NO. COA01-1299

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2002

ELVA ELLIOTT, INDIVIDUALLY AND
AS EXECUTOR OF THE ESTATE OF
LYNWOODE F. DANIEL,
Plaintiff-Appellant,

v. Granville County
No. 00 CVS 165

HUGH ROBERT DANIEL and
FIELDING K. DANIEL,
Defendants-Appellees.

Appeal by plaintiff from order entered 12 March 2001 by Judge J.B. Allen, Jr. in Superior Court, Granville County. Heard in the Court of Appeals 14 August 2002.

Wallace W. Bradsher, Jr. for plaintiff-appellant.

Edmundson & Burnette, L.L.P., by R. Gene Edmundson, J. Thomas Burnette, and S. Katherine Burnette, for defendants-appellees.

McGEE, Judge.

Elva Elliott (plaintiff) filed a complaint dated 15 February 2000 individually and as executor of the Estate of Lynwoode F. Daniel (Ms. Daniel), her mother, against Hugh Robert Daniel and Fielding K. Daniel (defendants), her brothers, for partition of Ms. Daniel's farm. Defendants filed an answer and counterclaim on 25 February 2000, alleging that the parties had entered into a settlement agreement on 27 May 1999 concerning the real property at issue. They attached a copy of the agreement to their answer.

Defendants filed a motion for summary judgment on 16 March 2000. Plaintiff filed an affidavit on 24 March 2000 in opposition to defendants' motion, in which she stated the agreement attached to defendants' answer was never meant to be a binding contract. The parties appeared before Judge Howard E. Manning, Jr. regarding the summary judgment motion on 27 March 2000. The parties announced that they had "resolved the case on partition" and informed the trial court of the settlement terms. Judge Manning raised concerns about ingress and egress rights relating to the land and did not enter a consent judgment. The parties agreed to reexamine that issue in the case. Defendants filed a second motion for entry of judgment on 27 April 2000. A second hearing was held on 11 May 2000 before Judge Manning but an order was not entered. A third hearing was held before Judge J.B. Allen, Jr. on defendants' motion for summary judgment on 5 February 2001. Judge Allen entered an order on 12 March 2001 granting defendants' motion, and finding as fact:

> 3. That on March 27, 2000, prior to the call of the matter for hearing, counsel for the Plaintiff announced to the Court that the matter had been settled and that the land in question would be divided in accordance with the map that was filed with [the] Court upon the terms and conditions stated by him in open court.
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> 4. That on February 5, 2001, Plaintiff testified that on March 27, 2000, she was present in Court with her attorney and that she agreed to the settlement as announced in open court on March 27, 2000. She further testified that she was satisfied with the settlement as announced by her attorney on March 27, 2000.

> 5. That on February 5, 2001 the Defendant, Fielding K. Daniel, testified that he was present in court on March 27, 2000 and that at the time the settlement agreement was announced in open court, he was in agreement and was satisfied with the settlement. He further testified that he believed the matter to be resolved at that time.
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> 6. That a hearing was conducted before the Honorable Howard E. Manning, Jr. on May 8, 2000 but he never issued a ruling. Mrs. Ella S. Wrenn, Trial Court Administrator for the Ninth Judicial District, testified, without objection, that on February 5, 2001, she spoke with Judge Manning's office and was told that Judge Manning was not going to issue a ruling and that it was his belief that the matter had been settled by the parties.
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> 8. That the Defendants agreed in open Court on February 5, 2001, that the Plaintiff has an easement over the lands to be distributed to Hugh Robert Daniel as set forth in Deed Book 710, Page 412 and shown on plat recorded in Plat Book 19, Page 185, Granville County Registry.
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> 9. That on March 27, 2000, the parties agreed in open court to divide the property as set forth on the map filed herein which said map is hereby incorporated by reference herein.

The trial court concluded as a matter of law:

> 15. That the settlement agreement entered on the record on March 27, 2000 was entered into in open court and was done by all of the parties willingly and knowingly and without duress or coercion. That at the time the agreement was entered into in open court, all of the parties were satisfied and in agreement with all of its terms.
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> 16. The Court finds that the settlement agreement of the parties announced in open court on March 27, 2000 was reasonable and proper in all respects and that it should be

> adopted by this Court as an order of this Court.

Plaintiff appeals.

"A consent judgment is a contract of the parties that may be sanctioned and entered upon the records of a court, but the 'power of [a] court to sign a consent judgment depends upon the unqualified consent of the parties.'" *Chance v. Henderson*, 134 N.C. App. 657, 661, 518 S.E.2d 780, 782-83 (1999) (quoting *King v. King*, 225 N.C. 639, 641, 35 S.E.2d 893, 895 (1945) (citations omitted)). A consent judgment may be set aside for lack of consent only when there is proper proof by the party alleging that consent was not given or that consent was obtained through fraud or mutual mistake. *Nickels v. Nickels*, 51 N.C. App. 690, 693, 277 S.E.2d 577, 579, *disc. review denied*, 303 N.C. 545, 281 S.E.2d 392 (1981). A trial court's findings of fact are conclusive on appeal if supported by competent evidence, but conclusions of law drawn from such facts are subject to appellate review. *Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 615, 219 S.E.2d 787, 790 (1975).

Plaintiff first argues the trial court erred in granting defendants' motion for entry of judgment. Plaintiff argues that there never was a binding settlement agreement because the parties failed to reach a meeting of the minds on all the terms of the agreement. Plaintiff contends there was a mutual mistake concerning the existence of an easement that would provide access to plaintiff's land, thus preventing a meeting of the minds. Plaintiff believed there was an easement but defendants did not.

Plaintiff argues that the holding in *Chappell v. Roth*, 353 N.C. 690, 548 S.E.2d 499 (2001), compels this Court to refuse to enforce the consent judgment of the trial court. In *Chappell*, the North Carolina Supreme Court refused to enforce a mediated settlement agreement between the parties. The parties' settlement agreement stated that the plaintiff would grant a "'full and complete release, mutually agreeable to both parties.'" *Chappell*, 353 N.C. at 691, 548 S.E.2d at 499-500 (quoting the parties' settlement agreement). The parties were unable to agree upon the language of the release, which was a material term of the agreement requiring mutual consent. The Supreme Court refused to enforce the agreement because the parties had failed to reach a meeting of the minds as to a material term, and the settlement agreement therefore did not constitute a valid contract.

Chappell is distinguishable from the case before us. In *Chappell*, the Court found that the mutually agreeable release clause was a material term of the consent agreement because it constituted part of the consideration for the agreement. *Id.* Without an agreement on a material issue, there could be no meeting of the minds and no enforceable agreement. *Id.* In the case before us, the parties agreed to the partition of the property absent any discussion of the easement. The easement was not an express term of the contract, nor was the original agreement that was submitted to Judge Manning contingent upon the issue of the easement. Judge Manning's request that the parties deal with the easement issue did not make it a material term of the original agreement, nor did it

make the consent agreement contingent upon a resolution of that issue. The issue of the easement was separate from the issue of the partition and did not prohibit a meeting of the minds between the parties.

Plaintiff also argues that if a valid agreement exists, the resulting agreement is unenforceable due to a mutual mistake between the parties concerning the existence of an easement. In order to alter or avoid a contract, there must exist a mutual mistake as to a material fact comprising the essence of the agreement. *Mullinax v. Fieldcrest Cannon, Inc.*, 100 N.C. App. 248, 251-52, 395 S.E.2d 160, 162 (1990). "A mutual mistake of fact is a mistake 'common to both parties and by reason of it each has done what neither intended.'" *Swain v. C & N Evans Trucking Co.*, 126 N.C. App. 332, 335, 484 S.E.2d 845, 848 (1997) (quoting *Financial Services v. Capitol Funds*, 288 N.C. 122, 135, 217 S.E.2d 551, 560 (1975)).

In the case before us, the parties were not mutually mistaken concerning the existence of the easement at the time of the original agreement. The record shows that the parties had differing assumptions concerning the easement. Plaintiff believed that she owned an easement that would cross the divided parcel, while defendants believed there was no easement. Under these facts, one of the parties was unilaterally mistaken concerning the easement because the easement either did or did not exist. One party was correct in its belief, thereby rendering a mutual mistake a legal impossibility. A unilateral mistake is insufficient to

avoid a contract absent fraud, undue influence, or oppressive circumstances. *Lowry v. Lowry*, 99 N.C. App. 246, 252, 393 S.E.2d 141, 144 (1990). Plaintiff's unilateral mistake concerning the easement does not negate the original unqualified consent of the parties and does not provide grounds for avoiding the contract.

Furthermore, the existence of an easement was not a material fact impacting the essence of the agreement. The original partition agreement submitted to Judge Manning was not contingent upon the existence of an easement. The agreement was based solely on the partition of a tract of land irrespective of ingress and egress rights. Assuming, *arguendo*, that the parties were both mistaken concerning the existence of an easement, that mistake was not material to the formation of the agreement and is not a valid basis for avoiding the contract on the grounds of mutual mistake. This assignment of error is without merit.

Plaintiff next argues the trial court erred in directing defendants to prepare an order in their favor before plaintiff had submitted evidence to the trial court. Plaintiff argues that the court's directive to defendants demonstrated a pre-disposition, deprived plaintiff of a fair and impartial hearing and was an abuse of the trial court's discretion. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). The practice of submitting proposed orders to a trial court is widely used and accepted in the trial courts of our State.

Plaintiff has cited no instance in the record that demonstrates that the trial court acted arbitrarily in ordering defendants to submit a proposed order or that the decision was unreasoned. Furthermore, plaintiff failed to cite any authority to support such a conclusion in this case. Accordingly, the trial court did not abuse its discretion in directing defendants to submit a proposed order. This assignment of error is overruled.

Plaintiff next argues the trial court erred in ruling on a motion that had been previously heard, but not ruled upon, by another trial court judge. Plaintiff argues that "[f]undamental fairness and equity" should have estopped Judge Allen from hearing a matter under advisement before another judge. Plaintiff has cited no substantive authority in support of this assignment of error and has failed to develop any argument upon which we can base a legal analysis, as required by N.C.R. App. P. 28(b)(6). This assignment of error is therefore deemed abandoned.

Lastly, plaintiff assigns error to the trial court's refusal to allow plaintiff to introduce evidence of a mutual mistake concerning the agreement. Plaintiff again cites no authority in support of this argument and fails to develop any argument upon which we can apply a legal analysis. We have also previously dealt with the issue of mutual mistake and determined that no such mistake existed on these facts. This assignment of error is without merit.

We affirm the order of the trial court.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

Report per Rule 30(e).