RENDERED: APRIL 12, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001764-MR

JOHN B. FORD — APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE MICHAEL L. MCKOWN, JUDGE
ACTION NO. 10-CI-00530

MARSHALL E. DAUGHERTY
AND JESSIE LEE DAUGHERTY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: John B. Ford has appealed from the September 29, 2017, order of the Ohio Circuit Court denying his motion to set aside an agreed order entered January 26, 2015, related to a real property dispute between him and his neighbors, brothers Marshall E. Daugherty and Jessie Lee Daugherty, Jr. (the Daughertys). We affirm.

The underlying action began with the filing of a petition for declaration of rights, injunctive relief, and monetary damages by the Daughertys against Ford on October 8, 2010. The Daughertys claimed they were owners in fee simple of real estate in Ohio County that they had acquired by deed dated July 19, 2007, and recorded a few days later. The description of the property in the deed was based on the September 2, 2004, survey of Michael Ward. This property had been owned by the Daugherty family for decades; the Daughertys' parents, Jessie and Dorothy, acquired the property by deed in 1969. After their parents' deaths, the Daughertys acquired the property by paying their siblings (the other beneficiaries) their portion of the appraised value of the property. Ford owned an adjoining tract that he had acquired from his parents by general warranty deed dated June 23, 1973, and recorded in early July of that year.

The Daughertys alleged that Ford had wrongfully entered upon their land, had markers placed in the ground where he claimed the boundary line was, and trespassed upon their land, without any right or authority. They claimed Ford had unduly harassed them regarding their use of the land, including making a report of trespass to the police. Finally, they claimed Ford had defaced and damaged timber belonging to them, removed and destroyed their personal property and improvements, and interfered with their use and enjoyment of their property. The Daughertys sought a declaration that they were the sole owners in fee simple

of the real estate described in the exhibits attached to the petition (the deed, the legal descriptions, and the survey plat); an order restraining Ford or his agents from entering their property; and monetary damages, costs, and attorney fees.

Ford filed an answer and counterclaim against the Daughertys on October 25, 2010, in which he also sought a declaration of rights, injunctive relief, and monetary damages. He alleged the Daughertys had wrongfully entered his land, removed trespass warning signs, placed markers in the ground where they claimed the boundary line was located, installed gates to prevent access to his land, and trespassed on his land without any right or authority. Ford also alleged that he and his predecessors in title had adversely possessed the disputed property under a claim of right; had exercised dominion and control of the property for farming, hunting, and timbering; and had paid the ad valorem property taxes. Therefore, Ford claimed to be the owner in fee of the land in Exhibit E to the Daughertys' petition and the boundaries that had been established for more than sixty years. Ford sought a permanent injunction restraining the Daughertys from entering his lands; a judgment determining that the Daughertys had no interest in the boundaries of his land and quieting the title in his name; and monetary damages, costs, and attorney fees. Ford was represented by attorney T. Steven Poteat.

In January 2013, the circuit court filed a notice to dismiss for lack of prosecution. The Daughertys filed a response and objection to the notice,

indicating that the parties had been in negotiations regarding a possible resolution of their claim and that Ford had been dealing with health issues. In addition, they had scheduled depositions to be held in June 2011 that had been canceled at the request of Ford's attorney. The Daughertys' attempts to reschedule the depositions went unanswered. They stated they wanted to move forward with discovery and set the case for trial if it could not be resolved. By order entered March 15, 2013, the court ordered the case would remain open and on the active docket.

A second notice to dismiss for lack of prosecution was filed on April 3, 2014. The Daughertys filed a response and objection to the court's notice and by separate filing moved the court to schedule a bench trial. The court again opted to keep the matter on its active docket by order dated May 22, 2014, and later scheduled a trial for December 12, 2014.

In August 2014, the Daughertys filed a motion for summary judgment. They described a previous lawsuit between the parties related to the boundary lines that had been filed in 2005 by Ford. A survey had been completed at the Daughertys' request, and the survey confirmed that the property Ford was claiming was in fact the Daughertys' property. A copy of Mr. Ward's deposition from the 2005 action was attached to the motion, in which he discussed two surveys he performed in September 2004 showing different boundary lines. Ford had signed the September 10, 2004, survey, but not the September 2, 2004, survey.

Ford's lawsuit was ultimately dismissed for lack of prosecution in 2008. When Ford again attempted to claim the disputed area in 2010, the Daughertys filed the current suit. The Daughertys went on to contest Ford's adverse possession claim.

The court held a hearing on the motion for summary judgment, but Ford did not attend the hearing or otherwise object to the motion. Neither Ford nor his counsel had appeared at the previous two hearings, and Ford had not shown any interest in defending the action. The court denied the motion by order entered November 14, 2014, finding that a genuine issue of material fact existed with respect to the deed's description and the associated surveys. The court expressed its frustration with Ford and his counsel "for their failure to attend hearings, comply with discovery and disclosure deadlines, and to generally participate in this matter." It nevertheless held that summary judgment was not the proper vehicle to dismiss an action due to a party's inappropriate behavior. The Daughertys moved the court to preclude Ford from presenting any witnesses at trial due to his failure to disclose any witnesses or expert witnesses.

On December 11, 2014, the day before the bench trial was scheduled, the Daughertys filed a notice to cancel the trial due to a pending agreement that would grant a judgment to the Daughertys and dismiss Ford's counterclaim. The notice stated that the agreed order would be "promptly tendered" to the court for entry. Then on January 8, 2015, the Daughertys moved the court to enforce the

agreement and sought attorney fees and costs. The Daughertys stated that counsel for Ford had initiated the settlement discussions that resulted in the agreed order, but he had since failed to honor the agreement. The motion continued:

> 2. On December 11, 2014, the afternoon before the bench trial, counsel for [Ford] telephoned the undersigned counsel. Said counsel advised that his client "did not want to fight this anymore", and asked if the trial for the next day, December 12, 2014 could be canceled. Said counsel advised that his client would "sign off" on whatever [the Daughertys] wanted, including an agreed order that resolved this litigation in [the Daughertys'] favor.
>
> 3. The undersigned counsel stated that he would be willing to call the Court and cancel the bench trial for the next morning, but would first need to have confirmation of the agreement in writing. Without written confirmation by counsel for [Ford] that an agreement had been reached as to all material terms, the hearing would need to proceed.
>
> 4. The undersigned counsel then immediately proceeded on December 11, 2014 to send an email to counsel for [Ford], which stated as follows (attached hereto as Exhibit A):
>
> > Steve:
> >
> > This is to confirm our telephone conversation that your client is in agreement with judgment being granted in favor of my clients, Marshall and Jesse [sic] Daugherty, decreeing that they are the owners of the land up to the boundary lines depicted on the survey that has been presented to the court, done by Michael Ward. Your client is also in agreement with his counterclaim being

> dismissed with prejudice, and that he is giving up any claim of adverse possession with respect to any of the property located within the boundaries of the Daugherty property, as shown on that survey. Please confirm, and I will alert the court, and also prepare an agreed order.

Mr. Poteat then replied as follows at 2:07 PM on December 11, 2014:

> Cliff, the below accurately represents my understanding.
>
> Thanks,
>
> Steve

> 5. After receiving that written confirmation from Mr. Poteat that an agreement had been reached, the undersigned notified the Court that this matter had been resolved and that the bench trial for the next day was canceled. The undersigned also immediately submitted to Mr. Poteat a draft of an agreed order, which Mr. Poteat stated would be signed and returned to the undersigned within a short period of time.
>
> 6. As of the date of this motion, the agreed order has not been signed. Counsel for [Ford] has repeatedly failed or refused to return phone calls, voice messages, texts and emails regarding the status of this agreed order. The undersigned counsel honestly has no idea what is going on.

Accordingly, the Daughertys requested that the court enter a judgment in their favor pursuant to the agreement they had reached in December as well as award them attorney fees. The Daughertys moved to cancel the hearing associated with

this motion as an agreed order signed by counsel for both parties had been tendered.

On January 26, 2015,[1] the circuit court entered the agreed order declaring the Daughertys to be the owners of the property as reflected on the survey performed by Mr. Ward dated September 2, 2004, which was marked as Exhibit A to the Daughertys' motion for summary judgment. That survey was incorporated to reflect the court's findings as to the boundary lines between the properties. The court also dismissed Ford's counterclaim with prejudice.

More than two years later, on February 15, 2017, Ford, now represented by new counsel, filed a motion to set aside the agreed order. Ford stated that at the time the agreement was reached, attorney Poteat had been suspended from practicing law by the Kentucky Bar Association (KBA) by letter dated January 24, 2014, due to his failure to comply with his continuing legal education requirements for the 2012-2013 educational year. The KBA's letter directed him to notify all courts in which he had matters pending as well as all clients in active litigation within ten days of this suspension. He was to notify his clients that he was unable to continue to represent them and urge them to promptly retain new counsel. Attorney Poteat did not notify the court or Ford of his suspension, and he signed the agreed order one year later. Ford also stated that the

[1] The court signed the agreed order two days earlier.

agreed order wrongly referenced the survey marked Exhibit A, not the survey by Mr. Ward he had agreed to and signed dated September 10, 2004, and marked as Exhibit B.[2] Ford stated that he had not known of the error until he hired surveyor Keith Biggerstaff to set the corner pins. Ford approached attorney Poteat to have the error corrected, and attorney Poteat, in turn, drafted a motion to set aside the judgment, which was never filed with the court. Attorney Poteat did not tell Ford about his suspension at that time. Ford did not learn about the suspension until he met with his current counsel. Ford cited to Kentucky Rules of Civil Procedure (CR) 60.02(d) and (f) in support of his motion for relief. He argued that attorney Poteat had acted without authority and committed fraud upon both the court and him. He posited that attorney Poteat pushed the settlement to avoid going to trial without a law license.

The Daughertys objected to the motion to set aside the agreed order and argued that Ford had the right to seek civil damages against attorney Poteat. They also argued that attorney Poteat had apparent authority to sign the agreed order and that they had the right to rely upon this apparent authority. The court

[2] Exhibit B to the Daughertys' motion for summary judgment is the 2005 deposition of Mr. Ward taken in the earlier lawsuit. The deposition references the two alternative plats that were attached as Exhibit A and Exhibit B, but the exhibits were not included in the copy attached to the motion.

scheduled an evidentiary hearing for May 2017, and attorney Poteat was subpoenaed to attend the hearing.

The court held the evidentiary hearing on May 2, 2017. Ford was the first witness to testify. He testified that attorney Poteat had not told him that he had lost his law license; Ford was not aware this had happened until his current counsel told him earlier that year. If he had known attorney Poteat was not able to represent him, he would not have given him authority to settle the case for him. He was also not aware that counsel for the Daughertys had filed a motion to enter a judgment in their favor or anything about that matter. Ford knew a trial had been scheduled, but he was told it had been settled. He never discussed potential witnesses or exhibits with attorney Poteat before the scheduled trial date, although he had discussed settling the case close to the trial date. Attorney Poteat told him the Daughertys did not want to spend any additional money on the case and wanted to settle it. He said he agreed to settle based upon the survey plat he had signed. Ford had not reviewed any of the email conversations between the two attorneys regarding the agreed order, had not reviewed the agreed order prior to its signing, and had not received a copy of the agreed order when it was entered. When he and attorney Poteat discussed the agreed order, Ford agreed with it because the plat attached to it (labeled Exhibit B) matched the survey he had signed. He would never have agreed to settle the case using the plat in Exhibit A because it

landlocked his property and did not go along with what he had always been told about the location of the property line. Ford said he first saw the agreed order when he met with another surveyor in early 2016. He contacted attorney Poteat shortly after discovering which plat had been used to tell him about the issue. According to Ford, attorney Poteat said he would contact the Daughertys' counsel and have it changed, as it was not agreed upon. That was not done to his knowledge.

On cross-examination, Ford recalled that two surveys had been performed, each showing where the parties thought the boundary line was. He said he knew a trial date was scheduled in December 2014, and attorney Poteat told him the case had been settled on the survey plat that he had signed. Ford did not ask his attorney to show him anything after the case settled and he did not read or ask to read the agreed order prior to its entry because he trusted his attorney. Attorney Poteat explained the terms over the telephone, and that was sufficient for him. He stated there was only one plat that he had signed, and that was the one he agreed to. Ford thought attorney Poteat did not know what was wrong with the agreed order, and Ford did not believe he had intentionally lied to him or committed any fraud against him. In February 2016, attorney Poteat showed him a copy of the agreed order that he (attorney Poteat) had signed and that had been entered by the court. Ford did not ask to see the plat that was referenced in the agreed order. Attorney

Poteat told Ford that the agreed order incorporated the plat that Ford had signed. Ford had not had any conversations with the Daughertys after the case was settled. He had seen them in the disputed boundary line area in 2014 claiming the property in a way he did not agree with, and he called a deputy to see what was going on. He thought the matter had been resolved in his favor at that time, and that the Daughertys had given up. Ford believed attorney Poteat misunderstood what the agreement was. Ford described attorney Poteat as a friend and stated he did not want to file an action against him.

On redirect examination, Ford explained the Daughertys' actions in 2014 in more detail. He said he had caught them moving some of the poles. The Daughertys retrieved a document stating that they had won the lawsuit. Ford followed up with attorney Poteat and did not hear anything else about it. This happened prior to the entry of the agreed order. He did not know what document the Daughertys showed the deputy.

Attorney Poteat testified next. He was currently employed as a title examiner. The KBA had suspended his license in February 2014, but he had not been aware of that until over a year later because he thought the matter had been resolved. He found out about the suspension when he was told by someone in the Clerk's office in April or May of 2015. He admitted that he had never told Ford about the suspension. And he agreed that he was not authorized to represent Ford

or negotiate or sign agreements on his behalf. He had a conversation with the Daughertys' counsel about settlement prior to the trial. Ford authorized him to settle the case based on a survey by Mr. Ward. He only knew of one survey that Mr. Ward had signed off on, and he understood that Ford had signed off on this survey. He was not aware of any other survey that Mr. Ward had prepared. He looked at the survey referenced in the agreed order after it had been entered. He did not believe the document referenced in the agreed order was a survey but was a preliminary drawing. He did not intend that the document the agreed order ultimately referenced was the survey Ford had agreed to; rather, Ford had agreed to the survey that he had signed off on. He did not recall showing Ford the agreed order, but he did not think he had done so. He did not realize the document referenced in the agreed order was not a survey until after he had had a heart attack a little over a year earlier.

On cross-examination, attorney Poteat testified that he believed he was still a licensed attorney at the time the trial was scheduled. He thought he was able to negotiate the settlement and sign the agreed order on Ford's behalf. He denied that he had ever lied to Ford. He recalled his conversation with the Daughertys' counsel the day before the trial date, but he said he recalled telling him that Ford wanted to settle the case based on Mr. Ward's survey. He knew the Daughertys would get what they wanted based upon that survey. He recalled that

an adverse possession claim was brought to cover everything, but the claim was based on where the old fence line ran. He assumed the document attached to the summary judgment motion was the one Ford had agreed to. He did not look at the document.

Marshall Daugherty testified next. He recalled the time Ford called the police when they were putting stakes on the property line. He said this happened in 2008 or 2009, after the first lawsuit had been dismissed, but prior to the filing of the current one. The document he showed to the police had to do with the dismissal of the first lawsuit. He said there was a compromise survey, but that was never submitted to the court.

The parties filed briefs arguing their respective positions. Ford argued that he was entitled to relief pursuant to CR 60.02(d) based upon the fraud attorney Poteat perpetrated on him, opposing counsel, and the court, when he continued to act as a licensed attorney when his license had been suspended. The question came down to whether attorney Poteat lied to Ford about the terms of the settlement and which survey would provide the basis for the agreed order, or whether the Daughertys' counsel committed fraud by attaching the incorrect survey. Ford also requested relief under CR 60.02(f) based upon the extraordinary facts of the case related to the suspension of attorney Poteat's law license and his fraudulent conduct. Ford went on to argue that attorney Poteat did not have the authority to

act on his behalf based upon the suspension of his license and that because Ford did not sign the agreed order, it was invalid pursuant to CR 11. Because he was not represented by an attorney, Ford was required to sign it as the party. Finally, Ford argued that there was no meeting of the minds and that the doctrine of *res judicata* did not apply.

In response, the Daughertys argued that Ford failed to cite to any legal authority that, assuming attorney Poteat had acted fraudulently, would warrant setting aside the agreed order. They went on to argue that the doctrine of *res judicata* applied to bar him from seeking relief and that Ford failed to establish he was entitled to relief under CR 60.02(d) or (f) based upon the testimony at the hearing. Finally, they argued that Ford's testimony at the hearing that the survey landlocked his property was a newly raised claim and was in any event false based on the surveys. What happened, in essence, was that Ford had been incompetently represented by attorney Poteat, which was not a ground for setting aside a final judgment pursuant to CR 60.02(f).

By order entered September 29, 2017, the circuit court denied Ford's motion to set aside the agreed order. The court held that Ford was not entitled to relief under CR 60.02(d) because he had not established that attorney Poteat was knowingly practicing law without a valid license and because Ford failed to establish that opposing counsel had procured the agreed order by fraud. The court

next held that Ford had not established he was entitled to relief under CR 60.02(f) because mistaken or negligent legal representation was not a ground to grant such relief. And finally, the court rejected Ford's CR 11 argument, concluding that attorney Poteat had apparent authority to sign the agreed order on Ford's behalf, even if he was not actually licensed. This appeal now follows.

Before we may reach the merits of this appeal, we must address the Daughertys' contention that Kentucky law prohibits Ford's appeal, which was raised in a motion to dismiss to this Court during the pendency of the appeal. We decline to alter the three-judge motion panel's decision to deny the motion. As that panel stated, an order denying a CR 60.02 motion is a final and appealable order. *Hackney v. Hackney*, 327 S.W.2d 570, 571-72 (Ky. 1959) ("[A]n order *denying* relief under CR 60.02 . . . *is* appealable."). Therefore, we shall consider the issues Ford has raised in his appeal.

On appeal, Ford contends that the circuit court abused its discretion in denying its motion to vacate. CR 60.02 provides that a court may grant a party relief from a final judgment upon one of the following grounds:

> (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or

> otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

Such a motion "shall be made within a reasonable time," and the rule specifically states that the motion must be made "not more than one year after the judgment" for grounds (a), (b), and (c).

> Our standard of review for a trial court's denial of a CR 60.02 motion is abuse of discretion. *Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky. 1957). The test for abuse of discretion is whether the trial court's decision is arbitrary, unreasonable, unfair, or unsupported by legal principles. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

Lawson v. Lawson, 290 S.W.3d 691, 693-94 (Ky. App. 2009). "Under Ground No. 6 of CR 60.02, a judgment may be set aside for a reason of an extraordinary nature justifying relief from the operation of the judgment. However, because of the desirability of according finality to judgments, this clause must be invoked only with extreme caution, and only under most unusual circumstances." *Cawood v. Cawood*, 329 S.W.2d 569, 571 (Ky. 1959).

We shall first consider whether Ford is entitled to relief under CR 60.02(d) for fraud affecting the proceedings. The circuit court rejected his argument, concluding that Ford had failed to establish that his attorney had knowingly practiced law without a valid license or had intended to defraud him by doing so, nor had Ford established that the prior order was procured by fraud or

deceit of the opposing counsel, citing *Ipock v. Ipock*, 403 S.W.3d 580, 585 (Ky. App. 2013). Ford suggests that his attorney knew his license had been suspended based upon his lack of aggressive representation and his desire to avoid going to trial by making unauthorized promises against his (Ford's) best interests. He also speculates that opposing counsel may have committed fraud by attaching the wrong plat to the agreed order. The Daughertys disagree with these assertions.

In *Ipock, supra*, this Court addressed the application of CR 60.02(d) and explained:

> A party alleging fraud under CR 60.02(d) has the burden of proving, by clear and convincing evidence, that the opposing party's procurement of the court's prior order was achieved by fraud or deceit. *See Rice v. Dowell*, 322 S.W.2d 468 (Ky. 1959). The moving party must essentially prove that the opposing party's conduct outside of the trial itself somehow prevented the moving party from appearing or presenting fully and fairly its side of the case. *See* 7 Ky. Prac. R. Civ. Proc. Ann. Rule 60.02 (6th ed. 2012).

Ipock, 403 S.W.3d at 585. Ford did not present any evidence at all at the hearing that the Daughertys or their counsel committed any fraud related to the agreed order. Instead, he asserts his own supposition – not supported by any evidence – that perhaps the wrong plat was attached to the agreed order. The Daughertys, in response, dispute any deception or fraudulent action, and they properly correct Ford's misstatement in his brief that the wrong plat had been attached to the agreed order by pointing out that nothing was attached to it. The record reflects that the

agreed order incorporated by reference a survey attached to their motion for summary judgment as Exhibit A, and this exhibit was available for Ford and his counsel to inspect as it had been served months earlier.

Furthermore, we agree with the circuit court and the Daughertys that Ford has in any event failed to establish that his counsel committed any fraud because there was no evidence presented to establish that attorney Poteat had knowingly practiced law on a suspended license or intended to defraud Ford in that manner. Attorney Poteat testified that he thought he was still a licensed attorney at the time the agreed order was signed, and Ford did not offer any evidence to dispute this testimony. In addition, Ford testified that he did not believe attorney Poteat had committed any fraud. Accordingly, we hold that the circuit court did not abuse its discretion in denying Ford's motion for relief under CR 60.02(d).

We shall next consider whether Ford is entitled to relief under CR 60.02(f), which provides relief for "any other reason of an extraordinary nature justifying relief." The circuit court rejected Ford's argument that his representation by an unlicensed attorney met this standard, concluding that there was no legal authority to support his argument, that attorney Poteat had apparent authority, and that Ford had waited too long to seek relief.

In his brief, Ford contends that the situation went beyond his being poorly represented by attorney Poteat, and it was compounded by the license

suspension and the circumstances surrounding the agreed order (either Poteat was lying to Ford or opposing counsel about the reason for the settlement or Poteat was tricked by opposing counsel into signing the agreed order containing the wrong plat). However, our review of the evidentiary hearing establishes that attorney Poteat failed to determine which plat the agreed order referenced in his mistaken belief that only one plat existed (the one Ford had signed) and in his failure to review the referenced plat.

In *Vanhook v. Stanford-Lincoln County Rescue Squad, Inc.*, 678 S.W.2d 797, 799-800 (Ky. App. 1984), this Court addressed whether the negligence of an attorney could support a motion for CR 60.02 relief. We held that it does not:

> Negligence of an attorney is imputable to the client and is not a ground for relief under CR 59.01(c) or CR 60.02(a) or (f). *See Childers v. Potter*, 291 Ky. 478, 165 S.W.2d 3 (1942).
>
> Lisa Vanhook would have been entitled to a verdict and judgment in this case. Like the young Davis boy, she was merely an innocent passenger in one of the two vehicles. Both she and her husband were denied their day in court by the unexplained absence of their attorney. To reverse her case would require a re-trial of the original action. Her complaint was against the owners and drivers of both vehicles. We cannot compel them to go through another trial.
>
> In discussing a similar problem, the United States Supreme Court, in the case of *Link v. Wabash R.R. Co.*,

370 U.S. 626, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962), had this to say:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unfair penalty on the client. Petitioner voluntarily chose the attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of his freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."
>
> If appellants, Lisa Vanhook and Cecil Vanhook, are to be compensated for their losses, it will have to be in another case, in another forum and against other parties.

Ford testified that attorney Poteat was a friend and that he did not want to seek legal redress from him; rather, he sought relief through the present litigation. Ford chose his attorney and must accept the consequences of that choice.

Related to this argument is whether attorney Poteat had the apparent authority to sign the agreed order on Ford's behalf. We have defined apparent authority as follows:

> Apparent authority is not actual authority, but rather "is that which, by reason of prevailing usage or other circumstance, the agent is in effect held out by the principal as possessing. It is a matter of appearances, fairly chargeable to the principal and by which persons

> dealt with are deceived, and on which they rely." Annot., 2 A.L.R.2d 406, 407 (1948).

Estell v. Barrickman, 571 S.W.2d 650, 652 (Ky. App. 1978), *overruled on other grounds by Mid-States Plastics, Inc. v. Estate of Bryant ex rel. Bryant*, 245 S.W.3d 728 (Ky. 2008). And "[a]n agent's apparent authority is sufficient to bind the principal with respect to third parties, like the bank. *See Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 594 (Ky. 2012) ('The principal will then be bound by such a transaction [by an apparent agent] even if the agent was not actually authorized to enter it.')." *Mark D. Dean, P.S.C. v. Commonwealth Bank & Tr. Co.*, 434 S.W.3d 489, 508 (Ky. 2014).

Based upon attorney Poteat's status as counsel for Ford, we hold that the Daughertys and their counsel could reasonably believe that Poteat had the authority to act on Ford's behalf, regardless of the fact that his license had been suspended.

In so holding, we reject Ford's reliance upon the Supreme Court of Kentucky's opinion in *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996), which he cites to argue that attorney Poteat could not settle the case without express authority from him.

> While attorneys have been held to be superior agents (*Daugherty v. Runner*, Ky.App., 581 S.W.2d 12, 16 (1978)), a firm line of authority holds that with respect to settlement, attorneys are without power to bind their clients. *DeLong v. Owsley's Ex'x*, 308 Ky. 128, 213

S.W.2d 806 (1948); *Fillhardt v. Schmidt*, 291 Ky. 668, 165 S.W.2d 155 (1942); *Shropshire v. Shropshire*, 282 Ky. 211, 138 S.W.2d 340 (1940); *Jenkins v. City of Bowling Green*, 261 Ky. 679, 88 S.W.2d 692 (1935); *Brown v. Bunger*, Ky., 43 S.W. 714 (1897). *See also* 7 Am.Jur.2d *Attorneys at Law* § 156 (1980), (which discloses that Kentucky case law is consistent with the general rule). These cases contain little reasoning to justify the rule stated, suggesting that the rendering courts regarded the rule as so manifest to be without any need for exposition. While the reasons for the rule are not persuasively expounded and fail to take account of the potential effect upon third parties, and while it would be possible to distinguish these cases from the case at bar, the fact remains that the rule is broad and unambiguous. As succinctly stated in *Fillhardt*:

> 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 [Kentucky Supreme Court 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. Our recent decision in *Farmers Deposit Bank v. Ripato*, Ky., 760 S.W.2d 396 (1988), is not to the contrary for it was premised on the active participation by the represented parties in the negotiations. We noted that the attorney was not discharged until after the compromise had been reached and that the settlement took place under the clients'

> watchful eyes. Active participation in the particulars of settlement may be deemed to create implied authority. *See also Combs' Adm'r v. Virginia Iron, Coal & Coke Co.*, 236 Ky. 524, 33 S.W.2d 649, 651 (1930), (holding that an unauthorized settlement may be ratified by the client, even by the client's silence; "It is the client's duty, having knowledge of the settlement, to express his disapproval within a reasonable time").

Clark, 917 S.W.2d at 576-77.

The obvious difference between the present case and *Clark* is that this case does not concern a settlement agreement, but rather an agreed order. And based on the testimony elicited at the hearing, it appears that Ford had given attorney Poteat the necessary authority to enter into the agreed order, albeit using a different survey plat. Furthermore, in light of Ford's suggestion that we use our equitable powers to grant him relief, we agree with the Daughertys that they would be substantially prejudiced if the agreed order were to be set aside more than five years later. The Daughertys would have to pay for the duplication of trial preparation and address the possibility that witnesses may no longer be available. Accordingly, we find no error in the circuit court's conclusion that attorney Poteat had the apparent authority to sign the agreed order on Ford's behalf.

Finally, we reject Ford's argument that CR 11 provides him with any relief. He asserts that because attorney Poteat's license had been suspended, he could no longer sign pleadings, motions, or other papers under CR 11. And because attorney Poteat was not licensed, Ford argued that he was not represented

by counsel. Therefore, Ford needed to sign any pleading, motion, or other paper filed with the court. He did not sign the agreed order, which he argues invalidates it. We disagree and hold that because attorney Poteat had apparent authority to sign the agreed order as discussed above, Ford is not entitled to relief under CR 11. The circuit court did not abuse its discretion in so holding. *Lawson*, *supra*.

For the foregoing reasons, the order of the Ohio Circuit Court denying Ford's motion to set aside the agreed order is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEES:
Cheryl Cureton Spalding Owensboro, Kentucky	Clifton A. Boswell Owensboro, Kentucky