

STATE OF MICHIGAN
COURT OF APPEALS

CAROL SUNDELL,

Plaintiff-Appellant,

v

NATIONWIDE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

August 21, 2007

No. 268977

Wayne Circuit Court

LC No. 03-327603-NF

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

In this action for recovery of no-fault personal injury protection benefits, the parties' attorneys reached an agreement to settle the case and a dismissal order was entered. Plaintiff later refused to sign the written settlement agreement and defendant moved to enforce the settlement. Plaintiff now appeals as of right from the trial court's orders granting defendant's motion to enforce the settlement and denying plaintiff's motion to set aside the dismissal. We affirm.

I. Background

Plaintiff was represented by attorneys Richard Kepes and Ronald Smith. In July 2005, Smith sent defense counsel a letter that stated:

Pursuant to my telephone conversation with Mr. Waldman earlier today, please be advised that, with our client's authority, we accept your client's offer to settle this matter, for all past, present and future PIP benefits arising out of the motor vehicle accident of August 19, 1996, for the sum of \$106,000.00 and the waiver of the \$6,000.00 judgment for mediation sanctions against Ms. Sundell.¹

¹ These sanctions were entered against plaintiff in a previous district court action that was unsatisfied.

It is my understanding that you will prepare a proposed mutual release and settlement agreement, and will forward it to me for review. Should you have any questions or comments, please do not hesitate to contact the undersigned.

Defense counsel responded and confirmed the settlement terms. He further stated:

I will prepare a proposed mutual release and settlement agreement, and will forward it to you for your review, along with a stipulation of dismissal which will include language that Ms. Sundell's claims for past, present, and future benefits are dismissed with prejudice.

Subsequently, defense counsel sent the proposed release and a stipulation of dismissal to Kepes. The release, which incorporated the settlement agreement, was entitled "Release, Hold Harmless Agreement, and Covenant Not to Sue." It provided that plaintiff was to receive \$106,000 for the release of all past, present, and future claims arising from the 1996 accident against defendant, and that defendant was waiving the \$6,000 judgment for sanctions entered against plaintiff. The release also contained hold harmless and covenant-not-to-sue clauses.

Plaintiff subsequently refused to sign the release. However, an order of dismissal had already been entered. Defendant filed a motion to enforce the settlement and plaintiff filed a motion to set aside the dismissal. After a hearing, the trial court granted defendant's motion and denied plaintiff's motion. Plaintiff's motion for reconsideration was also denied.

II. Contract Formation

Plaintiff first proffers several reasons why the letters exchanged between the parties' attorneys did not form a valid contract. "An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006), quoting *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). "The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian, supra* at 452.

Plaintiff first asserts that the letters did not form a valid contract because Smith's letter did not accept defendant's offer. "Before a contract can be completed, there must be an offer and acceptance. Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed." *Id.*, quoting *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). "An offer is defined as the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Kloian, supra* at 453 (internal quotations and citation omitted). "[A]n acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose." *Id.* at 453-454 (internal quotations and citation omitted).

Plaintiff contends that the letters were only an agreement to agree, pointing to the fact that the letters referred to the agreement to be drafted by defendant as a "proposed mutual release and settlement agreement" for plaintiff's "review." We disagree. The letters clearly indicated

that Smith, on behalf of plaintiff, accepted defendant's offer to settle the suit for \$106,000, plus the waiver of sanctions, and defendant confirmed this acceptance. It was only the wording of these settlement terms that needed to be codified.

Plaintiff next asserts that no contract was formed because the release did not accurately reflect the terms of the settlement and, therefore, there was no meeting of the minds. "[A] contract requires mutual assent or a meeting of the minds on all the essential terms." *Id.* at 452. "A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Id.* at 454 (internal quotations and citation omitted).

Plaintiff contends that the hold harmless and covenant-not-to-sue clauses that defendant included in its draft of the settlement agreement were additional terms to the parties' agreement that constituted a counter-offer, which plaintiff rejected. Thus, no contract was formed. However, plaintiff fails to recognize that a counter-offer is created by additional terms that are added to an acceptance. *Harper Bldg Co v Kaplan*, 332 Mich 651, 655-656; 52 NW2d 536 (1952). Here, Smith was unequivocal in his acceptance of defendant's offer to settle the suit for \$106,000 "for all past, present and future PIP benefits arise out of the motor vehicle accident of August 19, 1996," and a waiver of the \$6,000 judgment for sanctions against plaintiff.

The material question is whether the hold harmless and covenant-not-to-sue clauses were contemplated by the parties in their agreement as evidenced by the letters or constitute a modification of their agreement. MCR 2.507(H),² states:

An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

If the clauses modified the agreement, they are unenforceable because there is no writing subscribed by plaintiff, Smith, or Kepes accepting the modification. Thus, the writing requirement of MCR 2.507(H) would not be met. *Kloian, supra* at 460.

In the letters, the parties specifically agreed to execute a mutual "release." They did not mention the other clauses. The phrase "hold harmless" refers to an agreement to "absolve (another party) from any responsibility for damage or other liability arising from the transaction." Black's Law Dictionary (7th ed), p 737. A release immediately discharges an existing claim or right, while a covenant not to sue is an agreement not to sue on an existing claim. It does not extinguish the claim. *J & J Farmer Leasing, Inc v Citizens Ins Co of America*, 472 Mich 353, 357-358; 696 NW2d 681 (2005). Therefore, there is a difference between these terms.

² The court rule was amended in 2006 and recodified at MCR 2.507(G).

In this case, it is apparent that the parties used the term “release” in a generic sense, to refer to the document to be drafted. The scope of a release is determined by the intent of the parties. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). To the extent that the term “release” could be understood differently, it is appropriate to ascertain the parties’ intent by looking beyond the four corners of the letters. *Id.*

The reason plaintiff focuses on the hold harmless and covenant-not-to-sue clauses is because of their effect on a lien imposed on plaintiff by Medicare. The hold harmless clause meant that plaintiff was ultimately responsible for the amount of the Medicare lien. The covenant-not-to-sue clause prevented plaintiff from aiding Medicare in pursuing a claim against defendant for reimbursement. At the parties’ motions’ hearing, Kepes stated that he would not have forwarded the agreement to plaintiff had he known of the lien’s existence. He said he was not made aware of the possibility of a Medicare lien until plaintiff came to his office to sign the settlement agreement. Kepes also stated at the motion hearing that the hold harmless clause was routinely included in no-fault settlements. These statements indicate that he was aware that the hold harmless clause would be included in the drafted agreement.

The covenant-not-to-sue clause was not specifically addressed at the hearing because plaintiff did not raise it in her argument below. However, Kepes’ and Smith’s actions indicated that they did not object to the clause, forwarding the draft to plaintiff and having it revised once. Additionally, they stated that such clauses are routinely included in no-fault settlements. Notably, such a clause has the same effect on the parties to the agreement as a release. The difference is the effect on third parties. *J & J Farmer Leasing, supra* at 358; *Industrial Steel Stamping, Inc v Erie State Bank*, 167 Mich App 687, 693; 423 NW2d 317 (1988). Kepes stated that he was not aware that any entity would assert a claim to the settlement monies. Considering plaintiff’s attorneys’ words and actions, it is apparent that the parties contemplated that the drafted agreement would include the hold harmless and covenant-not-to-sue clauses when they referred to the drafting of a mutual release.

Plaintiff further asserts that the drafted release did not accurately reflect the parties’ agreement because it was not a “mutual” release. Plaintiff baldly asserts that defendant’s waiver of the sanctions against plaintiff only prohibited it from enforcing the judgment, it did not extinguish the claim. However, a release “immediately discharges an existing claim or right.” *J & J Farmer Leasing, supra* at 357-358. Defendant had no claim against plaintiff. The sanctions arose from a cause of action that plaintiff asserted against defendant. The right to enforce the judgment was the only right defendant had against plaintiff. A waiver is “the intentional and voluntary relinquishment of a known right.” *Moore v First Security Cas Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997). As a result, the parties gave up whatever rights they had in regard to each other. Thus, the release was mutual.

Accordingly, we conclude that the parties’ attorneys’ letters formed a valid contract. Plaintiff does not dispute that if the letters formed a valid contract, they satisfied the writing requirement of MCR 2.507(H).

III. Authority to Settle

“Under usual contract principles, plaintiff is bound by the settlement agreement absent a showing of mistake, fraud, or unconscionable advantage.” *Plamondon v Plamondon*, 230 Mich

App 54, 56; 583 NW2d 245 (1998). Plaintiff argues that if a contract was formed, it was unenforceable because her attorneys did not have the authority to settle on her behalf. The authority of an agent to bind a principal may be either actual or apparent, and actual authority may be either express or implied. *Alar v Mercy Mem Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995). Michigan does not recognize implied authority to settle. *Henderson v Great Atlantic & Pacific Tea Co, Inc*, 374 Mich 142, 147; 132 NW2d 75 (1965); *Nelson v Consumers Power Co*, 198 Mich App 82, 86; 497 NW2d 205 (1993). Plaintiff stated that her attorneys did not have express or apparent authority to settle on her behalf.

A. Actual Authority

Plaintiff first asserts that the trial court erred in concluding that her attorneys had actual authority to settle the case when it only had before it the conflicting affidavits of Smith and plaintiff.³ Smith stated that plaintiff told him not to settle for less than \$100,000. Plaintiff denied making this statement. In the case of a contested motion, the court rule provides:

When a motion is based on facts not appearing of record, the court may hear the motion on affidavits presented by the parties, or may direct that the motion be heard wholly or partly on oral testimony or deposition. MCR 2.119(E)(2).

This Court reviews a trial court's decision whether to hold an evidentiary hearing under MCR 2.119(E)(2) for an abuse of discretion. *Williams v Williams*, 214 Mich App 391, 399; 542 NW2d 892 (1995). An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

In addressing MCR 2.119(E)(2), this Court has stated:

While recognizing that the level of proof relating to allegations of fraud is “of the highest order,” we believe that the trial court itself is best equipped to decide whether the positions of the parties (as defined by the motion and response, as well as by the background of the litigation) mandate a judicial assessment of the demeanor of particular witnesses in order to assess credibility as part of the fact-finding process. Some motions undoubtedly will require such an assessment, e.g., situations in which “swearing contests” between two or more witnesses are involved, with no externally analyzable indicia of truth. Other motions will not, e.g., situations in which ascertainable material facts are alleged, such as the contents of a bank account on a particular day. Where the truth of fraud allegations can be determined without reference to demeanor, we do not believe that the law requires a trial court to devote its limited resources to an in-person hearing.

³ Although the trial court did not state what type of authority it found that plaintiff's attorneys had, its comments suggest that it determined that they had actual authority.

“Credibility” and “demeanor” are not synonymous. Demeanor may be one element in assessing a witness’ credibility, but often demeanor plays no such role. Such things as motive to lie, lack of opportunity to observe, and prior inconsistent statements may be more important determinants of credibility. SJI2d 4.01; CJI2d 2.6. [*Williams, supra* at 399.]

We conclude that the trial court did not abuse its discretion by not holding an evidentiary hearing. In making its determination, it appears that the trial court looked at the attorneys’ actions before and after the settlement was reached and plaintiff’s motive to lie. It did not need to rely on demeanor.⁴ Regardless, as discussed in part III(B), plaintiff’s attorneys had apparent authority to settle the case.

B. Apparent Authority

In *Nelson, supra* at 83, this Court recognized that an attorney, acting solely in the interest of a client and without any improper motives, has the apparent authority to settle a matter on behalf of his client. “Apparent authority arises where the acts and appearances lead a third person reasonably to believe that an agency relationship exists. However, apparent authority must be traceable to the principal and cannot be established only by the acts and conduct of the agent.” *Alar, supra* at 528 (citation omitted).

Plaintiff argues that the rule in *Nelson* actually authorizes an attorney to settle based on implied authority because it does not require the necessary manifestations from the client to the third party needed to create apparent authority in the attorney. Thus, it contravenes Supreme Court precedent. We disagree.

Before *Nelson* was decided, Michigan had not addressed an attorney’s apparent authority to settle a case on his client’s behalf. The courts had only dealt with the two types of actual authority, express and implied. See *Nelson, supra* at 83. Seven years before *Nelson* was decided, the Sixth Circuit Court of Appeals concluded in *Capital Dredge & Dock Corp v Detroit*, 800 F2d 525, 531 (CA 6, 1986), that Michigan would recognize an attorney’s apparent authority to settle if it addressed the issue. Finding the analysis in *Capital Dredge* highly persuasive and well-reasoned, the *Nelson* Court adopted it as its own.

“Generally, when a client hires an attorney and holds him out as counsel representing him in a matter, the client clothes the attorney with apparent authority to settle claims connected with the matter. Thus, a third party who reaches a settlement agreement with an attorney employed to represent his client in regard to the settled claim is generally entitled to enforcement of the settlement agreement even if the attorney was acting contrary to the client’s express instructions. In such a situation, the client’s remedy is to sue his attorney for professional malpractice. The third party may rely on the attorney’s apparent

⁴ Demeanor encompasses a witness’s outward behavior such as voice tone, hesitation, and facial expressions. Black’s Law Dictionary (6th ed), p 430.

authority unless he has reason to believe that the attorney has no authority to negotiate a settlement.

But for this rule of law, prudent litigants could not rely on opposing counsel's representation of authorization to settle. Fear of a later claim that counsel lacked authority to settle would require litigants to go behind counsel to the opposing party in order to verify authorization for every settlement offer." [Nelson, *supra* at 89-90, quoting *Capital Dredge*, *supra* at 530-531 (internal citations omitted).]

At first blush, a reading of the first sentence in the above-quoted passage could lead one to believe that mere representation of a client is sufficient to create apparent authority. However, the *Nelson* and *Capital Dredge* Courts recognized that an attorney has no authority to settle a case by virtue of his general retainer alone and cited the applicable agency principles regarding apparent authority. *Nelson*, *supra* at 85-86, 89⁵; *Capital Dredge*, *supra* at 530, 532. The inclusion of the phrase "holds him out as counsel representing him in a matter" in their holdings indicates that both courts did not abandon the manifestations requirement of apparent authority. In determining whether the attorney has apparent authority, the Courts focused on how the client held his attorney out as representing him.

In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances. *Meretta v Peach*, 195 Mich App 695, 699; 491 NW2d 278 (1992). "Whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of the principal the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it." *Smith v Saginaw S&L Ass'n*, 94 Mich App 263, 271-272; 288 NW2d 613 (1979), quoting *Atlantic Die Casting Co v Whiting Tubular Products, Inc*, 337 Mich 414, 422; 60 NW2d 174 (1953) (internal quotations and citations omitted).

Capital Dredge involved an explosion in a tunnel construction project. All parties blamed each other and the plaintiff hired an attorney, Alteri, to defend it. *Capital Dredge*, *supra* at 527. Finding that Alteri had apparent authority to settle, the court stated:

Capital Dredge has not argued that Alteri lacked authority to negotiate a settlement of any controversies arising from the explosion. To the contrary, Alteri was employed to represent Capital Dredge regarding certain claims arising from the explosion. Capital Dredge held Alteri out as having authority to represent it in not only the personal injury claims but also certain related claims against the city, such as the bonding capacity and reputation suit which Alteri filed on behalf of Capital Dredge. In these circumstances, the city could reasonably believe that

⁵ By finding the opinion in *Capital Dredge* to be well-reasoned, the *Nelson* Court implicitly recognized the apparent authority principles.

Alteri had authority to release Capital Dredge's extra work and delay claims arising from the explosion. Alteri therefore had apparent authority to release these claims. [*Id.* at 531.]

In *Nelson*, the plaintiff was involved in an accident with one of the defendant's vehicles. After mediation and before trial, the plaintiff's attorney, Bartnick, and defense counsel agreed to settle the suit for \$20,000. *Nelson, supra* at 84. "Bartnick stated that plaintiff specifically told him that she would accept the \$20,000 settlement. In contrast, plaintiff represented that her acceptance was expressly conditioned on her receiving a favorable magnetic resonance imaging (MRI) report regarding her left knee." *Id.* The plaintiff did not deny that Bartnick was authorized to negotiate a settlement and that Bartnick proceeded to negotiate the case on her behalf. Thus, in both *Capital Dredge* and *Nelson*, the plaintiffs manifested to the defendants that their attorneys had the apparent authority to settle because they allowed the attorneys to engage in settlement negotiations.

Applying *Nelson* to the instant case, we conclude that plaintiff's attorneys had the apparent authority to settle the case on her behalf. The parties' attorneys' first attempted to negotiate a settlement at a settlement conference in January 2005. MCR 2.401(E) provides, "The attorneys attending the conference shall be thoroughly familiar with the case and have the authority necessary to fully participate in the conference." Subsequently, plaintiff and her attorneys were present at a facilitation meeting where the parties attempted to negotiate a settlement. MCR 2.410(D)(1) provides, "The attorneys attending an ADR proceeding shall be thoroughly familiar with the case and have the authority necessary to fully participate in the proceeding." Although no agreement was reached at the meeting, the parties' attorneys eventually reached an agreement with the aid of the facilitator through telephone negotiations. Plaintiff does not state that she indicated to defendant at the mediation that there were to be no more negotiations or that she would not settle under any circumstances. Therefore, defendant had no reason to believe that plaintiff's attorneys did not have the continuing authority to settle on her behalf and were justified in relying on their apparent authority.

Plaintiff argues that even if the apparent authority rule in *Nelson* is viable, it does not control in this case because plaintiff's attorneys were not acting solely in plaintiff's interest, which is one of the rule's conditions. *Nelson, supra* at 83. She points to the fact that the attorneys were hired on a contingency basis. We are not persuaded that the mere fact that an attorney who settles a case was hired pursuant to a contingency agreement, as opposed to a retainer, is sufficient to show that he was not acting solely in the client's interest.

Plaintiff also contends that a note she wrote confirms that her attorneys knew of the Medicare lien well before the settlement, but nevertheless agreed to the settlement terms, which were clearly not in her best interests, given the lien's existence. However, the note is not dated, nor is the Medicare letter it refers to. Accordingly, the trial court did not abuse its discretion in granting defendant's motion to enforce the settlement. See *Groulx v Carlson*, 176 Mich App 484, 493; 440 NW2d 644 (1989).

Affirmed.

/s/ Alton T. Davis

/s/ Bill Schuette

/s/ Stephen L. Borrello