

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00313 COA

JENNIE WILLIAMS

APPELLANT

v.

GOODIN AND MOODY CONSTRUCTION COMPANY, INC.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. LEE J. HOWARD

COURT FROM WHICH APPEALED: NOXUBEE COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

LAUREL G. WEIR

THOMAS L. BOOKER

ATTORNEY FOR APPELLEE:

P. NELSON SMITH, JR.

NATURE OF THE CASE: CONTRACT TO ENFORCE SETTLEMENT AGREEMENT BASED
ON PROPERTY DAMAGE

TRIAL COURT DISPOSITION: COURT HELD SETTLEMENT AGREEMENT VALID

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

McMILLIN, P.J., FOR THE COURT:

This is an appeal from an order of the Circuit Court of Noxubee County granting a motion to enforce a settlement agreement reached between Jennie Williams, the plaintiff, and Goodin and Moody

Construction, one of three defendants. Williams claims that she never actually agreed to the terms of the purported settlement, and that it ought not to be enforced against her. The trial court determined that a binding settlement had been agreed to by Williams's counsel of record and entered the order that resulted in this appeal. In addition to the claim that she did not agree to the settlement, Williams raises three additional issues on appeal. We conclude this appeal to be without merit and affirm the judgment of the trial court.

I.

A Preliminary Procedural Matter

This case was originally commenced against three defendants. One defendant, Calvert-Spradling Engineers, Inc., settled with the plaintiff and was dismissed with prejudice. However, the third defendant, Northeast Noxubee Water Association, Inc., remains as a defendant in the case insofar as the record shows. The order for enforcement of the settlement agreement with Goodin and Moody Construction did not make the necessary determination under Mississippi Rule of Civil Procedure 54(b) to make the order a final judgment for purposes of appeal. *See* M.R.C.P. 54(b). Neither has there been a petition for an interlocutory appeal of this order under Rule 5 of the Mississippi Rules of Appellate Procedure. It thus appears that this appeal was premature.

However, the appellee has not raised any objection to the Court reaching the merits of the appeal. Because of the unique status of this case, the Court will proceed as if a petition for an interlocutory appeal had been filed and granted. We do so on our own motion by electing to suspend the application of the rules that would normally require us to dismiss this appeal, finding such authority in Mississippi Rule of Appellate Procedure 2(c), which permits a suspension of the rules "[i]n the interest of expediting decision" *See* M.R.A.P. 2(c). Our reason for doing so is that we have determined, *sua sponte*, that appellate resolution of the issue now before us "may . . . [m]aterially advance the termination of the litigation and avoid exceptional expense to the parties" *See* M.R.A.P 5(a)(1).

II.

The Facts

The material facts upon which this case must be decided are not in dispute. There are facts relating to the case that are hotly disputed by Williams, but the Court has determined that the proper result would not be affected by how these disputed facts might be resolved. This aspect of the case will be discussed later in this opinion.

The case was commenced as an action for trespass and resulting damage to real property. Williams claimed that the three defendants, acting in furtherance of a common purpose, had entered upon her property and installed a water line as a part of a community water system installation project without her permission and without an easement. Attorney Jack H. Hayes, Jr. filed the complaint as attorney of record for Williams.

Some time thereafter, Hayes wrote a letter to counsel for Goodin and Moody Construction confirming an agreed settlement of Williams's claim against that company in the amount of \$3,500.00. Counsel for Goodin and Moody Construction forwarded a draft in that amount payable to Williams and her attorney, a release form, and a proposed order of dismissal from the lawsuit with prejudice. Hayes forwarded the settlement documents to his client, but she refused to sign them. It is here that the only legitimate dispute in the relevant facts exists: Hayes testified that Williams had agreed to the settlement and changed her mind. Williams claimed she never authorized Hayes to settle the claim in that amount. However, as we have already observed, it is unnecessary to resolve this disputed issue of fact to properly decide the case.

III.

The Admissibility of Attorney Hayes's Testimony

The first issue Williams raises on appeal is a claim that Hayes should not have been permitted to testify concerning the purported settlement because Williams asserted the attorney-client privilege as a bar to his testimony. She argues that, without this testimony, there is no evidence of a settlement and that, therefore, Goodin and Moody Construction failed to carry its burden as movant.

The proof necessary to establish the existence of a binding settlement is not subject to the attorney-client privilege. The requisite proof consisted of two essential items. The first was evidence that Hayes did, in fact, represent Williams in the action -- a fact which is not disputed. Secondly, it consisted of the letter from Hayes to opposing counsel formally accepting the settlement offer and setting out the terms of the agreement.

The privilege attempted to be raised by Williams only protects "confidential" communications involving an attorney and his client. The Mississippi Rules of Evidence define such communications to be those "not intended to be disclosed to third persons" *See* M.R.E. 502(5). Authorization or direction to an attorney to accept a pending settlement offer from an opposing party must, of necessity, be communicated in order to have any efficacy, and a client has no rational basis to expect that such directives will not be disclosed. In fact, the attorney would be breaching his fiduciary duty to his client were he not to communicate such matters to the opposing parties in litigation.

Williams testified at the hearing that she never directed her attorney to accept the \$3,500.00 settlement offer. We find that to be a matter properly to be resolved between the client and the attorney. Absent some showing of fraud or collusion, the law of this state establishes beyond doubt that, as between the appellant, Williams, and the appellee, Goodin and Moody Construction, the agreement is enforceable.

The authority of an attorney to bind the client in the course of litigation is well-established. In *Craft v. Burrow*, 228 Miss. 664, 672, 89 So. 2d 722, 725 (1956), the supreme court enforced a consent decree entered without the client's knowledge, saying that "an attorney has the implied or apparent authority to consent to a decree against his client, if he acts in good faith and without fraud or collusion." In *Pace v. Financial Security Life*, 608 So. 2d 1135, 1138 (Miss. 1992), the court held a litigant bound by an admission contained in the answer. In reaching this conclusion, the Pace court

relied upon the following excerpt from *Sears, Roebuck & Co. v. Devers*:

An attorney employed for purposes of litigation has the general implied or apparent authority to enter into such stipulations or agreements, in connection with the conduct of litigation, as appear to be necessary or expedient for the advancement of his client's interests or to accomplishment of the purpose for which the attorney was employed.

Sears, Roebuck & Co. v. Devers, 405 So2d 898, 900 (Miss. 1981) (quoting 7A C.J.S. *Attorney and Client*, 205(a)).

We conclude that the broad grant of authority exemplified in these cases necessarily extends to authority to settle and compromise the claim that is the basis of the litigation. Other parties to the litigation, absent some special circumstance, are certainly entitled to rely upon the authority of the attorney to deal for his client and should not be compelled to seek independent confirmation from that attorney's client of every agreement or stipulation affecting the case. *See Terrain Enters. v. Western Casualty and Surety Co.*, 774 F.2d 1320, 1322 (5th Cir. 1985).

IV.

The Remaining Three Issues

We dispose of the three remaining issues in summary fashion. First, Williams claims that the settlement was void because it did not take into account the homestead rights of Williams's husband in the real property. The claim is tantamount to saying that her husband was a necessary party to the litigation -- an unusual assertion, at best, since Williams commenced the proceeding in her own name, never alleging the property to be homestead or offering any evidence to support the contention. She proceeded to settle with one other defendant without any indication of her husband's alleged stake in the matter. We follow our usual procedure and decline to consider this issue raised for the first time on appeal. *See Shaw v. Shaw*, 603 So. 2d 287, 295 (Miss. 1992).

Secondly, Williams claims that the settlement is void because the proposed release agreement (which she never signed) releases all remaining tort-feasors, and is, therefore void. This assertion is both factually inaccurate and legally incorrect. The release as prepared and forwarded to Hayes released only Goodin and Moody Construction and those in privity with that company. In any event, even if the proposed release as originally forwarded exceeded the terms of the settlement agreement, Williams would not have been entitled to summarily reject the settlement. Rather, her proper remedy would have been to insist that the written terms of the release comport with the agreed settlement of the case.

Finally, Williams claims for the first time on appeal that the settlement amount was so unconscionably low, when compared to her actual damages, that the agreement should be declared void. As we have already noted, we normally decline to consider issues not properly presented to the trial court for resolution. *See Shaw*, 603 So. 2d at 295. In all events, (a) Williams presents no coherent argument in support of these issues; (b) such argument as she makes is not supported by evidence in the record, and (c) the only legal authority cited is a passage from *Grant's Summary of Mississippi Law*, a useful research tool, perhaps, but hardly helpful to this Court as an aid in resolving questions of law. It is

difficult to make a reasoned response to this issue beyond simply observing that it is singularly without merit.

**THE JUDGMENT OF THE NOXUBEE COUNTY CIRCUIT COURT IS AFFIRMED.
COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND
SOUTHWICK, JJ., CONCUR. HINKEBEIN, J., NOT PARTICIPATING.**