RENDERED: NOVEMBER 30, 2018; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000725-MR

ERIN EMILLIE[1] BAAS — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE RICHARD A. WOESTE, JUDGE
ACTION NO. 14-CI-00800

EDWARD ARTHUR BAAS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Erin Baas appeals from orders of the Campbell Circuit Court, Family Division, enforcing and incorporating a mediated agreement into the decree dissolving her marriage to Edward Baas. Issues include: whether a "bullet-point" mediated agreement may be incorporated directly into a decree of dissolution as a

[1] "Emille" was misspelled on the notice of appeal. The Court is using the spelling as it appears in the record.

separation agreement under KRS[2] 403.180, whether mediator or attorney misconduct renders the mediated agreement unconscionable, and whether the mediated agreement is unconscionable. Having reviewed the record, we discern no error and affirm.

Erin, a business banker, sought divorce from Edward, a construction entrepreneur. The couple had one child together. The divorce proceedings were highly contentious.

During discovery, both parties had retained and deposed experts to appraise Edward's business interests. Erin hired Lori Wilhelmy, a professional business appraiser with a master's degree in business administration. Edward hired Joy L. Hall, a tax attorney. Both experts noted Edward owned a thirty percent, non-voting interest in American Facade Restoration, LLC ("AFR"). Hall valued AFR at $638,517 on the date of separation and Edward's thirty percent stake in the company at $77,419, heavily discounting the value due to Edward's lack of voting control. Wilhelmy valued AFR using two different valuation methods, reaching an average value of $3,790,000 and valued Edward's share at $1,137,000, considering both Edward's lack of voting control and integral role in operation of the business. Wilhelmy also valued Edward's thirty percent non-voting interest in another business, EML Properties, LLC ("EML"), a real estate

[2] Kentucky Revised Statutes.

holding company whose sole asset is the warehouse it leases to AFR. Rent paid by AFR comprises EML's entire income. Hall was only retained to valuate AFR and did not render an opinion as to the value of Edward's interest in EML. However, the parties ultimately stipulated Edward's share of EML was worth $120,000.

The trial court ordered the parties to attend mediation prior to the final hearing. The parties selected a mediator, a practicing attorney with substantial experience in domestic relations cases.

The parties, their counsel and the mediator, executed an agreement to mediate, which set out the terms under which the mediation would be conducted. Section two of this agreement specified, "[t]he Mediator is responsible for managing the process of mediation[,]" and "[t]he Mediator will not make decisions for the participants nor advise them as to what should or should not be decided on any issue." Section four of the agreement permitted consultation with outside experts, such as accountants or actuaries, during the mediation. Section six provided the mediator would not give legal advice.

The mediation took place at the office of Edward's counsel. The parties were never in the same room together. The mediator relayed communications between the parties. The mediation exceeded four hours.

Erin's counsel left the mediation to run personal errands and remained absent for approximately one hour. Even so, the mediator continued to move the

mediation forward through direct communication with Erin—no evidence was presented that the mediator communicated directly with Erin's attorney during her absence from the mediation. During counsel's absence, Erin was able to maintain contact with her attorney, as evidenced by several text messages the two exchanged regarding the mediator's communications. Negotiations continued through Erin's attorney's absence and after her return.

After her counsel's return but prior to reaching an agreement, Erin prepared to leave the proceedings and donned her coat. It was at that point Erin claims the mediator relayed Edward's offer to allow Erin to claim their three-year-old daughter on her future income tax returns if she would accept his valuation of his business interests. According to Erin, the mediator stated the value of the resulting tax credit would range from $3,000-$5,000 annually, with the total tax savings offsetting the disparity between the couple's conflicting valuations of Edward's business interests. Also, according to Erin, her attorney did not dispute the exemption was worth the range presented by the mediator. Erin alleges she agreed to Edward's offer based on these valuations. A "bullet-point" written mediation agreement was prepared, with both parties, their respective attorneys, and the mediator executing the document. Edward's counsel was to prepare a formal separation agreement based on the mediated agreement.

The "bullet-point" mediated agreement listed several agreements related to division of the couple's property. Among these: Erin waived her right to maintenance; Erin received a Toyota vehicle; Edward received the marital residence as well as another piece of real property the couple owned; Edward assumed liability, if any, for amounts owing on the couple's 2014 Ohio state income taxes and waived entitlement to any refund; Edward waived his right to reimbursement for their child's 2015 medical bills and for fees he paid to the court-appointed parenting coordinator; and both parties waived any marital interest in the retirement/pension accounts of the other. Most importantly for purposes of this appeal, Edward agreed to allow Erin to claim their child on her tax returns and Erin agreed to accept as her portion of Edward's business holdings a one-time lump sum payment of $120,000, plus monthly payments of $1,000 for five years.

In the days following the mediation, Edward circulated a proposed "Separation and Property Settlement Agreement" formally reciting the terms listed in the mediation agreement. Erin refused to execute the document upon learning the negotiated tax exemption was not as valuable as she had understood at the mediation, and because she alleged it addressed issues not previously discussed or agreed upon. In her affidavit, Erin also alleged her attorney "pressured [her] to take the deal after the fact by stating in a text message how 'conservative' Judge Woeste was and how he'd basically never award [her] the amount of money that

was agreed upon in the mediation or anywhere close to the amount [she] would be legally entitled." Erin's refusal to execute the document prompted Edward to move the trial court to enforce the mediated agreement.

Following a hearing, the trial court made several findings of fact and entered an order granting Edward's motion. Among its findings, the trial court determined: Edward had an annual salary of $149,080; Edward received distributions from his businesses in 2015 totaling $115,593; and Erin's income included a salary of $63,900 plus bonuses of $32,351.28 in 2015. Most importantly, the trial court found Erin's acceptance of the terms in the mediation agreement was not procured due to any fraud or material misrepresentation by Edward, and the agreed upon terms were not unconscionable. Thus, the trial court ordered the terms of the mediated agreement to be incorporated by reference into its decree.

Erin filed a motion to alter, amend, or vacate the trial court's order. The trial court denied Erin's motion, finding: the mediated agreement constituted a separation agreement under the plain language of KRS 403.180(1); neither the agreement itself, any alleged misstatements of the mediator, nor Erin's attorney's temporary absence from the mediation rendered the mediated agreement unconscionable; Erin's refusal to sign the "formal separation agreement" (on grounds it did not accurately reflect the provisions agreed upon in mediation) was

irrelevant because it was not the version Edward sought to enforce or incorporate into the parties' decree of dissolution; and, the mediation agreement was neither incomplete nor in need of amendment. This appeal followed.

As an initial matter, in contravention of CR[3] 76.12(4)(b)(i), Erin's brief exceeds the twenty-five-page limit. Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis,* 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike Erin's brief or dismiss her appeal for her attorney's failure to comply. *Elwell v. Stone,* 799 S.W.2d 46, 48 (Ky. App. 1990). While we have chosen not to impose such a harsh sanction, we strongly suggest counsel familiarize himself with the rules of appellate practice and caution counsel such latitude may not be extended in the future.

Erin's first argument asserts the trial court erred by incorporating the "bullet-point" mediation agreement directly into the decree of dissolution. KRS 403.180(1) provides:

> [t]o promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for maintenance of either of them, disposition of any

[3] Kentucky Rules of Civil Procedure.

> property owned by either of them, and custody, support and visitation of their children.

As the trial court correctly noted, nowhere does the language of the statute require the agreement to contain a specific caption or form, only that it be in writing. KRS 403.110 requires statutes under Chapter 403 be liberally construed and applied to achieve their purposes, including to "[p]romote the amicable settlement of disputes that have arisen between parties to a marriage[.]" Plain reading of these statutes supports the trial court's conclusion the mediated agreement qualifies as a separation agreement. Thus, incorporation of the mediated agreement into the dissolution decree was not improper.

Erin next argues her reliance on representations communicated by the mediator, which she subsequently determined to be inaccurate, unfairly restrained her ability to freely and knowingly weigh and accept Edward's offer relating to the tax credit for their three-year-old daughter. Erin further alleges misconduct of her attorney requires the mediated agreement be set aside. As a result, she asserts the mediation agreement is unenforceable. We disagree, and address these two issues in tandem.

Under Kentucky law, the general rule regarding contractual enforceability is, "absent fraud in the inducement, a written agreement duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms." *Schnuerle v. Insight Comm. Co., L.P.*, 376

S.W.3d 561, 575 (Ky. 2012) (citation omitted). The doctrine of unconscionability, however, is a narrow exception to the general rule, and "is used by the courts to police the excesses of certain parties who abuse their right to contract freely." *Id.* The exception "is directed against one-sided, oppressive and unfairly surprising contracts" rather than "against the consequences *per se* of uneven bargaining power or even a simple old-fashioned bad bargain." *Id.*

When evaluating whether a contractual agreement is procedurally unconscionable, courts must consider factors such as each party's bargaining power, conspicuousness and comprehensibility of contractual terms and language, oppressiveness of the terms, and the presence or absence of a meaningful choice. *Energy Home, Div. of Southern Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 835 (Ky. 2013) (citation omitted). One party's mistake of law—defined as an "erroneous conclusion respecting the legal effect of known facts"—"will not affect the enforceability of an agreement," unless "induced by fraud, undue influence or abuse of confidence." *Sadler v. Carpenter*, 251 S.W.2d 840, 842 (Ky. 1952) (citation omitted).

It matters not whether the misrepresentation, misapprehension, or misapplication of law derives from the party's own attorney. *Holbrook v. Holbrook*, 217 Ky. 77, 288 S.W. 1039, 1040-41 (1926) (citations omitted). Procedural unconscionability:

> does not include mistakes or errors of judgment growing out of a misconstruction or misunderstanding of the law, whether it be found in the form of statutes or court opinions, or embrace the failure of parties or counsel through mistake to avail themselves of remedies which if resorted to would have prevented the casualty or misfortune asserted.

Id. (quoting *Commonwealth v. Fidelity and Columbia Trust Co.*, 185 Ky. 300, 215 S.W. 42 (1919)). "Neglect, mistake or bad advice of counsel is not an unavoidable casualty warranting the granting of a new trial." *Saint Paul-Mercury Indemnity Co. v. Robertson*, 313 Ky. 239, 230 S.W.2d 436, 439 (1950) (citations omitted). "Negligence of an attorney is imputable to the client and is not ground for relief under CR 59.01(c) or CR 60.02(a) or (f)." *Vanhook v. Stanford-Lincoln County Rescue Squad, Inc.*, 678 S.W.2d 797, 799 (Ky. App. 1984).

Erin, alongside her motion to alter, amend, or vacate, filed an affidavit with the trial court detailing the alleged actions and representations of the mediator. Erin's affidavit and testimony before the trial court comprise the only evidence of record regarding the interactions between Erin and the mediator at the mediation. Erin was an interested witness; therefore, neither her affidavit nor testimony was conclusive or binding on the trial court as fact-finder, and the trial court retained its "prerogative as fact finder [sic] to remain unpersuaded that [Erin] had sustained her burden of persuasion." *Grider Hill Dock, Inc. v. Sloan*, 448 S.W.2d 373, 374-75 (Ky. 1969).

In the present appeal, the trial court weighed the evidence and made the crucial finding of fact that the mediator *had not* made false representations, but Erin had misinterpreted Edward's offer and its legal impact on her tax liability.

> The statement was not a false representation, but was merely misinterpreted by [Erin]. The tax exemption does provide [Erin] with a benefit worth $3,000 to $5,000 in reduced taxable income. [Erin] may have been confused as to how the benefit would impact her tax return, but that would be insufficient to excuse performance under the terms of the agreement. [Erin] works in the finance industry and frequently deals with tax forms and tax filings, so she should have at least a moderate familiarity with how exemptions function.

Pursuant to the trial court's explicit finding, the mediator committed no misconduct in her attempt to facilitate settlement by simply conveying Edward's offer to Erin and her counsel. Erin was under no constraint to accept any valuation of the tax exemption but her own. To address any uncertainty and obtain clarification prior to acceptance, she or her counsel remained free to consult an expert, continue the proceedings, or terminate the mediation.

The present appeal is akin to *Swope v. Chrisman*, No. 2009-CA-000431-MR, 2012 WL 1231922, at *1 (Ky. App. Apr. 13, 2012).[4] In *Swope*, appellants challenged the trial court's denial of a motion to set aside a mediated settlement agreement in a will contest, claiming appellees had fraudulently

[4] This unpublished opinion is cited pursuant to CR 76.28(4)(c) as illustrative of the issue before us and not as binding authority.

represented the value of a disputed bank account through the mediator. A panel of this Court affirmed the trial court's denial, holding:

> [c]ourts "will generally give no relief to a complaining party where means of knowledge of the truth or falsity of the representations are at his hands." *Mayo Arcade Corp. v. Bonded Floors Co*., 240 Ky. 212, 41 S.W.2d 1104, 1108 (1931); *see also McClure v. Young*, 396 S.W.2d 48, 51 (Ky. 1965).

Id. at *4. Because Erin and her attorney possessed the means to obtain "knowledge of the truth or falsity of the representations" allegedly communicated by Edward or the mediator, she is entitled to no relief and the trial court committed no error by enforcing the freely negotiated and accepted terms of the "bullet-point" mediation agreement.

Erin signed an "Agreement to Mediate" at the beginning of the mediation session underscoring: (1) the mediator did "not represent either or both parties, nor will she give advice," (2) persons other than the mediator, such as an accountant or actuary, could be called for consultation, and (3) if no such expert was available, mediation could be continued or concluded. Thus, Erin and her counsel were placed on notice of the mediator's limited role as facilitator, and were warned not to rely upon any comment by the mediator as legal advice, and to seek expert guidance for clarity. Erin could have communicated any uncertainty to her counsel for further clarification. Instead, Erin assumed the risk of any misunderstanding when she accepted Edward's offer and executed the settlement

agreement. For this reason, the trial court correctly held Erin's mistake of law and subsequent remorse were inadequate to excuse performance under the terms of the fairly-negotiated settlement agreement.

The law imposes a duty of self-preservation and protection, together with the duty to exercise ordinary care and common sense. *Flegles, Inc. v. TruServ Corp*., 289 S.W.3d 544, 549 (Ky. 2009). Here, Erin remained without constraint to investigate, accept, reject, or counter any offer or representation communicated by Edward, the mediator, or her own counsel. By failing to avail herself of the opportunity to research and scrutinize the mediator's comments through ordinary vigilance or inquiry, Erin breached her legal duty of self-protection. *Id.* As a result, Erin is precluded from asserting any alleged misstatement by the mediator as grounds to avoid the legal consequences of her acceptance of Edward's offer and execution of the settlement agreement. There was no procedural unconscionability. Erin's acceptance of Edward's offer was voluntary, though, in hindsight, perhaps disadvantageous and deleterious. Ultimately, Erin has only herself to blame for her "bad bargain" and Edward is entitled to enforcement of the fairly-negotiated settlement agreement.

Erin also argues the trial court erred in enforcing the mediation agreement because the mediator improperly pressed forward with negotiations in the physical absence of her counsel. However, Erin acquiesced to her counsel's

temporary physical absence, as evidenced by her continued participation in the proceedings. Erin's counsel remained available to offer legal advice during the period of her physical absence, as evidenced by the exchange of text messages with Erin. Erin's counsel was aware of the mediator's continued communication with Erin in her physical absence, did not object to the mediator's conduct, participated in the ongoing discussions with Erin through text messaging, and thereby manifested her consent to the continuation of the proceedings and the mediator's ongoing interaction with her client. Most importantly, any alleged procedural misstep by the mediator continuing negotiations during Erin's attorney's absence was rendered moot upon the return of Erin's attorney prior to acceptance of Edward's offer and execution of the mediation agreement.

Erin's final argument is the mediated agreement is manifestly unfair and unconscionable. This argument is largely a rehash of her previous arguments. Erin asserts the trial court abused its discretion when it failed to vacate its order adopting the mediated agreement into the decree of dissolution after learning about her attorney's alleged misconduct. In her motion to alter, amend, or vacate the trial court's order, Erin argued her counsel's absence during the discussion and valuation of Edward's business interests put her under duress. The trial court found,

> [t]here was no court order requiring counsel's attendance at mediation and there was nothing to prevent [Erin] from

> stopping the mediation if she felt uncomfortable continuing. Further, [Erin] still had the ability to communicate with counsel if necessary, as evidenced by the text messages sent during counsel's absence.

The trial court did not err in determining Erin's attorney's misconduct, if any, was insufficient to set aside the parties' agreement.

Erin asserts there are several reasons the trial court can set aside the agreement: fraud, undue influence, overreaching, and attorney misconduct. However, Erin neither adequately explains nor supports her assertion the mediated agreement is unconscionable. We will not search the record to construct Erin's argument for her, nor will we go on a fishing expedition to find support for her underdeveloped arguments. "Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979).

Therefore, having reviewed the record and the arguments advanced by the parties, we conclude the trial court did not commit reversible error because it was not improper for the "bullet-point" mediated agreement to be enforced or incorporated directly into the decree of dissolution; it was not erroneous to find the mediated settlement enforceable because neither mediator nor attorney misconduct rendered it procedurally unconscionable; and, it was not error to find the mediated agreement was not unconscionable. We therefore affirm the trial court's judgment.

COMBS, JUDGE, CONCURS.

D. LAMBERT, JUDGE, DISSENTS AND DOES NOT FILE A SEPARATE OPINION.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Steven Joseph Megerle Covington, Kentucky	William G. Knoebel Florence, Kentucky