) under which Great American assumed obligations to defend and indemnify Sysco under the National Fire policy. Great American maintained that the Tender Agreement was TE 53 alone and, by its express terms, contained no agreement by Great American to assume duties to Sysco under the National Fire policy; the only promise made by Great American was to immediately assume the defense of Castellini under Great American's policy.

The trial court determined that the Tender Agreement was comprised of TE 53 alone, that it was not integrated, and that its terms are ambiguous: "With respect to the agreement, there is language which is not very well defined, explained or clarified when TE 53 is read as a whole, e.g., 'This will confirm our ongoing discussions. . .', 'For the above reasons, and those set forth in Sean Hanifin's letter . . .', '. . . or by any other entity claiming the benefit of said primary coverage', and 'Chi-Chi's claims'. The provisionally accepted parol evidence is extensive and includes the declarations and depositions of a number of employees of both companies who were . . . involved in

the negotiations of the Tender Agreement and correspondence between the parties. The court does not weigh such evidence but looks at it with the goal of determining whether or not it supports a reasonable interpretation proposed by the respective parties. In other words, could reasonable people differ on the meaning or interpretation of the contract in light of the evidence. The court finds that [the] Tender Agreement is reasonably susceptible of the different interpretations proffered by the parties. Accordingly, it will be the function of [the] jury [in Step 2] to determine the weight and credibility of conflicting extrinsic evidence properly admitted into evidence in support of the two interpretations in order to determine the intent of the parties at the time the contract was executed."

The jury returned a verdict in National Fire's favor on its breach of contract claim. Relevant to this appeal are Questions 1 and 4 of the special verdict, which asked "1. In the Tender Agreement (TE 53), did Great American Insurance Company ('Great American') agree to accept the duty to defend and indemnify Sysco under the National Fire Insurance Company ('CNA') policy?" and "4. Did Great American fail to do something that the Tender Agreement (TE 53) required it to do?" The jury answered "yes" to both questions and awarded National Fire $3.5 million in damages.

Great American moved for JNOV and new trial, contending that the evidence did not support the verdict and that certain errors warranted a new trial. The trial court found that substantial evidence supported the verdict and denied both motions. It observed that "[b]oth Ms. Biondo and Ms. Witten gave lengthy testimony at trial. In addition, each party placed into evidence testimony from other witnesses and numerous

documents, including (but not necessarily limited to) letters, emails, and insurance policies. Counsel were afforded sufficient latitude to examine, cross-examine and argue their respective positions. The jury was presented a plethora of evidence and all counsel did a highly professional and commendable job in explaining to the jury how the evidence supported their respective client's position and not that of their opponent."

DISCUSSION

On appeal, Great American contends substantial evidence does not support the jury's finding that the parties intended for Great American to assume National Fire's contractual obligations to Sysco as well as those to Castellini. We conclude otherwise and affirm.

Standard of Review

In interpreting a contract, a court must "give effect to the mutual intention of the parties as it existed at the time of contracting." (Civ. Code, § 1636.) If a contract is in writing, that intention must be determined from the written language alone, if possible. (*Id.,* § 1639.) In certain circumstances, parol evidence can be admitted to interpret an ambiguous written agreement. (*Winet*, *supra*, 4 Cal.App.4th at p. 1165.) The test of whether parol evidence is admissible to construe ambiguous language is not whether the language appears to a court to be unambiguous, but whether parol evidence is relevant to prove a meaning to which the language is reasonably susceptible. (*Ibid.*)

The trial court's threshold determination of "ambiguity," i.e., whether contract language is reasonably susceptible to a given interpretation, is a question of law subject to independent review on appeal. (*Winet*, *supra*, 4 Cal.App.4th at p. 1165.) The second step, the ultimate construction of a contract,

is subject to differing standards of review depending on the parol evidence used to interpret the contract. When competent extrinsic evidence is in conflict, a reasonable construction of an agreement by the jury will be upheld so long as it is supported by substantial evidence. (*Id.* at pp. 1165-1166; *Curry v. Moody* (1995) 40 Cal.App.4th 1547, 1552-1553.) However, when no parol evidence is introduced or when the competent parol evidence does not conflict, the construction of a contract presents a question of law, subject to independent review. (*Winet*, at p. 1166.)

Great American contends that our review of the jury's construction of the Tender Agreement is de novo because the parol evidence that was introduced at trial on the ambiguous terms does not conflict. National Fire maintains that we resolved this issue in *National Fire I* and, consequently, our decision is law of the case. National Fire is correct.

"Under the law of the case doctrine, when an appellate court "'states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout [the case's] subsequent progress, both in the lower court and upon subsequent appeal.'"" (*People v. Barragan* (2004) 32 Cal.4th 236, 246.) Here, we determined, based on the voluminous extrinsic evidence submitted by the parties, that "the Tender Agreement is reasonably susceptible of different interpretations," and that "[t]he scope and effect of the Tender Agreement depend for resolution on the weight and credibility to be given to *conflicting* extrinsic evidence." (*National Fire I, supra,* B225270, slip opn. at p. 9, italics added.) Having already concluded the extrinsic evidence was conflicting, we reject Great American's argument to the contrary. (*Ibid.*)

Furthermore, the trial court reached the same conclusion in Step 1 of the trial. After reviewing the extensive trial exhibits and deposition testimony, the trial court confirmed what we had already determined, i.e., that the Tender Agreement was reasonably susceptible of the different interpretations proposed by the parties, and that "it will be the function of [the] jury to determine the weight and credibility of *conflicting* extrinsic evidence properly admitted into evidence in support of the two interpretations . . . ." (Italics added.) Moreover, Great American's counsel conceded during trial that "[t]he jury's role is to decide the factual issues as to the ambiguous terms," and the jury was specifically instructed that its "job will be to assist the court in deciding the meaning of those ambiguous terms by weighing the conflicting evidence presented by the parties."[3] We therefore review the jury's factual findings for substantial evidence. (*Winet*, *supra*, 4 Cal.App.4th at pp. 1165-1166.) Under this standard, we must resolve all conflicts in the evidence in favor of National Fire as the prevailing party and make all legitimate and reasonable inferences from the evidence to uphold the jury's findings if possible. (*In re Marriage of Bonds* (2000) 24 Cal.4th 1, 31, superseded by statute on another point as stated

---

[3] An example of the conflicting evidence is highlighted in Great American's opening brief. Great American notes that "Biondo testified that in all of her years in the insurance industry, she never heard of a primary insurer tendering its limits to an excess carrier with the expectation the excess would take over coverage under the primary's policy." In contrast, Witten testified, based on her 25 years of experience in the industry, that "it would be very unusual, and I haven't even heard of it, to tender limits and retain any obligations under the policy once you've delivered the policy to another entity."

in *In re Marriage of Cadwell-Faso & Faso* (2011) 191 Cal.App.4th 945, 958.)

Substantial Evidence Supports the Jury's Findings

We are satisfied that the record contains substantial evidence of the parties' intent to include Sysco's claims in the Tender Agreement. In making this determination, we have considered "objective manifestations of the parties' intent, including the words used in the [Tender Agreement], as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties." (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912; see *Meadows v. Lee* (1985) 175 Cal.App.3d 475, 483 ["The interpretation of a contract is often shown by the acts and conduct of the parties subsequent to the execution of the contract and prior to its controversy."].)

First, it is undisputed that at all times during the contract negotiation process, the parties agreed that Sysco was an additional insured under National Fire's policy and, as such, was entitled to a defense. Although Great American requested that the Tennessee green onion claims be carved out of the Tender Agreement, it did not do so with respect to Sysco's claims as an additional insured under the policy. Great American's failure to request exclusion of Sysco's claims suggests that the parties intended to include them in the tender of the policy limits, particularly since Great American also was aware of the arbitration involving Sysco and did not request its exclusion.

Great American relies on *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, for the proposition that the "failure to exclude the uncontemplated is not the equivalent

of substantial evidence supporting inclusion." (*Id.* at p. 658, fn. 19.) But in this instance, the possibility of having to defend and indemnify Sysco under the National Fire policy was not an uncontemplated event. Great American was aware that Sysco was an additional insured under the policy and that there was an ongoing arbitration involving Sysco. It is reasonable to infer, therefore, that these facts were contemplated by the parties during their negotiations.

Second, the parties' conduct after finalizing the Tender Agreement supports the jury's verdict. Shortly after the parties entered into the agreement, Hanifin, National Fire's coverage counsel, informed Krauss, Sysco's counsel, of its terms. Hanifin advised that Great American's acceptance of National Fire's "limits tender requires that [National Fire] absorb covered defense costs incurred prior to the date of tender: December 5, 2005." Hanifin further advised that "[w]ith respect to defense costs incurred subsequent to December 5, 2005, [National Fire] respectfully [requests] that Sysco/Sygma may wish to contact Great American, or other involved insurers, with respect to continued proceedings in this claim." This letter manifests National Fire's understanding that its obligations under the policy terminated upon payment of the $1,250,000 required under the Tender Agreement. Indeed, National Fire closed its file and heard nothing further about Sysco's claims until it received the demand from American Guarantee on Sysco's behalf in July 2007.

In addition, Witten sent an e-mail on December 5, 2005, to Whalen, Great American's counsel, and others, including Biondo, stating that National Fire "has tendered, and Great American has accepted, the primary policy limit for the Chi-Chi's

related claims." Witten explained that "[*t*]*his signals our departure from involvement with these cases, and Great American is, as of today, taking over the handling and management of the defense for the various pending matters*. *All further communications about the defense activities, direction, and progress of the Chi-Chis related lawsuits should be directed to Great American and/or its counsel*." (Italics added.) Witten noted that she was "happy to turn the reigns [sic] over," suggesting that she did not contemplate any further involvement relating to the Chi-Chi's claims, including any claims by Sysco. Biondo did not dispute any of Witten's statements, except to clarify that National Fire "will continue to defend the [Tennessee] litigation." At no time did Biondo mention that National Fire had a continuing obligation to defend and indemnify Sysco.

Third, the Tender Agreement lists four different categories of claimants, not just Castellini. It specifically states: "We agree that this tender is limited to and encompasses the entire remaining limits of primary coverage available to Castellini for claims arising out of the Pennsylvania Hepatitis A outbreak, whether those claims are asserted by injured patrons of Chi-Chi's, by Chi-Chi's directly, by any of Chi-Chi's carriers seeking subrogation, contribution or indemnity, *or by any other entity claiming the benefit of said primary coverage*." (Italics added.) A reasonable interpretation of this sentence is that the entities claiming the benefit of the primary coverage could include Sysco given its conceded status as an additional insured under the National Fire policy.

Fourth, early in the negotiation process, Witten forwarded to Biondo a tender proposal sent by Hanifin to Whalen regarding the "Chi Chi's Green Onions Matter." Hanifin's letter,

dated August 25, 2005, formalized National Fire's tender proposal to Great American. The proposed tender amount was $1,150,000 and stated, that upon acceptance of the tender, "Great American may resolve as it believes proper the assertions of entitlement to coverage by Chi Chi's and by Sygma/Sysco." The letter further stated: "CNA has paid all Castellini defense costs to date and will pay such costs through the date of tender to Great American. . . . Thereafter, Great American may address any future claims for policy benefits, whether from Chi Chi's, Sygma/Sysco or their insurers." Because the Tender Agreement specifically referenced the "ongoing discussions" between the parties, as well as Hanifin's letter to Whalen, the jury could reasonably have found that Great American had agreed to handle Sysco's assertion of an entitlement to coverage.

Fifth, Hanifin sent an e-mail to Whalen on October 24, 2005, in which he increased the tender offer to $1.5 million and stated that National Fire "will pay defense fees and costs incurred . . . , until the date Great American receives [National Fire's] payment" and confirmed that National Fire "will not agree to any settlements, make or authorize any settlement offers. In other words, [National Fire] will not be "involved in any settlement discussions, other than settlements as to which binding agreements already have been reached." The Tender Agreement contains virtually the same language regarding settlements. It is unlikely that National Fire would have agreed to forego further settlement discussions if it understood that it would continue to be liable to Sysco under its policy.

Sixth, the parties expressly discussed during their negotiations that "renewed demands by Sygma/Sysco" were one reason that National Fire would soon be required to fund

additional settlements. Both parties knew that if Chi-Chi's prevailed against Sysco in the arbitration over the Pennsylvania hepatitis outbreak, Sysco would demand that Castellini make it whole. Indeed, Witten advised Great American in an e-mail dated September 15, 2005, that "we believe it is in Castellini's best interests to participate in and control [the] defense [in the arbitration]."

Seventh, Great American's chief goal in entering into the Tender Agreement was to secure exclusive control over the handling of the Pennsylvania green onion claims because it believed National Fire's approach to defense and settlement of those claims was too lenient and was setting a "bad precedent" for future settlements of such claims. National Fire's main goal was to address the impossibility of settling so many serious injury claims within its relatively small primary limits. Both National Fire's and Great American's goals were furthered by execution of the Tender Agreement. Great American obtained control over the handling of the Pennsylvania claims and National Fire absolved itself from any further responsibility for the Chi-Chi's claims, including any claims by Sysco.

Finally, as National Fire points out, no evidence suggested that Great American expected National Fire would continue any involvement with the Pennsylvania green onion claims. On the contrary, the record discloses substantial evidence that both sides negotiated for National Fire's total exit from the defense and settlement of all claims for its primary insurance benefits, no matter who asserted such claims.

The Trial Court Properly Denied the Post-Trial Motions

A trial court may grant JNOV only if, when viewed in the light most favorable to the party in whose favor a verdict was

rendered, there is no substantial evidence to support the verdict. The trial court cannot weigh the evidence or judge witness credibility. If the evidence is conflicting or if reasonable inferences to support the verdict may be drawn from the evidence, the motion should be denied. (*Linear Technology Corp. v. Tokyo Electron Ltd.* (2011) 200 Cal.App.4th 1527, 1532.) We exercise independent review of the trial court's order denying JNOV. (*Ibid.*)

Here, the trial court determined after "carefully review[ing]" the evidence "that there is substantial evidence to support the jury's verdict." We reach the same conclusion.

Regarding the new trial motion, the trial court has broad discretion in ruling on the motion, and the court's exercise of that discretion is accorded great deference on appeal. (*Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872; *Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747.) We can reverse the denial of a new trial motion for insufficient evidence "'only if there is no substantial conflict in the evidence and the evidence compels the conclusion that the motion should have been granted.'" (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1416; accord *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752.)

The record reflects that the trial court appropriately weighed the evidence and credibility of the witnesses and ruled that there was sufficient evidence to support the jury's decision. (See *Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 215 ["When a trial court rules upon a motion for a new trial made upon the ground of insufficiency of the evidence, the judge is required to weigh the evidence and judge the credibility of witnesses"].)

Great American also contends the new trial motion should have been granted because National Fire judicially admitted that the National Fire policy was exhausted, and because the trial court's admission of Witten's subjective intent in entering into the Tender Agreement prejudicially tainted the trial. We reject both contentions.

With respect to exhaustion, Great American maintains that if National Fire was bound by its prior admission that its policy was exhausted, there would be no policy for Great American to purportedly "assume." The record confirms, however, that at trial, National Fire consistently maintained that the Tender Agreement transferred the obligations under the National Fire policy to Great American and that, in so doing, allowed National Fire to buy its peace. This is the issue that was tried to the jury, and Great American has not presented any compelling basis for treating National Fire's prior assertion as a judicial admission.

Lastly, Great American asserts that the trial court's error in allowing Witten to testify as to her own undisclosed intent in entering into the Tender Agreement resulted in a miscarriage of justice. The record reflects, however, that the court allowed both Witten and Biondo some latitude in discussing their subjective intent in making the agreement. The court ensured that the jury would not give weight to this evidence by instructing it not to "consider what a party thought but did not communicate to the other party" during the negotiation process. This instruction was sufficient to cure any possible error in allowing the evidence.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Roger T. Picquet, Judge*
Superior Court County of Ventura

Clyde & Co US, Peter J. Whalen, Kathryn C. Ashton and Sarah W. Orrick for Defendant and Appellant.

Squire Patton Boggs and Nathaniel K. Fisher; Greines, Martin, Stein & Richland, Laurie J. Hepler and G. David Godwin for Plaintiff and Respondent.

---

* (Retired Judge of the San Luis Obispo Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)