19-6568

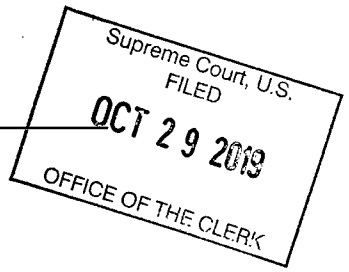
NO. 18-41189

ORIGINAL

IN THE

SUPREME COURT OF THE

UNITED STATES



KENISHA BOYD—PETITIONER

VS.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE—RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a bona fide settlement between the parties exists when the agreement is contingent in nature, and one party has the right to reject the offer later?
2. Whether the failure to object during the reading of a purported settlement agreement constitutes acceptance?
3. Whether it is abuse of discretion for the Judge to have knowledge of the actual settlement agreement?
4. Whether the Magistrate Judge appointed to be a neutral third-party mediator creates a conflict of interest when the Judge acts in their official judicial capacity during the mediation conference?
5. Whether the client has the right to withdraw their attorney's authority to enter into agreements on their behalf during a mediation conference?

PARTIES INVOLVED

The parties involved are identified in the style of the case.

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CITATION TO OPINION

Boyd v. Tex. Dep't of Criminal Justice, No. 18-41189, 2019 U.S. App. LEXIS 23050 (5th Cir. Aug. 1, 2019).

BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C §1254(1) to review a final judgement issued by August 1, 2019 by the United States Court of Appeals for the Fifth Circuit.

CONSITITUIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the U.S. Constitution allows that suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

2 U.S.C § 1311 states that Discriminatory practices prohibited, "All personnel actions affecting covered employees shall be made free from any discrimination based on (1) race, color, religion, sex, or national origin, within the meaning of section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2).

STATEMENT OF THE CASE

The Petitioner's long journey to this Court began on January 6, 2016 when the Petitioner and Defendant participated in an active mediation stemming from a suit under Title VII of the Civil Rights Act of 1964. The mediation proceeded with U.S. Magistrate Judge Keith F. Giblin appointed to act solely as a mediator for the Petitioner's case.

The mediation session began and once the Judge left the room the Petitioner attempted to discuss with her counsel that she felt the starting point was low and wanted to proceed to trial. Her attorney expressed to her that she was against going to trial because the costs would be substantial. The Petitioner expressed to her attorney that she was prepared to pay such costs. Throughout the mediation the Petitioner continued to express her concerns about settling her claims and wanting to proceed to trial.

After the mediation session, the Judge put on his black robe and announced in the presence of all parties and went on record with the court reporter that it was only his understanding that the parties have reached a settlement agreement. Additionally, he announced that the Defendants wanted the record to reflect that the agreement was contingent in nature. Specifically, the Defendant's wanted the record to reflect that the settlement was contingent upon approval from the appropriate State authorities. The Judge proceeds to read into the record the amount of the settlement and only asks the counsels present to confirm that this was the terms of the agreement. The Judge at no time asks the Petitioner whether

she understand or agrees with the settlement, and the record did not reflect any comments made by the Petitioner.

In fact, shortly after mediation the Petitioner emailed her attorney inquiring about preparing for trial. In preparation for trial she emailed her attorney several documents in support of individuals who could be witnesses. In April of 2016, the Petitioner traveled to her attorney's office and met with her to provide her with new witness statements. Due to no communication concerning what was going on with the case, the Petitioner continued to reach out to her attorney and her attorney stated that she would contact the Defendants.

Subsequently the Petitioner's hired new counsel and expressed that she did not intend to be bound by the purported agreement because she wanted to proceed to trial which was wholly disregarded by her previous attorney.

On August 30, 2016, over seven months later the Defendant's forward to the Petitioner's new attorney of record (1) compromise and settlement agreement, (2) complete release and waiver of all claims, and (3) stipulation of dismissal with prejudice. The petitioner or her attorney did not sign any of the documents sent over by the Defendant's and subsequently filed a motion to vacate the purported settlement agreement.

On March 13, 2017, the United States District Judge filed an order denying the motion and relied upon *Fulgence v. Ray McDermott & Co.*, 662 F.2d 1207 (5th Cir. 1981). Specifically, the Judge relied on that oral agreements to settle a Title VII claim is enforceable against a Plaintiff who knowingly and voluntarily agreed to the

terms of the settlement or authorized their attorney to settle the dispute. On March 23, 2017, the Petitioner appealed the first time to the 5th Circuit Court of Appeals. On September 18, 2017 the 5th Circuit Court of Appeals dismissed the Petitioner's appeal due to lack of jurisdiction stating that the District Court had not made a final judgment to be appealed.

Again, the Petitioner is sent back to the District Court because there is no final judgement. Over two years has passed since the initial mediation session and the Petitioner and Defendant are back in mediation for a second time. This is problematic and goes to show that there was no agreement. The Court ordered the parties to mediate again, even though the Court had already denied the motion to vacate the settlement agreement. This mediation results in an impasse. Again, the Defendants file a motion to enforce the previous settlement agreement. Why would the Defendant agree to mediate again if the parties had a previous settlement? If there was a previous agreement, it should be void. Still to this day no settlement documents have been provide to the Petitioner or her counsel stating that the previous settlement has been approved.

On December 11, 2018, the Court now holds an evidentiary hearing on the motion to enforce the previous settlement agreement from over two years ago. It is at this time that the Defendants enter as an exhibit the unsigned proposed settlement documents for the Court to review. During the hearing the Judge questioned the Petitioner as to why she waited so long to express that she was not in agreement and why did the case sit with no activity for over a year. Despite the

fact that the Petitioner was able to show an email that was sent to her attorney in January after the mediation inquiring about trial and that her newly hired attorney also reach out to the Defendants concerning the Petitioner's denial of the settlement; the motion to enforce was granted. On December 14, 2018, the District Court enters a final judgement enforcing the previous settlement agreement.

REASONS FOR GRANTING THE WRIT

Petitioner strongly believes that by granting this petition for writ of certiorari, this Honorable Court can make certain that her right to a trial is not denied due to a settlement that she did not authorize or approve.

I. WHEN A CLIENT IS PRESENT THEIR SETTLEMENT AUTHORITY TRUMPS THE ATTORNEYS

The Fifth Circuit has long adhered to the requirement that counsel be given authority to settle by the client:

> The law is settled that an attorney of record may not compromise, settle or consent to a final disposition of his client's case without express authority.... However, this general principle must be considered in connection with the rule that an attorney of record is presumed to have authority to compromise and settle litigation of his client, and a judgment entered upon an agreement by the attorney of record will be set aside only upon affirmative proof of the party seeking to vacate the judgment that the attorney had no right to consent to its entry. *Diaz v. Rio Grande Res.*

Corp., No. SA-05-CA-209-XR, 2006 U.S. Dist. LEXIS 83377, at *6-7 (W.D. Tex. Nov. 15, 2006).

A retained attorney is presumed to possess express authority to enter into a settlement agreement on behalf of a client. However, when the evidence reveals that the attorney did not have the client's authority to agree, the agreement should not be enforced. During an evidentiary hearing this should have been allowed to be established by testimony. The Petitioner withdrew her attorney's authority to settle on her behalf when she expressed to her attorney that she did not want to settle and instead proceed to trial. A compromise by an attorney without the client's knowledge or consent, which has the effect of depriving the client of her day in court, is an unauthorized act. This is evident here, The Petitioner, sends an email to her former attorney asking about trial shortly after mediation occurred. The attorney in return withdraws from the case.

II. SETTLEMENT AGREEMENTS ARE CONTRACTS AND CANNOT BE CONTINGENT IN NATURE

Title VII of the Civil Rights Act of 1964 allows persons who have been subjected to racial discrimination to monetary remedies. *2 U.S.C. § 1311.* As a function of this right courts encourage parties to negotiate the terms of such settlements. Any resulting settlement that arises becomes a binding contractual agreement between the parties. The common law of contracts demands that the parties display a mutual assent to be bound, for a binding agreement to be formed. The validity of a settlement agreement is "determined by federal law at least where the substantive rights and liabilities of the parties derive from federal law." *Lopez v. Kempthorne.*

No. H-07-1534. 2010 U.S Dist. LEXUS 118749 (S.I.) Tex. 2010) (citing Mid-South Towing Co. v. Har- Win, Inc., 733 F.2d 386. 389 (5th Cir. 1984)). Under federal law settlement agreements are contracts. Id. (citing Guidry v. Halliburton Geophysical Services Inc., 976 F.2d 938 940 (5th Cir. 1992)). The federal law of contracts "uses the core principles of the common law of contracts that are in force in most states." Id. (citing *Smith v. United States*, 328 F.3d 760. 767 n.8 (5th Cir. 2003)(per curiam). A binding agreement exists where there is a manifestation of mutual assent, usually in the form or an offer and acceptance. Id. (citing *Triche v. Lousiana Ins. Guranty Assoc.*, No. 08-3931.2010 U.S Dist. LEXIS 20123, 2010 WI.891000. (F.D. La. Mar, 5 2010)). Where there is a written document purporting to contain a binding settlement agreement, the question of whether an offer was accepted, and a contract was formed is primarily a question of law. *Id.*

When a purported agreement is contingent upon the completion of an act by the promisor, the promisee is under no obligation to act until the promisor has completed the requisite activity. Such an agreement is known to contain a condition precedent. "A condition precedent is either an act of a party that must be performed or a certain event that must happen before a contractual right accrues or a contractual duty arise." *In re Deepwater Horizon*, 786 f.3D 344, 361 (5th Cir. 2015); *Texas Dept. of Housing and Community Affairs v. Verex Assurance, Inc.*, 68

F.3d 922, 928 (5th Cir. 1995). A condition precedent may "relate either to the formulation of contracts or to liability under them." *Cedyco Corp v. PetroQuest*

Energy, LLC., 497 F.3d 485, 489 (5th Cir. 2007) (citing to *Gulf Construction Co. v. Self*, 676 S.W.2d 624, 627 (Tex.App-Corpus Christi 1984, writ ref'd n.r.e); *Hohenberg Bros. Co. v. George E. Gibbons and Co.*, 537 S.W.2d 1, 3 (Tex. 1976). Further, the Supreme Court of the United States has held that "a condition precedent is one in which must happen before either party becomes bound by contract." *Jones v. U.S.*, 96 U.S. 24, 28 (1877). The inclusion of words of conditionality, "such as 'if,' 'provided,' 'on condition that or some similar phrase of conditional language' present strong evidence of the party's intention to have an operable condition precedent." *Cedyco Corp*, 497 F.3d at 489 (5th Cir. 2007) (citing to *Sirtex Oil Indus. v. Eerigan.*, 403 S.W.2d 784, 787 (Tex.1966); Criswell v. European Crossroads Shopping Center, Ltd., 792 S.W.2d 945, 948 (Tex. 1990)). In *Cydeco*, the Fifth Circuit vacated a District Court's grant of summary judgement based on the operation of a condition precedent. *Cedyco Corp* 497 F.3d at 490-91. (5th Cir. 2007). The Court held that plain language of the disputed instrument established a condition precedent. Specifically, via PetroQuest's inclusion of "consent to assign required." *Id.* at 498. The Court found through analyzing the plain language of the contract that Exxon never "accepted, or voluntarily agreed to the assignment contemplated by the contract." *Id.* at 490. In sum, the Court held that words and language used in an agreement must be analyzed via their common meaning. *Id.* Analysis that resulted in the determination that an operative condition precedent existed. *Id.* Analysis that overcame an assertion of acceptance. *Id.* at 490-91. In the instant case at the Defendant placed a condition precedent on

its offer, that the agencies of the state must approve the mediated settlement before the agreement would be executed. However, the stated condition in the record indicated a timeframe of 180 days. Even if it is determined that there was condition precedent, such condition was not met because the defendants were not able to obtain that consent within 180 days and it sent documents that required signature nearly nine months later. Therefore, the State effectively had the power to refuse and reject, or to revise the purported agreement that was mediated on January 6, 2016. Because this condition precedent did not occur until nearly nine months after the date of the mediation, no contractual duty arose on January 6, 2016 and both parties have the power to rescind their respective duty to perform. The party cannot hold a contingent agreement open for almost a year and hold the right to bind the opposing party. Thus, no contractual obligation was created and no contract was formed.

On the other hand, the Defendants did not have the authority to settle the claim, hence why the settlement was contingent upon the others approval. Additionally, in the order appointing the magistrate judge as the mediator, the district court expressly stated that the Mediation Plan requires the presence of all parties, representatives, and professionals "with full authority to negotiate a settlement." The Defendants did not have the authority and therefore could not have entered into a binding agreement with the Petitioner.

III. SILENCE/FAILURE TO OBJECT IS NOT ACCEPTANCE

The Fifth Circuit has held that when a formal mode of acceptance is not prescribed, acceptance is effective when the offeror has actual knowledge of the offeree's acceptance. *Fujimoto v. Rio Grande Pickle Co.*, 414 F. 2d 648, 652 (5th Cir. 1969). Nothing in her conduct would suggest she accepted the agreement. First, the parties split up and went to separate rooms during the actual mediation. Second, Ms. Boyd remained silent during the reading of the purported agreement into the record. Finally, it is uncontested that Ms. Boyd has not signed any of the documents provided by the state of Texas since the mediation, which would indicate any assent to agreement. Accordingly, Ms. Boyd has expressed no intention to be bound, nor can the State of Texas show actual knowledge or any such intention. Therefore, no binding agreement has been formed. In Fujimoto, the Court explains that silence can be viewed as acceptance when the offeror knows acceptance has occurred because of the offeree's actions. Id. at 652-54.

In Fujimoto, the Court reasoned that because Fujimoto and Bravo continued to work and discussed the contract with the President of the company, the "acceptance should have been unmistakable to him." Id. at 653. Ms. Boyd's case is distinguishable from Fujimoto, because Defendants cannot have actual knowledge of Ms. Boyd's acceptance either through her words or deeds. The only actions that should be taken into consideration is her not signing the proposed settlement agreement and her withdrawing her attorney's authority to enter into any settlement agreements on her behalf.

IV. MAGISTRATE JUDGE NOT ACTING SOLELY AS A MEDIATOR

One of the principal duties of the Magistrate Judge in the Court can be to conduct settlement conferences. That role in settling cases is highly valued by the District Judge. However, the Magistrate Judge must only act as a mediator and when they do not it creates a conflict. A person serving as a mediator generally should not subsequently serve as a Judge. It is generally inappropriate for a mediator to serve in a judicial or quasi-judicial capacity during or even after a mediation session. After, the mediation session the Magistrate Judge put on his black robe and went on record about the settlement terms. When the Magistrate Judge put on his black robe he was acting in his official capacity and no longer as a mediator. This act created a conflict that should be addressed by the Courts.

The mediation process with a mediator is normally held differently then what occurred here. Once the mediation process is complete and the parties have come to a mutual agreement, it is reduced to writing. This writing is normally called a mediated settlement agreement, and it is signed by all parties including the client. Normally, mediators are not allowed to create a record where only parties acknowledge the terms and not sign that they agree. In this instance, had the Magistrate Judge not been acting in his official capacity there would have been a mediated settlement agreement and not just simply an oral record. A mediator should encourage the parties to reduce all settlement agreements to writing to prevent this very issue from occurring. The mediator acting in his judicial capacity created a conflict and runs a foul his ethical duties to the parties.

CONCLUSION

The Petitioner requests that the Court grant the petition for writ of certiorari.

Respectfully Submitted,

Kenisha Boyd