IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

HANNAH IAN, *Petitioner*,

v.

THE HONORABLE ROY C. WHITEHEAD, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, *Respondent Judge*,

JOSEPH MAIER, *Real Party in Interest*.

No. 1 CA-SA 17-0085
FILED 5-16-17

Petition for Special Action from the Superior Court in Maricopa County
No. FN2015-051543
The Honorable Roy C. Whitehead, Judge

JURISDICTION ACCEPTED IN PART; RELIEF GRANTED

COUNSEL

Jaburg & Wilk, PC, Phoenix
By Kathi M. Sandweiss, Laurence B. Hirsch, Carissa K. Seidl
Counsel for Petitioner

Provident Law PLLC, Scottsdale
By Bryan L. Eastin
Counsel for Real Party in Interest

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Donn Kessler joined.

C A T T A N I, Judge:

¶1 Hannah Ian ("Wife") seeks special action relief from the superior court's ruling precluding the introduction of settlement-negotiation emails exchanged between her attorney and former counsel for Joseph Maier ("Husband"), as well as communications between Husband and his former attorney and a deposition of Husband's former attorney. For reasons that follow, we accept jurisdiction in part and grant relief by reversing the order precluding admission of the settlement-negotiation emails. We decline jurisdiction as to the remaining claims raised in Wife's special action petition.

FACTS AND PROCEDURAL BACKGROUND

¶2 Wife filed a petition for dissolution of marriage in May 2015. On November 18, 2015, Wife's attorney emailed a settlement proposal to Husband's then-counsel. The email's subject line referred to its contents as a "Rule 408 Comprehensive Settlement Proposal." The email included the following language:

> All of the contents of this letter and any discussions we have regarding it shall constitute inadmissible settlement negotiations which are not [to] be introduced at any trial or hearing in this cause. Additionally, neither the letter itself nor the information set forth in this letter shall be admissible in any further proceedings in this matter other than for the issue of attorneys' fees and costs therein.

¶3 Husband's attorney made a settlement counter-offer that included similar language about the admissibility of the negotiations:

> Please note this counter-offer of settlement is being remitted pursuant to Rule 408 of the Rules of Evidence, and nothing contained herein will be admissible, absent our use of the same to show reasonableness of the parties' positions for the purposes of establishing a claim for attorneys' fees.

A response from Wife's attorney discussing the remaining issues stated:

> this correspondence falls under the purview of Rule 408 in the same manner as our previous proposal.

¶4 On December 28, 2015, Wife's attorney sent an email "confirm[ing] that a full and complete settlement has been reached pursuant to Rule 69, Arizona Rules of Family Law Procedure."[1] Husband's attorney replied that she "look[ed] forward to receiving the drafts for review." In February 2016, the court issued a minute entry indicating that the parties had settled, and the matter was placed on the inactive calendar.

¶5 Shortly thereafter, a dispute apparently arose about the parties' revocable trust. Husband refused to sign the final version of the parties' settlement agreement until the trust issue was resolved. Wife filed a motion claiming that emails between the parties' attorneys in December 2015 confirmed the existence of a binding agreement under Rule 69 and asking the court to enforce that agreement.

¶6 The court scheduled an evidentiary hearing to determine whether a Rule 69 agreement existed between the parties. Husband filed a motion in limine to preclude introduction of, among other things, the settlement-related emails between the parties' attorneys from November 18 through December 28. The court granted Husband's motion, and Wife petitioned this court for special action relief.

DISCUSSION

¶7 This court's power to accept special action jurisdiction is "highly discretionary." *State ex rel. Romley v. Fields*, 201 Ariz. 321, 323, ¶ 4 (App. 2001). We accept special action jurisdiction here because Wife lacks an equally speedy and adequate appellate remedy and because the superior court committed an error of law by precluding the settlement-negotiation

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[1] Arizona Rule of Family Law Procedure 69 provides, in pertinent part:

> A. An agreement between the parties shall be valid and binding if . . . the agreement is in writing.
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> . . . .
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> B. Any agreement entered into by the parties under this rule shall be presumed to be valid and binding, and it shall be the burden of the party challenging the validity of the agreement to prove any defect in the agreement . . . .

emails. *See* Ariz. R.P. Spec. Act. 1(a), 3(c); *McGuire v. Lee*, 239 Ariz. 384, 386, ¶ 6 (App. 2016).

¶8 Wife argues that the emails between counsel are admissible to show the fact of an agreement between the parties. Under Rule 69, any agreement between the parties is binding if made in writing or set forth on the record in a judicial or mediation proceeding. Ariz. R. Fam. Law P. 69(a). The requirement that agreements be made in writing "prevent[s] disputes as to the existence and terms of agreements and [] relieve[s] the court of the necessity of determining such disputes." *Hackin v. Rupp*, 9 Ariz. App. 354, 356 (App. 1969) (citation omitted).[2]

¶9 We agree that the challenged emails are admissible under Arizona Rule of Evidence 408. Although Rule 408(a) precludes introduction of settlement-negotiations when offered "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction," evidence of negotiations is admissible under Rule 408(b) when offered "for another purpose." Thus, evidence of negotiations may not be used for the reasons listed in Rule 408(a), but it may be used to prove the existence of a Rule 69 agreement. *Murray v. Murray*, 239 Ariz. 174, 178–79, ¶ 16 (App. 2016).

¶10 Husband argues that the parties entered a different agreement or stipulation that the settlement-negotiation emails would be inadmissible. But although parties may stipulate to waive a rule of evidence for trial, *see Pulliam v. Pulliam*, 139 Ariz. 343, 345 (App. 1984), the emails at issue here do not constitute such a stipulation. An enforceable agreement must include terms sufficiently specific "that the obligations involved can be ascertained." *Savoca Masonry Co. v. Homes & Son Constr. Co.*, 112 Ariz. 392, 394 (1975). Even if the cautionary unilateral language in the settlement-negotiation emails could be construed to be an offer and counter-offer, the parties never agreed to terms. The email from Wife's attorney stated the negotiations would be inadmissible for all issues other than "attorneys' fees and costs therein." The response from Husband's attorney stated the negotiations could be admitted "to show reasonableness of the parties' positions for the purposes of establishing a claim for attorneys' fees." And Wife's attorney later replied that the communication was inadmissible "under the purview of Rule 408 in the same manner as our previous proposal." These emails did not outline the terms of any purported stipulation with sufficient clarity to become enforceable between

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[2] The *Hackin* court was interpreting former Arizona Rule of Civil Procedure 80(d), upon which Rule 69 is based. Ariz. R. Fam. Law P. 69 cmt.

the parties—and they nowhere specified that the communications would be inadmissible to prove the fact of an agreement.

¶11 Husband also argues that promissory estoppel bars the admission of these emails because the boilerplate disclaimer language in emails sent on Wife's behalf created an enforceable promise not to use the emails "at any trial or hearing in this case." We disagree. Promissory estoppel allows a party to enforce a promise after justifiably (and foreseeably) relying on that promise. *Higginbottom v. State*, 203 Ariz. 139, 144, ¶ 18 (App. 2002). But a party cannot unilaterally change the rules of evidence applicable to a proceeding simply by attaching broad cautionary language to a settlement offer. *See Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1160–62 (9th Cir. 2007) ("Notwithstanding the letter's attempt to claim an absolute privilege, therefore, statements made in settlement negotiations are only excludable under the circumstances protected by [Federal Rule of Evidence 408]."). And here, allowing enforcement of the boilerplate disclaimer language under a promissory estoppel theory would subvert the policy behind Rule 69's requirement that agreements be made in writing. *See Hackin*, 9 Ariz. App. at 356.

CONCLUSION

¶12 For the foregoing reasons, we accept jurisdiction and grant relief as to the admissibility of the settlement-negotiation emails between the parties' attorneys. We decline jurisdiction as to Wife's request that Husband's former attorney's testimony and billing statements be admitted to show Husband authorized his former attorney to agree to a settlement. We note that Husband's counsel expressly represented at oral argument that Husband would not raise the issue of his former attorney's authority to agree to a settlement in the superior court. Accordingly, Husband is bound by that concession and the issue of the admissibility of the former attorney's testimony and billing statements is moot.

AMY M. WOOD • Clerk of the Court
FILED: JT