Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00116-CV

STRAD ENERGY SERVICES USA, LTD.; Strad Energy Services, Ltd.
& Strad Oilfield Services, Inc.,
Appellants

v.

Edward **BERNAL**,
Appellee

From the 79th Judicial District Court, Jim Wells County, Texas
Trial Court No. 15-09-55108-CV
Honorable Richard C. Terrell, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Rebeca C. Martinez, Justice

Delivered and Filed: October 26, 2016

AFFIRMED

Strad Energy Services USA, Ltd., Strad Energy Services, Ltd., and Strad Oilfield Services, Inc. appeal a take nothing judgment entered against them based on a jury's finding that Strad and Edward Bernal did not agree to settle Bernal's claim arising out of an automobile accident. On appeal, Strad contends the trial court erred by denying its motion for judgment notwithstanding the verdict because the evidence conclusively established that Bernal's attorney had apparent authority to enter into a Rule 11 settlement agreement or, in the alternative, Bernal should not be permitted to rebut the presumption that an attorney handling litigation has the authority to settle

the client's case. Strad also contends the trial court erred by failing to submit the ultimate and controlling question to the jury regarding whether Bernal's attorney had authority to enter into the Rule 11 settlement agreement. We affirm the trial court's judgment.

BACKGROUND

On February 15, 2012, Bernal was driving a van containing several passengers when his van collided with a vehicle driven by Stephen Craig Bishop. The collision also involved a third vehicle. Several plaintiffs subsequently sued Strad claiming Bishop was within the course and scope of his employment with Strad when he caused the collision. Bernal was also named as a defendant in the lawsuit.

On March 1, 2012, Bernal retained Art Davis to represent him with regard to his claim for personal injuries. Bernal was represented by a different attorney for the claims made against him as a defendant.

On February 10, 2014, Bernal filed a cross-claim against Strad for the personal injuries he sustained in the accident. On February 13, 2014, at 11:02 a.m., Davis faxed a demand letter to Strad's attorney, Wilbourn Woodward, offering to settle Bernal's claim against Strad for $27,500.00. That same day, Bernal faxed Davis a letter terminating him. Bernal was planning to hire a different attorney to represent him.

On February 14, 2014, Woodward signed and sent Davis a Rule 11 settlement agreement proposing to settle Bernal's claim for $27,500.00. That same day, Davis signed the Rule 11 agreement and returned it to Woodward.

On February 18, 2014, Woodward sent Davis a release and indemnity agreement to be signed by Bernal to finalize the settlement. On February 19, 2014, Davis met with Bernal to discuss the settlement. Bernal refused to agree to the terms of the settlement, and Davis informed Woodward that Bernal rejected the settlement.

On March 9, 2015, Strad filed a cross-claim against Bernal for breach of the Rule 11 settlement agreement. The trial court subsequently severed Strad's cross-claim from the underlying lawsuit, and a jury trial was held on Strad's breach of contract claim. The first question in the jury charge asked the jury whether Strad and Bernal agreed to settle Bernal's claim, and the question included an instruction on actual and apparent authority. The jury answered "no." Strad filed a motion for judgment notwithstanding the verdict which the trial court denied. Strad appeals.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

In its first two issues, Strad contends the trial court erred in denying its motion for judgment notwithstanding the jury's verdict. First, Strad contends the evidence conclusively established Davis had apparent authority to settle Bernal's claim. Second, Strad contends Bernal should not be permitted to rebut the presumption that Davis had authority to settle Bernal's claim. For the reasons stated below, we overrule both issues.

A. Standard of Review

"We review a JNOV under the no-evidence standard." *Bank of Am., N.A. v. Eisenhauer*, 474 S.W.3d 264, 265 (Tex. 2015). "No evidence exists when there is: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; [or] (d) the evidence establishes conclusively the opposite of the vital fact." *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 347 (Tex. 2015) (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005)). "More than a scintilla of evidence exists when the evidence supporting the finding rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Id*. (internal citations omitted). Under a no evidence standard, we "view the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless

reasonable jurors could not." *City of Keller*, 168 S.W.3d at 807. The "[j]urors are the sole judges of the credibility of the witnesses and the weight to give their testimony." *Id*. at 819. And, as a reviewing court, we "must assume that jurors resolved all conflicts in accordance with their verdict." *Id*. at 820.

B. Apparent Authority

In its first issue, Strad contends the trial court erred in denying its motion for judgment notwithstanding the verdict because the evidence conclusively established Davis had apparent authority to settle Bernal's claim.

"An agent's authority to act on behalf of a principal depends on some communication by the principal either to the agent (actual or express authority) or to the third party (apparent or implied authority)." *Gaines v. Kelly*, 235 S.W.3d 179, 182 (Tex. 2007). Apparent authority is based on estoppel and "'may arise either from a principal knowingly permitting an agent to hold [himself] out as having authority or by a principal's actions which lack such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority [he] purports to exercise.'" *Baptist Mem. Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 948 (Tex. 1998) (quoting *Ames v. Great S. Bank*, 672 S.W.2d 447, 450 (Tex. 1984)). "[T]he principal's full knowledge of all material facts is essential to establish a claim of apparent authority based on estoppel." *Gaines*, 235 S.W.3d at 182. "Moreover, when making that determination, only the conduct of the principal is relevant." *Id*. "Finally, the standard is that of a reasonably prudent person, using diligence and discretion to ascertain the agent's authority." *Id*. "Thus, to determine an agent's apparent authority we examine the conduct of the principal and the reasonableness of the third party's assumptions about authority." *Id*. "It has long been settled that the mere employment of counsel does not clothe the counsel with authority to settle the cause without the specific consent of the client." *Sw. Bell Tel. Co. v. Vidrine*, 610 S.W.2d 803, 805 (Tex.

Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); *see also First State Bank of Smithville*, 27 S.W.3d 287, 301 (Tex. App.—Austin 2000, pet. denied) (allowing an attorney to act on behalf of a client in a particular matter does not establish attorney's authority to settle a lawsuit).

In the instant case, Bernal and Davis testified Davis did not have authority to settle Bernal's claim. When Davis was asked why he signed the Rule 11 agreement in the absence of such authority, Davis admitted he signed the agreement in error. Davis appeared to believe Woodward understood Davis only signed the Rule 11 agreement to obtain the release that he planned to present to Bernal to obtain Bernal's approval to settle. With regard to what actions Bernal had taken to clothe Davis with the indicia of authority to settle the case, Woodward testified as follows:

> Q. Mr. Woodward, what evidence do you have that my client, Edward Bernal, gave Art Davis authority to make a demand or to accept a demand for $27,500?
>
> A. I don't have — I wouldn't have any communications or evidence of that. But you know, the Rule 11 itself and the — the communications I got from Art Davis, if you want to call that evidence of authority, then I would say that was —
>
> Q. Okay.
>
> A. — that would be it.
>
> Q. Can — can you show the jury on the exhibits that you have where Mr. Bernal has signed off on authority to Mr. Davis?
>
> A. Mr. Bernal's signature isn't on any of these documents.
>
> Q. So are you telling this jury that you're assuming that Mr. Davis had authority?
>
> A. At all relative times, yeah. I'm always assuming any attorney has authority to act — to act how they're acting.[1]

The only "actions" or "conduct" Woodward referenced in his testimony were actions taken by Davis, not by Bernal. As previously noted, however, when determining the existence of apparent authority, "only the conduct of the principal is relevant." *Gaines*, 235 S.W.3d at 182. Furthermore, although Woodward assumed Davis had authority simply based on Davis being

[1] In its brief, Strad refers to evidence that Davis took actions involving Bernal's health care providers and pharmacy; however, the record contains no evidence that Woodward had knowledge of these actions.

retained to represent Bernal, the "mere employment of counsel does not clothe the counsel with authority to settle the cause without the specific consent of the client." *Sw. Bell Tel. Co.*, 610 S.W.2d at 805; *see also Kettrick v. Coles*, No. 01-10-00855-CV, 2011 WL 3820941, at *8 (Tex. App.—Houston [1st Dist.] Aug. 25, 2011, pet. denied) ("When the evidence demonstrates that the attorney did not have the authority to enter into the settlement agreement, the agreement will not be enforced.") (mem. op.); *Breceda v. Whi*, 187 S.W.3d 148, 152 (Tex. App.—El Paso 2006, no pet.) (asserting "when the evidence reveals that the attorney did not have the client's authority to agree, the agreement will not be enforced"). Because the evidence did not conclusively establish Davis had apparent authority to settle Bernal's claim, Strad's first issue is overruled.

C. Presumption of Authority

In its second issue, Strad argues Bernal should not be allowed to rebut the presumption that Davis had authority to settle Bernal's claim. Strad acknowledges Texas law holds the presumption is rebuttable but cites a case from the Georgia Supreme Court which held the client was bound by his attorney's actions. *See Brumbelow v. N. Propane Gas Co.*, 308 S.E.2d 544 (Ga. 1983). Bernal responds citing cases from ten of the fourteen intermediate Texas appellate courts, including this court, holding the presumption is rebuttable.

As Strad recognizes, under Texas law, a rebuttable presumption exists that an attorney retained for litigation possesses the authority to enter into a settlement agreement on behalf of a client. *See, e.g., CIG, L.L.C. v. Panjwani*, No. 09-14-00163-CV, 2016 WL 908254, at *2 (Tex. App.—Beaumont Mar. 10, 2016, no pet.) (mem. op.); *Chavez v. Kan. City S. Ry. Co.*, No. 04-14-00354-CV, 2015 WL 3772225, at *6 (Tex. App.—San Antonio June 17, 2015, pet. filed) (mem. op.); *Whitmire v. Nat'l Cutting Horse Ass'n*, No. 02-11-00170-CV, 2012 WL 4815413, at *5 (Tex. App.—Fort Worth Oct. 11, 2012, no pet.) (mem. op.); *Kettrick*, 2011 WL 3820941, at *8; *Breceda*, 187 S.W.3d at 152. The presumption may be rebutted by evidence that the client did not authorize

the attorney to enter into the settlement. *See, e.g., CIG, L.L.C.*, 2016 WL 908254, at *2; *Chavez*, 2015 WL 3772225, at *6; *Whitmire*, 2012 WL 4815413, at *5; *Kettrick*, 2011 WL 3820941, at *8; *Breceda*, 187 S.W.3d at 152. The rationale for allowing the presumption to be rebutted appears to stem from the fiduciary nature of the relationship between an attorney and a client. As one court has stated, an attorney does not have authority to "release the very right in interest he has been employed to secure and protect." *Johnson v. Rancho Guadalupe, Inc.*, 789 S.W..2d 596, 598 (Tex. App.—Texarkana 1990, writ denied). Given the existing precedent and the sound rationale for making the presumption rebuttable, we decline Strad's invitation to revisit the rebuttable nature of this presumption. Strad's second issue is overruled.

JURY CHARGE

In its third issue, Strad contends the trial court erred in including a question in the charge that failed to submit the controlling issue to the jury. Strad asserts the controlling issue was whether Davis had authority to settle Bernal's claim, and the trial court erred in not submitting that question to the jury. Strad further asserts the question submitted by the trial court was confusing because it did not reference Davis but only referenced Bernal and Strad.

A. Jury Charge Submission and Standard of Review

"The trial court has broad discretion in submitting jury questions so long as the questions submitted fairly place the disputed issues before the jury." *Bexar Cty. Appraisal Dist. v. Abdo*, 399 S.W.3d 248, 258 (Tex. App.—San Antonio 2012, no pet.). "This broad discretion is subject only to the limitation that controlling issues of fact must be submitted to the jury." *Id*. "Controlling issues may be submitted to the jury by questions, instructions, definitions, or through a combination thereof." *Id*.

"Whether the [jury] charge submits the controlling issue in the case, in terms of theories of recovery or defense, is a question of law which is reviewed de novo." *Hamid v. Lexus*, 369 S.W.3d

291, 295 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *see also Alfiji, S.A. de C.V. v. Woodal*, 280 S.W.3d 897, 900 (Tex. App.—El Paso 2009, no pet.) (same). Other types of jury charge error, including the trial court's decision to refuse a particular question or instruction, are reviewed under an abuse of discretion standard. *Shupe v. Lingafelter*, 192 S.W.3d 577, 579 (Tex. 2006); *Cullum v. White*, 399 S.W.3d 173, 187 (Tex. App.—San Antonio 2011, pet. denied). A trial court abuses its discretion if the trial court acts without reference to any guiding rules and principles or if its ruling is arbitrary or unreasonable. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985); *In re Estate of Johnson*, 340 S.W.3d 769, 787 (Tex. App.—San Antonio 2011, pet. denied).

B. Jury Question Submitted

The trial court submitted the following question to the jury:

JURY QUESTION NO. 1

> Did Strad Energy and Edward Bernal agree to settle Bernal's claim arising out of the February 15, 2012 automobile accident?
>
> In deciding whether the parties reached an agreement, you may consider what they said and did in light of the surrounding circumstances, including any earlier course of dealing. You may not consider the parties' unexpressed thoughts or intentions.
>
> A party's conduct includes the conduct of another who acts with the party's authority or apparent authority.
>
> Authority for another to act for a party must arise from the party's agreement that the other act on behalf and for the benefit of the party. If a party so authorizes another to perform an act, that other party is also authorized to do whatever else is proper, usual, and necessary to perform the act expressly authorized.
>
> Apparent authority exists if a party (1) knowingly permits another to hold himself out as having authority or, (2) through lack of ordinary care, bestows on another such indications of authority that lead a reasonably prudent person to rely on the apparent existence of authority to his detriment. Only the acts of the party sought to be charged with responsibility for the conduct of another may be considered in determining whether apparent authority exists.

C. Analysis

As previously noted, the trial court severed Strad's cross-claim for breach of contract against Bernal into the underlying cause. In its cross-claim, Strad alleged Bernal breached the Rule 11 settlement agreement by taking actions inconsistent with it. Strad further alleged it incurred additional legal fees and expenses as a result of Bernal's breach.

Bernal filed an answer denying he executed any document or made any statement settling his claim against Strad. Bernal also alleged he was not liable to Strad "because the purported contract was executed by an unauthorized agent, Davis. Davis did not have the authority to make any settlement demands, negotiate or settle Bernal's case."

Given the allegations in the pleadings, the trial court did not err in determining the controlling issue of fact was whether Strad and Bernal agreed to settle Bernal's claim because Bernal disputed the existence of such an agreement. The trial court's question is based on PJC 101.1 which is to be submitted when there is a dispute about the existence of an agreement. TEXAS PATTERN JURY CHARGES: BUSINESS • CONSUMER • INSURANCE • EMPLOYMENT, PJC 101.1 & cmt. at 37 (2014) ("PJC 101.1 submits the issue of the existence of an agreement [and] should be used if there is a dispute about the existence of an agreement."); *see also Gunn Buick, Inc. v. Rosano*, 907 S.W.2d 628, 632 (Tex. App.—San Antonio 1995, no writ) ("The Pattern Jury Charge is an invaluable guide in the preparation of special issues and instructions."); *Murphy v. Waldrip*, 692 S.W.2d 584, 592 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.) (noting pattern jury charge is "an excellent aid and guide for judges and attorneys in formulating jury issues and instructions"). Because Davis's authority to sign the Rule 11 settlement agreement on Bernal's behalf was a factual component of the jury question, the trial court included an instruction in the jury charge regarding a person's authority to act for a party. *Id.* at PJC 101.4 & cmt. at 45 ("PJC 101.4 may be appropriate if the evidence raises a question [regarding] authority [and] is to be used only to

determine whether a party is contractually bound by the conduct of another."); *see also Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (reaffirming "longstanding, fundamental commitment to broad-form submission"). As previously noted, "[c]ontrolling issues may be submitted to the jury by questions, instructions, definitions, or through a combination thereof." *Abdo*, 399 S.W.3d 258. Because the trial court submitted the controlling issue to the jury and followed guiding rules and principals in including an instruction on the disputed fact regarding Davis's authority, Strad's third issue is overruled.

CONCLUSION

The trial court's judgment is affirmed.

Karen Angelini, Justice