STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN MCGRAW BATTLES, Plaintiff-Appellant,	UNPUBLISHED January 15, 2013
v	No. 306606 Wayne Circuit Court
MICHAEL KEVIN BATTLES, Defendant-Appellee.	LC No. 10-116277-DO

Before: TALBOT, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order denying her motion for rehearing and to set aside the judgment in this divorce action. Plaintiff also appeals by right the judgment of divorce itself. For the reasons set forth below, we affirm the judgment of the trial court.

I. STANDARDS OF REVIEW

This court reviews de novo a trial court's decision interpreting divorce judgments. *Neville v Neville*, 295 Mich App 460, 466; 812 NW2d 816 (2012). However, this Court reviews for an abuse of discretion a trial court's decision on a motion for rehearing or reconsideration, *Woods v SLB Property Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008), as well as a trial court's decision on a motion to set aside a judgment. *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). A trial court's findings of fact in a divorce case are reviewed for clear error. *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996).

II. NON-CONFORMING JUDGMENT

Plaintiff first argues that the judgment of divorce, which the trial court entered over her objection, did not conform to the terms of the settlement placed on the record at the settlement hearing on March 11, 2011. Accordingly, plaintiff argues, the trial court erred by entering the judgment of divorce and by failing to set it aside on plaintiff's motion. We disagree.

MCR 2.507(G) states:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless *it was made in open court*, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney. [Emphasis added.]

Here, the settlement agreement was memorialized in a letter, written by plaintiff's attorney on March 9, 2011. The letter outlined two separate possible agreements regarding the division of assets, described as alternatives "A" and "B." Plaintiff does not dispute that prior to the March 11, 2011 hearing, plaintiff and defendant had agreed to alternative "A." In fact, plaintiff's own attorney stated as much in open court at the March 11, 2011 settlement hearing:

> We're going to enter into a judgment that . . . is going to reference for purposes here . . . a letter that I sent to [defendant's attorney] dated [March 9, 2011], because it lists all the assets, which I am not going to go into to save time. *And the settlement set forth in the* [March 9, 2011] *letter, described as alternative A, will be utilized but for the following changes.* [Emphasis added.]

Later at the settlement hearing, plaintiff's attorney asked plaintiff whether she had "heard every bit of the recitations that we've placed on the record today" to which plaintiff responded "yes." Plaintiff also affirmed that she "knowingly and voluntarily agreed" to the settlement provisions

After the settlement hearing, plaintiff fired her attorney and retained new counsel. Since retaining new counsel, plaintiff has argued that the March 9, 2011 settlement letter is non-record evidence, and that this Court cannot rely on it. Plaintiff argues that the record settlement includes only the specific terms stated orally by the parties at the settlement hearing, and that certain assets described in the settlement letter were not mentioned at the settlement hearing. Accordingly, plaintiff argues that the judgment of divorce is non-conforming, should not have been entered by the trial court, and should have been set aside. We disagree.

Plaintiff offers no authority in support of her position that, under MCR 2.507(G), parties cannot incorporate by reference terms agreed upon by the parties in out of court negotiations ahead of time. Plaintiff has therefore abandoned this argument. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-27; 750 NW2d 228 (2008) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.") (citations and quotations omitted). In any event, the transcript of the hearing is clear that all involved, including the trial court itself, understood that the March 9, 2011 letter controlled the parties' intent. As a practical matter, plaintiff's principal objection to the judgment of divorce is that it contains a provision whereby plaintiff waived all claims to defendant's $206,000 retirement account.[1] The parties made no specific mention of the retirement account at the settlement

[1] The other two provisions included in the judgment to which plaintiff objects on appeal address COBRA insurance and the fact that the judgment of divorce lacks plaintiff's signature. Plaintiff argues that the divorce judgment mentions COBRA insurance, whereas neither the letter nor the transcript of the hearing do. Neither plaintiff's arguments about the COBRA provision or her signature are a basis for reversal. Regarding the COBRA provision, the judgment of divorce

hearing. However, the letter did; the letter is clear that plaintiff agreed to waive all claims to the account. In short, the divorce judgment accurately reflects the parties' intent memorialized in the March 9, 2011 letter, which in turn was incorporated by reference by plaintiff's attorney in open court.

Plaintiff also argues that even if plaintiff's attorney had attempted to introduce the letter into evidence at the settlement hearing, it would have been inadmissible because it was an offer to settle under MRE 408. We disagree. Although offers to compromise are inadmissible under MRE 408, the letter ceased being an offer to compromise when the parties agreed to alternative "A." At that point, the letter no longer represented an offer from plaintiff to defendant; instead, it became the agreement itself. Accordingly, the letter in its final form would have been admissible, because it was probative of a purpose other than "to prove liability or invalidity of the claim." MRE 408; see also *Gorman v Soble*, 120 Mich App 831, 842; 328 NW2d 119 (1982). The trial court did not err by entering the divorce judgment, or by declining to set it aside.

III. EVIDENTIARY HEARING AND MOTION TO SET ASIDE JUDGMENT

After the settlement hearing but prior to entry of the judgment of divorce, plaintiff submitted letters and affidavits from two mental health experts, Michael Wiest and Dr. Kyung Han. These materials indicated that, in the experts' opinion, plaintiff was in a "haze" during the settlement hearing and was unable to comprehend the terms of the settlement on that day. Also after the settlement hearing but prior to entry of the judgment of divorce, plaintiff had a guardian and a conservator appointed for her by the Wayne County Probate Court. On appeal, plaintiff argues that her mental state on the day of the settlement vitiated her ability to consent to the settlement. Plaintiff therefore argues that the trial court, once confronted with this new evidence regarding her mental state, erred by refusing to grant her an evidentiary hearing on the issue of her mental state, and by refusing to set aside the judgment of divorce once it entered. Again, we disagree.

Regarding the propriety of setting aside divorce judgments, this Court has held:

> It is a well-settled principle of law that courts are bound by property settlements reached through negotiations and agreement by parties to a divorce action, in the absence of fraud, duress, mutual mistake, or severe stress which prevented a party from understanding in a reasonable manner the nature and effect of the act in which she was engaged. This rule applies whether the settlement is in writing and signed by the parties or their representatives or the settlement is orally placed on the record and consented to by the parties, even though not yet formally entered as part of the divorce judgment by the lower court. [*Lentz v Lentz*, 271 Mich App 465, 474-75; 721 NW2d 861 (2006), quoting *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990) (citations omitted).]

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does not obligate either party to pay for the other's insurance. Regarding the absence of plaintiff's signature on the judgment of divorce, plaintiff contested the judgment of divorce and refused to sign it.

"[T]he test for whether consent was illusory because of severe stress is that of mental capacity to contract. That is, whether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he [or she] is engaged." *Vittiglio v Vittiglio*, 297 Mich App 391, 403; ___ NW2d ___ (2012) (citations and quotations omitted).

The trial court did not err by declining to hold an evidentiary hearing. This Court has held that, in divorce cases, a trial court is "not required to conduct a separate evidentiary hearing where it [is] satisfied that it was able to sufficiently decide the issue on the evidence before it." *Vittiglio*, 297 Mich App at 406. Wiest's and Han's affidavits and letters describe in detail their medical conclusions and the bases for those conclusions. Accordingly, it is unclear what new information an evidentiary hearing would have uncovered. Although plaintiff argues that the trial court should have held a hearing to allow Wiest and Han to testify in person, she does not explain what additional information an evidentiary hearing would have revealed.

Moreover, although plaintiff presented evidence after March 11, 2011 that she was mentally ill on and after March 11, 2011, the trial court found that, "it was never indicated to [the trial court] that [plaintiff] had any type of mental incapacity" on March 11, 2011, and in "no way did the [trial court] have any indication whatsoever that there was any mental incapacity on the part of [plaintiff] as of March . . . when the agreement was entered." The trial court also concluded, in a written order, that the "testimony given by Plaintiff on the record indicates that she knowingly and voluntarily entered into the parties' divorce agreement." Indeed, the trial court had the opportunity to observe plaintiff and her behavior on the day of the settlement hearing, and concluded that she was able to comprehend and consent to the terms of the settlement. In other words, the trial court was able to weigh on one hand its own assessment and observations of plaintiff at the settlement hearing, and on the other hand plaintiff's evidence regarding her mental state on that day. The trial court, based on its observations and assessments of plaintiff on March 11, 2011, determined that plaintiff "possesse[d] sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he [or she was] engaged," *Vittiglio*, 297 Mich App 391, 403, and therefore possessed the ability to consent to the divorce settlement. *Lentz*, 271 Mich App at 474-75. This Court has explained that it "defer[s] to the trial court's superior fact-finding ability." *Berger v Berger*, 277 Mich App 700, 703; 747 NW2d 336 (2008). That the trial court found its own observations and assessments more persuasive than plaintiff's evidence is not a basis for reversal. At minimum, we cannot conclude that the trial court's decisions fell outside the range of principled outcomes. *Hayford*, 279 Mich App at 325.

In sum, the trial court did not abuse its discretion by declining to hold an evidentiary hearing to allow plaintiff to develop her claim that she was incompetent to contract on the day of the settlement hearing.[2] Further, the trial court did not abuse its discretion by declining to set aside the divorce judgment.

[2] Plaintiff also argues that the trial court should have held an evidentiary hearing to allow her to further develop all her claims. However, as with the issue of plaintiff's capacity to contract, plaintiff has not shown what new information a hearing would have revealed with regard to her

IV. UNCONSCIONABILITY

Plaintiff's final argument is that the settlement agreement's terms are unconscionable, and that the trial court therefore abused its discretion when it declined to set the judgment aside. Again, we disagree.

"This Court has at least implied that a court may review the equities of property settlements in divorce actions where parties 'later attempt to renege on such agreements' if they appear unconscionable." *Vittiglio*, 297 Mich App at 403, quoting *Tinkle v. Tinkle*, 106 Mich App 423, 428; 308 NW2d 241 (1981). However, to set aside an agreement on the basis of unconscionability, the agreement must be both procedurally and substantively unconscionable. *Vittiglio*, 297 Mich App at 403 (citations omitted). "Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance" of the agreement's terms. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 144; 706 NW2d 741 (2005) (citations omitted).

Plaintiff cannot show procedural unconscionability because her own attorney prepared the settlement she describes as unconscionable. Accordingly, she cannot complain that she "had no realistic alternative to acceptance" of the settlement reflected by the judgment of divorce. *Id.* at 144 (citations omitted). Having concluded that the agreement was not procedurally unconscionable, we need not reach whether it was substantively unconscionable.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219(A).

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens

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other claims. Accordingly, the trial court did not err by declining to hold a hearing on plaintiff's other issues.