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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001118-MR

GLENDA SUE MUDD — APPELLANT

v.

APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 01-CI-00109

DAVID LEE MUDD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Glenda Sue Mudd appeals the Washington Circuit Court's order denying her motion to modify the circuit court's divorce decree insofar as it incorporated her property settlement agreement with appellee, David Lee Mudd. For the following reasons, we affirm.

Glenda and David Mudd were married on August 1, 1998. They separated on May 7, 2001, and Glenda filed a petition for dissolution of the marriage on September 17. The parties filed a property settlement agreement on June 28, 2002, which the

circuit court incorporated into its July 3 decree of dissolution. The settlement agreement declared the parties' previous prenuptial agreement null and void, and it provided as follows regarding certain real property:

> (a) The parties acknowledge that the Respondent owns as his non-marital property the home which has served as the marital residence and the acreage upon which it lies. This property is known as the E.C. "Tip" Mudd farm. The parties agree that the Respondent shall grant to the Petitioner the marital residence and that portion of the curtilege [sic], including the barn, encompassed by a survey to be done by Reed Spaulding, III, and as currently flagged by mutual agreement of the parties. The Respondent will transfer title to his interest in this real estate to the Petitioner, but will retain the right of first refusal to purchase at the last accepted selling price if the Petitioner, her heirs, assigns, or executor, opts to sell the property during the Respondent's lifetime. The Petitioner is granted the right of ingress and egress over the roadway currently serving the property herein conveyed. The Respondent shall retain the tobacco allotment of the E.C. "Tip" Mudd farm in its entirety.
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> (b) The parties agree that the Respondent shall grant to the Petitioner his ownership of the tract of real estate which joins the aforementioned E.C. "Tip" Mudd Farm, which is known as the Riggs property, and is recorded in Deed Book 264, Page 144 at the Office of the Washington County Court Clerk. The Petitioner will transfer twenty (20) feet of said property adjacent to the north side of the respondent's roadway to the respondent to be his absolutely and in fee simple. The real estate taxes for the year 2002 shall be prorated between the

> parties as of the date of the conveyance of said property.

At some point in July 2002, after the entry of the divorce decree, the parties and their surveyor, Reed Spaulding, III, met at the property in order to conduct the final survey. The parties argued when they were unable to agree upon the flagging of the property, and the survey was not completed. However, in December 2002, Spaulding returned to the property and marked the southern boundary of the residential tract according to Glenda's instructions. When he did not find any flags marking the northern boundary of the residential tract, Spaulding located that boundary as being the same as the southern roadway boundary on a 1999 roadway survey.

Subsequently, pursuant to KRS 403.250(1) and CR 60.02(f), Glenda moved to modify the property settlement agreement as incorporated in the dissolution decree. In support thereof, Glenda alleged that the parties had flagged the property prior to the entry of the property settlement agreement, marking the northern boundary of the residential tract along the mowing line known by the parties as the "Riggs Boundary." Glenda further claimed that she had objected to the attempted survey in October 2002, because David and Spaulding had moved the flags from the positions where they were originally placed by the parties. Glenda further refused to

accept a deed based on a later flagging and the December 2002 survey, and she requested the court to find that the settlement agreement was ambiguous and to "hear evidence as to the point at which minds met and what was agreed to." Apparently in the alternative, Glenda requested the court to find that the agreement, if based upon the second flagging, was overreaching and unconscionable, because the resulting northern boundary placed her house and barn very close to the roadway and thereby decreased the size and value of her land as awarded in the settlement agreement. David responded by moving the court to find, if it enlarged Glenda's portion of the property awarded under the settlement agreement, that the agreement should be declared unconscionable and thus null and void.

An evidentiary hearing was held, and on May 17, 2004, the circuit court entered an order overruling Glenda's motion to modify the property settlement agreement. The court found that the agreement was ambiguous in its use of the phrase "as currently flagged by mutual agreement of the parties" and, in accordance with contract law,[1] it construed this phrase against Glenda as the drafter of the agreement.[2] Thus, the court fixed

[1] "Questions relating to the construction, operation and effect of separation agreements between a husband and wife are governed, in general, by the rules and provisions applicable to the case of other contracts generally." *Richey v. Richey*, 389 S.W.2d 914, 917 (Ky. 1965) (internal citation omitted).

[2] "[W]hen a contract is susceptible of two meanings, it will be construed strongest against the party who drafted and prepared it." *B. Perini & Sons*

the boundary between the two properties according to Spaulding's December 2002 survey. This appeal followed.

As set forth above, Glenda's motion for modification of the dissolution decree was premised on the ambiguity of the phrase "as currently flagged by mutual agreement of the parties." This court recently stated that

> [i]t is well established in the law that the intentions of the parties to a conveyance must be construed from the four corners of the instrument. Parol evidence is inadmissible unless the language of the document is ambiguous, thereby leaving the parties' intentions susceptible of more than one interpretation.[3]

Thus, the ambiguity of a contract determines whether parol evidence may be introduced to discern the contracting parties' intentions. Here, the circuit court agreed with Glenda's contention that the settlement agreement was ambiguous and ultimately construed the language of the agreement against her, as the drafter of the agreement.

On appeal, however, Glenda contends that the phrase was "more than ambiguous" and that the parties made mutual unilateral mistakes as to what was "currently flagged" for purposes of the settlement agreement. "The function of the Court of Appeals is to review possible errors made by the trial

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v. Southern Ry. Co., 239 S.W.2d 964, 966 (Ky. 1951) (internal citation omitted).

[3] *White Log Jellico Coal Co. v. Zipp*, 32 S.W.3d 92, 94 (Ky.App. 2000).

court, but if the trial court had no opportunity to rule on the question, there is no alleged error for this court to review."[4] Moreover, the scope of our "review is limited to the theory or theories upon which the case was tried."[5] In the matter now before us, Glenda did not raise the issue of mutual unilateral mistake below, so the issue is not preserved for our review.

Glenda's next argument is that "in the absence of an agreement the court must decide the issues of property equitably to both parties." However, the circuit court did not find that there was no agreement between the parties. Instead, pursuant to Glenda's urging, the court found that the agreement was ambiguous.

Moreover, courts are not directed to simply construe an ambiguous contract equitably between the contracting parties. Instead, "where the terms of a written contract are ambiguous extrinsic evidence is admissible to explain it."[6] Courts often turn to established rules of construction in order to determine ambiguous contracts' meanings.[7] For example, a court "will look to the intention of the parties and will consider the subject matter of the contract, the objects to be accomplished, the

[4] *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky.App. 1985).

[5] *Weissinger v. Mannini*, 311 S.W.2d 199, 201 (Ky. 1958).

[6] *Teague v. Reid*, 340 S.W.2d 235, 242 (Ky. 1960).

[7] *Warfield Natural Gas Co. v. Clark's Adm'x*, 257 Ky. 724, 734, 79 S.W.2d 21, 26 (1934).

situation of the parties and the conditions and circumstances surrounding them."[8] As a last resort the circuit court may, as here, construe a contract "more strongly against the party which drafted the document."[9] Contrary to Glenda's contention, a different result is not required by KRS 403.190, which specifically exempts from division in just proportions any property excluded by the parties' valid agreement.[10]

Finally, Glenda proffers that the court abused its discretion in overruling her motion to modify the property settlement agreement, because the agreement is unconscionable and overreaching. Further, she argues that the court's location of the boundary based on its interpretation of the property settlement agreement placed her house and barn very close to the roadway and thereby decreased the size and value of the property awarded to her in the divorce.

The party claiming that a separation agreement is unconscionable has the burden of proving that the agreement is "manifestly unfair and inequitable."[11] An agreement cannot "be held unconscionable solely on the basis that it is a bad

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[8] *McHargue v. Conrad*, 312 Ky. 434, 437, 227 S.W.2d 977, 979 (1950).

[9] *L.K. Comstock & Co. v. Becon Const. Co.*, 932 F.Supp. 948, 968 (E.D. Ky. 1994).

[10] KRS 403.190(2)(d).

[11] *Peterson v. Peterson*, 583 S.W.2d 707, 711 (Ky.App. 1979) (internal citation omitted).

bargain."[12] On appeal, we give broad deference to the trial court's exercise of its discretion, as it is in the best position to make the analysis.[13] Having carefully reviewed the evidence, we cannot say that the trial court abused its discretion.

The Washington Circuit Court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Daniel Carroll Kelly Springfield, Kentucky	Susan Hanrahan McCain Springfield, Kentucky

[12] *Id.* at 712.

[13] *Shraberg v. Shraberg*, 939 S.W.2d 330, 333 (Ky. 1997).