

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Jeremy Toler, Defendant/Counterclaim
Plaintiff Below, Petitioner**

vs) No. 11-0911 (Harrison County 09-C-345-3)

**Roger W. Goff, Plaintiff/Counterclaim
Defendant Below, Respondent**

FILED

January 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Jeremy Toler appeals the circuit court's May 4, 2011, "Order Granting Motion for Summary Judgment of the Plaintiff and Denying Motion to Enforce Settlement of the Defendant, Jeremy Toler." Respondent Roger W. Goff has filed a timely response brief.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

In March of 2007, Betty J. Toler purchased a \$100,000 life insurance policy from Penn Mutual Insurance Company. Mrs. Toler designated her boyfriend, Roger W. Goff, as her primary beneficiary. She designated her adult children, Jennifer Toler Ooten and Jeremy Toler, as the contingent beneficiaries. Mrs. Toler died on August 25, 2008. Mr. Goff filed a claim with Penn Mutual for the life insurance proceeds, but Goff alleges that, *inter alia*, the insurance company failed to provide timely payment. In addition, the Toler children asserted a right to the insurance proceeds.

On August 4, 2009, Mr. Goff filed suit against Penn Mutual, Jennifer Toler Ooten, and Jeremy Toler. Count I asserted a declaratory judgment count asking the court to declare that Goff was the proper beneficiary of the insurance proceeds, not the decedent's children. The three remaining counts asserted claims against Penn Mutual. With the circuit court's permission, Penn Mutual paid the insurance proceeds plus interest, \$105,185.32, into the circuit court. By order of May 25, 2010, the circuit court dismissed Penn Mutual pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. The May 25, 2010, order

dismissing Penn Mutual is the subject of a separate appeal pending with this Court and is not decided in this memorandum decision.¹

Meanwhile, Jeremy Toler filed a counterclaim against Mr. Goff asserting, *inter alia*, that Goff had agreed to a settlement whereby Goff would share the decedent's non-probate estate – primarily the life insurance proceeds – with the decedent's children. Mr. Toler asserted that insurance agent Lloyd Shelton acted with apparent authority to represent Mr. Goff in settlement negotiations and agreement. Mr. Toler asserted that he and his sister were represented by his sister's then-husband, attorney Brian Ooten, for purposes of the alleged settlement.

Mr. Goff denied that he ever agreed to a settlement, and there was no signed settlement agreement. Furthermore, Mr. Goff denied that Mr. Shelton had either actual or apparent authority to act as Goff's agent for purposes of agreeing to a settlement. Mr. Goff asserted that he had no reason to settle because he was the named primary beneficiary who was solely entitled to the insurance proceeds. Although Mr. Shelton was named as a third-party defendant in this lawsuit, he was apparently never served or deposed.

By order of May 4, 2011, the circuit court granted summary judgment in favor of Mr. Goff on the issues pertaining to his entitlement to the life insurance proceeds. The circuit court found that Mr. Goff is the primary beneficiary, there was no evidence that the decedent ever sought to change this designation with the insurance company, and there was no evidence of a meeting of the minds regarding the purported settlement. The circuit court was unable to find from the evidence that Mr. Shelton was acting as an agent for Mr. Goff. Accordingly, the circuit court ordered that the life insurance proceeds be paid to Mr. Goff at the conclusion of any appeal.

In the present appeal, Mr. Toler asserts that the circuit court erred in granting summary judgment to Mr. Goff in the May 4, 2011, order. This Court reviews a circuit court's entry of summary judgment under a *de novo* standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Mr. Toler asserts that non-lawyer Mr. Shelton was acting with apparent authority and agreed to a settlement on Mr. Goff's behalf. Mr. Toler does not assert an *actual* authority argument, rather, he only argues that there was *apparent* authority. On the issue of apparent authority, this Court has said the following:

“One who by his acts or conduct has permitted another to act apparently or ostensibly as his agent, to the injury of a third person who has dealt with the apparent or ostensible agent in good faith and in the exercise of reasonable prudence, is estopped to deny the agency relationship.” Syl. Pt. 1, *General*

¹ The separate appeal is styled *Roger W. Goff v. Penn Mutual Life Insurance Co.*, No. 11-1020.

Electric Credit Corporation v. Fields, 148 W.Va. 176, 133 S.E.2d 780 (1963).

Syl. Pt. 3, *Messer v. Huntington Anesthesia Group, Inc.*, 222 W.Va. 410, 664 S.E.2d 751 (2008) (per curiam).

Apparent or ostensible authority results from “statements, conduct, lack of ordinary care, or other manifestations of the principal's consent, whereby third persons are justified in believing that the agent is acting within his authority. (Footnotes omitted.)” 3 Am.Jur.2d, *Agency* § 79 (1986), *citing*, Restatement, *Agency* 2d § 27.

Clint Hurt & Assoc., Inc. v. Rare Earth Energy, Inc., 198 W.Va. 320, 327, 480 S.E.2d 529, 536 (1996) (per curiam).

Upon a review of the parties’ arguments, the record on appeal, and the pertinent legal authorities, this Court affirms the circuit court's decision. As we stated in *Clint Hurt & Associates*, third persons must be “justified” in believing that there is apparent authority. Mr. Ooten, who is an attorney, and the Tolers would not have been justified in believing that Mr. Shelton, a non-lawyer, had authority to represent someone in the settlement of a legal dispute. Moreover, Mr. Goff reasonably argues that he had no reason to settle because he was the sole primary beneficiary named for the policy.

In addition, Mr. Toler asserts the following assignments of error: that the circuit court erred in finding that the evidence did not support an enforceable agreement due to lack of mutual assent; that the circuit court erred in failing to apply the public policy of favoring resolution of litigation by settlement; and that the circuit court erred in relying on case law regarding ambiguity in insurance contracts. Because we find that there was no apparent authority for Mr. Shelton to have settled this legal dispute, these remaining assignments of error are moot.

Affirmed.

ISSUED: January 13, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh