

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-1016

MARJORIE L. KAGNO, personal representative,¹

vs.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Marjorie Kagno, as the personal representative of the Estate of Leonard J. Kagno (Leonard), is appealing a judgment entered against the defendant after a Superior Court judge allowed the defendant's motion to confirm and enforce a settlement agreement. In September 2019, Leonard filed a suit against the Massachusetts Bay Transportation Authority (MBTA) seeking damages for injuries he sustained in a pedestrian-train accident.² Leonard was represented by Attorney Harold Jacobi, III (Jacobi). In December 2020, Jacobi orally accepted a \$50,000 settlement offer from the MBTA, purportedly

¹ Of the Estate of Leonard Kagno.

² During the pendency of the Superior Court action, Marjorie L. Kagno, Personal Representative of the Estate of Leonard Kagno, was substituted for Leonard Kagno as the plaintiff pursuant to Mass. R. Civ. P. 25 (a) (1), 365 Mass. 771 (1974).

on Leonard's behalf. During the settlement negotiations, Jacobi had made the MBTA aware that Leonard had a terminal illness, was in hospice, and that time was of the essence. At the time he accepted the settlement, Jacobi knew that Leonard had passed away and that Leonard's family was not interested in accepting a \$50,000 settlement. Shortly after Jacobi orally agreed to the MBTA's settlement offer, the MBTA became aware of Leonard's death. When it did not receive a signed release from Jacobi, the MBTA filed a motion to confirm and enforce the settlement agreement. Following a nonevidentiary hearing, the judge allowed the motion, finding that Jacobi was an agent for Leonard and had the apparent authority to settle the lawsuit. Judgment then entered against the defendant in the amount of \$50,000. The plaintiff now appeals; arguing that the judge's finding that Jacobi had the apparent authority to enter into a settlement agreement on Leonard's behalf was clearly erroneous.

Discussion. 1. Standard of review. We do not set aside a judge's findings of fact unless they are "clearly erroneous." Mass. R. Civ. P. 52 (a), as amended, 423 Mass. 1402 (1996). "A finding is 'clearly erroneous' only when, 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 509 (1997), quoting Building Inspector of

Lancaster v. Sanderson, 372 Mass. 157, 160 (1977). "We are not bound, however, by the judge's conclusions of law, and we must ensure that the judge's ultimate findings and conclusions are consistent with relevant legal standards." Id. at 510.

2. Apparent authority. Upon a thorough review of the record, we view the judge's finding that Jacobi had apparent authority to settle Leonard's claim as an erroneous legal conclusion, or, to the extent it is a finding of fact, clearly erroneous. "The concept of agency, as defined by the common law, acknowledges a consensual relationship between parties, in which one party acts as a representative or on behalf of the other party with power to effect the legal rights and duties of that other party." Newton Centre Realty, Inc. v. Jaffe, 97 Mass. App. Ct. 726, 728 (2020), quoting Bailey v. Astra Tech, Inc., 84 Mass. App. Ct. 590, 596 n.14 (2013). "[A]n attorney, merely by his having been retained in a litigation, does not possess the power to settle it, see Precious v. O'Rourke, 270 Mass. 305, 308 (1930), [although] he may be so empowered by the client, expressly or by implication from conduct." Hubbard v. Peairs, 24 Mass. App. Ct. 372, 377-378 (1987). "When the attorney undertakes to bind his client by an agreement to compromise his client's substantial rights, the opposing party must ascertain at his peril whether the attorney has authority to make the settlement." O'Rourke, supra. "The authority of an

agent is a question of fact, 'the answer to which depends upon the inference to be drawn from a variety of circumstances relating to the conduct of the apparent agent, and whether the circumstances are such as to warrant persons dealing with him, in the exercise of reasonable prudence and discretion, to believe he has authority to represent the alleged principal in regard to the transaction in question'" (citation omitted). Costonis v. Medford Hous. Auth., 343 Mass. 108, 113 (1961).

Here, the judge did not make detailed findings. At the hearing, there were no witnesses. Although the motion and opposition contained attachments, including affidavits of counsel, this panel is unable to determine what the judge relied on in making his findings and legal conclusions. Moreover, since Leonard had died before Jacobi took any action to settle the claim for \$50,000, Jacobi's agency, including any apparent authority, had terminated. Jacobi was aware that Leonard died on December 5, 2020. On December 11, 2020, Jacobi demanded a \$50,000 settlement, which the MBTA agreed to. The MBTA does not dispute that Jacobi made the demand for \$50,000 after he knew that Leonard, Jacobi's principal, had died. Where the principal has died, there cannot be an agency relationship, and therefore Jacobi could not have had the apparent authority to enter into

the settlement on behalf of Leonard.³ "Generally, the death of the principal automatically terminates the actual and apparent authority of the agent because it negates the existence of the person on whose behalf the agent acts" (citation and quotation omitted). Jaffe, 97 Mass. App. at 728. "Like [actual] authority, apparent authority terminates with the death of the principal. Third persons who, in ignorance of the death, deal with the former agent (who also may be ignorant of the death) have no rights upon the contract against the estate of the deceased." Restatement (Second) of Agency § 120 comment c (1958).⁴ We therefore conclude the motion judge erred in finding that Jacobi had the apparent authority to agree to the settlement offer.

³ The defendant relies on Erb vs. Wainwright, Mass. Sup. Ct., No. MICV199906275 (Middlesex County June 4, 2003) to establish that because Leonard and Jacobi agreed to a contingent fee arrangement, the agency relationship survived Leonard's death. Although an attorney can still be paid for work performed after the death of a client when there is a contingent fee arrangement, the mere existence of a contingent fee arrangement does not create an exception to the general rule that the death of the principal terminates the agency relationship.

⁴ But see Restatement (Third) of the Law Governing Lawyers § 31 comment i (2000) (third party who reasonably relies on lawyer's authority to bind client should be protected regardless of unknown event responsible for lawyer's loss of actual authority).

The judgment is vacated, the order allowing the motion to confirm and enforce settlement agreement is reversed, the order allowing the motion for settlement approval is reversed, and the case is remanded to the Superior Court for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Vuono,
Sullivan & Lemire, JJ.⁵),



Clerk

Entered: August 12, 2022.

⁵ The panelists are listed in order of seniority.