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NOT TO BE PUBLISHED

OPINION OF SEPTEMBER 16, 2011, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001794-MR

KEVIN PRESCOTT

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 08-CI-00768

ALTON CANNON, ADMINISTRATOR *DE BONIS NON*,
ESTATE OF ROBERT V. DENK, Deceased

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON, COMBS AND THOMPSON, JUDGES.

COMBS, JUDGE: Kevin Prescott appeals an order of the Bullitt Circuit Court granting the motion of Alton Cannon, Administrator *De Bonis Non*, of the Estate of Robert V. Denk, to enforce a settlement of the parties' claims. After our review, we vacate and remand for further proceedings.

Robert V. Denk, a resident of Grayson County, Kentucky, died on February 16, 2006. On June 11, 2008, the administrator *de bonis non* of his estate filed a foreclosure action against Prescott. Prescott, *pro se*, answered the complaint. At issue was a promissory note executed by Prescott, who denied that he had executed the note and also denied that his property was subject to the claimed mortgage. Prescott filed a counterclaim seeking reimbursement of \$10,000.00 that he had allegedly paid toward the decedent's funeral expenses. The administrator denied Prescott's claims.

At his deposition, Prescott admitted that he had been indebted to Denk. However, he claimed that he had repaid his debt to Denk in full with the winnings of a gambling venture with the decedent. The matter was scheduled for a bench trial to be held April 29, 2009.

Near the end of April 2009, Prescott secured counsel, Aaron Esmailzadeh. The trial was rescheduled for May 27, 2009. In mid June, the court granted Prescott's motion for continuance; trial was rescheduled for September 4, 2009.

In July 2009, the administrator filed an amended complaint against Prescott seeking an assignment of Prescott's interest in approximately \$20,000.00 in cash belonging to the decedent's estate. While in Prescott's possession, that cash had been confiscated by police in St. Louis, Missouri. The administrator also requested the trial court to order Prescott to divulge the location of some \$30,000.00 in cash buried by Denk before he died. Prescott denied that the decedent's estate had any interest in the money confiscated from him by St. Louis, Missouri, police. In

anticipation of the upcoming trial, the parties filed trial memoranda and tendered proposed findings of fact and conclusions of law.

On September 2 and 3, the parties' attorneys began in earnest to negotiate a compromise of the claims. Esmailzadeh communicated directly with Prescott regarding the proposed terms of settlement. By the end of the day on September 3, a written agreement settling the parties' claims had been prepared and signed by their attorneys. Shortly thereafter, Prescott renounced the settlement. Esmailzadeh promptly communicated Prescott's position to the administrator of the estate.

On September 24, 2009, Prescott's attorney, Aaron Esmailzadeh, filed a motion to withdraw as counsel. The trial court conducted a hearing on this motion on September 28, 2009. During the hearing, Esmailzadeh indicated to the court that his client had authorized him to reach a settlement with the administrator of the estate and that Prescott was now unwilling to accept the terms of the agreement. Esmailzadeh did not believe that he could continue in the representation under the circumstances. Prescott, on the other hand, indicated to the court that he did not want his attorney to withdraw from the representation. Instead, Prescott stated that he wanted Esmailzadeh to represent him at trial. With respect to the settlement agreement, Prescott explained that Esmailzadeh must have misunderstood their communications during the negotiation. Prescott stated that he had not been on his medication at the time, but he was adamant that he would never have accepted the terms of the agreement as written. The court counseled Prescott to discuss his position with Esmailzadeh and to attempt to sort out the

differences between them. Esmailzadeh's motion to withdraw from the representation was not granted.

On November 2, 2009, the administrator filed a motion to enforce the settlement. During the court's hearing on the motion, the administrator's attorney explained to the court that -- under the circumstances -- Esmailzadeh should be entitled to withdraw from the representation and that, according to case law, he was permitted to testify regarding the nature of the parties' settlement activities. Esmailzadeh stated to the court that since he had not been permitted to withdraw from the representation, he was now prepared to advocate for his client. The proceedings continued.

The administrator's attorney called Esmailzadeh to testify. Esmailzadeh objected to being called as a witness against his client. The trial court did not directly address the apparent conflict of interest. However, it declined to order Esmailzadeh to testify contrary to his client's best interests.

Prescott was next called to testify. He indicated that he and Esmailzadeh had had little communication during the period of negotiation and that he had not given Esmailzadeh authority to enter into the settlement. Prescott also testified that the administrator's attorney had been aware since the inception of the litigation that he would forever be unwilling to accept the exact terms that had allegedly been negotiated on his behalf. During Prescott's testimony, the administrator's attorney asked the court to admonish Esmailzadeh that he could not assist his client

in conduct that the attorney knew to be fraudulent. Instead, the court reminded Prescott that perjury was punishable by imprisonment.

Finally, the administrator's attorney testified. The attorney indicated that Esmailzadeh had won several concessions during the negotiation and that it was clear that Esmailzadeh possessed Prescott's express authorization to enter into the settlement.

By its order entered on August 24, 2010, the trial court granted the administrator's motion to enforce the settlement. The court found that Prescott had given Esmailzadeh express authority to settle the parties' claims and that the failure to enforce the agreement would have a substantial and adverse effect on the beneficiaries of the Denk estate since the estate would incur the expense of trial preparation for a second time and suffer further delay. This appeal followed.

In his brief to this court, Esmailzadeh continues to represent his client's interests vigorously. Citing *Clark v. Burden*, 917 S.W.2d 574 (Ky.1996), Esmailzadeh challenges the trial court's order to enforce the settlement by contending that he (Esmailzadeh) lacked the authority necessary to settle any claims on his client's behalf. He contends that the trial court erred by finding authorization where none existed. Esmailzadeh also contends that the trial court erred by finding that the decedent's estate would be substantially and adversely affected if the settlement were not enforced. The administrator of the decedent's estate contends that the record supports its position that the settlement is indeed enforceable against Prescott. However, the attorney for the estate candidly

acknowledges that Esmailzadeh has been put in an untenable position -- both as advocate for and as witness against his client.

When determining whether to settle a claim, our courts recognize that final decision-making authority rests with a client -- not with his attorney. *Clark*, 917 S.W.2d at 575. Without his client's express authority, an attorney generally has no authority to bind his client to a settlement or compromise. *Id.* at 576. Kentucky's Rules of Professional Conduct mandatorily direct that an attorney "**shall** abide by a client's decision whether to accept an offer of settlement" Rule[s] of the Supreme Court (SCR) 3.130-1.2(a). (Emphasis added.)

In *Clark v. Burden*, 917 S.W. at 577, the Supreme Court of Kentucky directed that where a dispute erupts as to whether a client has given settlement authority to his attorney, "the trial court shall summarily decide the facts." In such a proceeding, the attorney-client privilege will not prevent the attorney from testifying as to the client's instructions regarding settlement. *Id.* Whether Prescott gave Esmailzadeh express authority to settle the matter was the critical issue at the court's hearing. Esmailzadeh's testimony was material to the interests of both parties and was critical to a resolution of this central issue of authorization. However, SCR 3.130-3.7(a) specifically provides that a "lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness. . . ." ¹ Comment 5 to SCR 3.130-3.7 indicates that where there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the

¹ None of the several enumerated exceptions to the rule applies under the circumstances of this case.

representation is improper. The comment also provides that the problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party.

Although our Rules of Professional Conduct indicate that determining whether such a conflict exists is primarily the responsibility of the lawyer involved, courts have an abiding and independent interest in assuring that representation of litigants is not compromised by an improper conflict of interest. Under the circumstances presented here -- where an attorney was required to continue in the representation despite a patent conflict of interest, the integrity of both the court and the attorney was undermined. While neither of the parties on appeal was in a position to have raised the issue of the unadjudicated conflict of interest before this court, the error has grave implications beyond the Bullitt Circuit Court, these attorneys, and these parties. Therefore, we hold that the court erred in failing to enter an order permitting Esmailzadeh to withdraw from the representation.² We remand for a re-trial on the merits of the case.

The order of the Bullitt Circuit Court enforcing the alleged settlement is vacated. This matter is remanded for further proceedings consistent with our opinion.

CAPERSON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE

OPINION.

² We note that Esmailzadeh was no longer representing Mr. Prescott at the oral argument in this case.

THOMPSON, JUDGE, DISSENTING: In this troublesome case, I must respectfully dissent.

I am in complete agreement with the majority that SCR 3.130-1.2(a) requires that an attorney abide by his client's decision regarding a proposed settlement. Mr. Esmailzadeh was in an ethically precarious position caused by the trial court's refusal to permit him to withdraw from the case even when it was apparent that his professional and ethical duties conflicted. However, the trial court found that Esmailzadeh had express authority and, therefore, his ethical conduct is not the issue. In fact, when he learned that Prescott was not going to abide by the settlement terms, he sought to withdraw from the case.

Furthermore, even if there was substantial evidence that Prescott did not authorize the settlement, I cannot agree with the majority's result. Case law teaches that in situations where the authority of an attorney to reach a settlement is questioned, the court must determine the extent a third party is affected if the settlement is not enforced. In *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996), the Court explained the analysis:

[T]he proper inquiry is whether the peculiar agency relationship between attorney and client is sufficiently comprehensive with respect to third parties to overcome the fundamental right of the client to ultimately decide upon the settlement. An important consideration is the extent to which those dealing with an attorney in such circumstances may be harmed by unauthorized offers or acceptances of settlement. If it should be determined that third parties who may be dealing with such attorneys would be substantially and adversely affected by unauthorized attorney settlements, then the client

employing the attorney should be bound. On the other hand, if it is determined that no substantial harm will befall third parties, then ultimate control should remain with the client, notwithstanding purported settlements by an attorney. The foregoing is consistent with the general law of agency which allocates loss to the party who invested the agent with authority to initiate the transaction.

Id. at 576.

In this case, the trial court found as a matter of fact that “not to enforce the agreement would have a substantial and adverse effect on the party seeking its enforcement.” It further found that “[f]ailure to enforce the agreement would cause great expense in preparation of the trial and would further delay closing of the estate thereby affecting beneficiaries by continued delay.”

The majority has ignored the ramifications of its order to the innocent third party and, instead, held in favor of Prescott, who the trial court found conferred authority upon his attorney to settle the claim. I do not believe Prescott should be rewarded for refusing to comply with the terms of the agreement.

I would affirm.

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