

2010 WL 10106068 (Or.Cir.) (Trial Motion, Memorandum and Affidavit)  
Circuit Court of Oregon.  
Josephine County

Thomas R. HART., Jr., as Trustee of the Thomas Hart, Sr., Revocable Living  
Trust and as Personal representative of Thomas R. Hart, Sr.'s Estate, Plaintiff,

v.

Anna HART aka Ann Hart, Anna Boyles, Ann Boyles, Phil Kudlac, as Trustee of Thomas Hart Sr.'s Revocable  
Living Trust, and Ruth Harris, as Trustee of Thomas Hart, Sr.'s Revocable Living Trust, Defendant.

No. 09CV0701.  
March 23, 2010.

**Memorandum in Support of Motion to Set Aside (Revoke) Contempt Order**

Foster A. Glass OSB No. 751334, for defendant.

COMES NOW, Defendant Anna Hart, through her attorney, Foster Glass and submits the following points and authorities, exhibits and argument in support of the above-referenced motion:

**FACTS IN SUPPORT OF DEFENDANT'S MOTION**

1. See Ex. 101 attached to the Declaration of Anna Hart, which is a true copy of Defendant's factual statement regarding non-consent to permit Attorney Talmadge to sign a stipulated agreement and order turning over the stock account to Plaintiff and the reasons therefore. Exhibit 101 explains why she is otherwise not in contempt. See Ex. 102, a transcript of a court appearance 11/13/09 and Ex. 103 a transcript from a hearing on 2/1/2010. Exhibit 104 is Anna Hart's accounting for the subject stock account expenditures. Ex. 105 is Thomas Hart Sr.'s Last Will and Testament dated 10/31/2000 at Article III which references Thomas Hart Sr.'s Living Trust and contingency that should his trust be found invalid, the *"residue of my estate is to Mary Ann Hart, as trustee, or her successor, to be held in a testamentary trust and administered and distributed in accordance with the dispositive provision of the trust described above, including any amendments made to it before my death (whether before or after execution of this will), which provisions are incorporated into this will by reference."* (Emphasis supplied). Exhibit 113 is a Bargain and Sale Deed conveying the real property to the trust. Exhibit 111 is the Third Amended Trust dated Dec. 15, 2008, in which Article 5.1.1 provides for distribution of the home at 380 Espey Road, Grants Pass, Oregon *"to be paid from my trust proceeds. This would include, but not limited to, the first mortgage and any amounts due under the line of credit."* (Emphasis added).

**ARGUMENT**

2. **Defendant's attorney lacked authority to bind her to a non-consensual stipulated agreement.** That is why her attorney objected to the signing of the stipulated agreement, objected to the signing of the proposed court order, and requested a hearing. Prior to the date of hearing, Defendant's new Bend attorney requested a postponement because of his previously scheduled commitments in other courts. Defendant's new attorney's motion was denied and he was caught between courts on the day of the hearing, out of cell range and this Court entered the order upon the basis of non-appearance. [UTCR 19.020](#) and [19.040\(1\)\(b\)](#) "govern civil contempt proceedings for remedial sanctions under [ORS 33.055](#)." These procedures have not been followed in the present case, which is prerequisite prior to an order finding *contempt*.

**3. What is the standard by which an attorney may bind his client?** Any apparent authority to settle a case *requires actions or words by the client conveying the impression that an attorney has authority to settle the case*. Settlement agreements, negotiated and even executed by agents will not be enforceable unless they are agreed to by a person with authority to bind the principal. *Johnson v. Tesky*, 57 Or App 133, 643 P2d 1344 (1982). Once in litigation, it is a well known fact that most settlement negotiations are undertaken by attorneys representing respective parties. The authority given to negotiate or even discuss settlement with the opposing party in a lawsuit does not by itself imply or provide the authority to reach a binding agreement; the client's express authorization is necessary. *Tesky*, Id. There was no actual authority and at the very least, a question of fact exists as to what, if any authority existed to bind Anna Hart to give up her legal right to the stock which was in the exclusive name of she and her husband, passing to her upon operation of law at his death, as survivor. See Defendant's Exhibit 106, page 4, which shows the stock ownership. Without such actions by the client there is no apparent authority.

In fact, Attorney Talmadge filed a motion objecting to the Court's order and refused to sign the stipulated agreement to transfer the subject stock. Although *Tesky* addresses actual authority, it also stands for the proposition that in the absence of any evidence that one party did or said anything that would reasonably convey the impression to the other party's attorney that their attorney had anything other than the usual power of an attorney in charge of litigation, that is, to engage in settlement discussions and negotiations, solicit settlement offers, etc., subject to the client's approval, there can be no authority to settle which would estop a party from disavowing a settlement agreement reached by their attorney. The general rule is that mere employment of an attorney does not give that attorney actual or apparent authority to enter into a binding settlement agreement. *First Federal Savings and Loan Association of Walla Walla v. C.P.R. Construction, Inc.*, 70 Or App 296, 689 P2d 981 (1984). In order for a client to be bound, the attorney must have actual or implied authority. *Fleishman v. Meyer*, 46 Or 267, 80 P. 209 (1905). *State v. Jackson*, 221 Or 315, 351 P2d 43 (1960).

In this instance, to be bound, the settlement agreement ultimately had to be approved and accepted by Anna Hart. She refused to be bound and never conveyed to the Court that she agreed to the proposal, however, a complete integrated agreement was required, including a statement in the agreement as to the necessity of a bond under [ORCP 62](#). It is my understanding that she was not even in court and her consent was never put on the record. When the settlement agreement was presented, Anna Hart rejected it, reasonably, and largely for the reason that it required her to transfer property to Plaintiff which would leave her destitute, without funds for an attorney. Such a transfer would breach the terms of the Trust which required funding from other sources. In light of the conversion of funds, breach of fiduciary duties by Plaintiff (see [Elder Abuse](#) law suit information) Defendant would be turning over additional assets to those who had already converted their father's assets. As argued in subparagraph 3 below, Plaintiffs had no lawful authority to seize and use Defendant's property when they hold assets which should be utilized to pay her late husband's debts under the terms of the trust agreement.

An attorney cannot bind their client without showing objective manifestations by a party that their attorney has express or implied authority to accept a settlement offer. *First Federal Savings*, *supra*. Absent is any evidence that Defendant engaged in any conduct of any type whatsoever, other than rejecting the settlement agreement. See Exhibits 102 and 103.

[ORS 9.330](#) addresses the scope of an attorney's authority and specifically does not give the authority required in the present circumstances. In fact, it reads: “An attorney has authority to bind the attorney's client in any of the proceedings in an action, suit or proceeding...” This statute does not change the general rule that an attorney has no authority, absent his client's express or implied consent, to compromise a client's case. *First Federal Savings*, *Fleishman*, *Jackson*, *supra*. [ORS 9.330](#) gives an attorney representing a party in a case authority to make representations about the case's status to the court, power to make trial management decisions, act for the client in the process of a trial, acknowledge satisfaction of judgment or decree. *State v. Becker*, 178 Or App 602, 37 P3d 252, *rev. denied*, 334 Or 327, 52 P3d 435 (2002); *Walk v. Hibberd*, 65 Or 497, 133 P. 94 (1913); *Union Central Life Insurance Company v. Toliver*, 52 Or 185, 52 P2d 1129 (1936); *Pyle v. Wolf Corporation*, 354 F. Supp346 (1972). In fact, whether a defendant's alleged attorney was in fact authorized to even act as an attorney, is itself a question of fact. *Financial Indem. Co. V. Bevans*, 38 Or App 369, 590 P2d 276 (1979).

**4. The Unsigned Stipulated Order.** The unsigned order included at page 4 of the affidavit of Thomas Hart, Jr. a false statement that “*This Mellon account is the only money available to pay the obligation stated in the court's order and other current obligations of my father's estate.*” This is a patently false statement. Where are the funds from Thomas Hart Sr's other estate assets? Plaintiffs must provide a list of and accounting for the assets. Based upon the Exhibits attached to Anna Hart's Declaration, and Defendant, Successor Trustee, Ruth Harris' Declaration, the question arises: Where are the assets? See Exhibits 115 and 116 regarding attorney Hughes and CPA Behymer accounting for substantial assets wrongfully withheld from Thomas Hart Sr and the Trust of Thomas Hart Sr and his deceased wife, Mary Ann Hart. The **Elder Abuse** and Breach of Fiduciary Duty suit, *Thomas Hart, Sr. v. Thomas Hart, Jr. and Cheryl Hart, Josephine Co. Case No. 09CV0455* referenced the following asset issues:

(1) Paragraph 5 mentions 5 million in acquired real property deeded into Hartson's LLC in 2000 following Thomas R. Hart and Mary Ann Hart's creation of their respective trusts. They alleged that “*Tom's trust and Mary Ann's trust were the sole owners of Hartson's LLC (50% each).*” The question should be asked: Where are the subsequent deed transfers of this five million in property to Thomas Hart, Jr. and Cheryl Hart?

(2) At Paragraph 6 assets of “Hart Manufacturing, Inc.” and “Hart's Jewelers” were allegedly transferred to the Trust by husband and wife.

(3) Paragraph 7 alleges a gifting program to his children in 2000, but “did not intend that the annual transfers would cause their children to gain control over the financial affairs of Plaintiff or Mary Ann Hart.”

(4) Paragraphs 8 and 9 alleged Mary Ann Hart died on August 12, 2005 and that the trust required income for the remaining spouse.

(5) Paragraph 10 alleges that the value of decedent Mary Ann Hart's trust was determined for tax purposes. Note that subsequently it has been found that Plaintiffs took \$15,283 from Thomas Hart, Sr's stock account (Ex. 104, pg. 5); \$10,000 (Ex. 104, pg. 4) was taken by Cheryl Hix; Thomas Hart Jr. deposited Thomas Hart Sr's \$18,233.57 retirement check on 9/13/06 to open and fund the deceased Mary Ann Hart's trust account (see Ex. 108). Thomas Hart Sr., not Thomas Hart Jr. was still the Trustee at that time. The check was not endorsed and the bank illegally permitted Thomas Hart Jr. and Cheryl Hix to control the account. The \$18,000 is unaccounted for.

(6) The remaining paragraphs of the **Elder Abuse** Complaint (paragraph 13) allege that Thomas Hart Jr. and Cheryl Hart removed more funds from the retirement account than they were entitled to, without Thomas Hart Sr's knowledge or consent; and Thomas Hart Sr. was then obligated to fund (pay back into the account) over \$30,000. In actuality, his children told Thomas Hart Sr. he would go to jail if he did not repay the money. Thomas Hart Sr. then asserts he *had to borrow money* (mortgage real property) to live and pay his bills.

(7) Paragraphs 15 and 16 of the complaint allege how his children worked with the family attorney Dole (who had apparently also represented principally Thomas Hart Sr.) For the express purpose of deceiving Thomas Hart Sr to gain control of all of Thomas Hart Sr's assets. It is alleged that Thomas Hart Sr was promised that if he relinquished control, he would still receive his assets - but they cut him off. Thus, Thomas Hart Sr made his “Third Amendment to the Thomas R. Hart Revocable Living Trust” on December 15, 2008 and the above referenced lawsuit was filed May 1, 2009. Thomas Hart Sr died the day the Answer to the Complaint was due. See Ex. 118 attached to the Declaration of Foster Glass, A letter regarding a Bar sanction proceeding against Attorney Dole. Thomas Hart Jr was appointed personal representative of the estate and the lawsuit against him and his sister was dismissed. Note that the complaint made a claim for almost \$900,000 in additional assets withheld and due Thomas Hart, Sr. See also the Declaration of Third Successor Trustee regarding the accounting procedures: CPA Behymer and attorneys Hughs and Turner determined the value of Thomas Hart Sr's withheld assets.

Unfortunately, Plaintiffs have managed to gain control of their father's estate, have run rough-shod over Defendants, have not been honest with the Court, and have not equitably handled their father's assets and estate as he wished and provided for in his will and trust. See Exhibit 114 attached to the Declaration of Anna Hart, which is a letter written by Thomas Hart Sr describing the disappointment and unhappiness caused by his children's behavior.

It should be clear at this point that Plaintiffs were less than candid when they claimed that the only assets available were the stock account and his house. It appears that what Plaintiffs actually mean, is that the excess of 5 million in assets, plus the funds from Thomas Hart Sr's retirement account: \$10,000, \$18,000, plus checks written by Cheryl Hart Hix on Thomas Hart Sr's personal account, were already acquired and converted and the only assets remaining which they had not managed to acquire, were the remaining stock account (which legally belonged to Defendant Anna Hart) and the house which belongs to Anna Hart by operation of law as decedent's widow under the Third Trust amendment, the deed and the will.

**Defendant's previous attorney was unaware of all the facts early in this case when he attempted to stipulate to the agreement to turn over the stock account.** An independent and thorough accounting of the estate assets is necessary. Under the circumstances of the issues of conversion of assets, removal of Thomas Hart Jr as personal representative is appropriate; as well as reinstatement of the **elder abuse** lawsuit filed by Thomas Hart Sr, in order to recover the converted estate assets. Also, the Defendants' Answer needs to be amended to include a breach of fiduciary duty against Thomas Hart Jr, as president of the corporate entities which refuse to fund the trust.

To require Decedent's widow to give up assets clearly hers under the law, thereby deprives her of the ability to hire an attorney to represent her would have placed Defendant in an impossible position.

**4. Defendant was not in contempt.** As set forth in Defendant's accounting (Ex. 104), Defendant did not stipulate to give her stock to Plaintiffs, had already paid an attorney and expended money to pay for the house and her expenses, because Plaintiffs have violated the terms of the will and trust in refusing to provide for the mortgage and maintenance expenses, including the sum of \$400,000 to the widow...Not only were Plaintiffs not entitled to Defendant's stock assets to, but they also were not entitled to control her separate assets. In her letter (Ex. 101) Defendant was told by her attorney that the Court had not signed the proposed stipulated agreement and that the Court had not signed the order to turn her assets over to Plaintiffs, from which they would pay her bills. The effect of the Order would essentially provide Plaintiffs with prejudgment injunctive relief to which they were not entitled. However, the Court, as shown in Ex. 103 signed Plaintiff's Order of contempt on Feb. 1, 2010 with Defendant and her attorney absent. Defendant has continued to make the mortgage payments and has provided an accounting (Ex. 104). Defendant has enough money left for 5 months. The question is: what funds did she have at her disposal at the date of the signing of the order? Insufficient funds existed.

The history of quasi contempt issues is shown in the attached Exhibits 102 and 103. Ex. 102 is a transcript of Court from 11/12/09. The Court discusses an order to show cause - apparently as Anna Hart had withdrawn her consent and her attorney had refused to sign the stipulated agreement. The Judge took the position that the in-court stipulation of her attorney bound the parties (even though Defendant was not present to stipulate) because the stipulation document to be signed later "*simply memorializes that agreement and can proceed with or without your signature.*" Attorney Talmadge for the defense emphasizes his memorandum citation to *Western Ridge Land Company* regarding discovery sanctions "*wherein the Court issued an order requiring the production of certain documents orally but it hadn't been memorialized in writing...default was entered ten days after the date the issue was raised in court. It went up on appeal... the Court said: the order was not enforceable until it was actually signed and served upon opposing counsel.*" Attorney Talmadge then stated his client, "*directed me not to sign the order and stated she was not consenting to the order.*" Exhibit 103 is a transcript of the Court hearing dated 2/1/10. Neither her attorney, nor Defendant were in court. It should be noted Defendant's new attorney had a scheduling conflict in other court matters and had filed a request for a continuance which had been denied. The attorney attempted to call into this court from the road, but was unable to make cell contact in time for the hearing. Defendant Anna Hart was unaware that the matter had not been continued. Apparently, at that time, the Court was going to sign an order to show cause and Plaintiffs attorney stated... "*If I get this order signed I can do another motion, an order to show cause and have her come in and that sort of thing for contempt*"

for not following this.” So apparently the Court must have signed the Plaintiff’s presented order regarding the stipulation. The record is not clear. Defendant has provided a copy of an unsigned and undated document presented by Plaintiff to the Court entitled “Order on Plaintiffs’ Motion for Contempt.” If this is the order signed by the Court, it states in pertinent part: (1) “*that the stipulated order granting Plaintiffs’ motion for injunction was a stipulated agreement that was entered into in open court on August 31, 2009 and was effective as of August 31, 2009*”<sup>1</sup>; (2) that “*Defendant Anna Hart has violated the order by closing and liquidating the Bank of New York Mellon account, by failing to provide the listing agreement to Thomas R. Hart, Jr....*” Then at paragraph 5 of the “Order on Plaintiff’s Motion for Contempt,” it reads as though a determination of contempt has already been made... “*The contempt proceeding is adjourned and another hearing will be scheduled to determine the disposition of the Bank of New York Mellon account and any penalties or sanctions that should be imposed for violation of the stipulated order granting Plaintiff’s motion for injunction.*” The foregoing language asserts Defendant has already been found in contempt and that sanctions will be determined. This order (if actually signed) violates the fundamental due process required by [ORS 33.055](#) and the mandated UTCR Chapter 19 contempt proceedings in the following particulars:

[UTCR 19.040](#) Applicability of ORCP and other UTCR (1) To the extent rules in this chapter are inconsistent with other applicable rules, the rules in this chapter govern contempt proceedings under [ORS 33.015](#) to [33.155](#). Except as otherwise provided in this chapter:

(b) UTCR that govern civil proceedings apply to original proceedings for remedial sanctions under [ORS 33.055](#);

[UTCR 19.020](#) Initiating instrument requirements (1) In addition to any other requirements for initiating instruments, the initiating instrument in a contempt proceeding under [ORS 33.055](#) (remedial or [ORS 33.065](#) (punitive)), must state:

(a) The maximum sanctions(s) that the party seeks

(b) Whether the party seeks a sanction of confinement

(c) As to each sanction sought, whether plaintiff considers the sanction remedial or punitive.

ORCP 33.055(5)(a) provides that the court may *issue an order* directing the defendant in a contempt proceeding to appear...but *personal service* is required unless waived under 5(b); and “The person initiating a proceeding under this section shall file supporting documentation or affidavits sufficient to give defendant notice of the specific acts alleged to constitute contempt.” [ORS 33.055\(4\)](#).

Under [ORS 33.055\(6\)](#) “*a court may impose a remedial sanction only after affording the defendant opportunity for a hearing tried by a court.*” And under (8) is entitled to be represented by counsel. Defendant has not been accorded any of the required procedural requisites. Punishment for civil contempt arising from disobedience of a judgment or decree is restricted to cases in which a violation of a lawful court order and in which the violation is *willful and with bad intent*. [State v. ex rel Oregon State Bar v. Wright](#), 280 Or 713, 573 P2d 294 (1977).

**We also direct the Court’s attention to the fact that in this case, Thomas Hart Jr’s affidavit, which is the basis for the Court’s contempt issue, is false - a fraud on the court. See paragraph 4 above.**

**5. Plaintiffs were not entitled to prejudgment provisional process in the form of a court order taking Defendant’s stock from her under the provisions of [ORCP 82](#) and [83](#).**

A. Defendant legitimately had full legal right and ownership of the stock.

B. Plaintiffs had taken in excess of 5 million in assets from decedent Thomas Hart Sr, who had filed a financial **elder abuse** - breach of fiduciary duty suit (Ex. 112). This suit was dismissed upon his death when one of the Defendants of that lawsuit,



Thomas Hart Jr was appointed as personal representative of their father's estate, which they had already converted to their own use.

C. Plaintiffs in this present lawsuit have breached their fiduciary duty (as alleged in their father's suit and as shown in the exhibits attached to Anna Hart's Declaration) to fund Decedent's trust as promised both during and after his lifetime.

D. Plaintiffs in the present suit have falsely represented to the Court that Decedent and his widow's stock (to which they never had a legitimate claim) is the "only money available to pay for the obligations of my father's estate." What they are really saying to the Court is that Plaintiffs should not have to expend any of the excess 5 million in funds they received from their father's estate, including those funds already proven (in the exhibits attached to Anna Hart's Declaration) to have been unlawfully converted to their own use. Instead, they tell the Court that they should be awarded Defendant's assets as well.

E. No where did Plaintiffs ever set forth information to support a basis for a claim of right to the stock other than Thomas Hart Jr's unsupported sworn affidavit that stating that: "*This Mellon account is the only money available to pay the obligations of my father's estate.*"

**6. The proposed stipulated order for injunction was not fully integrated or completed in court.** Not only did Defendant and her attorney object in court (Ex. 102), but the terms of the agreement were incomplete in that the parties did not agree and the proposed motion and order did not provide whether Plaintiff Thomas Hart Jr, upon receipt of the funds from Mellon, would serve with or without bond. Considering the issues herein, Defendant had not agreed to an essential element. The subsequent court order providing an injunction over Defendant's objection violated due process because:

(1) The provisions of [ORCP 82](#) without express waiver or a hearing on the merits requires that Plaintiff post bond to assure compliance and to protect the assets of the other party.

(2) Once Defendant objected (and did not stipulate on the record) those objections being stated to the court, the order could not be signed by the court without a due process hearing setting forth proof of Plaintiff's claim for protection and the posting of a bond unless Defendant agreed to waive a bond.

The right to immediate provisional process before a show cause hearing is conditioned on first satisfying the conditions set forth in ORCP 83A; ORCP 83E. This procedure was developed with an intent to pass the constitutional tests set forth in [Fuentes v. Shevin](#), 407 US 67, 92 S.Ct 1832, 32 L Ed2d 556 (1972). In [Connecticut v. Doeher](#), 501 US 1, 111 S.Ct 2105, 115 L Ed2d 1 (1991), the court found that a Connecticut statute *violated a defendant's due process rights* because it permitted ex parte attachment absent a showing of extraordinary circumstances. Based on the Court's rationale in *Connecticut*, it appears that Oregon's law should pass constitutional scrutiny. Oregon requires the plaintiff to set forth factual statements showing that the defendant or the person in possession or control of the property about to be attached or replevied is either engaging in or about to engage in conduct that would place the property "in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser," or that the person in control or possession of the property would not comply with a temporary restraining order. [ORCP 83 E](#). Furthermore, the person claiming a right to provisional process must show a basis for a legitimate claim that the property is part of the estate, subject to an issue in the case. Clearly the stock belongs to decedent's widow.

DATED this 21<sup>st</sup> day of March, 2010.

Foster A. Glass OSB No. 751334

**Attorney for Defendant**

Footnotes

- 1 This underlined portion as to it being effective on Aug. 31, 2009 is contrary to the case of Western Ridge Land Company cited by Attorney Talmadge at the 11/13/09 hearing.

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