FRANCINE BOCCIA, Plaintiff-Appellant, vs. NGOC PHAM, RALPH L. LENTO, JOHN CATONA, JR., PAUL KRAMER, JITNEY 51, LLC, JOHN DOE(s) (1-5) INDIVIDUALLY (names being fictitious), ABC PARTNERSHIP and XYZ CORPORATION, j/s/a, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-001672-23T1 Civil Action **ON APPEAL FROM** **SUPERIOR COURT, LAW DIVISION, ATLANTIC COUNTY** **SAT BELOW: HONORABLE JOHN C. PORTO, P.J.CV.**

BRIEF AND APPENDIX FOR DEFENDANT-RESPONDENT, NGOC PHAM

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PRELIMINARY STATEMENT

This appeal involves a dispute as to whether the plaintiff authorized her attorney to enter into a separate settlement agreement with one defendant for his policy limits. After conducting a plenary hearing, the trial court found that the plaintiff had authorized her attorney to enter into a settlement agreement with the defendant-respondent and that she had actual authority to settle the case. Plaintiff now appeals that decision.

PROCEDURAL HISTORY

On December 20, 2020, Plaintiff, Francine Boccia, filed a personal injury action stemming from a motor vehicle accident which occurred on January 4, 2019. (Pa1-Pa14). The lawsuit was filed against defendants Ngoc Pham, Ralph L. Lento, John Catona, Jr., Paul Kramer, and Jitney 51, LLC, as well as fictitious defendants. (Pa1-Pa14). Defendants subsequently answered the complaint. (Pa15-Pa69). After a settlement was reached between the plaintiff and defendant, Ngoc Pham, as described below, defendant Pham filed a motion to enforce settlement on November 29, 2023, when plaintiff did not return the settlement documents. (Da1[1]-Da15). After the motion was opposed, the trial

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court conducted a plenary hearing on the question of whether plaintiff had agreed to a settlement with defendant Pham, on January 4, 2024. (1T:5-56). The trial court granted defendant Pham's motion at the conclusion of the plenary hearing. (1T:43-55; Da16).

COUNTER-STATEMENT OF FACTS

At the plenary hearing on January 4, 2024, the court heard testimony from plaintiff's former attorney, Tara Cannaday, and plaintiff herself. (1T:11-39). Ms. Cannaday testified that on October 25, 2023, despite her recommendations to settle the matter globally, plaintiff called her and instructed her to accept the settlement of $100,000.00 from defendant Pham, as that was her insurance policy limits, and to proceed to trial against codefendants (1T:22-23, 26). Ms. Cannaday then drafted a letter and subsequently sent to plaintiff confirming her instructions to settle separately with defendant Pham. (1T:22, 28; DCa10[2]-DCa12). Due to a breakdown of the attorney-client relationship thereafter, Ms. Cannaday filed a motion to be relieved as counsel. (1T:22; Pa75-Pa78).

Plaintiff testified that she did not respond to Ms. Cannaday's October 26 letter indicating that Ms. Cannaday did not have authority to settle the case. (1T:28). She further testified that Ms. Cannaday told her that plaintiff was

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making a mistake in her decision to settle with defendant Pham only. (1T:30). She furthermore gave Ms. Cannaday permission to discuss placing the settlement proceeds in a special needs trust with specialized counsel. (1T:33).

At the conclusion of the plenary hearing, the trial court determined that a settlement agreement had been reached between defendant Pham and plaintiff. (1T:44-55). He found Ms. Cannaday's testimony more credible that she had been instructed to settle the case with defendant Pham by plaintiff. (1T:47).

ARGUMENT

I. THE TRIAL COURT PROPERLY ENTERED AN ORDER TO ENFORCE THE SETTLEMENT BECAUSE PLAINTIFF'S COUNSEL HAD ACTUAL AND APPARENT AUTHORITY TO ENTER INTO A SETTLEMENT.

The Court should affirm the trial court because plaintiff's counsel had actual and apparent authority to settle the case based on plaintiff's instructions. Settlement agreements between parties in litigation are contracts. Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008); Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (citing Pascarella v. Bruck, 190 N.J. Super 118, 124 (App. Div.), certif. denied 94 N.J. 600 (1983)); Cumberland Farms, Inc. v. New Jersey Dep't of Env't Prot., 447 N.J. Super. 423, 438 (App. Div. 2016); Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 475 (App. Div. 2009); Jennings v. Reed, 381 N.J. Super. 217, 227 (App. Div. 2005). Indeed, " '[s]ettlement of litigation ranks high in our public

policy.' " Brundage, supra, 195 N.J. at 601 (quoting Jannarone v. W.T. Co., 65 N.J. Super. 472, 476 (App. Div.), certif. denied 35 N.J. 61 (1961)). When faced with a settlement agreement, " ' absent a demonstration of 'fraud or other compelling circumstances,' a court should enforce a settlement. Capparelli v. Lopatin, 459 N.J. Super. 584, 603-604 (App. Div. 2019) (quoting Jennings, supra, 381 N.J. Super. at 227). See also Honeywell v. Bubb, 130 N.J. Super. 130, 136 (App. Div. 1974). Of course, "[i]f a settlement agreement is achieved through coercion, deception, fraud, undue pressure, or unseemly conduct, or if one party was not competent to voluntarily consent thereto, the settlement agreement must be set aside." Peskin v. Peskin, 271 N.J. Super. 261, 276 (App. Div. 1994). Furthermore, a written release is not necessary to enforce a settlement as it is "a mere formality, not essential to formation of the contract of settlement." Hagrish v. Olson, 254 N.J. Super. 133, 138 (App. Div. 1992). In fact, "[w]here the parties agree upon the essential terms of a settlement, so that the mechanics can be 'fleshed out' in a writing to be thereafter executed, the settlement will be enforced notwithstanding the fact the writing does not materialize because a party later reneges." Lahue v. Pio Costa, 263 N.J. Super. 469, 475 (App. Div. 1997).

The standard of review of a motion to enforce a settlement is de novo. Gold Tree Spa, Inc., v. PD Nail Corp. 305 N.J. Super. 240, 245 (App. Div. 2023). However, a trial court's findings of facts " 'are considered binding on appeal when

supported by adequate, substantial, and credible evidence.' " Horne v. Edwards, 477 N.J. Super. 302, 312-313 (App. Div. 2023) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)).

Generally, "unless an attorney is specifically authorized by the client to settle a case, the consent of the client is necessary." Amatuzzo v. Kozmiuk, 305 N.J. Super. 469, 475 (App. Div. 1997) (citing City of Jerey City v. Roosevelt Stadium Marina, Inc., 210 N.J. Super. 315, 327 (App. Div. 1986)). Attorneys can settle lawsuits based on two types of authority which are binding upon their client: " 'actual, either express or implied, and apparent authority.' " Burnett v. Cty. Of Gloucester, 415 N.J. Super. 506, 513 (App. Div. 2010) (quoting Newark Branch, NAACP v. West Orange, 786 F. Supp. 408, 423 (D.N.J. 1992); Seacoast Realty Co. v. W. Long Branch Borough (Monmouth Cty), 14 N.J. Tax 197, 202-203 (1994). An attorney has implied actual authority inasmuch as they are " 'authorized to do what [they] may reasonably infer the principal desires [them] to do in light of the principal's manifestations and facts as [they] know or should know when [they act].'" Newark Branch NAACP, supra, 786 F. Supp. at 424 (quoting Lampley v. Davis Mach. Corp., 219 N.J. Super. 540, 548-549 (App. Div. 1987)).

A. Plaintiff's Former Counsel Had Actual Authority to Settle this Matter with Defendant Pham.

In this case, plaintiff's previous counsel, Ms. Cannaday, had actual authority to settle plaintiff's case for the $100,000.00 policy limits with defendant Pham. Ms. Cannaday testified that on October 25, 2023, plaintiff "advised [her] to settle with the defendant Pham for the $100,000 policy limits because there would be nothing more" and proceed against codefendant. (1T:22-23). She further testified that she wrote to plaintiff on October 26, 2023 confirming their conversation in which plaintiff had advised her to accept the $100,000.00 from defendant Pham. (1T:28, DCa10-DCa12). This is further bolstered by the testimony that plaintiff stated she was going to use these settlement proceeds to set up a special needs trust. (1T:14, DCa25). Plaintiff testified that she did receive the October 26 letter and did not state in response that she did not want to settle with defendant Pham. (1T:28). Plaintiff further testified that Ms. Cannaday subsequently sent her the release. (1T:30). She also confirmed that she gave Ms. Cannaday permission to discuss her case with the special needs lawyer regarding the settlement, on November 1, 2023. (1T:33, DCa17). The trial court credited Ms. Cannaday's testimony more so than the plaintiff's and found that she had actual, express authority to settle the case for $100,000.00 with defendant Pham. (1T:55).

Plaintiff cites Williams v. Vito, 365 N.J. Super. 225 (Law Div. 2003), for its proposition that Ms. Cannaday did not have authority to enter into a settlement agreement. (Pb5-Pb6). Plaintiff incorrectly cites the case as Appellate Division precedent. (Pb5). However, Williams is similar to the facts of this case. Williams was a motor vehicle personal injury matter in which an attorney-client relationship was "somewhat strained." Id. at 227. There was a non-binding arbitration in that case which awarded the plaintiff $31,500.00. Ibid. Defendant rejected the award and file a request for a trial *de novo*. Ibid. Defendant offered $10,000.00, which plaintiff initially rejected and instructed counsel to attempt to settle the matter for $20,000.00. Id. at 227-228. Defendant would only settle for $10,000.00, to which the plaintiff said, "I am tired of this and I will take the $10,000." Id. at 228. Similarly, in this case, although perhaps dissatisfied, plaintiff told Ms. Cannaday to settle her case with defendant Pham for $100,000.00 and proceed to trial against the codefendant. (1T:23).

Plaintiff goes on to state that the trial judge abused his discretion in that the testimony of Ms. Cannaday that plaintiff wanted to enter into a separate settlement agreement with defendant Pham is contradicted by her certification dated October 27, 2023 in support of her motion to withdraw as counsel for plaintiff. (Pb7-8, Pa75-Pa79). Plaintiff ignores the materials submitted to the court as part of the motion to enforce the settlement which indicated an obvious

intent of the plaintiff to settle, and indeed made no effort to include them in her appendix. (DCa1-DCa32). Most strikingly, this includes a letter, omitted from plaintiff's appendix, confirming plaintiff's instructions to her attorney to settle separately with defendant Pham and proceed to trial against codefendants. (DCa10). This all supports the trial judge's conclusion that Ms. Cannaday had actual authority to settle with defendant Pham.

B. Plaintiff's Prior Counsel Had Apparent Authority to Settle the Matter.

Plaintiff's prior attorney had apparent authority as well to settle the matter. Plaintiff emailed defendant's counsel on October 25, 2023 indicating that her client had instructed her to settle the case with defendant Pham's policy limits. (See Da10). It is proper for this Court to consider the apparent authority issue. The Appellate Division can consider an issue before the trial court that was argued on a different theory in the trial court. See Docteroff v. Barra Corp., 282 N.J. Super. 230, 237 (App. Div. 1995); Reagan v. City of New Brunswick, 305 N.J. Super. 242, 355 (App. Div. 1997), overruled on other grounds, Dzwonar v. McDevitt, 177 N.J. 451 (2003); State v. Romano-Rosado, 462 N.J. Super. 183, 202-203 (App. Div. 2020). Although the trial court's decision was based on actual authority to settle, the issue of apparent authority was discussed. (1T:51). An attorney can be deemed to have apparent authority to settle "even…where the principal denies having granted authority to settle, but

nevertheless places the attorney in a position where 'a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform the particular act in question.'" Seacoast, supra, 19 N.J. Tax. at 204-205 (citing United States Plywood Corp. v. Neidlinger, 41 N.J. 66, 74 (1963), quoting J. Wiss & Sons Co. v. H.G. Vogel Co., 86 N.J.L. 618, 621, (E. & A. 1914)). The creation of apparent authority is based on the "actions of the principal, not the alleged agent." LoBiondo v. O'Callaghan, 357 N.J. Super. 488, 497 (App Div.), certif. denied 177 N.J. 224 (2003). "Sending an attorney to a settlement conference presumptively establishes that the attorney has the authority to settle." Seacoast, supra, 19 N.J.Tax. at 204. In this matter, fresh off a settlement conference which occurred on October 19, 2023, in which defendant Pham's policy limits were discussed and the fact that there was no more money to be had, plaintiff's counsel conveyed an acceptance of the policy limits to defendant's counsel on October 25, 2023. (See Da10). Certainly, regardless of actual authority, defense counsel was certainly justified in assuming that plaintiff's counsel, who had just six days earlier represented plaintiff at a settlement conference, had the authority to settle the matter with defendant Pham. As such, plaintiff's previous counsel had apparent authority to settle the matter.

II. PLAINTIFF WAS NOT UNDULY PRESSURED TO ENTER INTO THE SETTLEMENT AGREEMENT.

Plaintiff goes on to argue that plaintiff was pressured into the settlement and that it should be set aside. (Pb6-Pb8). She was given an opportunity to brief this issue before the trial court and declined to do so. (1T:42). As such, any argument as such should be deemed waived on appeal. See Shaw v. Bender, 90 N.J.L. 147, 150 (E. & A. 1917).

Nevertheless, if a "settlement agreement is achieved through coercion, deception, fraud, undue pressure, or unseemly conduct, or if one party was not competent to voluntarily consent thereto", a settlement agreement should be set aside. Peskin, supra 271 N.J. Super. at 276; see also Nolan, supra, 120 N.J. at 472. The burden of proof is on the party seeking to set aside a settlement agreement. See Wolkoff v. Villane, 288 N.J. Super. 282, 291-292 (App. Div. 1996). In Peskin, the defendant was found to have been "improperly coerced" into settling the case when the trial court had indicated it would take his refusal to settle into account in any fee application and that it would hold defendant in contempt if he did not give a yes or no answer to the question as to whether he would settle, and that it "would not be 'taking a settlement' and 'trying the case to conclusion'" after a lunch break. Id. at 278. In this matter, plaintiff alleges generically that she felt pressured to settle the matter. (Pb7-Pb8). However, she was simply advised both by counsel and by the trial court at a settlement conference that the policy limits of defendant Pham were

$100,000.00 and that she should globally resolve for defendant Pham's policy limits and the offer from codefendant Jitney 51. (1T:32, Da16-Da19). The record is devoid of any undue pressure or coercion.

CONCLUSION

For the foregoing reasons, the trial judge's order enforcing settlement dated January 4, 2024 should be affirmed.

Respectfully Submitted ,
LAW OFFICE OF MICHAEL G. DAVID

By: ***/s/ David Sideman***
David Sideman

Dated: August 1, 2024

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Plaintiff goes on to argue that plaintiff was pressured into the settlement and that it should be set aside. (Pb6-Pb8). She was given an opportunity to brief this issue before the trial court and declined to do so. (1T:42). As such, any argument as such should be deemed waived on appeal. See Shaw v. Bender, 90 N.J.L. 147, 150 (E. & A. 1917).

Nevertheless, if a "settlement agreement is achieved through coercion, deception, fraud, undue pressure, or unseemly conduct, or if one party was not competent to voluntarily consent thereto", a settlement agreement should be set aside. Peskin, supra 271 N.J. Super. at 276; see also Nolan, supra, 120 N.J. at 472. The burden of proof is on the party seeking to set aside a settlement agreement. See Wolkoff v. Villane, 288 N.J. Super. 282, 291-292 (App. Div. 1996). In Peskin, the defendant was found to have been "improperly coerced" into settling the case when the trial court had indicated it would take his refusal to settle into account in any fee application and that it would hold defendant in contempt if he did not give a yes or no answer to the question as to whether he would settle, and that it "would not be 'taking a settlement' and 'trying the case to conclusion'" after a lunch break. Id. at 278. In this matter, plaintiff alleges generically that she felt pressured to settle the matter. (Pb7-Pb8). However, she was simply advised both by counsel and by the trial court at a settlement conference that the policy limits of defendant Pham were

$100,000.00 and that she should globally resolve for defendant Pham's policy limits and the offer from codefendant Jitney 51. (1T:32, Da16-Da19). The record is devoid of any undue pressure or coercion.

CONCLUSION

For the foregoing reasons, the trial judge's order enforcing settlement dated January 4, 2024 should be affirmed.

Respectfully Submitted ,
LAW OFFICE OF MICHAEL G. DAVID

By: ***/s/ David Sideman***
David Sideman

Dated: August 1, 2024