TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00665-CV

Daniel Wiegrefe, Appellant

v.

Jennefer Wiegrefe, Appellee

FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 368TH JUDICIAL DISTRICT NO. 16-0709-C368, HONORABLE RICK J. KENNON, JUDGE PRESIDING

D I S S E N T I N G O P I N I O N

I respectfully dissent. In particular, I disagree with the majority's analysis of the third bill-of-review element as it relates to this case: fault or negligence on the part of Jennefer, the bill-of-review plaintiff. On the record before us, it is evident that a drafting error by Daniel's attorney resulted in a significant asset (an Edward Jones account in the approximate amount of $160,000) (the Account) being awarded to Daniel in the final divorce decree, even though the parties specifically agreed in a mediated settlement agreement (MSA) that the asset would be awarded to Jennefer. The MSA was a nine-page document with two exhibits listing personal property and a spreadsheet of assets. The MSA assigned the task of drafting the divorce decree to Daniel's attorney. The MSA was then formalized into a 42-page agreed Final Decree of Divorce. The Account in question was one of five Edward Jones accounts listed in the decree by either ten-digit account numbers or five-digit account-number abbreviations. There were other types of accounts listed in

the decree by account numbers as well. One line in the decree listed the Account in the section "Property Awarded To Husband" when it should have been listed in the section "Property Awarded to Wife." Neither the parties nor their counsel caught this error before they signed the decree.[1] The record indicates that Daniel and his attorney went to court to prove up the divorce and have the decree signed by the trial judge. No reporter's record was made of this proceeding. Following the entry of the decree, Daniel's attorney never provided a copy of the signed decree to Jennefer's attorney, despite repeated requests.

The majority analyzes Jennefer's fault or negligence as it relates to the two errors that the trial court found Daniel committed, one before the trial court signed the final decree (the drafting error) and one after the trial court signed the final decree (the delivery error). I disagree with the majority's analysis related to both errors.

The pre-decree drafting error

In its findings of fact and conclusions of law, the trial court concluded that Jennefer "had a meritorious ground for new trial or appeal as the *Agreed Final Decree of Divorce* did not comply with the terms of the MSA" because of all parties' mutual mistake in drafting the final decree. At the moment the trial judge signed the decree containing the drafting error, Jennefer's meritorious ground of appeal—mutual mistake—arose and the trial court's plenary power began to run. I disagree with the majority's conclusion that because Jennefer and her attorney were negligent

[1] Daniel testified that he "could not recall" when he discovered that the Account was mistakenly awarded to him in the decree. The trial court ultimately found that the drafting error was the result of mutual mistake, not fraud.

or at fault in signing the final decree containing this drafting error, any error by Daniel or his attorney made in drafting the document was therefore not "unmixed" with Jennefer's error, and thus, Jennefer's error serves as a basis for denying her bill of review. In my view, this conflates the required elements of a bill of review and focuses the analysis on the wrong time frame, considering the particular facts of this case.

The majority's conclusion that Jennefer's meritorious defense is also the "fault" that precludes her bill of review essentially eliminates the second element of the analysis. The second element of the analysis in a case involving a party's failure to file a timely motion for new trial or a timely appeal requires the bill-of-review plaintiff to establish that *she was prevented from making a timely appeal* by the fraud, accident or wrongful act of the opposing party or by an official mistake. *Petro-Chem. Transp., Inc. v. Carroll*, 514 S.W.2d 240, 243-46 (Tex. 1974). In my opinion, it is this second element that must be unmixed with any fault or negligence on the part of the bill-of-review plaintiff, not the first element of a meritorious ground for appeal. *Id.* Necessarily, this second element points the analysis to the time frame of the trial court's plenary power. *See Clarendon Nat'l Ins. Co. v. Thompson*, 199 S.W.3d 482, 488 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("[W]hen a plaintiff complains that it lost the opportunity to request a motion for new trial, the relevant inquiry with regard to plaintiff's negligence becomes whether its negligence resulted in its losing the right to file a motion for new trial.") (citing *Petro-Chem. Transp.*, 514 S.W.2d at 246)). Relevant to this case, the trial judge signed the decree on March 28, 2016, and its plenary power to entertain a motion for new trial or other plea expired on April 27, 2016. In my view, Jennefer needed to prove absence of fault or negligence in failing to file a motion for new trial or a timely

appeal during the period of the trial court's plenary power, not an absence of fault or negligence in the rendering of the incorrect judgment.

Although I view any fault or negligence by Jennefer in signing the agreed Final Decree of Divorce as relevant to the merits of her prima facie meritorious ground for appeal, I must note that in my opinion this case is factually distinguishable from the contract cases cited by the majority that stand for the principle that parties should be held to the terms of the contract they sign. *See, e.g.*, *National Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 425 (Tex. 2015); *Malott v. Murchison*, 337 S.W.2d 190, 193 (Tex. Civ. App.—Austin 1960, no writ). Certainly, that is a well-established rule of law, but its application here as a basis for precluding Jennefer's bill of review—and allowing Daniel to avoid his contractual agreement in the MSA—is misplaced. The trial court's finding of a mutual drafting mistake by the parties, which is unchallenged by Daniel,[2] renders the case principles in *Westergren* and *Malott* inapposite. *Schwartz v. Schwartz*, 247 S.W.3d 804, 806 (Tex. App.—Dallas 2008, no pet.) ("As with any other contract, absent consent of the parties, the provisions of the [divorce] agreement will not be modified or set aside except for fraud, accident or mutual mistake of fact."). Mutual mistake serves as a basis for rescission, reformation, or avoidance of contract obligations, not as a rationale for the enforcement of contract obligations. *See Samson Expl., LLC v. T.S. Reed Props., Inc.*, No. 15-0886, 2017 WL 2713047, at *8 (Tex. June 23, 2017) (explaining that scrivener's failure to embody true agreement of parties

[2] Daniel asserts that the mutual drafting mistake is not a "mistake" for purposes of a bill of review, but he does not specifically challenge or deny that a mutual drafting mistake occurred. In fact, Daniel uses this finding by the trial court to support his assertion that there is no evidence that he committed fraud.

provides grounds for equitable remedy of reformation based on mutual mistake); *Myrad Props., Inc. v. LaSalle Bank Nat'l Ass'n*, 300 S.W.3d 746, 751 (Tex. 2009) ("Rescission is an available equitable remedy if mutual mistake is shown."); *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 178 (Tex. 1997) ("[A] release is a contract, and like any other contract, is subject to avoidance on grounds such as fraud or mistake."). The record indicates that all material terms in the parties' divorce proceedings were settled by the MSA. The only change to the terms of the decree now sought by Jennefer is to correct the ownership of the Account to comport with that original agreement. Daniel agrees that the Account in question was awarded to Jennefer in the MSA pursuant to the parties' agreement, but the record reflects that he would not agree to correct the drafting error. The record also indicates that Daniel told Jennefer she could go after her lawyer's malpractice insurance for the amount in the Account. The record demonstrates that Daniel seeks to benefit from the mutual mistake notwithstanding the contractual obligations in the MSA.[3]

Relatedly, the majority points to the merger clause in the decree as support for its analysis of Jennefer's negligence in approving the contents of the final divorce decree. The merger clause provides: "To the extent there exist any differences between the [MSA] and this Final Decree of Divorce, this Final Decree of Divorce shall control in all instances." Generally, the merger doctrine prevents admission of parol evidence such as a variance between prior agreements and the

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[3] The MSA contained the following language in the typeface shown below:

> **THIS AGREEMENT IS NOT SUBJECT TO REVOCATION.**
>
> **THE PARTIES AGREE THAT EITHER PARTY TO THIS AGREEMENT IS ENTITLED TO ENTRY OF JUDGMENT IN ACCORDANCE WITH THE TERMS OF THIS MEDIATED SETTLEMENT AGREEMENT AND AGREE TO REQUEST THAT THE COURT HAVING JURISDICTION HEREIN ENTER JUDGMENT FORTHWITH IN ACCORDANCE WITH THIS MEDIATED SETTLEMENT AGREEMENT.**

final contract at issue. *See Alvarado v. Bolton*, 749 S.W.2d 47, 48 (Tex. 1988); *Springs Window Fashions Div., Inc. v. Blind Maker, Inc.*, 184 S.W.3d 840, 869 (Tex. App.—Austin 2006, pet. granted, judgm't vacated w.r.m.) ("The merger doctrine is an adjunct of the parol-evidence rule."). But this doctrine is usually inapplicable in the case of a mutual mistake by the contracting parties. *See Geodyne Energy Income Prod. P'ship I-E v. Newton Corp*., 161 S.W.3d 482, 487 (Tex. 2005) (concluding that, despite merger doctrine, prior agreements are not merged into deed signed due to fraud, accident, or mistake); *Commercial Bank, Uninc. of Mason, Tex. v. Satterwhite*, 413 S.W.2d 905, 909 (Tex. 1967). In light of the trial court's unchallenged finding of mutual mistake, the majority's emphasis on contract and merger cases seems misplaced. Those cases do not provide support for the majority's ultimate conclusion that the trial court abused its discretion in granting Jennefer's petition for bill of review.

For all these reasons, I disagree with the majority's conclusion that Jennefer's pre-decree negligence or fault in approving the contents of the final divorce decree was not "unmixed" with Daniel's drafting error for purposes of the bill-of-review requirements. Instead, I would conclude that the trial court's finding of mutual mistake provides Jennefer with the meritorious ground of appeal required for a bill of review. I would consider only whether Jennefer had any fault or negligence *after* the decree was signed that "mixed" with Daniel's fraud, accident, or wrongful acts to prevent her from making a timely appeal.

The post-decree delivery error

I also disagree with the majority's conclusion that "Jennefer or her attorney was negligent or at fault in failing to timely obtain a copy of the divorce decree, read it, and discover the

mistake" and that this negligence means that any error Daniel or his attorney made in not providing a copy of the decree to Jennefer after entry is therefore not "unmixed" with Jennefer's error. We review a trial court's decision to grant a bill of review for an abuse of discretion, indulging every presumption in favor of the trial court's ruling. *Sweetwater Austin Props., L.L.C. v. SOS All., Inc.*, 299 S.W.3d 879, 886 (Tex. App.—Austin 2009, pet. denied). We will not disturb the trial court's ruling unless it acted in an arbitrary and unreasonable manner or without reference to guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985); *Sweetwater Austin Props.*, 299 S.W.3d at 886. Under an abuse-of-discretion standard, we defer to the trial court's factual determinations if they are supported by evidence. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding).

In my opinion, the trial court's conclusion that Jennefer "was prevented from timely filing a motion for new trial or appeal due to not receiving the *Agreed Final Decree of Divorce* as required by local custom and practice" must be considered in the context in which it occurred—the prove-up of the parties' settlement agreement. In this situation, the parties had already resolved their differences through settlement, and no one intended to appeal the final judgment. Having reviewed the agreed decree before the prove-up hearing (and not having discovered the error then), there is no reason to expect that Jennefer or her attorney would be seeking a copy of the final decree to scrutinize it for appealable errors. Therefore, I would defer to the trial court's conclusion that Jennefer's failure to discover the drafting error until after the court's plenary power expired was not due to negligence on her part.

The trial court heard the testimony of Jennefer's attorney, Jennefer, and Daniel and reviewed the MSA and divorce decree. The parties agreed in the MSA that Daniel and his attorney would go to court to handle the prove-up of the divorce; consequently, Jennefer and her attorney were not present at that proceeding. The testimony demonstrated that Daniel's attorney never sent a copy of the signed decree to Jennefer's attorney after it was entered, despite multiple requests from Jennefer's attorney, and contrary to the common practice of attorneys to provide each other with copies of signed orders. Daniel testified that he could not recall when he realized the Account had been assigned to him in the decree but admitted that he never discussed or reached an agreement with Jennefer to assign or give the Account to him at any time after they signed the MSA. The trial court also heard evidence that on May 16, 2016, Jennefer went to the courthouse and obtained a copy of the decree herself. The record further indicates that her attorney did not keep billing records after the decree was entered and considered the case to be over. There was no indication in the record that Jennefer or her attorney knew or had reason to believe the final decree deviated from the MSA. Daniel has not advanced any reason other than asserting that Jennefer and her attorney were negligent by signing the decree containing the error and then by not catching the error before the court's plenary power expired. The trial court ultimately made fifteen Findings of Fact and eight Conclusions of Law and found that Jennefer was prevented from timely filing a motion for new trial or appeal due to not receiving a copy of the decree, as required by local custom and practice, and that Jennefer was not negligent in not bringing her motion for new trial or appeal before the Court's plenary power expired.

In deciding that this was an abuse of discretion, the majority seems to re-weigh the evidence. The majority concludes that Jennefer was negligent because she could have obtained a copy of the final decree at any time after it was signed and then extends that conclusion into an assumption that Jennefer would not have discovered the mistake before the trial court lost plenary power, even if she had received the decree on the same day it was signed, because she had a copy of the decree for a period of 44 days before she discovered the mistake. One could also speculate that Jennefer would have discovered the mistake sooner if she had received the decree sooner. The majority's assumption that she would not have is not supported by direct evidence in the record and seems to simply second-guess the trial court's review of the evidence and exercise of discretion, which is beyond the scope of our appellate review. *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005).

While the third bill-of-review element requires a party to show its lack of fault or negligence in failing to timely make a motion for new trial or to timely appeal, there is no requirement that a party must show it diligently monitored the status of a case after it is over. *See Mabon Ltd. v. Afri-Carib Enters., Inc*., 369 S.W.3d 809, 813 (Tex. 2012). This principle seems particularly applicable after a case has been settled.[4] Daniel has cited no cases, and I have found none, that require a party such as Jennefer, following a divorce settlement resulting in a MSA, entry

[4] The record clearly demonstrates that once Jennefer discovered the error, she immediately pursued legal remedies to correct it. *See Tice v. City of Pasadena*, 767 S.W.2d 700, 702 (Tex. 1989) (requiring party to exercise due diligence to avail himself of all adequate legal remedies against former judgment before filing bill of review); *Purdue v. Patten Corp.*, 142 S.W.3d 596, 606 (Tex. App—Austin 2004, no pet.) (requiring party to prove exercise of due diligence or show good cause for failing to exhaust legal remedies before filing bill of review).

of a decree supposedly in accordance with the terms of the MSA, and the resulting termination of the case, to obtain a copy of the file-stamped decree within 30 days of signing and scrutinize it for errors (or to keep her attorney on the clock to do so for her) or else be "negligent" for purposes of a petition for a bill of review. Findings of fault and negligence are inherently factual and case-specific, which is why we defer to the trial court's findings absent a clear abuse of discretion. On the facts presented by this record, I would conclude that the trial court did not abuse its discretion by granting Jennefer's petition for a bill of review.

For the foregoing reasons, I would instead affirm the trial court's order granting the petition for review. Accordingly, I respectfully dissent.

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Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Field and Bourland

Filed: August 29, 2017