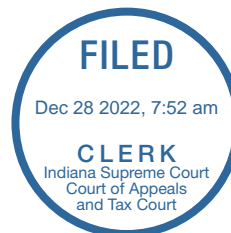


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

George Eltzroth,
Appellant-Plaintiff,

v.

Zaki Ali, and Zaki Ali Attorney at
Law LLC d/b/a Zaki Ali Trial
Lawyers,
Appellee-Defendant.

December 28, 2022
Court of Appeals Case No.
22A-PL-963
Appeal from the
Madison Circuit Court
The Honorable
Mark Dudley, Judge
Trial Court Cause No.
48C06-2012-PL-176

Foley, Judge.

- [1] George Eltzroth (“Eltzroth”) was represented by Zaki Ali, and Zaki Ali Attorney at Law LLC d/b/a Zaki Ali Trial Lawyers (collectively, “Ali”) in a

criminal matter. After that criminal matter was concluded, Eltzroth filed a complaint against Ali for legal malpractice and a fee dispute and was represented by the Nice Law Firm, LLP (“Nice”) in his suit against Ali. Nice later negotiated a settlement with Ali. Eltzroth appeals from the trial court’s order enforcing the settlement agreement and concluding that Eltzroth had authorized Nice to settle the lawsuit. Eltzroth argues that the trial court erred in ordering that the settlement agreement should be enforced, and that Nice had actual authority to settle the lawsuit on behalf of Eltzroth. Finding no error in the trial court’s order, we affirm.

Facts and Procedural History

[2] On December 4, 2020, Eltzroth filed a complaint for legal malpractice against Ali with a “fee dispute” count claiming that Eltzroth was entitled to a refund for fees paid to Ali for legal services performed by Ali in 2014 and 2015 because the amount paid was not reasonable. Eltzroth contended that he agreed to a guilty plea in a criminal case in which Ali served as his defense counsel, and that the guilty plea was used in a separate civil suit to “coerce” a civil settlement with his victim. Appellant’s App. Vol. II pp. 14–15. Eltzroth was represented by Nice in this lawsuit against Ali.

[3] On September 3, 2021, and October 4, 2021, Eltzroth and Ali, through counsel, exchanged a written settlement demand and response consistent with the trial court’s Case Management Order. Eltzroth and Ali also engaged in discovery, including interrogatories, requests for admission, and requests for production of documents. The settlement demand to Ali and the discovery served on Ali on

Eltzroth's behalf were sent by Nice. The parties, through counsel, continued to exchange settlement offers in November 2021. On November 10, 2021, Ali's counsel conveyed another a settlement offer to Eltzroth and asked Nice to confirm that he was acting with Eltzroth's authority before engaging in further settlement exchanges. Later that day, Nice confirmed that he was acting pursuant to Eltzroth's authority and conveyed a counter amount to Ali's settlement offer.

[4] On November 17, 2021, Ali extended a settlement offer of \$7,500.00 in exchange for Eltzroth's dismissal with prejudice of his civil suit and his full release of claims, to be detailed in a settlement and release agreement along with other standard, non-monetary terms. On November 29, 2021, Eltzroth, by Nice, agreed to the \$7,500.00 settlement in exchange for Eltzroth's dismissal with prejudice and full release of claims. In an email, agreeing to the settlement, Nice stated:

I have finally received authority to accept \$7,500 on Mr. Eltzroth's behalf. Please obtain a check and provide a release and stipulation of dismissal and we will work with you toward the closing of this file.

Appellant's App. Vol. II p. 112.

[5] On December 13, 2021, Nice communicated to Ali's counsel that they were obtaining Eltzroth's signature on the written settlement and release agreement and would forward it as soon as they received it. On December 27, 2021, Ali's counsel wrote Nice to inquire on the status of Eltzroth's signature. On

December 31, 2021, Nice responded that he did not expect to hear back from Eltzroth until the following week. On January 18, 2022, Nice filed a Motion to Withdraw Appearance “[d]ue to a break down in the attorney-client relationship.” *Id.* at 91. Nice attached his letter to Eltzroth to the motion notifying Eltzroth of Nice’s intention to withdraw and noted that Ali’s counsel would “likely move the court to compel the previously agreed to settlement.” *Id.* at 94. The trial court granted Nice’s request, and Eltzroth obtained successor counsel.

[6] On January 20, 2022, Ali filed a Motion to Enforce Settlement Agreement. At the evidentiary hearing on the motion to enforce the settlement agreement, Nice and Eltzroth both testified regarding the settlement authority given to Nice, and the settlement agreement reached between the parties. Nice testified that Eltzroth gave him authority to accept \$7,500.00 to settle the claim in exchange for dismissal of the lawsuit and signing a release of claims. *Tr.* pp. 11–13. Nice testified that he had a twenty-minute conversation with Eltzroth on November 10, 2021, during which Eltzroth gave him authority to settle the case for \$5,000.00. *Id.* at 11, 14–15, 21–22. Nice testified that Eltzroth gave Nice “authority to settle for less than” \$7,500.00, and he was able to settle it for more than the \$5,000.00 that Eltzroth authorized him to accept. *Id.* at 15, 21–22.

[7] In his testimony, Eltzroth did not deny that the conversation with Nice occurred, but instead, testified that he did not recall it. On cross-examination by Ali’s counsel, the following exchange occurred:

Q. And to be clear you're not denying that the conversation occurred, you, you just don't have any memory of it?

A. Well like not that date.

MR. SHANKS: Your Honor I would object. That's been asked and answered.

THE COURT: Overruled.

MR. SHANKS: Go ahead and answer the questions.

A. No I do not remember it.

Id. at 30.

[8] On redirect examination, Eltzroth stated he did not know whether the conversation occurred but that he did not recall it.

Q. Okay. Again just so that we're clear you indicated in your testimony you don't recall (INDISCERNIBLE-ZOOM CONNECTION BREAKING UP) conversation?

A. (INDISCERNIBLE-ZOOM CONNECTION BREAKING UP).

Q. Does that mean it didn't occur?

A. I don't know if it occurred or not but I don't recall it.

Id.

[9] On March 30, 2022, the trial court issued its Order Granting Defendants' Motion to Enforce Settlement Agreement, concluding that "Eltzroth is bound by the terms of the settlement agreement." Appellant's App. Vol. II p. 11. The trial court found, in pertinent part:

The court after hearing the testimony and observing the witnesses determines that Nice had actual authority from Eltzroth to enter into a \$7,500.00 settlement with Ali. There is no direct conflict in testimony to resolve, rather one party has a definite memory and the other, in all honesty, cannot dispute that definite memory. In addition to the testimony of Nice and Eltzroth, the court also relies on the withdrawal letter and emails showing consistency with Nice's testimony. The court finds that Eltzroth did authorize Nice to settle his lawsuit for \$5,000.00 or more.

Id. at 13.

[10] The trial court ordered Eltzroth to sign and deliver the written settlement and release agreement previously circulated by Ali's counsel, directed Ali to deliver a \$7,500.00 settlement check to Eltzroth following receipt of the signed agreement, and directed the parties to file a Stipulation of Dismissal with Prejudice. Eltzroth now appeals.

Discussion and Decision

[11] Eltzroth argues that the trial court erred when it determined that Nice had actual authority to enter into a settlement agreement with Ali. On appeal from matters determined after a bench trial, we shall not set aside the findings or judgment of the trial court unless they are clearly erroneous. Ind. Trial Rule

52(A). We do not reweigh the evidence or judge the credibility of the witnesses. *Broadway Logistics Complex, LLC v. Katona*, 179 N.E.3d 467, 472 (Ind. Ct. App. 2021) (citing *Marion Cnty. Auditor v. Sawmill Creek, LLC*, 964 N.E.2d 213, 216 (Ind. 2012)), *trans. denied*. We will reverse when our review of the record “leaves us with a firm conviction that a mistake has been made.” *Todd v. Coleman*, 119 N.E.3d 1137, 1139–40 (Ind. Ct. App. 2019) (citing *State Farm Ins. Co. v. Young*, 985 N.E.2d 764, 766 (Ind. Ct. App. 2013)).

[12] Here, in its order enforcing the settlement agreement, the trial court found that Nice had actual authority from Eltzroth to enter into the settlement agreement with Ali. Eltzroth argues that no evidence was presented to support the trial court’s determination. “‘Indiana strongly favors settlement agreements and if a party agrees to settle a pending action, but then refuses to consummate his settlement agreement, the opposing party may obtain a judgment enforcing the agreement.’” *Id.* at 1140 (quoting *Sands v. Helen HCI, LLC*, 945 N.E.2d 176, 180 (Ind. Ct. App. 2011), *trans. denied*). Settlement agreements are governed by the same general principles of contract law as other agreements. *Id.*

[13] Our Supreme Court has recognized three classifications of authority: (1) actual authority; (2) apparent authority; and (3) inherent authority. *Adsit Co. v. Gustin*, 874 N.E.2d 1018, 1024 (Ind. Ct. App. 2007) (citing *Gallant Ins. Co. v. Isaac*, 751 N.E.2d 672, 675 (Ind. 2001)). “Authority can be express or implied and may be conferred by words or other conduct, including acquiescence.” *Id.* Here, the trial court found that Nice had actual authority. Actual authority exists when the principal has, by words or conduct, caused the agent to believe that the

principal has authorized him or her to act on the principal's behalf. *Gallant*, 751 N.E.2d at 675. Actual authority focuses on the belief of the agent and may be express, implied, or created by acquiescence. *Todd*, 119 N.E.3d at 1141.

[14] At the hearing in this case, Nice testified that he spoke with Eltzroth and obtained express authority from him on November 10, 2021, to settle the lawsuit with Ali. Nice also testified that Eltzroth gave him authority to settle for less than \$7,500.00, with permission to attempt to settle for a higher amount. There was no evidence presented that conflicted with this testimony. Eltzroth merely testified that he did not recall having a conversation with Nice about settlement and authorization to enter into a settlement, but he did not deny that any such conversation ever occurred.

[15] On appeal, Eltzroth contends that the only evidence that he had given Nice actual authority to make a binding settlement on his behalf was the testimony of Nice. The trial court relied on the emails exchanged between Nice and Ali's counsel and found that they were consistent with Nice's testimony and bolstered statements by Nice that he had been given authority to settle by Eltzroth. The trial court specifically found Nice's testimony that he received permission from Eltzroth to accept a minimum offer of \$5,000.00 when they spoke on November 10, 2021, to be consistent with the email exchanges between Nice and Ali's attorney. The emails show that Nice received a \$5,000.00 offer from Ali sometime before November 10, 2021, and that, after discussing it with Eltzroth, Nice sent a counteroffer on November 10, 2021. Ali then sent a counteroffer of \$7,500.00 on November 17, 2021, which Nice

accepted on Eltzroth's behalf twelve days later. Nice's testimony that he had express authority to settle the lawsuit and to accept the \$7,500.00 settlement offer on Eltzroth's behalf was consistent with these emails, which contained the essential agreed-to settlement terms.

[16] Eltzroth relies on both *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299 (Ind. 1998) and *Beam v. Wal-Mart Stores, Inc.*, 829 F. Supp. 2d 706 (S.D. Ind. 2011) in his argument that the evidence was not sufficient to prove that Nice had actual authority to settle the lawsuit. However, his reliance on both cases is misplaced. First, *Koval* held that, as a general rule, the “retention of an attorney does not without more carry implied authority to the attorney to settle.” 693 N.E.2d at 1303. In that case, an attorney, representing two of the parties, agreed to a settlement that compromised the interests of both parties; however, one of the parties had not authorized the other party or the attorney to settle and later refused to agree to the settlement. *Id.* at 1301. Here, Nice testified that Eltzroth gave him authority to settle the case, and there was no testimony that Nice was not authorized to do so. In *Beam*, the District Court held that an email alone did not establish that the attorney had apparent authority to enter into a settlement agreement because there was no other manifestation by the plaintiff, either directly or indirectly, that indicated that the attorney had the authority to settle the case. 829 F. Supp. 2d at 709. “Apparent authority exists when a third party reasonably believes an agent possesses authority because of some manifestation from the principal.” *Id.* In the present case, the trial court found that actual authority existed, not apparent authority. Additionally, Nice

testified that he had actual authority to settle the case, and Eltzroth did not dispute this, only that he did not recall such a conversation occurring. Thus, Eltzroth's reliance on these two cases does not support his claim that the trial court erred in finding that actual authority existed.

[17] We can only set aside the trial court's judgment if it is clearly erroneous, and we cannot reweigh the evidence or judge the credibility of the witnesses. *Todd*, 119 N.E.3d at 1139–40. Here, the trial court relied on the testimony of Nice and Eltzroth and the email exchanges between Nice and Ali's attorney to conclude that Nice had actual authority to enter the settlement with Ali. Eltzroth's arguments are merely requests to assess witness credibility and reweigh evidence, which this court may not do. We, therefore, conclude that there was sufficient evidence for the trial court to determine that Nice had actual authority to settle the lawsuit with Ali, and the trial court did not err in ordering that the settlement agreement be enforced.

[18] Affirmed.

Robb, J., and Mathias, J., concur.