IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-DC-320

Russell G. Berg
Appellant (Respondent below)

–v–

Stacey L. Berg
Appellee (Petitioner below)

Argued: April 29, 2021 | Decided: June 29, 2021

Appeal from the Allen Circuit Court,
No. 02C01-1709-DC-1268
The Honorable John D. Kitch, III, Magistrate

On Petition to Transfer from the Indiana Court of Appeals,
No. 19A-DC-3038

Opinion by Justice Goff

Chief Justice Rush and Justices David, Massa, and Slaughter concur.

Goff, Justice.

Alternative Dispute Resolution (A.D.R.) plays an important role in our justice system. Because our public policy strongly favors the amicable resolution of disputes, we encourage parties to communicate openly and honestly during A.D.R. proceedings such as mediation. For this reason, communications during settlement negotiations are deemed confidential.

The question here is whether documents produced in anticipation of mediation fall under this confidentiality requirement. We conclude that they do and hold that the trial court erroneously admitted a marital balance sheet prepared for mediation to allow Wife to avoid the parties' settlement agreement. But, because the trial court also found that Husband had breached the settlement agreement, we affirm the trial court.

Facts and Procedural History

In 2017, Stacey Berg (Wife) sued Russell Berg (Husband) for dissolution of marriage. After limited discovery, Wife and Husband participated in mediation and signed a settlement agreement (the Agreement) under which each party retained all stock accounts in their respective names and Husband received all jointly held stock accounts. The Agreement contains a warranty stating, "[e]ach of the parties further represent and warrant one to the other that all assets and debts owned or owed by the parties, either individually or jointly, have been correctly and truly revealed to the other and reflected within this [A]greement." Appellant's App. Vol. 2, pp. 21–22. The trial court approved the Agreement and incorporated it into the dissolution decree.

One year later, Wife filed a Trial Rule 60(B) motion for relief from judgment, alleging that the Agreement shouldn't be enforced because it was procured through fraud, constructive fraud, misrepresentation, mutual mistake, or other misconduct. Wife's motion rested on the omission of a stock account from the balance sheet that the parties had used in determining the division of assets. Husband had identified that account to

Wife's lawyer during their exchange of information. The lawyers discussed getting together to reconcile the parties' balance sheets. When Wife's attorney gave Husband's attorney her version of the balance sheet, Husband's attorney pointed out one of Wife's accounts that was missing but said nothing about Husband's missing account. After Wife added her missing account to the balance sheet, Husband's attorney said they would use her balance sheet at mediation. Wife maintains that the parties used her sheet, which omitted Husband's account, when determining the division of assets at mediation.

Husband moved to strike the evidence submitted by Wife as inadmissible mediation evidence. The trial court overruled Husband's objection and initially denied relief to Wife. Wife then filed a motion to correct errors, which the trial court granted. Because the trial court found that fraud, constructive fraud, mutual mistake, or misrepresentation had occurred and that Husband had breached the Agreement's warranty provision, it awarded Wife half of the value of the account.

In a 2-1 published opinion, the Court of Appeals reversed. *Berg v. Berg*, 151 N.E.3d 321 (Ind. Ct. App. 2020). In the majority's view, the evidence that Wife proffered, and which the trial court relied on in granting relief, was inadmissible because it was evidence of what transpired at mediation. *Id.* at 329. The trial court erroneously granted Wife's motion to correct errors, the majority reasoned, because the inadmissible evidence was required to avoid the Agreement and because Wife was estopped from claiming that Husband had breached the warranty. *Id*. at 331.

In dissent, Judge Crone would have affirmed the trial court on grounds that Husband cited no authority for the proposition that evidence prepared in anticipation of (rather than during) mediation is inadmissible under Evidence Rule 408. *Id*. at 331–32 (Crone, J., dissenting). *See* Ind. Appellate Rule 46(A)(8)(a) (requiring a party to support his or her arguments with "cogent reasoning" and "citations to the authorities").

Wife petitioned this Court for transfer, which we now grant, thus vacating the Court of Appeals opinion. *See* App. R. 58(A).

Standards of Review

Because we generally review a ruling on a motion to correct error for an abuse of discretion, we will only reverse "where the trial court's judgment is clearly against the logic and effect of the facts and circumstances before it or where the trial court errs on a matter of law." *Perkinson v. Perkinson*, 989 N.E.2d 758, 761 (Ind. 2013). But, where a ruling turns on a question of law, our review is de novo. *Id*.

An abuse-of-discretion standard likewise applies to a ruling on a Trial Rule 60(B) motion. *Citimortgage, Inc. v. Barabas*, 975 N.E.2d 805, 812 (Ind. 2012). "[A] court's exercise of power under Trial Rule 60(B) is subject to the limitations of the substantive law itself." *Ryan v. Ryan*, 972 N.E.2d 359, 370 (Ind. 2012). So, when a 60(B) motion involves a marital settlement agreement, the Court treats the matter "as a contract dispute, subject to the rules of contract law." *Id.* at 370–71.

Discussion and Decision

Wife argues that the trial court properly admitted her evidence to allow her to avoid the contract because the information was exchanged **before** mediation (thus falling beyond the reach of Rule 408) and because the evidence was discoverable outside of mediation under A.D.R. Rule 2.11(B)(2). She also argues that, even if the evidence isn't admissible for that purpose, it is admissible to prove that Husband breached the warranty. Husband, on the other hand, argues Wife's evidence should be excluded under Indiana A.D.R. Rule 2.11 and Indiana Rule of Evidence 408. He also characterizes the warranty as a mutual warranty and argues that Wife cannot now argue that the assets and debts weren't correctly revealed or reflected.

I. Wife's evidence was inadmissible to avoid the Agreement under Indiana Evidence Rule 408.

Because "Indiana judicial policy strongly urges the amicable resolution of disputes," we embrace "a robust policy of confidentiality of conduct

and statements made during negotiation and mediation." *Horner v. Carter*, 981 N.E.2d 1210, 1212 (Ind. 2013). This robust policy takes root in both our A.D.R. Rules and Evidence Rule 408, which govern the mediation process. As relevant here, A.D.R. Rule 2.1 provides that mediation is "the confidential process by which a neutral, acting as a mediator, selected by the parties or appointed by the court, assists the litigants in reaching a mutually acceptable agreement." While "[e]vidence discoverable outside of mediation shall not be excluded merely because it was discussed or presented in the course of mediation," A.D.R. 2.11(B)(2), the mediation itself "shall be regarded as settlement negotiations governed by Indiana Evidence Rule 408," A.D.R. 2.11(B)(1).

Evidence Rule 408, in turn, operates to foster an open exchange between the parties during settlement negotiations by excluding from evidence statements made or documents prepared for mediation. *Worman Enter. v. Boone Co. Solid Waste Mgmt. Dist.*, 805 N.E.2d 369, 376 (Ind. 2004). Specifically, when a party attempts to "prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction," Rule 408 renders inadmissible evidence of "furnishing, promising, or offering, or accepting, promising to accept, or offering to accept a valuable consideration in order to compromise the claim" and "conduct or a statement made during compromise negotiations about the claim." Ind. Evidence Rule 408.

A. Information exchanged specifically to assist in mediation, but disclosed prior to mediation, falls under Rule 408.

Wife acknowledges "that evidence of what transpired <u>at mediation</u> is deemed confidential and presumably not admissible." Pet. to Trans. at 6. She contends, however, that the evidence she submitted "did not transpire at mediation." *Id.* Rather, she insists, the evidence can't be excluded under Rule 408(a)(2) because the "exchange of information" about "marital assets and debts, the valuation of marital assets and debts," and the use of the balance sheet "all took place weeks <u>before</u> the mediation session." *Id.*

We disagree with Wife's reading of the rules. While the A.D.R. rules and Rule 408 don't apply when a mediation is "not instituted pursuant to judicial action in a pending case," *Vernon v. Acton*, 732 N.E.2d 805, 808 n.5 (Ind. 2000), nothing in Rule 408 limits the application of 408(a)(2) to the mediation session itself. In *Kerhof v. Kerhof*, the Court of Appeals held that an alleged statement made by the husband outside of any formal settlement negotiation fell under Rule 408. 703 N.E.2d 1108, 1112 (Ind. Ct. App. 1998). The wife in that case sought to admit evidence that, after the filing of the dissolution petition but before the final dissolution hearing, the husband told her that he would have to pay her $150,000 in the settlement. *Id*. The Court of Appeals affirmed the trial court's exclusion of that evidence, noting that there was sufficient evidence that the statement by the husband was part of settlement negotiations. *Id*.

Because Rule 408 is intended "to promote candor by excluding admissions of fact," communications to facilitate settlement "are not admissible into evidence." *Worman,* 805 N.E.2d at 376–77. And here, the contents of the balance sheet are "admissions of fact" that certain assets and debts exist and about the value of the assets and quantity of the debt. These "facts" established the point from which the parties would negotiate at the mediation itself. That the admission of fact occurred prior to the formal mediation proceeding doesn't remove it from the ambit of the mediation process if it was made for the purpose of reaching a settlement agreement.

B. The balance sheet isn't admissible as evidence discoverable outside of settlement negotiations.

While A.D.R. Rules 2.11(A) and (B)(1) make mediation confidential, A.D.R. Rule 2.11(B)(2) provides that "[e]vidence discoverable outside of mediation shall not be excluded merely because it was discussed or presented in the course of mediation." Contrary to Wife's argument, the evidence in the balance sheet wasn't discoverable outside of settlement negotiations. Rather, the figures on the balance sheet reflected the positions that the parties took on the value of certain property for the purpose of negotiation.

This observation is consistent with prior caselaw. In *R. R. Donnelley & Sons Co. v. North Texas Steel Co.*, our Court of Appeals applied the Fifth Circuit's interpretation of Federal Rule of Evidence 408, which is similar to our Rule 408,[1] to determine that a video produced specifically for settlement negotiations should not have been admitted at trial. 752 N.E.2d 112, 128–29, 130 (Ind. Ct. App. 2001). When the racks which R. R. Donnelley & Sons Company (RRD) had recently purchased collapsed and caused extensive damage, RRD sued North Texas Steel Company (NTS). *Id*. at 120. RRD contended that NTS defectively welded the racks. *Id*. As the parties prepared for mediation, an expert conducted and filmed a weld test to present at the mediation. *Id*. at 127. The parties didn't reach a settlement, and NTS sought admission of the video at trial. *Id*.

The trial court admitted the video over RRD's objection. *Id*. The Court of Appeals reversed the trial court. *Id*. at 140. The panel accepted the Fifth Circuit's reasoning that a document falls within the "protected area of compromise" where "the statements or conduct were intended to be part of the negotiations toward compromise." *Id.* at 129 (quoting *Ramada Development Co. v. Rauch*, 644 F.2d 1097, 1106–07 (5th Cir. 1981)). And the video in *R. R. Donnelley* was intended to be part of negotiations toward compromise, the court found, because the "expert ideas and research were being exchanged in the spirit of attempting to resolve the case through mediation." *Id*. at 130 (quotation marks omitted).[2]

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[1] Federal Rule of Evidence Rule 408 allows the introduction in a criminal case of statements or conduct during compromise negotiations regarding a civil dispute by a government regulatory, investigative, or enforcement agency. Fed. R. Evid. 408(a)(2).

[2] Other courts have also found that material prepared for compromise negotiations are protected by Rule 408. *See, e.g.*, *EEOC v. UMB Bank Fin. Corp.*, 558 F.3d 784, 791 (8th Cir. 2009); *Affiliated Mfrs. v. Aluminum Co. of Am.*, 56 F.3d 521, 530 (3d Cir. 1995); *Blu-J, Inc. v. Kemper C.P.A. Grp.*, 916 F.2d 637, 642 (11th Cir. 1990); *Kritikos v. Palmer Johnson, Inc.*, 821 F.2d 418, 423 (7th Cir. 1987); *Ramada Dev. Co. v. Rauch*, 644 F.2d 1097, 1107 (5th Cir. 1981); *Axenics, Inc. v. Turner Constr. Co.*, 62 A.3d 754, 768 (N.H. 2013); *State ex rel. Miller v. Superior Court*, 941 P.2d 240, 244 (Ariz. Ct. App. 1997).

C. Challenging the validity of the Agreement is not a collateral matter for the purposes of 408(b)'s exception.

Evidence Rule 408 contains an exception that allows the admission of evidence "for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." Evid. R. 408(b). The exception for evidence used "for another purpose" extends to evidence used "in collateral matters unrelated to the dispute that is the subject of the mediation." *Horner*, 981 N.E.2d at 1212.

In *Horner*, the husband sought to modify the maintenance provision of the settlement agreement in the dissolution of his marriage. *Id*. at 1211. During the evidentiary hearing, the husband attempted to testify about statements he made to the mediator. *Id*. The trial court excluded the testimony and ultimately denied his request for modification. *Id*. This Court affirmed the trial court. *Id*. at 1213. Because the husband sought to "avoid liability under the agreed settlement on grounds that it reflected neither his intent, nor his oral agreement during mediation," this Court found that the evidence wasn't used in a collateral matter and was inadmissible. *Id*. at 1212, 1213.

Like in *Horner*, Wife seeks to make a change to the Agreement itself. This is clearly distinguishable from the only post-*Horner* Indiana case that found that Rule 408's exception applies. *See Gast v. Hall*, 858 N.E.2d 154, 161 (Ind. Ct. App. 2006) (evidence of the mental condition of the testator at a mediation on a different matter was admissible to prove testamentary capacity).

Rule 408 applies, and Wife's evidence is inadmissible to avoid the Agreement. Because the trial court relied on this inadmissible evidence to

find that fraud, constructive fraud, mutual mistake, or misrepresentation had occurred, this finding cannot be the basis for Wife's relief.[3]

II. A warranty clause in which "each of the parties" warrants "one to the other" doesn't preclude a party from demonstrating breach of warranty.

Wife argues that Husband breached the warranty language included in the Agreement. Under the Agreement's warranty, "[e]ach of the parties further represent one to the other that all assets and debts owned or owed by the parties, either individually or jointly, have been correctly and truly revealed to the other and reflected in this agreement." Appellant's App. Vol. 2, pp. 21–22. Husband argues that Wife is estopped from pursuing her breach-of-warranty claim because Husband and Wife **both** assumed responsibility for the factual assertions made under the "mutual warranty."[4]

"A warranty is a promise relating to past or existing fact that incorporates a 'commitment by the promisor that he will be responsible if the facts are not as manifested.'" *Johnson v. Scandia Assocs., Inc.*, 717 N.E.2d 24, 28 (Ind. 1999) (quoting 1 Samuel Williston, *A Treatise on the Law of Contracts* § 1:2, at 10 (Richard A. Lord, ed., 4th ed. 1990)). As Judge Learned Hand noted, a warranty is intended to "relieve the promisee of

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[3] Since we find that Wife's evidence isn't admissible to attack the settlement, we don't reach her claim that she can avoid the Agreement because Husband engaged in a "gaming view of the litigation process" that constitutes constructive fraud. *See* Appellee's Br. at 16 (internal quotations omitted).

[4] Husband also maintains that neither party argued that the Agreement was breached by either party. But Wife argued before the trial court that the Agreement required each party to "correctly and truly reveal" to the other all assets and that Husband failed to meet that contractual obligation. Appellant's App. Vol. 2, p. 34. And a claim that a party failed to meet a contractual obligation is a claim that the contract was breached. *See Kaghann's Korner, Inc. v. Brown & Sons Fuel Co.*, 706 N.E.2d 556, 565 (Ind. Ct. App. 1999) ("The trial court did not err in finding that as a matter of law Brown failed to strictly perform its contractual obligations, thereby committing a breach of contract.").

any duty to ascertain the fact for himself." *Metro. Coal Co. v. Howard*, 155 F.2d 780, 784 (2d Cir. 1946).

The Court of Appeals held that, because Wife also warranted that all assets and debts had been "correctly and truly" revealed and reflected in the Agreement, she is "estopped from obtaining relief because Wife is disputing the truth of her own assertions." *Berg*, 151 N.E.3d at 330 & n.11. We disagree.

While the warranty does provide that the parties warrant "one to the other" that the assets and debts are reflected in the Agreement, the language doesn't preclude Wife from arguing that Husband breached the warranty. When the Court examines a contract, we look at the "contract as a whole" and "accept an interpretation of the contract that harmonizes all its provisions." *Ryan v. TCI Architects/Eng'rs/Contractors, Inc.*, 72 N.E.3d 908, 914 (Ind. 2017) (citing *Kelly v. Smith*, 611 N.E.2d 118, 121 (Ind. 1993)). "A contract should be construed so as to not render any words, phrases, or terms ineffective or meaningless." *Id*. "A contract is ambiguous if reasonable people would find it subject to more than one interpretation." *Willey v. State*, 712 N.E.2d 434, 440 (Ind. 1999) (quoting *Haxton v. McClure Oil Corp.*, 697 N.E.2d 1277, 1280 (Ind. Ct. App. 1998)).

If we were to interpret the warranty clause as the Court of Appeals did, that clause would be meaningless because neither party would be able to enforce it. A reasonable person wouldn't find that the parties added the warranty provision without intending it to have any effect, and our case law requires that we "make every effort to avoid a construction of contractual language that renders any words, phrases, or terms ineffective or meaningless." *Ind. Gaming Co., L.P. v. Blevins*, 724 N.E.2d 274, 278 (Ind. Ct. App. 2000). Furthermore, this isn't a case where the parties merely warranted as a singular unit that the assets and debts were reflected in an agreement. Instead, "[e]ach of the parties" warranted "one to the other" that the assets were accurate. The words "each" and "one" separate the parties out. Either Husband or Wife may enforce the Agreement and allege breach of the warranty provision. Since we find that Wife is not precluded from claiming that Husband breached the warranty, we must determine whether

the trial court abused its discretion in finding that Husband did breach the warranty.[5]

While Wife's evidence wasn't admissible to challenge the validity of the Agreement under Trial Rule 60(B), it is admissible in the collateral breach-of-contract claim. "The essential elements of a breach of contract action are the existence of a contract, the defendant's breach thereof, and damages." *Fowler v. Campbell*, 612 N.E.2d 596, 600 (Ind. Ct. App. 1993). The evidence here shows that (1) each party promised that the assets and debts were "correctly and truly" reflected in the Agreement—the contract; (2) Husband's assets were not "correctly and truly" reflected in the Agreement—the breach;[6] and (3) Wife's portion of the 50/50 division of assets would have been higher if the account were included—the damage. The trial court didn't abuse its discretion in determining that Husband breached the Agreement. And Indiana has a statutory presumption of a 50/50 division of marital assets. Ind. Code § 31-15-7-5 (2018). Thus, the trial court didn't err in awarding Wife 50% of the Edward Jones account because of Husband's breach of the Agreement.

Conclusion

The trial court incorrectly determined that fraud, constructive fraud, mutual mistake, or misrepresentation had occurred, but because the trial

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[5] The Court of Appeals' citations to 31 C.J.S. Estoppel and Waiver § 72 (2019) and *Stevens v. State Farm Fire & Casualty Co.*, 929 S.W.2d 665, 672 (Tex. Ct. App. 1996) to support its conclusion that Wife is estopped from claiming that Husband breached the warranty clause are inapposite. *See Berg*, 151 N.E.3d at 330–31. In her claim of breach of warranty, Wife isn't arguing that the Agreement "do[es] not express [her] intentions or understanding." *See* 31 C.J.S. Estoppel and Waiver § 72, at 414. Nor is she seeking to avoid being "bound by the terms of [the] contract." *See Stevens*, 929 S.W.2d at 672.

[6] This case is readily distinguishable from *Ehle v. Ehle*, 737 N.E.2d 429 (Ind. Ct. App. 2000). In that case, the wife relied on her husband's representation as to his assets, rather than conducting her own discovery. *Id.* at 434. While the Court of Appeals stated that the wife would have been unable to recover absent the husband's fraud, the parties in that case didn't have an agreement to disclose the information and ensure that it was accurately reflected in the agreement. *Id*.

court didn't abuse its discretion in finding that Husband had breached the warranty clause of the Agreement, we affirm the trial court.

Rush, C.J., and David, Massa, and Slaughter, JJ., concur.

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