IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT KNOXVILLE

FILED

February 20, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

AUSTIN POWDER COMPANY,
RENDRO CONSTRUCITON COMPANY,
and D & P CONSTRUCTION COMPANY,

Plaintiffs-Appellees,

Vs.

Blount Circuit E-16403
C.A. No. 03A01-9507-CV-00225

WALTER THOMPSON,

Defendant-Appellant.

FROM THE BLOUNTY COUNTY CIRCUIT COURT

THE HONORABLE W. DALE YOUNG, JUDGE

E. Jerome Melson of Watson, Hollow & Reeves of Knoxville
For Plaintiffs-Appellees

Henry T. Ogle of Knoxville
For Defendant-Appellant

AFFIRMED AND REMANDED

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE

This appeal involves a suit for specific performance of an agreement to compromise and settle a damage suit. Plaintiffs, Austin Powder Company, Renfro Construction Company, and D & P Construction Company (hereinafter plaintiffs or Austin Powder) sued defendant, Walter Thompson, seeking specific performance of an alleged agreement settling an earlier filed lawsuit (underlying litigation) brought by Thompson against plaintiffs.

In the underlying litigation Thompson sued plaintiffs for damage to his residence which he alleged was caused by plaintiffs' blasting operation in connection with road construction. It is undisputed that Karl Spalvins, one of Thompson's attorneys of record in the underlying litigation, advised Jerome Melson, attorney for Austin Powder, that Thompson accepted Austin Powder's offer of settlement in the sum of $13,500.00, and that subsequently Thompson refused to accept the tendered settlement check and refused to sign the release of his claim against Austin Powder. The instant suit for specific performance ensued, and Thompson's defense is that he did not agree to the settlement, did not authorize his attorneys to make any such settlement, and that, therefore, his attorneys did not have authority to settle the suit.

The case was tried by the court sitting without a jury and taken under advisement. The trial court filed a memorandum opinion which states, in pertinent part:

> It is undisputed in the record that Karl Spalvins represented Defendant Thompson in the case lodged in the Law Division of this Court (L-6275). It is further undisputed in the record that Spalvins advised E. Jerome Melson, Counsel for Plaintiffs, in this case, that Thompson accepted the Plaintiff's offer of settlement of $13,500.00 in the underlying litigation.
>
> From the entire record in this cause, the Court is persuaded that by his word and his deed Defendant Thompson clothed his attorney with such authority that

> Thompson knowingly permitted his Attorney to believe, in good faith, that he had the authority of Thompson to settle the action in question, which settlement was communicated to and accepted by Counsel for the opposing parties. Spalvins, for Thompson, contracted with Plaintiffs to settle the underlying case.

Pursuant to the court's findings, an order was entered requiring specific performance of the settlement agreement. Thompson has appealed, and the only issue for review is whether the evidence preponderates against the trial court's finding that Thompson's attorney acted with Thompson's authority in settling the case.

Thompson retained attorney David Creekmore of Knoxville to represent him in his suit against Austin Powder for damages caused to his house in a blasting operation in connection with highway construction. When Mr. Creekmore was ordered to report for duty in the Desert Storm operation, he associated, with Thompson's approval, attorney Karl Spalvins. When Creekmore returned from active duty, the case had not been tried, so he continued to work on the case with Spalvins, who was apparently considered to be the lead attorney.

The case was set for trial on Tuesday, September 21, 1993. On Friday morning, September 17, 1993, Spalvins, Creekmore, and Thompson met to discuss trial preparation and to consider a settlement offer from Austin Powder. Thompson had previously been offered $10,000.00 in settlement of his claim, but he unequivocally rejected this offer. On Friday, September 17, 1993, Spalvins related to Thompson an offer of $12,500.00 that had been advanced by Austin Powder. Thompson was unhappy with this offer, but his attorneys advised him that he should give it some consideration. Thompson was invited to lunch with Spalvins and Creekmore to further discuss the settlement offer, but he declined the invitation stating that he had another business engagement and would get

back in touch with Spalvins in the afternoon. Later, on Friday afternoon, Austin Powder's attorney, Jerome Melson, advised Spalvins by telephone that the offer was increased to $13,500.00. At this point, a sharp dispute arises between Spalvins and Thompson as to what occurred. Spalvins testified that on Friday afternoon Thompson returned to Spalvins's office at which time Spalvins related the latest offer of $13,500.00. With respect to the meeting between Spalvins and Thompson to discuss this offer, Spalvins testified as follows:

> Q. [By Mr. Melson] In what form did that discussion take place? Was it a personal visit or was it over the phone?
>
> A. No, it was personal. I said, "Walter, here is what we've got. We've got to go to trial or you are going to have to accept it." He said to me, he said, "That's not enough money, but just get it over with." He said, "I can make more money than that by working on Monday and Tuesday with my equipment rather than being in a courthouse." I told him it was going to take all day Monday and it was going to take all day Tuesday.
>
> Q. For the trial?
>
> A. For the trial, for the final preparation and marking whatever we needed to mark. I said, "Walter, that is the only decision you can make." He said, "Get it over with. You and David get your money and get it over with." Well, I got it over with. I called you [Melson] back and I accepted the offer.
>
> Q. Did you make that telephone call to me in Mr. Thompson's presence?
>
> A. Yes, I did.
>
> Q. Where did this meeting between yourself and Mr. Thompson take place where he told you to get it over with when you discussed the $13,500 figure?
>
> A. It was in a conference room in my office.
>
> Q. Who was in attendance?
>
> A. Myself and Mr. Thompson.

Q. Where was Mr. Creekmore?

A. Mr. Creekmore did not come back in the afternoon.

Q. Okay. So this took place on the afternoon of Friday, September 17th, 1993?

A. Yes, it did.

Q. Following your telephone call to me indicating that the money was accepted and the matter concluded, what further activity took place in your office with respect to Mr. Thompson?

A. Well, I think I asked you to call the Court and tell them that the case was off, to notify the Court. That was going to be your responsibility. I said, "Walter, it will be some time before these papers come and we'll call you when it's ready." He walked outside the door of the conference room where my paralegal's desk is and he had a short conversation with my paralegal. I could hear it because it was right there.

Q. What was the nature of the conversation?

A. She gave him the standard thing about the money will come in, the releases will come in, you will have to come in and sign it, we will have it deposited in trust, and then there was some conversation somewhere along the line if he was going to have to sign anything. I told him that I, as his attorney, and David could sign the Order. He did not have to sign the Order.

Q. Did he indicate to you that he understood what was going on?

A. He did.

Q. Did he leave your office on the afternoon of Friday, September 17th, 1993, following the exchange he had with your paralegal?

A. Yes, he did.

Q. Did you have any further communication with him on that day?

A. No.

Q. Did you have any further communication with Mr. Thompson in any form over the weekend on Saturday

> or Sunday?
>
> A. No.
>
> Q. Did you have any communication with him in any form on Monday, --
>
> A. No.
>
> Q. -- the day before the trial date of September 21, 1993?
>
> A. No.
>
> Q. Did you have any communication with Mr. Thompson in any form on Tuesday, September 21, 1993, the date it was set for trial?
>
> A. No.

Spalvins also testified that he understood from Thompson's statements that he, Spalvins, had express authority to settle the case on Thompson's behalf for $13,500.00. Spalvins further testified that after he received the releases and checks from Melson to complete the settlement, he could not get in touch with Thompson, and he called Creekmore to seek his help in reaching Thompson. On November 19th Spalvins was informed by letter from Thompson that he was no longer Thompson's attorney.

At trial, the plaintiffs also called Spalvins's paralegal, Diana Moyers, as a witness. Ms. Moyers testified that she assisted Spalvins in trial preparations and in dealing with various details of his clients' cases. She also testified that the underlying litigation was set for trial on Tuesday, September 21, and that there was a meeting on Friday morning, September 17, involving Creekmore, Spalvins, and Thompson. She recalled that the meeting lasted until approximately 12:45 p.m. when Thompson left the office. Ms. Moyers testified that on Friday afternoon, Thompson returned to Spalvins's office, at which time Thompson and Spalvins met alone for approximately an hour in Spalvins's conference room.

She further testified that as Thompson was leaving, he and Spalvins were discussing the paper work for the settlement, and that she then had a conversation with Thompson regarding the procedure for handling the paper work, including the time frame for receiving the settlement proceeds. She stated that Spalvins did not ask any questions and did not appear to be confused about her statements regarding these settlement procedures.

Thompson's proof consisted of his testimony and the testimony of his secretary, Irma Taylor. Thompson testified that he attended the meeting on Friday morning, September 17, 1993, with Spalvins and Creekmore. He stated that although he never rejected the $13,500.00 settlement offer, he was unhappy and dissatisfied with the offer. Thompson stated that he did not go to lunch with Spalvins and Creekmore because he had another business engagement, and that he was told to think about the offer and get back in touch with Spalvins. Thompson testified that after concluding his business engagement, he returned to his own office on Friday afternoon, and he told his secretary, Irma Taylor, that he felt like his attorneys "had sold . . . [him] out" and that he was quite angry. He stated that he told Ms. Taylor to leave early that afternoon, because he did not want her to hear the language he intended to use when he called Mr. Spalvins. He testified that after Ms. Taylor left at about 4 p.m., he telephoned Spalvins and reiterated his dissatisfaction with the settlement offer and told Spalvins that the attorneys should "get . . . [their] money and leave . . . [him] out of it." Thompson further stated that he informed Spalvins that he would not sign anything. Thompson testified as follows:

> Q. And she left and then around 4:00 you picked up
> the phone to call Mr. Spalvins, correct?
>
> A. That's correct.
>
> Q. In that telephone conversation you cussed him out

you said, correct?

A. Correct.

Q. In that telephone conversation you told him, "You and David Creekmore go ahead and you get your all's money and leave me out of it," is that right?

A. That's right.

Q. You also told him you were dissatisfied, correct?

A. The last thing --

Q. I just -- I'm sorry. Go ahead.

A. To go ahead and get their money and leave the rest up to me. I wasn't going to sign a damn thing and hung up the phone on him when he didn't need me.

Q. At any rate, Mr. Thompson, it was during this telephone conversation that you said for what had been offered, I can't get the bricks off my house for that, correct?

A. Correct.

Q. And that you were told by Mr. Spalvins that, in effect, if you take this case to trial it's like rolling the dice with a jury and you could come up snake eyes, correct?

A. That is what he was saying.

Q. And that offended you because you are not a gambling man, correct?

A. That's true, too.

Q. You told him don't be using references like that with me; I've never used dice in my life, correct?

A. That's correct.

Q. At any rate, you became disgusted and you told Mr. Spalvins to go ahead and do what you are going to do but I'm not signing anything and Mr. Spalvins said I'm your lawyer, I'll sign it, I'll settle it and you said thank you and hung up.

A. That's correct. He said he didn't need me.

> Q. Right.
>
> A. He said I don't need you, so I'll sign it. The last of the conversation I said thank you and hung the phone up.
>
> Q. You did not talk to Mr. Spalvins anymore from that point forward up until the time he was deposed in connection with this case; is that fair to say?
>
> A. Never spoke to him until we had a deposition in your office.

Thompson further testified that he did not inquire as to whether the underlying action would still be tried on Tuesday, September 21, and that he did not attend court on that day.

To corroborate his testimony, Thompson introduced the testimony of his secretary, Irma Taylor. Ms. Taylor testified that on Friday, September 17, 1993, Thompson met with his attorneys in the attorneys' office. She stated that when Thompson returned to his office that afternoon he was very angry and was upset because the settlement offer would not cover the cost of repairing his home, and that he stated he was not going to settle the case. Ms. Taylor testified that later in the afternoon, Thompson told her to leave the office early because he planned to use some strong language when he called Spalvins. She further stated that while she was present, Thompson did not leave his office to return to Spalvins's office.

Thompson asserts that in order to bind a client to a settlement agreement, an attorney must have unambiguous, express, and unequivocal actual authority to settle a case. He asserts that the evidence in the record preponderates against the trial court's finding that Spalvins had such authority. Since the case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must

affirm, absent error of law. T.R.A.P. 13(d).

The trial judge, as the trier of fact, had the opportunity to observe the manner and demeanor of all of the witnesses as they testified from the witness stand. The weight, faith, and credit to be given to a witness's testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court. *Town of Alamo v. Forcum-James Co.*, 205 Tenn. 478, 327 S.W.2d 47 (1959); *Sisk v. Valley Forge Ins. Co.*, 640 S.W.2d 844 (Tenn. App. 1982). Any conflict in the testimony requiring a determination of the credibility of the witnesses rests in the first instance with the trial court, and the credibility accorded will be given great weight by the appellate court. *State ex rel. Balsinger v. Town of Madisonville*, 222 Tenn. 272, 435 S.W.2d 803 (1968); *Haverlah v. Memphis Aviation, Inc.*, 674 S.W.2d 297 (Tenn. App. 1984).

It is apparent that the trial court found Spalvins's testimony concerning the September 17, 1993, afternoon conference to be more persuasive than the testimony of Thompson. The evidence does not preponderate against this finding. We must, therefore, determine whether, according to Spalvins's testimony regarding the conference and events incident thereto, Spalvins had authority from Thompson to agree to the settlement of the case.

The general rule in Tennessee is that an attorney cannot surrender substantial rights of a client, including an agreement to dismiss the litigation thereby permanently barring a client from pursuing his claim, without the express authority of the client. *Davis v. Home Ins. Co.*, 127 Tenn. 330, 337, 155 S.W. 131 (1912); *Long v. Kirby-Smith*, 40 Tenn. App. 446, 292 S.W.2d 216, 222 (1956).

In the case at bar, it is uncontroverted that Thompson was dissatisfied with the offer of settlement. However, according to Spalvins's testimony, when he informed Thompson that he could either accept the offer or go to trial,

Thompson replied, "That's not enough money, but just get it over with. I can make more money than that by working on Monday and Tuesday with my equipment rather than being in a courthouse." Spalvins then called Austin Powder's attorney and accepted the offer while Thompson was present. Moreover, Spalvins testified that he explained the mechanics of the settlement to Thompson and that when Thompson was leaving his office, his paralegal also explained the mechanics of the settlement and the probable time table involved. Spalvins's paralegal testified that after this explanation, Thompson made no comment or statement which indicated that he did not agree with the settlement reached. Finally, Thompson's statements to the effect that he could make more money in his business than he could being at the courthouse, in conjunction with the fact that Thompson did not appear in court on the date the underlying suit was set for trial, indicate that Thompson did in fact authorize Spalvins to settle the suit.

Under the state of this record, we cannot say that the evidence preponderates against the trial court's finding that Thompson authorized Mr. Spalvins to agree to the settlement of his case.

Thompson also asserts that pursuant to T.C.A. § 29-34-101, an attorney must have express, written authority to settle a case, and since Spalvins had no such written authority, he had no authority to settle. We disagree. T.C.A. § 29-34-101 (1980) provides:

> 29-34-101. Express consent required for settlements. - In any tort action, prior settlement of damages made on behalf of the plaintiff by another, in exchange for a release executed by or on behalf of the defendant [sic], shall constitute no bar to the plaintiff's action, and proof by the defendant of such settlement and release shall be inadmissible, unless it be shown that such settlement made on behalf of the plaintiff was with the express consent of the plaintiff given in writing, after the cause of action arose.

By its terms, this statute is applicable where a plaintiff is sought to be charged with a settlement made on his or her behalf in a suit in which he or she was a defendant. A prime example is a tort suit against an insured that is handled by the liability insurance carrier. It is common knowledge that liability insurance companies, by the terms of their policies, have the authority to settle cases on behalf of their insureds, and this statute prevents such a settlement from being a bar to the insured's cause of action against an alleged tortfeasor unless it is shown that the insured expressly consented to the settlement in writing. This is not the situation we have in the case at bar. We do not have a prior settlement made on behalf of anyone by a third party, and this statute is simply not applicable to the case before us.

The judgment of the trial court is affirmed, the case is remanded to the trial court for such other proceedings as may be necessary, and costs of the appeal are assessed against the appellant.

____
W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

____
ALAN E. HIGHERS, JUDGE

____
DAVID R. FARMER, JUDGE