

IN THE SUPREME COURT OF MISSISSIPPI

PHILLYS ANN MILLS CARSON

APPELLANT

VS.

CAUSE NO. 2009-CA-01836

**DONALD K. SOWELL AND SOUTHERN
COMPUTER SERVICES, INC.**

APPELLEES

BRIEF OF APPELLEES

Appeal from the Circuit Court of DeSoto County, Mississippi

Oral argument not requested

**CAM AUERSWALD MBN [REDACTED]
RICHARD KIMMEL MBN [REDACTED]
UPSHAW, WILLIAMS, BIGGERS
& BECKHAM, LLP
309 FULTON STREET
GREENWOOD, MS 38930
662-455-1613
662-453-9245
ATTORNEYS FOR APPELLEES**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellees certifies that the following are listed in order that the Justice System and this Court may evaluate possible disqualificational recusal.

1. Phyllis Mills-Carson, pro se Appellant;
2. Donald K. Sowell, Appellee;
3. Southern Computer Services, Inc., Appellee;
4. Richard L. Kimmel, Esq., attorney for Appellees;
5. Cam Auerswald, Esq., attorney for Appellees;
6. Joe Wilson, Esq., former attorney for Appellant;
7. David Walker, Esq., former attorney for Appellant;
8. Honorable Robert P. Chamberlin, Jr., Trial Judge.

THIS the 12th day of April, 2011.



CAM AUERSWALD

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STATEMENT OF ISSUES

1. The Trial Court did not Err by Enforcing the Settlement Between Appellant and Appellees, and dismissing Appellant's case, with prejudice.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings in the Court Below.

On October 5, 2007 Appellant and Appellee Sowell, an employee of Appellee Souther Computer Services Incorporated were involved in an automobile accident. Based on this accident, Appellant's attorney David L. Walker (hereinafter referred to as "Walker") filed a complaint on her behalf of Appellant for damages on September 24, 2008. (C. P. 8-107). While summonses were issued on October 6, 2008, Appellees were never served¹. (C.P. 5-7 and 11-12).

Instead, to resolve Appellant's claim, the insurance carrier for Appellees, Progressive Gulf Insurance Company, entered into settlement negotiations with Walker. (C. P. 19).

On or about October 23, 2008, Appellant's claim was settled for \$19,000.00. In exchange for the \$19,000.00 it was expected that the Appellant would execute a full and final release and indemnifying agreement and she and her counsel would dismiss her complaint, with prejudice. (C. P. 19). However, Appellees were notified that Appellant wanted to rescind the settlement even though there was a valid contract entered into between Appellant's attorney and agent and Appellees, precluding recision. (*Id.*).

Appellant's attorney David L. Walker then filed a Motion to Enforce Settlement on November 25, 2008. (C. P. 13-17). Appellees joined in said motion additionally seeking enforcement of the settlement and dismissal of Appellant's claim, with prejudice. (C.P. 18-20). The motion hearing was held on October 5, 2009 and subsequently on October 8, 2009 the trial court

¹ Pursuant to Rule 28(c) of the Mississippi Rules of Appellate Procedure, all citations to the records throughout this brief will be as follows "C. P. ____" will be used to reference portions of the clerk's papers, "R. ____" will reference relevant portions of oral argument and testimonial evidence, "P. E. ____" references Appellant's exhibits and appropriate page numbers, and "D. E. ____" references Appellees' exhibits and appropriate page numbers.

entered an Order Enforcing settlement and dismissing Appellant's Complaint, with Prejudice. (C. P. 48-19). Appellant filed a Notice of Appeal on November 9, 2009. (C. P. 50-51).

B. Statement of Relevant Facts.

This suit arose from damages sustained by Appellant Phillys Ann Mills-Carson in an automobile accident on October 5, 2007 in DeSoto County, Mississippi (C.P. 8-10). Appellant hired David L. Walker to provide legal services on her behalf in this personal injury action. (C.P. 16). Walker filed a Complaint on behalf of Appellant on September 24, 2008. (*Id.*)

To resolve Ms. Carson's claim, the insurance carrier for Appellees, Progressive Gulf Insurance Company, entered into settlement negotiations with Walker. (C.P. 13-17). On or about October 23, 2008, Appellant's attorney settled her claim for \$19,000.00 (C.P. 19).

However, Appellant refused to execute the settlement. (C.P. 19, R. 34-35, and 47 - 48). Walker then filed a Motion to Enforce settlement on November 25, 2008. (C.P. 13-17). Appellees joined in said motion additionally seeking enforcement of the settlement and dismissal of Appellant's claim, with Prejudice (C. P. 18-20). A hearing was held on both motions of October 5, 2009. (C.P. 41). Appellant was represented at the hearing by Joe Wilson, Esq. who was substituted as her attorney. (C.P. 45 and R. 22). At the hearing, both Appellant and her former attorney David L. Walker testified. Appellant never objected to the trial judge sitting as the finder of fact nor did she request a jury trial to determine any factual disputes that may have arisen. (R. 23-61).

At the hearing, Walker testified that he was authorized by Ms. Carson to settle her claim in a range between \$18,000.00 and \$25,000.00. (R. 47 and 50). Walker claimed in his testimony that Appellant did not wish to go through a trial and he settled her claim for \$19,000.00, which was within the range of \$18,000.00 to \$25,000.00. (R. 47).

Further, Walker testified that when he received the settlement release and settlement check (from Progressive) he called Ms. Carson to ask her to come by the office, which she did do. (*Id.*) Once there, Appellant refused to execute [the release] because she claimed that Dr. Tensor (her chiropractor) overcharged her or did not treat her on the days he alleged. (R. 47-48).

Conversely, Appellant testified that Walker settled her claim for \$19,000.00 without her authority. (R. 33). Appellant does admit that on the date Mr. Walker settled her claim he was her attorney. (R. 37).

Subsequently, the trial court entered an Order on October 8, 2009 enforcing settlement and dismissing Appellant's Complaint, with Prejudice. (C. P. 48-49). The trial judge found that there was no dispute that a settlement was made between Appellant's attorney and Appellees. (C.P. 48-49). The judge found, after hearing testimony from both Walker and Appellant, that there existed credible and persuasive proof to support enforcement of settlement. (C.P. 49). The Court further found that under *Parmley v. 84 Lumber Co.*, 911 So.2d 569 (Miss. App. 2005), Walker had the authority to bind Appellant and did so. (C.P. 48). Appellant filed a Notice of Appeal on November 9, 2010. (C. P. 50-51).

C. Summary of the Argument.

Appellant's arguments are procedurally barred for failure to cite authority in support thereof, and her appeal must be dismissed. Notwithstanding this fatal error, the trial judge did not err in enforcing the settlement at issue. It is immaterial that Appellant claims she did not authorize or personally agree to the settlement at issue. As a matter of law, David L. Walker was Appellant's attorney and agent at the time when he settled her case, and he bound her to the settlement. Accordingly, Appellees respectfully request this honorable court to affirm the order of the trial court

enforcing settlement and dismissing Appellant's case, with prejudice.

ARGUMENT

A. Appellant's Failure to Cite Authority in Support of her Arguments Renders her Arguments Procedurally Barred

Appellant states in her brief that "[t]here is no case law on point with the facts of this case. Likely due to the constitutional implications requiring a Plaintiff to settle a case against an insurance company if they feel like they have not been fully compensated for their injuries." (Appellant's Brief p. 8) Presumably, this statement is the basis for her failure to cite any authority in support of her arguments. As shown below, there are cases on point with the facts of this case, they are just not in favor of Appellant.

Appellant's failure to support her arguments with legal authority is fatal to her appeal, rendering her arguments procedurally barred. *Birrages v. Ill. Cen. R.R. Co.*, 950 So. 2d 188, 194 (Miss. App. 2006). See also, *M.R.A.P.* 28(a)(6)

Notwithstanding this error, the following shows that the trial judge did not err in enforcing the settlement at issue and dismissing Appellant's case, with prejudice.

B. Standard of Review

In determining whether a trial court erred in enforcing a settlement agreement this court must determine whether the findings of the trial judge were clearly erroneous and whether the trial judge abused his discretion. *Ill. Cent. R.R. v. McDaniel*, 951 So. 2d 523, 526 (Miss. 2006) (internal quotations and citations omitted). In determining whether a trial judge abused his discretion, the reviewing court must have a "'definite and firm conviction' that the court below committed a clear error of judgment and the conclusion it reached upon a weighing of the relevant factors." *Howard*

v. TotalFinna E & P USA, Inc., 899 So. 2d 882, 888 (Miss. 2005) (quoting *Saracci v. Int'l Paper Co.*, 699 So. 2d 546, 556 (Miss. 1997)).

In the absence of objection, the trial judge is certainly entitled to sit as the finder of fact in deciding a motion to enforce settlement. *Ill. Cent. R.R. v. Byrd*, 44 So. 3d 943, 947 (Miss. 2010). [O]n appeal of a trial court judgment rendered subsequent to a bench trial where the judge has sat as the fact finder, the Mississippi Supreme Court must afford deference to the findings of the trial judge. *Chantey Music Pub., Inc. v. Malaco, Inc.*, 915 So. 2d 1052, 1056 (Miss. 2005). A circuit court judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor, and his findings are safe on appeal where they are supported by substantial, credible and reasonable evidence. *Id.* (quoting *City of Jackson v. Perry*, 764 So. 2d 373, 376 (Miss. 2000) (citing *Puckett v. Stuckey*, 633 So. 2d 978, 982 (Miss. 1993))). Therefore, this Court affords the same deference to the rulings of a circuit court judge ruling from the bench as it does a chancellor. *Id.* It follows that [this Court] will not disturb the findings of the judge unless manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Id.* (citing, *Hill v. Southeastern Floor Covering Co.*, 956 So. 2d 874, 877 (Miss. 1992); and, *Bell v. Parker*, 563 So. 2d 594, 597 (Miss. 1990)).

Here, based on the proof from the hearing to enforce settlement and the applicable legal standards, the trial judge's order granting enforcement of settlement and dismissing Appellant's complaint, with prejudice is proper. The Appellant has not and cannot sustain her burden in showing that the trial judge's decision was clearly erroneous or that he abused his discretion, and his order must be affirmed.

C. The trial court did not err by enforcing the settlement between Appellant and Appellees and dismissing Appellant's case, with prejudice.

Here it is undisputed that a settlement was reached between Appellant's attorney and Appellees. Walker's Motion to Enforce only amplifies this fact. (R. 47 and C. P. 13-17). Appellant argues that the lack of documentation to her regarding the settlement offer, her lack of knowledge of the offer and her unwillingness to accept the settlement provides the proof needed to show that there was no meeting of the minds between the parties and thus no contract. (Appellant's Brief, p. 13). She also argues there is no substantial credible evidence supporting a finding that her attorney had actual or apparent authority to settle her case for \$19,000.00. (Appellate's Brief, p. 12).² Accordingly, she argues that to force her to sign the settlement documents is a deprivation of her right to trial. (Appellant's Brief, p. 13-14).

While Appellant provides no legal authority for her arguments, taking her proof and arguments at face value, it appears she is asking this court to disregard the longstanding principles controlling agency and contracts.

Mississippi law favors settlement for the expeditious closure of cases. *McBride v. Chevron USA*, 673 So.2d 372, 379 (Miss. 1996). Mississippi courts favor the settlement of disputes by agreement of the parties and ordinarily will enforce a settlement agreement which the parties have

²Appellant also argues that her oral acceptance of the settlement at issue violates the statute of frauds and the settlement is therefore legally impermissible. (Appellant's Brief p. 13) It is unclear from her statement of facts what this argument is based on and is therefore difficult to address. Further, Appellant fails to cite any authority to support her argument which renders her argument procedurally barred.. *Birrages*, 950 So. 2d at 194. And, this issue was not raised at the trial court level, and is therefore waived on appeal. *Id.* Notwithstanding Appellant's failures in these regards, *Miss. Code Ann.* §15-3-1 sets forth what agreements or contracts are controlled by the statute of frauds and settlement agreements are not contained in this code section. If, however, the statute of frauds applied, the release, which Appellant refused to sign, would satisfy the statute of frauds as a written document.

made, absent any fraud, mistake or overreaching. *McManus v. Howard*, 569 So.2d 1213, 1215 (Miss. 1990); *First Nat'l Bank of Vicksburg v. Caruthers*, 443 So.2d 861, 864 (Miss. 1983); *Weatherford v. Martin*, 418 So.2d 777, 778 (Miss. 1982). A settlement entered into in good faith without fraud is valid, without regards to the real merits of the dispute. *Strong v. Cowsen*, 19 So.2d 813, 814 (Miss. 1944). A settlement is a contract. *McManus*, 569 So.2d at 1215.

If a settlement agreement is reached, Plaintiff relinquishes her right to proceed to trial. *Byrd*, 44 So.3d at 947. (Emphasis supplied). Where the parties, acting in good faith, settle a controversy, the courts will enforce the compromise without regard to what the result might have been had the parties chosen to litigate. *Hennessy v. Bacon*, 137 U.S. 78, 11 S.Ct. 17, 4 L.Ed. 605 (1980).

It is almost too fundamental for citation that an attorney is presumed to have authority to speak for and bind his client. *Parmley v. 84 Lumber Co.*, 911 So.2d 569, 573 (Miss. App. 2005). (Emphasis supplied). An act is considered to be within the agent's apparent authority when a third party is justified in concluding that the agent is authorized to perform it from the nature of the duties which are entrusted to him. *McPherson v. McLendon*, 221 So.2d 75, 78 (Miss. 1969). Apparent authority is to be determined from the acts of the principal and requires reliance and good faith on the part of the third party. *Tarver v. J.W. Sanders Cotton Mill*, 187 Miss. 111, 192 So. 17 (Miss. 1939).

It is clear that attorneys are presumed to have authority to speak for and bind his client and a settlement terminates the litigation. *Parmley*, 911 So. 2d at 573 and *Byrd*, 44 So.3d at 947. Appellant argues that *Parmley* is distinguishable from the facts of this case, but it is not. (Appellant's brief p. 10). She argues that in *Parmley*, Plaintiff's counsel represented both parties and that since *Parmley* dealt with breach of contract, it is inapplicable to this personal injury action.

(*Id.*) Appellant apparently misreads and misunderstands *Parmley*.

A reading of *Parmley* shows that it is right in line with this case, both factually and authoritatively. In *Parmley*, the plaintiff's attorney represented to various defendants' attorneys that plaintiff would settle for various amounts of money. *Parmley*, 911 So. 2d at 571-2. There are no facts in *Parmley* to suggest that plaintiff's attorney was also representing any of the defendants. In fact, *Parmley*'s attorney of record is not the same as the defendants'. *Id.* At 570. Just like in this case, after *Parmley*'s attorney reached settlements with the various defendants, *Parmley* decided he would not accept the settlements and contended he did not authorize the settlements. *Id.* at 571-2.

While there is no detail as to the level of proof *Parmley* put on to deny the existence of his attorney's authority to settle his case, the Mississippi Court of Appeals held that the only issue was whether an agent of *Parmley*, acting with actual or apparent authority, agreed to a settlement of his case. *Id.* at 572. The court analyzed the actions of *Parmley*'s attorney leading up to the formation of the settlement agreements and found that the trial court, as the finder of fact, relied on substantial credible evidence in finding a settlement existed. *Id.* at 573.

Parmley holds that an attorney, as agent of his client (the principal) can bind her to a settlement. *Id.* That is just what Appellant's attorney in this case did, as there is no fact question that Walker settled with Appellees. (R. 47 and C.P. 13-17).

The United States Courts of Appeals for the Fifth Circuit visited very similar facts in *Terrain Enterprises, Inc. v. Western Casualty and Security Co.* 774 F.2d 1320, (5th Cir. 1985). In *Terrain*, the Fifth Circuit applied Mississippi law in determining whether there was a valid and binding settlement between the parties where *Terrain* contended its attorney who offered settlement did not have actual or apparent authority to settle the case. *Terrain*, 774 F. 2d at 1321. The Fifth Circuit

found that Terrain failed to show its lawyer lacked the authority to bind it to the settlement stating:

[I]t is presumed that an attorney who has represented a party is authorized to take all action necessary to conduct litigation. *Great Atlantic and Pacific Tea Co. v. Majure*, 176 Miss. 356, 168 So. 466, 468 (1936). The burden of showing that the attorney had no authority to act is upon the party denying such authority. *Hirsch Bros. & Co. v. R.E. Kennigton Co.*, 155 Miss. 124 So. 344 (1929). Terrain did not meet this burden because they did not offer any proof that [its attorney] did not have authority to act on their behalf. Western was justified in relying upon the settlement offer made by [Terrain's attorney] based upon his previous actions as representative of Terrain. There is no question of good faith. Thus, the three requirements of apparent authority were satisfied in this instance. 774 F.2d at 1322.

The Court in *Terrain* enforced the settlement reached between Terrain's attorney and the other party based on the actions of Terrain's counsel as agent for Terrain. *Id.* Under *Parmley* and *Terrain*, the trial judge's order affirming settlement was proper and must be affirmed.

Again, the salient facts applicable to an analysis of the issues presented here are: (1) David L. Walker was Appellant's attorney when he settled her case (R. 37); (2) although Appellant disputes Walker's authority, Walker testified under oath that he was authorized to settle Appellant's claim in a range between \$18,000.00 and \$25,000.00 (R. 47); and, (3) there was a settlement reached between Walker as Appellant's attorney of Appellees for \$19,000.00. (R. 47).

Here, Appellant's counsel bound her to the terms of the settlement by contracting to settle Appellant's claim. Our law is clear that if settlement is reached, Appellant loses her right to proceed to trial. Appellant admitted Walker was acting as her attorney at the time he settled her claim. Walker testified he had authority to settle Appellant's case within a certain range and did so. Appellant's failure to object to the trial judge so sitting waives any argument of error in her appeal. *Birrages*, 950 So.2d at 194. Here, the trial judge found substantial credible proof that Walker was

authorized to settle Appellants case and did so. (C.P. 48-49). Just like in *Parmley* and *Terrain*, above, Appellant is bound by the settlement.

CONCLUSION

Notwithstanding Appellant's failure to cite authority in support of her arguments, Appellant's arguments suggest this Court needs to throw the principles of agency and contracts out of the window simply because she was not pleased with the settlement reached by her attorney. David L. Walker was acting on behalf of Appellant as her attorney when he settled her case and our law presumes he had that authority. To the extent Appellant's arguments boil down to a fact question on authority, the trial judge found substantial credible proof to support a finding of that authority. Appellant's failure to object to the trial judge sitting as the finder of fact waives any right to complain about his findings now unless there was a complete absence of proof supporting his decision. The judge found that proof in Walker's testimony. The existence of this substantial credible proof negates Appellant's ability to show that the trial judge erred or abused his discretion. Accordingly, the trial judge's order enforcing settlement and dismissing Appellant's case with prejudice must be affirmed.

UPSHAW, WILLIAMS, BIGGERS
& BECKHAM, LLP

BY:



CAM AUERSWALD, MBN: [REDACTED]
OF COUNSEL TO APPELLEES

OF COUNSEL:

UPSHAW, WILLIAMS, BIGGERS
& BECKHAM, LLP
309 FULTON STREET
POST OFFICE DRAWER 8230
GREENWOOD, MISSISSIPPI 38935-8230
TEL: (662) 455-1613
FAX: (662) 453-9245

CERTIFICATE OF SERVICE

I, Cam Auerswald, of counsel to Defendant(s), hereby certify that I have this day mailed, with postage prepaid, a true and correct copy of the above and foregoing document unto:

Phillys Ann Mills-Carson
1046 Church Road West
No. 106-232
Southaven, Mississippi 38671

David L. Walker, Esq.
Post Office Box 896
Southaven, MS 38671

Honorable Robert P. Chamberlin
Post Office Box 280
Hernando, MS 38632-0280

SO CERTIFIED, this the 12th day of April, 2011.



CAM AUERSWALD