THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 2011-CP-26-5044

(Appeal Tracking Number 2013-001975)

Diane W. Johnson ..... Appellant,

v.

South Carolina Bank & Trust, Doug Holman, Glenn Bullard, and
The Estate of Wadeus W. West ..... Respondents.

INITIAL BRIEF OF RESPONDENTS

TURNER, PADGET, GRAHAM & LANEY, P.A.

R. Wayne Byrd
Jeffrey L. Payne
J. René Josey
Post Office Box 5478
Florence, SC 29502-5478
843-656-4451 (Telephone)
843-413-5818 (Fax)
RJosey@TurnerPadget.com (Email)

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COURT RULES

STATEMENT OF ISSUES ON APPEAL

Respondents are satisfied with Appellant's statement of the issues.

STATEMENT OF THE CASE

Respondents are satisfied with Appellant's statement of the case.

FACTS

Wadues West died in March 2007. Respondent Glenn Bullard was appointed as the personal representative of the West estate ("Estate"). The beneficiaries of the Estate were the Appellant and an *inter vivos* trust ("Trust") created by West in 1995. R.pp. ____ (Amended Complaint ¶ ¶ 8-9, Answer Admitting Same ¶ 6). Bullard and the South Carolina Bank and Trust ("SCBT") are the Trustees of the Trust. The Appellant is the lifetime income beneficary of the Trust, R.pp. ____ (Amended Complaint ¶¶ 10-15, Answer ¶ ¶ 6-11), while her children Maegan and Michael Johnson are the remainder beneficiaries. See Appellant's Brief, p.3. The Appellant brought this action complaining about Respondents' respective administration of the Estate and the Trust. R.pp. ____ (Complaint and Amended Complaint).

On May 9, 2012, after an all-day mediation overseen by a certified mediator and state bar member Williard D. Hanna, Jr., R.p.10 line 22 –p. 11 line 6 (4 June 2013 Transcript, Description by Appellant's counsel), the parties entered into a written Settlement Agreement (hereinafter "Agreement"). R.p. ____. The Agreement provided that the Appellant would be deeded certain parcels of property by the Trust. In addition, SCBT agreed to pay the Appellant $100,000. The Agreement further provided that all remaining assets of the Trust were to be assigned and transferred to SCBT in satisfaction of the indebtedness owed to it on a $3.4 million loan provided to the Trust for payment of federal estate taxes. The Agreement provided that the Appellants would transfer the real estate and pay any sums due within ten days after the Probate Court's approval (among other reasons, Probate Court approval was contemplated by the

Agreement because of the interests of Appellant's children as remainder beneficiaries under the Trust).

Pursuant to the Agreement, the Respondent prepared and filed a petition with the Horry County Probate Court to obtain an Order allowing for the termination of the Trust and for a final distribution of the Trust assets. Without asserting any claim of duress, the Appellant through her attorney specifically consented to the relief requested in the Petition. See Probate Court Petition, R. p. _____. The Probate Court scheduled a hearing on the Petition for November 14, 2012 – six months after the mediation. At the hearing, the Appellant appeared and voiced no objection. The remainder beneficiaries Maegan and Michael Johnson appeared at the hearing (R.p.5 lines 5-8) and voiced no objections to the Agreement so long as the proposed Probate Court order expressly provided that it would have no prejudicial impact on their separate case for damages pending against the Respondents in the Horry County Court of Common Pleas.[1]

After the Probate Court hearing, but before formal deeds were prepared to transfer the property to the Appellant, the Respondents requested that the Appellant provide her attorney with the required release to be held in trust until the real estate could be transferred. Then, for the first time, Appellant disavowed the settlement and refused to sign the requisite release. Consequently the Respondents filed a motion to enforce the Agreement. R.pp. ____. This motion was heard by the Circuit Court on June 4, 2013 (R.pp.____) and an Order enforcing the Agreement was issued June 10, 2013. R. p._____. Appellant's motion to reconsider that

---

[1] The Probate Court specially addressed any concerns from the Appellant and her attorney replied:

> We reached a Settlement Agreement in Mediation some months [ago]. The children were not present. My client's desire is to make sure that they are adequately represented and their suit is allowed to go forward and so our interest are consistent perfectly consistent with that. We want them to go forward we want them to have their day in court.

Transcript of Probate Court Hearing, R. p. ____ lines 3-13. (now page 9)

enforcement was denied by the Circuit Court on August 6, 2013. R.p. _____. This appeal followed.

ARGUMENT

The Trial Court Was Correct To Enforce The Parties' Settlement Agreement.

A. The Settlement Agreement As A Contract: Very Limited Scope of Review.

Settlement agreements are reviewed by the circuit court in much the same way as contracts. Vista Antiques & Persian Rugs, Inc. v. Noaha, LLC, 2009 S.C. App. LEXIS 548 (S.C. Ct. App. Jan. 9, 2009) (citations omitted). When an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement. Id. When an agreement is plain and unambiguous, the court does not have the authority to modify its terms. Id.

Here, of course, the question is not the construction of the Agreement but the existence of an Agreement in light of a duress claim.[2] In the context of a motion to enforce a settlement, however, the appellate court's scope of review is also limited much like the trial court's limited authority to review a contract.

With settlements, our appellate courts have limited their review to whether there has been an abuse of discretion. In Rock Smith Chevrolet, Inc. v. Smith, 309 S.C. 91, 419 S.E.2d 841 (Ct.App. 1992), the Supreme Court began with its support for settlements generally:

> It has long been the policy of the court to encourage settlement in lieu of litigation, and courts have usually enforced settlement agreements. There can be no doubt but that the trial court retains inherent jurisdiction and power to enforce agreements entered into in settlement of litigation before that court.

[2] Recognizing the requisites of SCRCP 43(k) were satisfied, Appellant has not challenged the terms of the Agreement or her actual execution thereof; Appellant has instead limited her arguments both in the trial court and in her initial brief here to one of duress. In this case, the written Agreement signed by the Appellant was incorporated into a petition submitted in the Probate Court (Exhibit D to that Petition) with the Appellant's express consent. The Agreement was also referenced and described in open Court at the Probate Hearing and noted there for the record.

The Supreme Court concluded that the trial court should be affirmed[3] because of its considerable discretion with such motions, saying: "It may not be said that his ruling involved an abuse of discretion, nor can we say there is no basis in the record for his ruling."

Accordingly, the question here is whether the trial court abused its discretion in enforcing the mediated Agreement or whether there was no basis in the record for the trial court's ruling (which would amount to an abuse of discretion). As discussed below, the record here demonstrates that the trial court's ruling is well-supported by the Appellant's own conduct over a considerable period of time.

B. Duress As A Contract Defense Generally.

Duress is a defense to the validity and enforceability of a contract as Appellant now argues. Appellant's Brief cites Holler v. Holler, 364 S.C. 256, 612 S.E.2d 469 (Ct. App. 2005), for both a definition of nullifying duress[4] and for circumstantial factors ("age, sex, and compact of the party") to be considered in the factual determination of whether duress is present.[5] Appellant's Brief at 3.

The definition found in Holler and cited by Appellant has been applied for decades. See Mut. Plate Glass & Cas. Co., 191 S.C. 177, 4 S.E.2d 123 (S.C. 1939) (duress is defined as "a condition of the mind produced by improper external pressure of influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition"); see also Phillips v. Baker, 284 S.C. 134, 325 S.E.2d 533 (1985); In re Nightingale's

---

[3] In Rock Smith Chevrolet, the trial court had determined not to enforce a settlement where one party only had a sixth grade education and the testimony led the trial judge to conclude that the party did not understand a communication from his attorney. Here there is no evidence that Appellant misunderstood anything.

[4] The Holler case and others note that some form or level of duress is often present in litigation but not all duress rises to a level sufficient to defeat a contract.

[5] Notably, the Appellant makes no suggestion in her Brief or in her underlying affidavit that anything about her age, sex, or other personal characteristics rendered her particularly succeptible to stress. There is nothing suggesting she is of limited education or limited comprehension. There is nothing suggesting any particularized vulnerability. This is in stark contrast to the facts underlying the Holler decision which are discussed in this Brief.

Estate, 182 S.C. 527, 189 S.E. 890, 897 (1937). Our Courts have recognized three elements that must be proved "in order to establish that a contract was procured through duress: (1) that the person was coerced to enter into the contract; (2) that the person was put in such fear that he was bereft of the quality of mind essential to the making of a contract; and (3) that the contract was thereby obtained as a result of this state of mind." Gainey v. Gainey, 382 S.C. 414, 675 S.E.2d 792 (Ct. App. 2009)(citing to In re Nightingale's Estate, supra).

Gainey involved the settlement of family court matters where one spouse later asserted duress as a means to try and avoid the settlement. In Gainey, the recanting spouse failed to adequately show duress. Perhaps not suprisingly, many allegations of duress arise in the context of family litigation. See also Forsythe v. Forsythe, 290 S.C. 253, 255-56, 349 S.E.2d 405, 406 (Ct. App. 1986); Burnett v. Burnett, 290 S.C. 28, 30, 347 S.E.2d 908, 909 (Ct. App. 1986); Sauls v. Sauls, 287 S.C. 297, 300, 337 S.E.2d 893, 895 (Ct. App. 1985). In each of these cases, Gainey, Forsythe, Burnett, and Sauls, the Courts failed to find sufficient duress to avoid the agreements involved. Notably, the recanting parties in each of these cases also had legal counsel at the time of their assent to an agreement.[6]

It is also notable that Holler did involve a finding of duress. This rare result is notable because the facts involved are very different from the other matters and very different from the circumstances at bar. Holler involved an unrepresented pregnant woman from Ukraine with weak language skills whom had been in the United States less than 90 days. This immigrant was

[6] As the late United States District Court Judge Falcon B. Hawkins, noted in Hyman v. Ford Motor Co., 142 F.Supp.2d 735 (D.S.C. 2001) (quoting Humana Kansas City, Inc. v. Continental Cas. Co., 1995 U.S. Dist. LEXIS 16847; 1995 WL 669241 (W.D. Mo. 1995), aff'd, 94 F.3d 648 (8th Cir. 1996)), "duress will rarely exist when the parties are sophisticated and represented by counsel during negotiations." Judge Hawkins also noted similar decisions arising from the federal courts of our state. Id. citing House v. Aiken Co. National Bank, 956 F. Supp. 1284 (D.S.C. 1996), aff'd, 103 F.3d 118 (4th Cir. 1996) (access to an attorney supports finding a validity of release); Resolution Trust Corp. v. Palmetto Fort of Mt. Pleasant, 831 F. Supp. 510 (D.S.C. 1993)(finding no duress when document was executed after consultation with attorney).

facing deportation if she did not get married so, only days before her Visa expired, she signed an untranslated premarital agreement prepared and presented only in English by the man who had fathered her child only weeks earlier. The counseled and mediated agreement here is a far, far cry from the extreme multi-lingual shotgun-wedding circumstances presented by Holler.

C. Belated Discomfort And Second Thoughts Are Not Duress.

In this case, the Agreement was reduced to writing and signed by the parties. Appellant and her legal counsel were active participants in a lengthy mediation. R.p.10 line 22 –p. 11 line 6 (4 June 2013 Transcript). When the parties reached an agreement, the mediator Mr. Hanna reduced the terms to a written agreement. Appellant signed the Agreement. The Appellant's current assertion of discomfort was not raised at the mediation and has not been supported by other participants in the mediation. Moreover, this assertion of duress was not even raised at the Probate Court hearing some six months after the mediation. The trial court here rejected this belated claim of discomfort in light of undisputed circumstances suggesting the validity of Appelllant's asent. Other than the self-serving assertion of duress[7] by one who now has admitted second thoughts,[8] the Appellant has not shown any fact or circumstance that would support a claim that the environment of her assent to the Agreement was any different than every mediation or litigation.

---

[7] As Appellant notes in her Brief, pp. 3-4, she submitted an affidavit that asserted she was "under a tremendous amount of stress" and felt "intimidated and pressured" by the "intensity" of the mediation process.

[8] Perhaps indicative of the Appellant's motive in seeking to now avoid her Agreement, her affidavit suggest that the real pressure was not from the mediator at mediation but from her children after the mediation. She states, "...the Settlement Agreement has caused intense problems with my relationship with both of my children.... My children think that I have sold them out ...." R.pp. _____. Of course, the litigation interest of those children against the Respondents was preserved and protected by Agreement and terms of the Probate Court Order with their assent in that Court. R. p. 5 lines 5-8 and p.10 lines 11-24 (Probate Court Transcript). Perhaps the children are estranged from their mother, but the circumstances suggest it has nothing to do with this case and wasn't a factor at the time of the Agreement.

D. As Appellant's Agent, Counsel Ratified The Agreement.

In this case, not only did Appellant execute the Agreement, but her attorney consented to the subsequent presentation of that agreement to the Probate Court. It is a long-standing and well-settled rule that an attorney may settle litigation on behalf of his client and that the client is bound by his attorney's settlement actions. Motley v. Williams, 374 S.C. 107, 647 S.E.2d 244 (Ct.App. 2007) (citations omitted).

In Motley, the parties were engaged in a dispute over a parcel of real property. At a hearing before the Master-in-Equity, the attorneys for the parties announced a settlement agreement in which the parties would divide the real property. Id. Thereafter, the Defendant in that case filed a motion to set aside the settlement order, claiming that he "repeatedly instructed his attorney not to settle the case under any circumstances." Affirming the lower court's denial of the motion to set aside the settlement, the Court of Appeals stated:

> While Williams may at one time have had every intention of having the case tried, his attorney consented to a settlement before the court. His counsel presumptively possessed the authority to make such an agreement, particularly in light of the fact that Williams was present in the courtroom at that time. Any mistake that may have occurred was solely a result of a communication breakdown between Williams and his attorney. As prescribed by the law of this state, Williams is bound by the actions of his lawyer.

This rule is based on the principles of agency law. Id. In the absence of fraud, the undoubted attorneys of record for the parties may enter into agreements to settle and adjust the issues and subject-matter of a suit; to later allow a party to repudiate this agreement and employ different counsel to upset and set aside what his first counsel has done would undermine the orderly administration of justice. Id.[9]

---

[9] Likewise, "when a litigant voluntarily accepts an offer of settlement, either directly or indirectly through the duly authorized actions of his attorney, the integrity of the settlement cannot be attacked on the basis of inadequate representation by the litigant's attorney. In such cases, any remaining dispute is purely between the party and his attorney." Motley, 374 S.C. at 113, 647 S.E.2d at 247 (quoting Shelton v. Bressant, 312 S.C. 183, 312 S.C. 208, 439 S.E.2d 833 (1993)). Of course, in the instant case, there was no miscommunication or inadequate represntation as

Just as in Motley, the Appellant in this action was not only present at the mediation, she was present in the Probate Court six months later when her counsel ratified the Appellant's position that the Agreement be carried out. See footnote 1 and accompanying text, supra. While counsel's ratificaton is not the most direct basis for sustaining the trial court's enforcement of the Agreement, it alone is a basis – but more than that, it is a circumstance that reaffirms the Appellant's original assent to the Agreement. As Respondent's counsel suggested to the trial court, the orderly administration of justice requires that Appellant be judicially estopped from trying to reverse course and dispute that assent now. R.p. 14 lines 8-13.[10]

CONCLUSION

The Appellant changed her mind about an agreed settlement after a professionally conducted mediation, at which she was well represented, resulted in a signed agreement. The Appellant's own signature under these circumstances undermines her subsequent claim of duress. Moreover, her representation by competent counsel at the mediation served to protect her from any improper influences or extraordinary duress. Finally, her continued acceptance and ratification of the Agreement for a six month period including in a personal appearance before the Probate Court also contradicts her new claim of duress. Therefore, the trial court had ample reason and circumstances to enforce the Agreement and to do so was not an abuse of discretion. The decision should be affirmed.

[SIGNATURE PAGE TO FOLLOW]

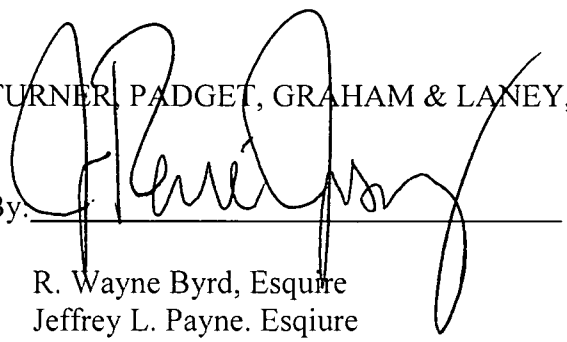
Appellant's counsel secured a fine settlement for his client and she reaffirmed her assent to that settlement after six months when the matter was heard by the Probate Court.

[10] See Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997)(expressly adopting judicial estoppel because proper function of the judicial process requires litigants to maintain consistency with regard to their factual presentations and advocacy).

Florence, South Carolina

November 25, 2013

TURNER, PADGET, GRAHAM & LANEY, P. A.

By: 

R. Wayne Byrd, Esquire
Jeffrey L. Payne. Esqiure
J. René Josey, Esquire
319 S. Irby Street
Post Office Box 5478 (29502)
Florence, South Carolina 29501
(843) 662-9008
(843) 667-0828 fax
Email: rjosey@turnerpadget.com

ATTORNEYS FOR THE RESPONDENTS