

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000928-MR

ROSE MARIE DESANTIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 82-CI-002387

DALKON SHIELD CLAIMANTS TRUST

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE: Rose Marie DeSantis (DeSantis) appeals from an order of the Jefferson Circuit Court entered February 12, 1998, which enforced the terms of a settlement agreement entered into between DeSantis and the Dalkon Shield Claimants Trust (the Trust). We affirm.

In 1984, DeSantis filed suit against the A.H. Robins Company, manufacturers of the Dalkon Shield contraceptive device, alleging that she became sterile after repeated bouts of pelvic inflammatory disease allegedly caused by the Dalkon Shield. The A.H. Robins Company ultimately declared bankruptcy and established the Trust to handle the mountain of litigation over

the Dalkon Shield. DeSantis ultimately amended her claim to substitute the Trust for Robins. DeSantis was represented by Attorney James Bryant (Bryant) throughout the course of her litigation against the Trust.

The relevant facts of this case are undisputed. On January 9, 1998, Robert Tucker (Tucker), an attorney for the Trust, faxed a settlement offer regarding DeSantis' claim to Bryant. The terms of the settlement were set forth as follows:

[T]he Trust review of [DeSantis] medical records has resulted in a final settlement offer of \$95,999.40. Upon acceptance of this offer, Ms. DeSantis would be entitled to the pro rata payment which, as you know, leads to an additional payment of 85% of the final settlement offer now, with an anticipated future payment of 15% of the final settlement offer. The anticipated payment (with pro rata) would be \$191,998.80.

Bryant telephoned DeSantis early in the morning on January 10, 1998 and advised her of the Trust's settlement offer. DeSantis undeniably told Bryant that she would accept the offer and Bryant told her that he would inform the Trust of her acceptance. Bryant then telephoned Tucker on the same day and left a voice mail message at 8:50 a.m. stating:

I'm calling in response to your Friday afternoon fax on Rose Marie DeSantis. I have talked with Ms. DeSantis and she accepts the Trust's revised offer as described in your fax to me....Ms. DeSantis has accepted the Trust's offer.

Bryant left a similar voice mail on the same day with Susan Wettle, the Trust's local counsel. Several hours after her initial acceptance of the Trust's settlement offer, DeSantis

telephoned Bryant and told him that after further consideration she no longer wished to accept the settlement offer.

The parties appeared before the trial court to discuss several pre-trial motions on January 12, 1998. At that time, counsel for the Trust informed the trial court that a settlement had been reached over the weekend but that Bryant had just informed that Trust that DeSantis has changed her mind.

On January 15, 1998, the Trust filed a motion to enforce the settlement. Bryant's response to the Trust's motion indicated that the facts as set forth in the Trust's motion were correct and that the case law cited by the Trust constituted controlling authority. In an order entered January 26, 1998, and amended February 3, 1998, the trial court granted the Trust's motion.

Following entry of the trial court's amended order, DeSantis filed a pro se motion to reconsider. In her motion and affidavit, DeSantis admitted that: (1) She initially accepted the offer of settlement; (2) Bryant told her that he would inform the trust of her acceptance; and (3) she later telephoned Bryant and told him that she changed her mind. However, DeSantis raised numerous arguments as to why the settlement should not be enforced, namely (1) she did not understand nor did Bryant tell her that her oral acceptance was irrevocable; (2) she believed that the settlement would not take effect until reduced to writing and signed; (3) she suffers from depression, had not taken her medicine at the time Bryant called her, and acted "impulsively" in accepting; (4) Bryant did not tell her he would

immediately notify the Trust of her acceptance; (5) she had not been informed by Bryant that a trial date had been set for May 12, 1998 and that had she known of the pendency of the trial date she would not have settled; and (6) Bryant did nothing to represent her interests in regard to the Trust's motion to enforce the settlement. DeSantis also represented herself at the hearing on her motion to reconsider. At the hearing she once again admitted that she initially accepted that Trust's offer but later changed her mind. In an order entered March 12, 1998, the trial court dismissed DeSantis' case with prejudice. This appeal followed.

DeSantis first contends that Bryant lacked authority to settle her claims against the Trust. She maintains that a lawyer has no authority to settle absent express authority do so from the client, and that a client cannot give express authority to settle unless the attorney explains the matter sufficiently enough to allow the client to make an informed decision in regard to settlement. DeSantis argues that her initial acceptance of the settlement offer was not an "informed decision" because Bryant never told her that a verbal consent was binding or of the pendency of a trial date.

DeSantis is correct in her assertion that an attorney lacks authority to settle a claim without the consent of the client. In Clark v. Burden, Ky., 917 S.W.2d 574 (1996), the Kentucky Supreme Court put to rest any doubt that express authority to settle is required, and held that the apparent authority arising arising from the principal/agent aspect of the

attorney/client relationship does not in and of itself give the attorney power to bind a client to a settlement agreement in the absence of the client's consent to be so bound. Clark, 917 S.W.2d at 576. If there is a question regarding whether express authority was given, the trial court is given the authority to "summarily decide the fact." Id. at 577. We will not disturb a trial court's finding that express authority to settle was given as long as that decision is supported by substantial evidence and no abuse of discretion on behalf of the trial court has occurred. General Motors Corporation v. Herald, Ky., 833 S.W.2d 804, 806, (1992). In this case, the record leaves no doubt that DeSantis clearly gave Bryant express authority to settle on the day he informed her of the Trust's offer. Upon her acceptance of the offer, it became binding and enforceable.

DeSantis' arguments that her acceptance of the settlement offer should be negated because Bryant allegedly failed to explain the ramifications of an oral consent to settle and to inform her of the pendency of a trial date are unpersuasive. While DeSantis is correct that SCR 3.130(1.4)(b) requires an attorney to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions," his alleged failure to do so has no effect on the validity of her acceptance. Any relief for an alleged failure on Bryant's part to conform to the mandates of SCR 3.130(1.4)(b) must come from a cause of action against Bryant, not in the rescinding of the settlement between DeSantis and the Trust.

DeSantis also argues that the Trust failed to meet its burden of proving that Bryant had her express authority to settle and that there was no meeting of the minds between herself and Bryant as to his authority to settle. In light of the fact that DeSantis has admitted to initially accepting the Trust's settlement offer, these arguments are without merit.

Finally, DeSantis argues that she never agreed to settle her claims against the Trust for \$191,998.80. DeSantis alleges that when Bryant called her on January 10, 1998 to tell her of the Trust's settlement offer, he told her that the offer was for \$199,000. DeSantis argues that because there was no meeting of the minds regarding the amount of the settlement, her acceptance should be negated.

In reviewing the record on appeal, we note that this issue was never raised before the trial court. In general, this Court is not permitted to review issues that were not argued before the trial court. Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989). Because DeSantis failed to raise this issue below, it would not be proper for us to rule on it now. Even if this issue was properly before us, we do not believe that it should affect the validity of DeSantis' acceptance. If Bryant did, in fact, fail to properly advise DeSantis of the true amount of the Trust's settlement offer, recovery should be directly against Bryant and not against the Trust.

Having considered the parties' arguments on appeal, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan Jackson Balliet
Louisville, KY

BRIEF FOR APPELLEE:

Susan S. Wettle
Louisville, KY

Robert C. Tucker
Cleveland, OH