[Cite as *Killa v. Killa*, 2004-Ohio-566.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CHRISTINE M. KILLA, PLAINTIFF-APPELLANT, VS. DANIEL W. KILLA, DEFENDANT-APPELLEE.	)))))))))	CASE NO. 03 MA 101 OPINION

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court, Domestic Relations Division Case No. 02 DR 633
JUDGMENT:	Affirmed
APPEARANCES:	
For Plaintiff-Appellant:	Attorney Joseph F. Rafidi 3627 South Avenue Youngstown, Ohio 44502
For Defendant-Appellee:	Attorney Jeffrey V. Goodman 252 Seneca Avenue, N.E. Warren, Ohio 44481

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: February 6, 2004

DONOFRIO, J.

{¶1} Plaintiff-appellant, Christine M. Killa, appeals from a Mahoning County Common Pleas Court, Domestic Relations Division decision granting her a divorce from defendant-appellee, Daniel W. Killa, and denying her motion to vacate the court's implementation of a shared parenting plan within the divorce decree.

{¶2} The parties were married on February 28, 1998. They share two children, Tyler Nicholas (d.o.b. 8/21/96) and Nikolas Anthony (d.o.b. 1/21/99). Appellant filed for a divorce on September 18, 2002. Both parties requested that the court name them the children's residential parent. The court named appellant as the residential parent during the pendency of the divorce and appointed a guardian ad litem (GAL) for the children.

{¶3} The parties began settlement negotiations and eventually reached an agreement, which was read into the record. Per the agreement, the parties entered into a shared parenting plan whereby appellee was designated residential parent for school purposes and the children were to reside with appellee. Appellant was to have liberal parenting time by agreement of the parties, but not less than the court's standard order of parenting time.

{¶4} The court then filed a judgment entry on May 6, 2003, ordering the parties to reduce the agreement to writing and submit a signed judgment entry to the court. The order stated that if the court did not receive a signed judgment entry by June 6, 2003, it would dismiss the case and/or impose sanctions. Appellee's counsel prepared a judgment entry. However, appellant refused to sign it. Instead, on May 19, 2003, appellant filed a Civ.R. 60(B) motion to vacate the settlement agreement. For cause, appellant alleged that she believed a previous agreed to shared parenting plan was going to be in effect upon the parties' divorce. She also alleged she was distraught over the GAL's recommendation, had been ill for a week, and was unable to think clearly. She further claimed she was unable to comprehend her counsel's

advice. Finally, she asserted she was not afforded the opportunity to question the GAL.

{¶5} On June 9, 2003, the court entered the final decree of divorce incorporating the parties' consent decree and denying appellant's motion to vacate. Appellant filed a motion for stay first with the trial court and then with this court. Both the trial court and this court denied the motion. But this court agreed to expedite the case. Appellant filed her timely notice of appeal on June 13, 2003.

{¶6} Appellant raises three assignments of error, the first of which states:

{¶7} "THE TRIAL COURT ERRED BY REFUSING TO GRANT APPELLANT'S MOTION TO VACATE JUDGMENT ENTRY."

{¶8} Appellant contends the trial court erred in denying her Civ.R. 60(B) motion to vacate the settlement agreement. She compares her case to that of criminal defendants who are afforded an opportunity to change their guilty pleas subsequent to entering into a plea agreement. Appellant points out that Crim.R. 32.1 provides defendants with a right to withdraw a guilty plea prior to sentencing. She acknowledges that this right is not absolute, but notes that the trial court must conduct a hearing to determine whether there is a legitimate reason to allow the defendant to withdraw his or her plea. Citing, *State v. Xie* (1992), 62 Ohio St.3d 521. Appellant requests that she be given this same opportunity to have a hearing for the court to determine whether she has a legitimate reason to withdraw her consent to the settlement agreement.

{¶9} Appellant further contends that she misunderstood the terms to which she consented. She blames this on being overwhelmed by illness, personal grief, and the pressure to settle. Appellant asserts that she was incapable of comprehending the advice of her counsel, thus she could not give an informed consent.

{¶10} An appellate court will not reverse a trial court's ruling on a Civ.R. 60(B) motion absent a showing of abuse of discretion. *State ex rel. Russo v. Deters* (1997), 80 Ohio St.3d 152, 153. Abuse of discretion connotes more than an error in judgment;

it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶11} The Ohio Supreme Court set out the controlling test for Civ.R. 60(B) motions in *GTE Automatic Elec., Inc. v. Arc Industries, Inc.* (1976), 47 Ohio St.2d 146. The court stated:

{¶12} "To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." Id. at paragraph two of the syllabus.

{¶13} Additionally, "if the Civ.R. 60(B) motion contains allegations of operative facts which would warrant relief from judgment, the trial court should grant a hearing to take evidence to verify those facts before it rules on the motion. Conversely, an evidentiary hearing is not required where the motion and attached evidentiary material do not contain allegations of operative facts which would warrant relief under Civ.R. 60(B)." (Internal citations omitted.) *State ex rel. Richard v. Seidner* (1996), 76 Ohio St.3d 149, 151.

{¶14} The trial court held a hearing on June 6, 2003, to determine why the parties had not submitted the agreed judgment entry and to rule on appellant's Civ.R. 60(B) motion. (June 9, 2003 judgment entry). Thus, the court did provide appellant with a hearing. The court then analyzed the issue in its judgment entry of divorce. It discussed the binding nature of a settlement agreement, including an oral settlement agreement. It found that it questioned appellant extensively about the settlement and gave her several opportunities to voice any dissatisfaction with it. It further found appellant spoke with her counsel numerous times during the proceeding to discuss her options. The court noted that it questioned her about being pressured, whether she understood everything, and whether she was under any condition that would hamper

her ability to understand. The court found that appellant voluntarily entered into the settlement agreement, therefore it would bind the parties to the agreement. Accordingly, the court denied appellant's Civ.R. 60(B) motion.

{¶15} Turning to the first *GTE* requirement, appellant submitted her own affidavit with her motion to vacate. In her affidavit, appellant claimed she was ill for the week leading up to the settlement conference. She stated that she forced herself to appear at the conference because she believed she would have the opportunity to question the GAL regarding his recommendation.[1] Appellant stated she was weak and even though the court questioned her regarding her understanding of the agreement, she was taken off guard by the GAL's recommendation and was too exhausted from her illness to think clearly when the court questioned her. Additionally, she claimed she did not fully understand her counsel's advice and felt she had no other recourse. Appellant next averred that at a settlement conference in March, she and appellee agreed to a shared parenting plan whereby the children would reside with her and appellee would have liberal visitation. She claimed that the day before the parties entered the settlement agreement on the record, she asked appellee if he still agreed to a shared parenting plan where the children would reside with her and he said yes. Appellant asserted that at the May 6, 2003 proceeding before the court, she believed the court was adopting the alleged shared parenting plan where the children would reside with her. Finally, appellant contended that the GAL was discriminatory towards her and did not investigate her case fully.

{¶16} Appellant does not have a meritorious claim or defense to present. At the hearing, the court made sure that appellant was well aware of what she was agreeing to and that she wanted to settle the case. Appellee's counsel read the parties' agreement into the record. As he read the agreement, the court and appellant interrupted and asked questions. For instance, when counsel stated that the children were going to move with appellee to Sharon, Pennsylvania and attend school there,

[1] The GAL's report is not included in the record. However, from the statements made by appellant, it seems the report was unfavorable to her.

the court interrupted with a question. It then asked appellant if this statement was correct. The following colloquy took place:

{¶17} "THE COURT: Is that correct, Mrs. Killa?

{¶18} "MS. KILLA: That's what I'm told, yes.

{¶19} "THE COURT: Is that what you're happy with?

{¶20} "MS. KILLA: No, Your Honor, I'm not happy with any of this, but this is the agreement.

{¶21} "THE COURT: Pardon me?

{¶22} "MS. KILLA: This is the agreement that we decided.

{¶23} "THE COURT: You don't have to agree to something you're not happy with. I'm going to ask questions. If you're not satisfied, I'm not going to approve the agreement.

{¶24} "MS. KILLA: Well, I do know quite a bit about Sharon Local School System. I work in Sharon, Pennsylvania. And I do know it is not a good school system.

{¶25} "THE COURT: Well, then, are you asking me to try this case then on the issues?

{¶26} "MR. RAFIDI [appellant's counsel]: Is that what you want to do?

{¶27} "THE COURT: Because you have to be satisfied with this agreement. I'm going to ask questions. If you tell me you're not satisfied, then I'm going to just say forget it; we'll try the case, and I'll make the decision." (Tr. 7-8).

{¶28} The court then explained some things to appellant about appellee moving to Pennsylvania and appellant's counsel stated that appellant was consenting to appellee moving to Sharon. Once again, the court asked:

{¶29} "THE COURT: So you're saying by this agreement - - so that's why I'm asking you right now are you satisfied with the shared parenting plan including the provision that's letting Mr. Killa remove the children from the State of Ohio to Pennsylvania after the school year of June 2003?

{¶30} "MS. Killa: Yes, I do." (Tr. 9).

{¶31} Again, the court wanted to be sure appellant was in agreement with the settlement, so it asked her:

{¶32} "THE COURT: Okay. Now, before you said you weren't satisfied; you weren't happy; you did not like the school system. After you heard the explanation that if you didn't permit this he could come in and file a motion, say, Judge, I want to move to Pennsylvania and these are the reasons for it, and you could file your motions and everything else, and then we could have a hearing, are you sure after all this explanation, after talking with your counsel, that you're satisfied with this provision of this shared parenting plan?" (Tr. 9-10).

{¶33} Appellant requested that she ask a question. The court told her to ask her attorney and they went off the record while appellant consulted with her attorney. (Tr. 10). When they went back on the record, the court asked appellant if her attorney provided her with a satisfactory response to her question, to which she responded, "Yes." (Tr. 10). The court then asked her if she understood her attorney's response, to which she again responded, "Yes, I did." (Tr. 10).

{¶34} The court then asked both parties a series of questions including whether they believed the shared parenting agreement was in the children's best interests, whether the liberal visitation schedule served the children's best interests, and whether they were satisfied with the parenting arrangement for school purposes. (Tr. 10-12). Appellant answered all of these questions in the affirmative. (Tr. 10-12).

{¶35} Counsel continued reading the settlement agreement into the record and appellant interrupted a few more times to ask her attorney questions on issues regarding property division and spousal support. (Tr. 16, 19, 22-23).

{¶36} After appellee's counsel finished reading the agreement in full, the court again questioned the parties:

{¶37} "THE COURT: * * * Do you understand the shared parenting agreement as read into the record and those portions that will be set forth or reduced to writing, and you'll sign off of that shared parenting plan? Do you understand that, Mrs. Killa?

{¶38} "MS. KILLA: Yes, I do.

{¶39} "* * *

{¶40} "THE COURT: Are you satisfied with every provision of that shared parenting plan for the best interest of the children?

{¶41} "MS. KILLA: Yes.

{¶42} "* * *

{¶43} "THE COURT: Do you have any questions or concerns or any misunderstandings about any portion of that shared parenting plan?

{¶44} "MS. KILLA: No.

{¶45} "* * *

{¶46} "THE COURT: Is it your intent that you're going to live by the shared parenting plan day in and day out, Mrs. Killa?

{¶47} "MS. KILLA: Yes.

{¶48} "* * *

{¶49} "THE COURT: Now, do we have any questions or comments we need to address with regard to the shared parenting plan?

{¶50} "MS. KILLA: No." (Tr. 30-32).

{¶51} The court then discussed the other aspects of the agreement. Finally, in an effort to ensure the parties knew exactly what they were doing, the court asked them another series of questions:

{¶52} "THE COURT: * * * Are you satisfied in total with this full agreement, Mrs. Killa?

{¶53} "MS. KILLA: Yes.

{¶54} "* * *

{¶55} "THE COURT: Are you satisfied with the representation of your attorney?

{¶56} "MS. KILLA: Yes.

{¶57} "* * *

{¶58} "THE COURT: Do you feel pressured by me as the Judge in this court to settle your case in this manner, specifically with the term that I would not accept the three years of nonmodifiable child support?

{¶59} "MS. KILLA: Yes.

{¶60} "THE COURT: You're still satisfied with this agreement?

{¶61} "MS. KILLA: Yes.

{¶62} "* * *

{¶63} "THE COURT: When you look at the whole agreement can you live with it day in and day out?

{¶64} "MS. KILLA: Yes.

{¶65} "* * *

{¶66} "THE COURT: Are either one of you under any prescription drugs, nonprescription drugs, legal drugs, illegal drugs, that you've taken for the first time, taken too much of, taken too little of the drug, and that's stopping you from thinking clearly?

{¶67} "MS. KILLA: No.

{¶68} "* * *

{¶69} "THE COURT: Okay. Are the emotions of this divorce or something else that's going on in your life too tragic that you can't think about this agreement today?

{¶70} "MS. KILLA: No.

{¶71} "* * *

{¶72} "THE COURT: Are you under any physical condition that's stopping you from thinking clearly today?

{¶73} "MS. KILLA: No.

{¶74} "THE COURT: Are you satisfied with this agreement?

{¶75} "MS. KILLA: Yes.

{¶76} "* * *

{¶77} "THE COURT: Are you asking me as the Judge in this court to adopt the shared parenting plan and the agreement to settle your marital differences?

{¶78} "MS. KILLA: Yes." (Tr. 34-37).

{¶79} Given these exchanges, the trial court took every necessary precaution to ensure that the parties were aware of all aspects of the settlement agreement and fully consented to it. It made sure to give appellant as many opportunities as she needed to confer with her counsel. It questioned her several times regarding her satisfaction with the agreement. It informed her that if she was not satisfied, the court would not accept the settlement and would try the case. Importantly, the court questioned appellant about anything that might impair her ability to think clearly, including drugs, physical illness, and stress. Appellant told the court none of these things affected her.

{¶80} When parties voluntarily enter into an agreement in the presence of the court, the agreement is a binding contract. *Spercel v. Sterling Industries, Inc.* (1972), 31 Ohio St.2d 36, paragraph one of the syllabus. An oral settlement agreement is enforceable with no more formality and no greater particularity than would be for the enforcement of a binding contract. Id. at 39. In this case, the trial court went to great lengths to ensure that appellant entered the agreement voluntarily and the record fails to indicate otherwise. As the Tenth District has noted:

{¶81} "Every settlement is the result of difficult choices growing out of the conduct of litigation, some of them adverse to each party. A measure of dissatisfaction is thus implicit in the settlement process, and does not vitiate the binding effect of a resulting consent judgment." *Chase v. Chase* (May 31, 2001), 10th Dist. No. 00AP-951.

{¶82} Appellant cannot now claim that she was unaware of what she agreed to at the time of settlement. While she may have felt ill, stressed, or pressured, this is most likely not uncommon for parties in a contested divorce action. The record gives no indication that appellant was unaware of what she agreed to. She asked questions of her counsel and of the court when she needed clarification on particular issues. She told the court she was able to think clearly and was not under any type of drugs, physical impairment, or stress that hampered her ability to understand what she

agreed to. So appellant does not have a meritorious claim or defense to present, thus she cannot meet the first *GTE* requirement.

{¶83} The grounds for relief under the second *GTE* element are:

{¶84} "(1) [M]istake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment." Civ.R. 60(B).

{¶85} Appellant claims she was entitled to relief due to "mistake, error, illness, lack of ability to form consent, and general injustice." (Appellant's brief, p. 2). Thus, appellant's claim falls under Civ.R. 60(B)(1) and (5).

{¶86} Appellant is not entitled to relief for the same reasons as discussed extensively regarding the first *GTE* requirement. Because the trial court went to great lengths to ensure that appellant entered the agreement voluntarily and the record fails to indicate otherwise, appellant cannot show that she is entitled to relief under Civ.R. 60(B)(1) or (5).

{¶87} Appellant did meet the third *GTE* requirement, timeliness. She filed her motion to vacate the judgment entry on May 19, 2003. While at this point the court had not yet reduced the settlement to judgment, it had entered a judgment ordering the parties to prepare the entry on May 6, 2003. It entered its final judgment on June 9, 2003. Thus, while appellant's motion may have been premature, it was timely filed.

{¶88} But since appellant failed to meet the first two *GTE* requirements, the trial court did not abuse its discretion in denying her Civ.R. 60(B) motion. Accordingly, appellant's first assignment of error is without merit.

{¶89} Appellant's second assignment of error states:

{¶90} "THE TRIAL COURT ERRED BY ALLOWING FOR SETTLEMENT NEGOTIATION WITHOUT THE PRESENCE OF THE GUARDIAN AD LITEM."

{¶91} Appellant alleges the court should not have allowed the parties to settle the case without the GAL present. She asserts the court could have allowed the parties to initiate settlement talk, but should not have allowed them to finalize their agreement until it first reviewed the settlement with the GAL. Appellant argues that the trial court should have questioned the GAL on the record to assess the children's best interests. She requests that we remand this case to the trial court for the GAL to give his input and allow the parties to question him as to his recommendation.

{¶92} "'A judgment of a court of competent jurisdiction, rendered by consent of parties, will not be reversed on error.'" *Sharp v. Sharp*, 10th Dist. No. 01AP-665, 2002-Ohio-1040, quoting *Wells v. Warrick Martin & Co.* (1853), 1 Ohio St. 386, syllabus. Accordingly, a party to a consent decree or other judgment entered by consent cannot appeal the consent judgment unless the party has expressly reserved the right to appeal the contested issues. Id., citing *Tradesmen Internatl., Inc. v. Kahoe* (Mar. 16, 2000), 8th Dist. No. 74420, *Assn. of Community Orgs. for Reform Now v. Edgar* (C.A.7, 1996), 99 F.3d 261, 262.

{¶93} Appellant cannot now argue that the court should not have allowed the parties to settle without including the GAL. Appellant and her counsel fully participated in the settlement agreement. There is no indication on the record that appellant ever asked that the GAL be questioned before the settlement was entered. There is also no indication that appellant ever asked that the GAL be included in the settlement negotiations. Furthermore, as already discussed, appellant entered into the settlement agreement voluntarily. As a result, appellant is now precluded from raising this issue as a ground for reversal. In addition, from the record it seems that both parties and the court read the GAL's report. Thus, they knew his findings and recommendation. Hence, appellant's second assignment of error is without merit.

{¶94} Appellant's third assignment of error states:

{¶95} "THE TRIAL COURT ERRED WHEN IT ALLOWED CONSENT DECREE TO BE REDUCED TO JUDGMENT WITHOUT RELIABLY DETERMINING EACH PARTY'S CONSENT TO THE TERMS."

{¶96} Appellant argues that the trial court should not have entered the settlement agreement into the record before both parties had actually signed it. She contends that at the time she consented to the terms of the settlement agreement, her psychological mindset was altered due to the medication she was taking. She also asserts she was ill that day and was pressured into agreeing to the settlement agreement. Appellant claims that the next day, she realized that the agreement was not in her best interest and promptly moved to withdraw her consent to its terms.

{¶97} While appellant now asserts that her mind was altered due to medication, she made no mention of this in her motion to vacate in the trial court or her accompanying affidavit. She stated that she had been ill, but never suggested that she was under the influence of any medication that could impair her thought process. Thus, she is precluded from now arguing that she was under the influence of medication since she failed to raise this issue in the trial court. Furthermore, after the settlement agreement had been read into the record, the trial court made sure to ask the parties if they were under the influence of any sort of drugs, legal or illegal, that prevented them from thinking clearly. (Tr. 36). Appellant responded "No." (Tr. 36).

{¶98} Appellant also alleges she was ill, unable to think clearly, and was pressured into signing the agreement. If we were to overturn the settlement agreement, we would in effect be saying that anyone who claims to have been stressed, pressured, or feeling ill can invalidate a settlement agreement. If so, then settlement agreements would have no finality; a party would never be sure whether the other party was of the proper mindset to settle. Furthermore, the trial court made an extensive inquiry into appellant's mindset and whether she wanted to enter into the settlement agreement. Consequently, appellant's third assignment of error is without merit.

{¶99} For the reasons stated above, the trial court's decision is hereby affirmed.

Judgment affirmed.

Vukovich and DeGenaro, JJ., concur.