

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO.: 35593

**FAROUK ABADIR, HOSNY GABRIEL,
RICARDO RAMOS, ALFREDO RIVAS,
MICHAEL VEGA and HUNTINGTON
ANESTHESIOLOGY GROUP, INC.**

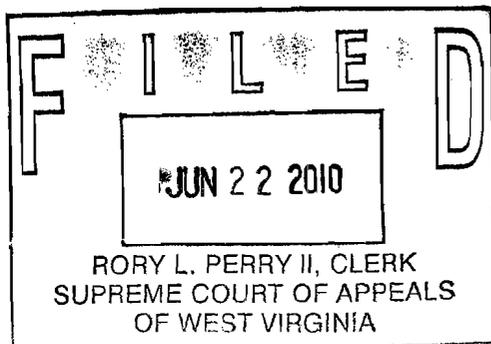
Appellants

v.

**MARK H. DELLINGER and
BOWLES, RICE, McDAVID,
GRAFF & LOVE, LLP**

Appellees

BRIEF OF APPELLANTS



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Introductory Statement

The Appellants commenced this litigation because, according to their complaint, a case in which they had been the defendants was settled by their attorney, Mark Dellinger, without their consent. In that case, in connection with a motion to enforce the settlement, the Circuit Court had determined that Mr. Dellinger lacked the actual authority to do what he had done. On appeal, however, this Court reversed that decision holding that Mr. Dellinger, as the attorney of record, had the apparent authority to obligate his clients to a settlement to which they had not agreed.¹ The Circuit Court, based upon that ruling, dismissed this case concluding that since it had been determined by this Court that Mr. Dellinger had the apparent authority to settle, the doctrine of collateral estoppel precluded the Appellants from challenging what he had done. In reaching this decision, it appears that the Circuit Court failed to perceive the difference between the actual authority of an attorney, which pertains to the relationship between the attorney and the client, and the apparent authority of an attorney to act for the client, which relates to the dealings between the attorney and a third party.²

Facts

This appeal is the third chapter in the *Messer v Huntington Anesthesia Group* saga which was begun in 2002 by an anesthetist who claimed that the failure of her employer to accommodate her

¹ *Messer v. Huntington Anesthesia Group*, 664 S.E.2d 751 (WV, 2008) (*Messer II*)

² The requirements to establish apparent authority were summarized in *Messer II* (Syllabus Point 3)

One who by his acts or conduct has permitted another to act apparently or ostensibly as his agent, to the injury of a third person who has dealt with the apparent or ostensible agent in good faith and in the exercise of reasonable prudence, is estopped to deny the agency relationship

physical limitations exacerbated a pre-existing medical condition. The Circuit Court dismissed that case theorizing that the exclusivity of the Workers Compensation law barred her claims. On appeal, although this Court agreed that Ms. Messer's claims for physical injuries were precluded, it remanded the case to allow the development of any claims that might have resulted from a violation of the West Virginia Human Rights Act.³

After the remand, mediation was attempted but no settlement agreement was reached because not every party attended. By written agreement additional time was allowed to determine if all individual defendants were willing to settle:

The Defendants have not been able to reach all partners that are party Defendants and this agreement will be held in abeyance for 3 weeks pending approval of all partners. ***If there is not approval by all within 3 weeks there is no settlement*** and the matter may proceed to trial as if no settlement was reached. [Emphasis added] ⁴

It was undisputed that the approval of all did not occur. However, the Appellants counsel, Mark Dellinger, notified Ms. Messer's counsel that the case had been settled. The Circuit Court conducted an evidentiary hearing to determine whether the settlement had been authorized. Mr. Dellinger admitted that he had not spoken with all of the defendants. Additionally, he conceded that three of the defendants had previously advised that they would never agree to pay any money to settle. However, he claimed that one of the defendants, Ricardo Ramos, had advised him that all had agreed and that he relied upon this representation without further corroboration. Dr. Ramos denied having said this. He testified that he told Mr. Dellinger that although he thought the others eventually would agree, there were problems and that additional time was needed. The Circuit Court ruled that since all of the defendants had not agreed,

³ *Messer v. Huntington Anesthesia Group, Inc.*, 620 S.E.2d 144 (WV 2005) (*Messer I*)

⁴ This agreement is reprinted in this Court's second *Messer* opinion at 664 S.E.2d at 775

the purported settlement had not been authorized. A few months later, the Circuit Court granted a motion for summary judgment and dismissed the case.

In *Messer II*, this Court again reversed the Circuit Court⁵. However, it did not reverse the summary judgment nor did it reverse the Circuit Court's finding that Mr. Dellinger lacked the actual authority to do what he did. To the contrary, it held that even though Mr. Dellinger acted in the absence of actual authority⁶, he had the apparent authority to bind his clients to the settlement:

These facts simply do not establish the clear showing necessary to overcome the presumption of Mr. Dellinger's **apparent authority** to bind his clients to the settlement agreement. Appellant [Ms Messer] acted in good faith and exercised reasonable prudence in **relying on the apparent authority of Mr. Dellinger**, and by so doing is entitled to enforcement of the settlement agreement. [Emphasis added]

Messer v. Huntington Anesthesia Group, 664 S.E.2d at 761 (WV. 2008).

After paying the settlement plus Ms. Messer's attorney fees⁷ as mandated by this Court's opinion, the Appellants commenced this action which the Circuit Court dismissed on motion. In its Order, the Circuit Court held that the Appellants were collaterally estopped from contending that Mr. Dellinger lacked the authority to settle the prior case. Although it is difficult to understand the Circuit Court's rationale for that conclusion, it is suggested that it failed to understand that there is a difference between actual authority and apparent authority. Thus the Circuit Court held that because the issues relating to the authority of Mr. Dellinger had been litigated, "the criteria for applying the doctrine of collateral

⁵ *Messer v. Huntington Anesthesia Group*, 664 S.E.2d 751 (WV. 2008)

⁶ In its opinion this Court stated "The sole pivotal issue before us then is whether, in the absence of express authority, the Appellees' attorney had the apparent authority to obligate the doctors and HAGI to the terms of the settlement agreement." 664 S.E. 2d at 759.

⁷ The Circuit Court had ordered Mr. Dellinger to pay Ms. Messer's attorney fees. He never appealed that order or moved to intervene in *Messer II*; he simply refused to do anything so they were paid by the Appellants.

estoppel are therefore satisfied, and plaintiffs' claims against these defendants must be dismissed.”

Assignment of Error

As previously discussed, after conducting an evidentiary hearing the Circuit Court ruled that Mr. Dellinger had not been authorized to settle a case. This finding was never reversed. Rather, this Court held that even though Mr. Dellinger lacked the actual authority to settle, he had the apparent authority to bind his clients. Then, in this case, when the Appellants sought to recover the economic consequences resulting from Mr. Dellinger acting outside of his actual authority, the Circuit Court ruled that they were collaterally estopped from making that claim. This is error.

Argument

Since this case was decided upon a Rule 12(b)(6) motion to dismiss, the allegations in the complaint must be considered to be true and all reasonable inferences must be construed in favor of the plaintiff. *E.g., Coberly v. Coberly*, 580 S.E.2d 515 (WV 2003); *Adams v. Ireland*, 528 S.E.2d 197 (1999). The gravamen of the complaint was that Mr. Dellinger settled a case without the express authority to do so and as a consequence, his clients, the Appellants in this case, were damaged. Clearly this allegation states a claim upon which relief can be granted. An agent who acts without authority from the principal is liable for the resulting liability. *E.g., National Grange Mutual Ins. Co. v. Wyoming County Ins. Agency, Inc.*, 195 S.E.2d 151 (WV 1973).

Although the Circuit Court did not appear to disagree with the legal proposition that the unauthorized act of an attorney is actionable, it ruled that the doctrine of collateral estoppel prevented the Appellants from asserting this claim against Mr. Dellinger. It did so by failing to comprehend the distinction between the actual authority of an agent to do some act and the apparent authority of an agent to bind the principal by an unauthorized act. The Circuit Court's confusion is apparent from the

following excerpt from its Order (p.10):

The gravamen of plaintiffs' present legal malpractice Complaint is the averment that Mr. Dellinger lacked authority from HAGI and the doctors to bind them to a settlement with Ms. Messer. *See* the Complaint, page 4, ¶¶ 16, 17 and 22. The same issue was at the heart of their opposition to the motion to enforce the settlement in the underlying action and their subsequent appeal in *Messer*: "Appellees maintain that. . . Mr. Dellinger never had been authorized to make the representation that all of the doctors had approved the settlement agreement." *Messer*, 664 S.E.2d at 759. The Supreme Court of Appeals clearly rejected that proposition in *Messer*, and this Court has concluded that plaintiffs are therefore estopped from relitigating the issue now in this malpractice action.

Certainly, in *Messer II* this Court ruled that Mr. Dellinger was able to obligate the Appellants to a settlement. But it never ruled that Mr. Dellinger had the actual authority to do so. To the contrary, this Court recognized that because Mr. Dellinger had never been authorized by his clients to settle, the issue was whether he had the apparent authority to do so:

"The sole pivotal issue before us then is whether, in the absence of express authority, the Appellees' attorney had the apparent authority to obligate the doctors and HAGI to the terms of the settlement agreement." 664 S.E. 2d at 759.

To answer to that question, this Court ruled that he did:

Appellant [Ms. Messer] acted in good faith and exercised reasonable prudence in relying on the apparent authority of Mr. Dellinger, and by so doing is entitled to enforcement of the settlement agreement. 664 S.E.2d at 761

The sole issue in this appeal is whether this Court's prior decision that the Appellants failed to rebut the presumption that Mr. Dellinger had the authority to settle the case, collaterally estops them from maintaining an action against Mr. Dellinger for obligating them to a settlement to which they had never agreed.⁸

In *Conley v. Spillers*, 301 S.E.2d 216 (WV 1983) this Court explained that the doctrine of

⁸ This Court's actual holding was "These facts simply do not establish the clear showing necessary to overcome the presumption of Mr. Dellinger's apparent authority to bind his clients to the settlement agreement." 664 S.E.2d at 761

collateral estoppel will prevent litigation of issues which previously have been litigated:

Collateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit.

301 S.E. 2d at 217 (Syllabus Point 2) But, according to *Conley*, if the parties in the second suit are not the same as in the earlier matter, collateral estoppel extends only to those matters that have actually been litigated:

But where the causes of action are not the same, the parties being identical or in privity, the bar extends to only those matters which were actually litigated in the former proceeding, as distinguished from those matters that might or could have been litigated therein, and arises by way of estoppel rather than by way of strict *res adjudicata*. *Lane v. Williams*, 150 W.Va. 96, 100, 144 S.E.2d 234, 236 (1965).

Id. So, with respect to the claim by an entity that was not a party to the first litigation, according to *Conley* the determination requires consideration of several factors:

Whether a stranger to the first action can assert collateral estoppel in the second action depends on several general inquiries: Whether the issues presented in the present case are the same as presented in the earlier case; whether the controlling facts or legal principles have changed substantially since the earlier case; and, whether there are special circumstances that would warrant the conclusion that enforcement of the judgment would be unfair.

301 S.E. 2d at 218 (Syllabus Point 6)

In *State v. Miller*, 459 S.E.2d 114 (WV 1995) (Syllabus Point 1) this Court defined the criteria for the application of collateral estoppel:

Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Then, in *Holloman v. Nationwide Mutual Insurance Company*, 617 S.E. 2d 816, 822 (WV 2005) this Court pointed out that according to *Miller* the doctrine of collateral estoppel mandates that the facts, the

legal standards, and the procedures be identical and that the party against which the doctrine is asserted has had a full and fair opportunity to litigate the issue. In other words "[t]he central inquiry on collateral estoppel is whether a given issue has been actually litigated by the parties in the earlier suit." *Peters v Rivers Edge Mining, Inc.*, 680 S.E.2d 791, 808 (WV 2009). See also, *Stillwell v City of Wheeling*, 558 S.E. 2d 598 (WV 2001); *Mellon-Stuart Co. v. Hall*, 359 S.E.2d 124 (WV 1987). Whether those issues could have been litigated is not important; they actually must have been litigated. *Lane v Williams*, 144 S.E.2d 234 (WV 1965).

In applying the *Miller* criteria to this case it seems reasonably clear that the first requirement - the issue previously decided being identical to the one presented here - is not satisfied. In the prior case, which was between the Appellants and Ms. Messer, the Circuit Court determined that Mr. Dellinger did not have the actual authority to settle the litigation. This Court did not reverse that finding. Rather, it seemed to recognize the legitimacy of the Circuit Court's conclusion by limiting its ruling to the issue of apparent authority rather than actual authority:

The sole pivotal issue before us then is whether, in the absence of express authority, the Appellees' attorney had the apparent authority to obligate the doctors and HAGI to the terms of the settlement agreement.⁹

In explaining its rationale for obligating the Petitioners to a settlement which they had never authorized, this Court stated:

When an attorney-client relationship exists, apparent authority of the attorney to represent his client is presumed. Syl. Pt. 1, *Miranosky v. Parson*, 152 W.Va. 241, 161 S.E.2d 665 (1968). We addressed the significance of this presumption of apparent authority with regard to settlement agreements in *Sanson v. Brandywine Homes, Inc.*, 215 W.Va. 307, 599 S.E.2d 730 (2004). The *Sanson* plaintiffs alleged on appeal that their attorney had reached the settlement with the corporate defendant without their authorization. Although accepting the position of the plaintiffs, the decision to enforce the

⁹ 664 S.E.2d at 759

settlement agreement was upheld based upon the following reasoning:

While this Court has recognized that "[t]he mere relation of attorney and client does not clothe the attorney with implied authority to compromise a claim of the client," Syllabus Point 5, *Dwight v. Hazlett*, 107 W.Va. 192, 147 S.E. 877 (1929), we have also held that "[w]hen an attorney appears in court representing clients there is a strong presumption of his authority to represent such clients, and the burden is upon the party denying the authority to clearly show the want of authority." Syllabus Point 1, *Miranosky v. Parson*, 152 W.Va. 241, 161 S.E.2d 665 (1968).¹⁰

This Court never determined that Mr. Dellinger had been authorized to do what he did. Rather, it ruled that Mr. Dellinger's clients had failed to overcome the apparent authority that is implicit in an attorney client relationship.

These facts simply do not establish the clear showing necessary to overcome the presumption of Mr. Dellinger's **apparent authority** to bind his clients to the settlement agreement.[Emphasis added]¹¹

To state it more simply, since this Court held in the *Messer II* that Mr. Dellinger had the apparent authority to settle the case, the fact that his action may not have been authorized was not relevant to its decision. This means that the issue of actual authority was not decided by *Messer II*. As a consequence, the first criterion of collateral estoppel, that "the issue previously decided is identical to the one in the current proceeding," does not exist.

It is submitted that the fourth criterion of *Miller* is, likewise, absent. In reconciling the *Conley* and *Miller* decisions, this Court in *Holloman* stated that the caveat in *Conley* that there should be no "special circumstances that would warrant the conclusion that" the application of the doctrine of collateral estoppel would be unfair, fell within the fourth criterion of *Miller*. Among the special circumstances referenced in *Miller* are situations in which the legal standards are different even though the facts may

¹⁰ 664 S.E.2d at 759 - 60

¹¹ 664 S.E.2d at 761

be identical. 459 S.E. 2d 121. In its decision in *Messer II*, this Court relied upon the presumption that an attorney has the apparent authority to settle a case. Accordingly, ruled that it was incumbent upon the client to overcome that presumption by a “clear showing” of evidence. Although that concept was not defined in *Messer II*, a “clear showing” certainly seems to be akin to the “clear and convincing” standard that is required in some cases. In any event, this standard of proof is obviously different from the mere preponderance of evidence standard that the Appellants must satisfy to prove the lack of actual authority in their case against Mr. Dellinger.

In summary, the issue decided in the *Messer II* was the apparent authority of Mr. Dellinger and the one being raised in this proceeding is his lack of actual authority. Since actual authority is that which was expressly conferred by the principal and since apparent authority is that which from the existing circumstances appears to a third party to have been authorized, the issues decided by *Messer II* should not collaterally estop the Appellants from maintaining an action against their attorney. For this reason, it is submitted that the Circuit Court’s decision was incorrect

Conclusion

Here, an attorney who was responsible for representing the interests of several individuals and the corporation in which they were involved, negotiated a settlement that was contingent upon the unanimous consent of all. It was undisputed that there never was unanimity. None-the-less, the attorney notified opposing counsel that the matter had been settled. Based upon the evidence presented, which included the testimony of Mr. Dellinger, the Circuit Court in the prior case determined that the settlement had not been authorized. This Court accepted that finding but held that the absence of actual authority was irrelevant because Mr. Dellinger had the apparent authority to bind his clients.

Then when those clients claimed that their attorney had betrayed their interests by obligating them

to a settlement without their consent, the Circuit Court ruled that there could be no redress. This is clear error - if there was no actual authority there was a breach of duty by that attorney which resulted in economic injury to the Appellants. This is all that is required to state a claim upon which relief can be granted. Accordingly the decision by the Circuit Court is wrong and should be reversed.

For the foregoing reasons, the Appellants pray that this Court reverse the decision of the Circuit Court of Cabell County and remand the case for further proceedings.

Respectfully submitted.

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CERTIFICATE OF SERVICE

William D. Levine, does hereby certify that the foregoing **Brief of Appellants** was served upon counsel of record on June 18, 2010 by depositing a copy in the United States Mail, postage prepaid, addressed as follows:

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