STATE OF MICHIGAN

COURT OF APPEALS

VIRGINIA MARY BUNTING,

Plaintiff-Appellee,

v

EDWIN HAROLD BUNTING,

Defendant-Appellant.

UNPUBLISHED
July 27, 2004

No. 246087
Washtenaw Circuit Court
LC No. 00-2853-DO

Before: Judges Sawyer, P.J., Gage and Owens, JJ.

PER CURIAM.

Defendant appeals as of right an order following a post-judgment evidentiary hearing, which, among other things, adopted the reconciliation of the special master, enforced the March 14, 2002 consent judgment of divorce, and awarded plaintiff $187,830.16 in funds deemed forfeited by defendant pursuant to *Sands v Sands*, 442 Mich 30; 497 NW2d 493 (1993). We affirm in part, reverse in part, and remand for modification of the consent judgment to conform to the settlement agreement placed on the record by the parties.

Defendant first argues that the court improperly delegated its judicial function to the special master and, as a result, the consent judgment must be vacated. We disagree.

Whether the appointment of a special master is unlawful is a question of law that is reviewed de novo. *Oakland Co Prosecutor v Beckwith*, 242 Mich App 579, 581; 619 NW2d 172 (2000). A trial court may not delegate its judicial power to an expert witness. *Id.* at 583, citing *Carson Fisher Potts & Hyman v Hyman*, 220 Mich App 116, 120-122; 559 NW2d 54 (1996). Here, the consent judgment required the special master to examine documents and prepare findings of fact, both of which were nondelegable judicial functions. *Carson Fisher Potts & Hyman*, *supra* at 121. Moreover, the fact that her findings were mere recommendations subject to challenge by the parties and modification by the court did not make her appointment permissible. *Oakland Co Prosecutor*, *supra* at 584. However, *Oakland Co Prosecutor*, *supra* at 581, and *Carson Fisher Potts & Hyman*, *supra* at 119, both involved appointments of special masters over objections of the appealing parties.

Plaintiff argues that because the parties in the instant case agreed to the special master's appointment, the court's appointment was not in error, and cites *Mitan v New World Television, Inc*, 469 Mich 892; 669 NW2d 813 (2003), to support her position. In lieu of granting leave to appeal, our Supreme Court reversed this Court's decision in *Mitan v New World Television, Inc*,

unpublished opinion per curiam of the Court of Appeals, issued November 12, 2002 (Docket No. 225530), stating that where a party requests the appointment of a special master with respect to discovery issues and fails to challenge the appointment, it is improper for this Court to reverse the circuit court's action. *Mitan, supra* at 892. The Supreme Court's reversal is binding if it "contains a concise statement of the applicable facts and the reason for the decision." *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1993),

The record indicates that defendant agreed to the appointment of a bookkeeper and failed to object to her subsequent appointment as a special master; however, it is not clear that defendant requested her appointment as a special master. Nevertheless, where a party is aware of a trial irregularity and remains silent, the party cannot later claim error upon receipt of an unfavorable verdict. *Samper v Boschma*, 369 Mich 261, 265; 119 NW2d 607 (1963). Thus, defendant's argument fails.

Defendant next argues that the consent judgment entered by the court failed to comport with the parties' settlement agreement on the record. We agree.

Interpretation of unambiguous contracts is a question of law. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). A property settlement agreement is a contract, and a judgment entered with respect to the parties' agreement is treated like a contract. *Gramer, supra* at 125. In the instant case, the parties reached a settlement agreement in open court on March 6, 2002, with respect to a partial distribution of their marital assets. When a property settlement agreement is reached on the record in open court it is binding pursuant to MCR 2.507(H). The parties were to sign the consent judgment on March 14, 2002. The day before the judgment was to be signed, defendant's attorney called the court and plaintiff's attorney to say that he would not be able to attend because he had a conflict. Plaintiff presented defendant a copy of the consent judgment, which contained twenty-seven pages of substantive terms, at the hearing. When defendant refused to sign the judgment, the court noted that the consent judgment comported with the agreement placed on record and signed it.

Generally, when a consent judgment is entered by the court, it is final and binding, and can only be set aside on a proper ground for relief pursuant to MCR 2.612(C)(1). *Staple v Staple*, 241 Mich App 562, 564, 572; 616 NW2d 219 (2000). "Absent fraud, duress, or mutual mistake, courts must uphold divorce property settlements reached through negotiation and agreement of the parties." *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999), citing *Bers v Bers*, 161 Mich App 457, 464; 411 NW2d 732 (1987). Nevertheless, "'[t]he primary goal in the construction or interpretation of any contract is to honor the intent of the parties.'" *Mikonczyk v Detroit Newspapers*, 238 Mich App 347, 349-350; 605 NW2d 360 (1999), quoting *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). If there is no meeting of the minds on all material facts, there is no valid contract. *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992).

Where a consent judgment has incorporated terms additional to those agreed to on the record with respect to a settlement agreement, this Court has refused to enforce it, stating that while the parties may indeed have contemplated incorporating additional provisions in the contract, they should have done so when the agreement was placed on the record rather than days afterward. *Mikonczyk, supra* at 350. "In the absence of evidence that the issue was contemplated and agreed on at the time the settlement agreement was made, we find no basis for

permitting defendants to unilaterally incorporate [an additional] provision into the agreement." *Id.* at 350-351. The drafter of the judgment must comply with the "plain and simple terms of the agreement as set forth on the record." *Id.* at 351.

In comparing the consent judgment with the settlement agreement on the record, we find that the consent judgment did not comport with the agreement on record with respect to the following items: the consent judgment improperly restricted defendant's ability to transfer or encumber the Kelly Lake and Townline Lake properties, improperly gave plaintiff a lien in all property awarded defendant, and permitted plaintiff to convey defendant's interest after all terms of the consent judgment had been satisfied while requiring defendant to immediately convey plaintiff's interest. There was clearly disagreement with respect to the lien provisions, and plaintiff should not have been permitted to unilaterally add the lien provisions to the consent judgment. *Mikonczyk, supra* at 350-351.

The consent judgment improperly included in the marital estate rents from the Cape Coral and Columbia properties. Although it is clear from previous orders and the agreement on record that the rents were to be deposited in the escrow account and included in the property settlement agreement in some fashion, it is not clear whether they were marital property or defendant's solely owned property. The parties did not agree on the record that the rents were part of the marital estate, only that they were to be considered in the reconciliation provided by the special master. Therefore, to the extent that the consent judgment provided that the rents were marital property, the judgment impermissibly unilaterally added a provision. *Mikonczyk, supra* at 350-351.

Because the parties specifically did not consent to release all claims, the unilateral provision requiring release was improper. *Mikonczyk, supra* at 350-351. The consent judgment improperly limited personal property to property other than cash and motor vehicles. *Id.* Because plaintiff agreed to award defendant the jewelry, the consent judgment should have provided this award. Failure to do so was inconsistent with the agreement on record. Because drafters must comply with the plain terms of the agreement on record, *Mikonczyk, supra* at 351, failure to award defendant the jewelry was error.

Defendant next argues that the trial court abused its discretion by not adjourning the proceedings when defendant's attorney notified the court that he could not attend because of a prior trial commitment. We disagree.

A court's refusal to grant a continuance is reviewed for an abuse of discretion. *Soumis v Soumis,* 218 Mich App 27, 32; 553 NW2d 619 (1996). When defendant refused to sign the consent judgment, the trial court noted that defendant's attorney had notified the court the day before that he could not attend the entry of judgment because of a criminal proceeding that was supposed to have been adjourned. The court stated that it would sign the order because defendant's attorney waited until the last minute to contact the court, and the consent judgment comported with the agreement on record. Unlike the court rule with respect to attorney scheduling conflicts during trial, MCR 2.501(D), there is no requirement for attendance with respect to entry of judgment under MCR 2.602. Therefore, defendant's attorney was not required to be present to execute the consent judgment. Because the attorney was not required to be present, there was no evidence of good cause required to adjourn. *Soumis, supra* at 32, citing *Zerillo v Dyksterhouse,* 191 Mich App 228, 230; 477 NW2d 117 (1991).

Nevertheless, defendant cites *People v Williams*, 386 Mich 565, 578; 194 NW2d 337 (1972), to support his claim that the court abused its discretion. Our Supreme Court in *Williams* indicated that it was an abuse of discretion to deny a continuance where (a) the party was asserting a constitutional right, (b) there was a legitimate reason for asserting the right, (c) the party was not negligent, and (d) the party had not caused delays in the trial. *Id.* However, defendant has not met the elements of the *Williams* test. A party is constitutionally guaranteed the right to counsel in criminal cases, not civil cases. *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2002). Therefore, defendant cannot meet the first element of the *Williams* test.

Moreover, attorneys are not required to be present when a judgment is entered, so defendant is unable to meet the second element. With respect to the third element, the court noted that defendant's attorney was aware for some time about the schedule conflict, was aware of the conflict when he agreed to the date for entry of judgment, and only mentioned the proceeding to the court and opposing counsel the night before the entry of judgment. MCR 2.501(D)(2) provides that counsel has a responsibility "to notify the court as soon as the potential conflict becomes evident." Therefore, defendant's attorney had a duty to notify the court of the *potential* conflict. Because he did not do so, he breached the duty, and the need for the continuance was caused by this breach. Thus, defendant's counsel was negligent. As noted by this Court in *Pascoe v Sova*, 209 Mich App 297, 300; 530 NW2d 781 (1995):

> "An attorney's negligence or mistake is distinguishable, as regards the right to reopen a default judgment, from his abandonment of the case, which may be in effect a fraud on his client. So that the mere fact that the attorney's negligence may be imputable to his client and prevent the latter from relying on that ground for vacating or opening a default judgment, it does not necessarily follow that the same rule will apply in the event of the attorney's abandonment of the case." [*Pascoe, supra* at 300, quoting *White v Sadler*, 350 Mich 511, 523; 87 NW2d 192 (1957).]

Therefore, because an attorney's negligence can be imputed to his client, defendant cannot use his attorney's failure to appear as a ground to set aside the consent judgment. *Id.* With respect to the last element, the record is replete with show cause motions and motions to compel discovery filed by plaintiff, as well as several instances of defendant secreting assets. Therefore, defendant has caused numerous delays in the trial and is unable to meet the last element. Moreover, because the settlement agreement was memorialized on the record in open court, it was binding on the parties; the consent judgment merely purported to state the parties' agreement, and the court indicated that the judgment could be modified if there were any discrepancies between the judgment and the agreement on record. Thus, no abuse of discretion occurred.

Defendant next argues that the court abused its discretion by quashing defendant's subpoenas where defendant had evidence that the special master had miscategorized expenditures. We disagree.

A trial court's decision to deny a discovery request is reviewed for an abuse of discretion. *Chastain v Gen Motors Corp (On Remand)*, 254 Mich App 576, 593; 657 NW2d 804 (2002), citing *Harrison v Olde Financial Corp*, 225 Mich App 601, 614; 572 NW2d 679 (1997). Although the underlying facts and data were discoverable, MCR 2.302 and MRE 703 and 705, it

was not necessarily an abuse of discretion to deny discovery in the instant case. A trial court has discretion to limit excessive or abusive discovery. *Chastain, supra* at 593. This Court has held that where a party requests discovery years after the discovery period is closed in an effort to open a new theory of recovery just before trial, the court does not abuse its discretion by denying the request. *Id.* at 593-594. A party may not argue that an error occurred that requires reversal where the party intentionally or negligently contributed to the error. *Harville v State Plumbing & Heating*, 218 Mich App 302, 323-324; 553 NW2d 377 (1996). The court noted that the special master did the best she could with the information provided given the level of cooperation from the parties. Because of defendant's dilatory actions, the court was within its discretion to quash defendant's subpoenas.

Defendant next argues that the court should not have adopted the special master's reconciliation where she acknowledged that she did not investigate the parties' transactions before the complaint for divorce was filed because pre-divorce conduct is relevant to determine an equitable distribution of property. We disagree.

A trial court may not alter "settlements reached through negotiation and agreement of the parties." *Quade, supra* at 226, citing *Bers, supra* at 464. The relevant portion of the agreement on record indicated that the parties agreed the reconciliation would start on the date of filing. Because the parties agreed that the date of filing was when the reconciliation would start, the court did not have the authority to order a different starting point. *Quade, supra* at 226, citing *Bers, supra* at 464. Moreover, there was no indication until months after the reconciliation was finalized that defendant challenged the starting date. A party cannot agree to an action at the trial court level and then raise the action as error on appeal. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997). It was defendant's burden to prove his allegations that plaintiff engaged in pre-divorce planning. "A party asserting a claim has the burden of proving its damages with reasonable certainty," and "damages based on speculation are not recoverable." *Berrios v Miles, Inc,* 226 Mich App 470, 478; 574 NW2d 677 (1997).

Defendant argues that the court erroneously determined that defendant had forfeited $187,830.16 to plaintiff solely because defendant attempted to conceal the Jackson National life insurance policies. We disagree.

A trial court's decision whether to award forfeiture of assets is reviewed for an abuse of discretion. *Sands, supra* at 34. The test for an abuse of discretion is very difficult to prove. *Sparks v Sparks*, 440 Mich 141, 150-151; 485 NW2d 893 (1992). "There is no automatic rule of forfeiture." *Sands, supra* at 31. Because the order following the post-judgment evidentiary hearing referenced the *Sands* doctrine, we do not perceive that the court awarded the forfeiture solely on the basis that defendant attempted to conceal assets. The doctrine in *Sands, supra,* outlined numerous factors to be considered when making a dispositional ruling:

> "(1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity." [*Sands, supra* at 35, quoting *Sparks, supra* at 159-160.]

Here, the parties had been married for approximately thirty years, and plaintiff actively contributed to the increase in the marital estate. Both parties were retired and financially well off, not in good health, and were in their late 60s or early 70s. With respect to past relations and conduct of the parties, defendant's behavior left much to be desired. He violated the restraining order on numerous occasions by removing money from accounts. Defendant sent plaintiff a threatening audiotape and impaled items on her fence. He falsely reported to police that the person hired to appraise the vehicles had stolen them. He refused to sign listing agreements, even when ordered to sign them by the court. He transferred the Merrill Lynch accounts to Jackson National, then refused to disclose their whereabouts. When the policies were discovered, defendant refused to comply with the court's order to sign a release so that plaintiff could determine their value. He encouraged land contract vendees to delay payments, then denied doing so. He filed motions without counsel's knowledge and refused to let his attorney sign any documents. Given that this evidence was presented to the trial court, the court's determination that the Jackson National life insurance policies were forfeited was not an abuse of discretion.

Affirmed in part, reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Donald S. Owens