

DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

Calvin A. Johnson v. Velma Virginia Skarvan

992 So. 2d 873 (Fla. Dist. Ct. App. 2008) · No. No. 5D07-3102 · Decided October 17, 2008

SUMMARY

The Florida Fifth District Court of Appeal held that an attorney lacked authority to settle a personal injury action for less than the amount authorized by the client. The court rejected reliance on an alleged emergency and reversed and remanded the order enforcing the settlement.

CASE DETAILS

COURT	District Court of Appeal of Florida, Fifth District
WRITING FOR THE COURT	Torpy, J.; Pleus, J.; Orfinger, J.
JURISDICTION	Florida
DECIDED	October 17, 2008
DOCKET	No. 5D07-3102
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appellant challenged an order granting a motion to enforce a settlement agreement in a personal injury action.
STANDARD OF REVIEW	The court reviewed the legal issue of counsel's authority to settle and concluded that the absence of a hearing transcript did not preclude review because the factual basis for the trial court's findings appeared on the face of the record.
PRECEDENTIAL VALUE	Published opinion; precedential value under Florida appellate precedent rules.
PARTIES	Calvin A. Johnson v. Velma Virginia Skarvan

TOPICS

- civil procedure
- appellate procedure
- personal injury
- standard of review

PRACTICE AREAS

- civil procedure
- personal injury

QUESTIONS PRESENTED

1. Whether the absence of a transcript of the settlement-enforcement hearing required affirmance of the trial court's order.
2. Whether an attorney may settle a client's claim for less than the amount authorized by the client based on implied or apparent authority arising from an alleged emergency.
3. Whether the settlement's purported benefit to the client establishes counsel's authority to enter the settlement.

HOLDINGS

1. The absence of a transcript did not preclude appellate review because the factual underpinning of the trial court's findings was apparent from the face of the record.
2. The attorney lacked authority to settle the client's case for \$6,500 when the client had authorized settlement only for \$7,500, and the alleged emergency did not establish implied or apparent authority.
3. A finding that the settlement was in the client's best interest did not establish counsel's legal authority to settle the claim.

KEY QUOTATIONS

"the "mere employment of an attorney does not give the attorney the implied or apparent authority to compromise the client's cause of action or settle the client's claim." (875)

"when an attorney is confronted with an emergency which requires immediate action to protect the client's interests and consultation with the client is impossible." (875)

FACTUAL BACKGROUND

Johnson retained Stephen J. Kirschner to prosecute a personal injury action arising from a motor vehicle accident. Johnson authorized Kirschner to settle for \$7,500 after Johnson said he could not attend a scheduled independent medical examination. When the appellee offered only \$6,500, Kirschner accepted the offer without contacting Johnson, believing that acceptance would avoid possible sanctions. Kirschner later sought to enforce the settlement, asserting implied or apparent authority based on an alleged emergency.

PROCEDURAL HISTORY

After the appellant authorized his attorney to settle for \$7,500, the attorney accepted the appellee's \$6,500 offer without actual authority. The trial court found that the settlement was in the appellant's best interest and that counsel had implied authority because an alleged emergency made immediate action necessary. The appellate court reviewed the order and reversed, remanding the matter.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The order granting the motion to enforce the settlement agreement was reversed and the matter was remanded.

CASES CITED

- *Nehleber v. Anzalone*, 345 So. 2d 822, 823 (Fla. 4th DCA 1977)
- *Hirsch v. Hirsch*, 642 So. 2d 20, 21 (Fla. 5th DCA 1994)
- *Collado v. Pavlow*, 951 So. 2d 69, 71 (Fla. 5th DCA 2007)

OPINION

PER CURIAM.

992 So. 2d 873 (2008) Calvin A. JOHNSON, Appellant, v. Velma Virginia SKARVAN, Appellee. No. 5D07-3102. District Court of Appeal of Florida, Fifth District. October 17, 2008. *874 Calvin A. Johnson, Deland, pro se. David A. Collins of Kevin W. Korth & Associates, Elizabeth C. Wheeler of Elizabeth C. Wheeler, P.A., Orlando, for Appellee. TORPY, J. Appellant challenges the lower court's order granting a motion to enforce a settlement agreement in this personal injury action.

Because Appellant's attorney did not have authority to settle the case on Appellant's behalf, we reverse the lower court's order. This action arose out of a motor vehicle accident. Appellant retained Attorney Stephen J. Kirschner to prosecute the action on his behalf.

In due course, Appellant's independent medical examination was scheduled. Several days prior to the scheduled examination, Appellant told Mr. Kirschner that he would be unable to attend the examination because he intended to be in Atlanta at the time. Mr. Kirschner informed Appellant that his refusal to attend the examination might result in sanctions including the dismissal of the action.

In response, Appellant authorized Mr. Kirschner to settle the suit for the total sum of \$7,500. Thereafter, Mr. Kirschner entered into settlement negotiations with Appellee. However, the negotiations resulted in an offer by Appellee of only \$6,500, \$1,000 less than the actual authority Appellant gave to his counsel. Apparently unable to contact Appellant before the scheduled independent medical examination, and believing that it was in Appellant's best interest to accept the lesser sum to avoid the possibility of sanctions, Mr. Kirschner agreed with Appellee's counsel to settle Appellant's case for \$6,500.

Mr. Kirschner subsequently filed a motion to withdraw, claiming entitlement to a lien on the settlement proceeds. He also filed a "Verified Motion To Enforce Settlement," in which he acknowledged that he did not have actual authority from Appellant to settle Appellant's case for \$6,500. Instead, Mr. Kirschner contended that he had implied or apparent authority to compromise his client's claim because Appellant's refusal to attend the independent medical examination

constituted an "emergency," justifying the unauthorized settlement based upon *Nehleber v. Anzalone*, 345 So.

2d 822 (Fla. 4th DCA 1977). The trial court conducted a hearing on the verified motion and made two findings: (1) that the settlement was in Appellant's best interest, and (2) that Appellant's counsel had implied authority to settle the case due to the so-called emergency, also relying upon *Nehleber*. This appeal timely followed. At the outset, we address Appellee's contention that the failure of Appellant to file a transcript of the hearing compels us to affirm.

Because the factual underpinning for the trial court's findings is apparent from the face of the record, we do not agree that the absence of a transcript precludes review on the merits. *875 *Hirsch v. Hirsch*, 642 So. 2d 20, 21 (Fla. 5th DCA 1994). Turning to the merits, we start our analysis with the general rule that the "mere employment of an attorney does not give the attorney the implied or apparent authority to compromise the client's cause of action or settle the client's claim."

Collado v. Pavlow, 951 So. 2d 69, 71 (Fla. 5th DCA 2007). An exception to this general rule is said to exist "when an attorney is confronted with an emergency which requires immediate action to protect the client's interests and consultation with the client is impossible." *Id.* (citing *Nehleber*, 345 So.2d at 823).

Although several courts, including our own, have acknowledged this exception, Appellee concedes, and our research confirms, that no Florida appellate court has ever found the exception to be applicable. We conclude that it is not applicable here, even assuming that the exception is legally sound.

As for the lower court's finding that the settlement was in Appellant's best interest, that finding does not bear on the legal issue here, which is counsel's authority to settle the case, not the wisdom of counsel's decision. REVERSED and REMANDED. PLEUS and ORFINGER, JJ., concur.