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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1999-CA-002975-MR

GARY W. FARRIS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 97-CI-006177

PERRY W. FLOYD — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: HUDDLESTON, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Settlement negotiations concluded with a $100,000.00 settlement offer on the table. The offer was renewed during voir dire with a comment that the attorney did not know if the offer would still be there once the jury was seated. The jury was seated and plaintiff interrupted the presentation of his proof to accept the offer. The defendant said it was too late to accept the offer and the trial court agreed. We agree with the trial court that the offer was revoked. Hence, we affirm.

Gary W. Farris brought a personal injury action against Perry W. Floyd as a result of a motor vehicle accident that occurred on December 27, 1995, in Louisville, Kentucky. The

trial court found two offers of settlement were made prior to trial. On July 29, 1999, Kevin Mathews, counsel for Floyd, offered Farris, through his counsel, Udell B. Levy, $75,000.00 to settle. On August 2, 1999, Levy contacted Mathews and advised that Farris would settle for $250,000.00. Later that day, Mathews offered Levy $100,000.00. The court made no findings (stated allegations) as to what further communications were made until after the case was called for trial on August 3, 1999. Before the start of trial, Mathews again offered $100,000.00 to settle. Although Levy did not verbally reject the offer, he proceeded with voir dire. During voir dire, Levy asked Mathews if he would be able to get any further authority. Mathews responded that $100,000.00 was their final offer and he did not know if the offer would still be on the table once the jury was seated. Without any verbal answer, the parties continued voir dire, a jury was seated, and the plaintiff began presenting evidence. The next morning, after the jury was seated, and during the testimony of the plaintiff, Levy notified Mathews that Farris would accept the $100,000.00 offer. A discussion took place between the attorneys, and the trial continued.

The trial court found the offer had been revoked by intimation from Mathews to Levy that the offer would last only until the jury was seated. On appeal, Levy contends the offer was not rejected by Levy, that there was no time limitation on the offer, and that the offer had not been revoked as a matter of law at the time of acceptance.

An offer can expire by rejection (Shaw v. Ingram-Day Lumber Co., 152 Ky. 329, 153 S.W. 431 (1913)), revocation (Venters v. Stewart, Ky., 261 S.W.2d 444 (1953)), or through time limitations placed on acceptance (Gold Spring Distilling Co. v. Stitzel Distilling Co., 150 Ky. 457, 150 S.W. 516 (1912)). The first offer of $75,000.00 was rejected by the counter-offer of $250,000.00. Shaw, 153 S.W. at 433.

The subsequent offer of $100,000.00 may have been rejected by Levy indicating that it was not enough to settle the case - if such statement was made. The trial court did not make a finding on this issue. Nevertheless, this second offer would have been rejected by intimation by going to trial. Actions sometimes convey an answer louder than words. Although Levy may not have verbally rejected the offer, we believe that proceeding to trial after the case was called is in effect a rejection. See First Development Corporation of Kentucky v. Martin Marietta Corporation, 959 F.2d 617 (6th Cir. 1992).

During the voir dire, in response to Levy's inquiry, Mathews informed Levy that he only had authority to settle for $100,000.00 and he didn't know if the offer would still be "on the table" once the jury was seated. This statement renews the offer until the jury is seated. Clearly Mathews was putting Levy on notice of the possible time limitation of his offer, that he would have to check the extent of his authority with his client if the jury were seated. Our Supreme Court, in Clark v. Burden, Ky., 917 S.W.2d 574 (1996), indicated that expressed authority to settle is required; "with respect to settlement, attorneys are

without power to bind their clients." (citations omitted). Id. at 576.

> As succinctly stated in Fillhardt [v. Schmidt, 291 Ky. 668, 165 S.W.2d 155 (1942)]:
>
> The rule is almost universal that an attorney, clothed with no other authority than that arising from his relationship, has no implied power to compromise and settle a client's claim or cause of action except, perhaps, when he is confronted with an emergency and prompt action is necessary to protect the interest of his client without an opportunity for consultation with him. 165 S.W.2d at 160. When this rule is considered alongside disciplinary rules SCR 3.130-1.2(a) and SCR 3.130-1.4(b), we are bound to conclude that in ordinary circumstances, express client authority is required. Without such authority, no enforceable settlement agreement may come into existence.

Id.

> Notwithstanding the foregoing, we can conceive of circumstances in which the rights of third parties might be substantially and adversely affected by an attorney possessing apparent authority but who lacked actual authority. If such a contention were made, a court of equity would be empowered to fix responsibility where it belonged to prevent injustice. In most circumstances, however, express authority will be required and in the event of a dispute as to whether the client has given settlement authority, the trial court shall summarily decide the facts.

Id. at 577.

We agree with the trial court that Mathews was giving Levy notice of a limitation or intimation that the offer expired and that the offer was rejected once the jury was seated. Pursuant to Clark, 917 S.W.2d at 577, the trial court is given authority to "summarily decide the facts." We will not disturb a trial court's finding as to what 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 Mathews clearly gave Levy notice of a limitation on his authority to settle after the jury was seated. Levy's attempted acceptance after the jury was seated was beyond the time given for acceptance and must fail. Gold Spring Distilling Co., 150 S.W. at 516.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Udell B. Levy
Louisville, Kentucky

BRIEF FOR APPELLEE:

Kevin Mathews
Louisville, Kentucky