Reversed and Remanded and Opinion filed February 15, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00996-CV

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IN THE INTEREST OF S.A.H. AND M.R.H.

On Appeal from the 311th District Court
Harris County, Texas
Trial Court Cause No. 97-44708

O P I N I O N

Appellant, Emma Maria Hall, appeals from an "agreed" judgment purportedly incorporating a mediated settlement agreement and earlier Rule 11 agreement with her ex-husband, appellee, William Joe Hall. Ms. Hall asserts the trial court erred in entering the "agreed" order Mr. Hall prepared, signed, and submitted because it did not strictly or literally comply with the parties' mediated settlement agreement. We reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mr. Hall and Ms. Hall were parties to post-divorce litigation regarding child custody and Mr. Hall's child-support obligations. In March 1999, they signed a Rule 11 agreement

which primarily addressed custody of their minor children. Two months later they signed a memorandum of agreement in connection with a mediated settlement. This agreement also addressed child custody and support issues. It contained, *inter alia*, an explicit incorporation of "[a]ll provisions of [the] Rule 11 Agreement, attached . . . as Exhibit A, . . . except those crossed out . . . ." Both parties agree that the Rule 11 agreement attached as Exhibit A originally contained a particular injunction provision which they later crossed out.

Mr. Hall's counsel forwarded to Ms. Hall's counsel a draft of a proposed modification order which ostensibly reflected the parties' settlement. After receiving this draft, Ms. Hall's counsel notified opposing counsel that the proposed order did not conform to the parties' settlement agreement. About a week later, Ms. Hall filed a motion to enforce the mediated settlement agreement in which she stated that (1) both parties had signed a mediated settlement agreement; and (2) the order Mr. Hall had submitted to her counsel for signature did not conform with the parties' settlement agreement. Ms. Hall requested the trial court to enter a final order conforming to the parties' settlement agreement, a copy of which Ms. Hall attached to her motion. That same day, the trial court conducted a hearing on the motion to enforce the mediated settlement agreement. At the conclusion of the hearing, the trial court found that the disputed injunction provision of the Rule 11 agreement had survived the parties' mediated settlement agreement and that the Rule 11 agreement was enforceable.[1] Mr. Hall agreed to

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[1] The trial court's ruling provides:

> Based on the review of the mediated settlement agreement and the Rule 11 agreement and having heard the argument of counsel, the Court finds that the paragraph 2 of the Rule 11 agreement does – did survive the mediated settlement agreement and so far as the only issue was whether – if the future enforceability of the Rule 11 agreement pertained to that paragraph was an issue but not the whole injunction to begin with; and the Court finds that the Rule 11 agreement was prepared. It was signed by the parties and their attorneys and filed with the Court which makes the Rule 11 agreement enforceable.

prepare and submit an order reflecting the trial court's ruling. Mr. Hall's counsel drafted, signed, and submitted to the trial court a proposed "agreed order." Neither Ms. Hall nor her counsel agreed to or signed this order. Furthermore, Ms. Hall expressly disputed any agreement to the "agreed order" in her motion to enforce the settlement agreement.

On June 4, 1999, the trial court signed an apparently incomplete "agreed order" modifying the parent-child relationship.[2] On July 6, 1999, Ms. Hall filed a motion for new trial, raising the same issue now presented on appeal. That motion was overruled by operation of law.

II. ISSUE PRESENTED ON APPEAL

In one point of error, Ms. Hall asserts that the trial court erred in signing the "agreed order" because it did not strictly comply with the parties' mediated settlement agreement.

A. Preservation of Error

As a preliminary matter, we address Mr. Hall's contention that Ms. Hall has waived appellate review of her complaint because "[t]here is not evidence of any objections raised by Appellant to the substance of the Agreed Order . . . ."

To preserve error for appellate review, the record must show that: (1) the party asserting error made the complaint to the trial court by a timely request, objection, or motion stating the specific grounds therefor, unless the specific grounds were apparent from the context; and (2) the trial court ruled on the request, objection, or motion, either expressly or implicitly, or the trial court refused to rule and the complaining party objected to the refusal. TEX. R. APP. P. 33.1(a)(1). However, in a civil case, the overruling of a motion for new trial by operation of law preserves a complaint properly made in that motion, unless the taking of evidence was necessary to properly present the complaint in the trial court. *Id.* at 33.1(b).

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[2] The "agreed order" signed by the trial court is missing its page number two.

Here, Ms. Hall's timely-filed motion for new trial was overruled by operation of law. In that motion, she asserted that the judgment the trial court signed lacked "strict or literal compliance" with the settlement agreement. At the time the trial court considered Ms. Hall's motion for new trial, it already had in its possession all the documents it needed to determine whether the "agreed order" it had signed strictly or literally complied with the parties' settlement agreement. Moreover, Ms. Hall's complaint was not a type for which evidence was required to be presented. *See* TEX. R. CIV. P. 324(b)(1) (providing that complaints on which evidence must be heard include jury misconduct, newly discovered evidence, and failure to set aside a default judgment). Accordingly, we find Ms. Hall's motion for new trial was sufficient to preserve appellate review of her complaint regarding variances between the "agreed order" and the parties' mediated settlement agreement.

B. Validity of "Agreed Order"

Having found that Ms. Hall preserved appellate review of her complaint, we now consider the merits of her sole point of error. As a threshold matter, we must determine which of the parties' two agreements is controlling for purposes of determining the validity of the trial court's judgment. Ms. Hall argues that because the settlement agreement incorporates all of the Rule 11 agreement *except* a particular injunction provision, the settlement agreement supersedes the prior Rule 11 agreement. We agree.

Under Texas' well-established merger doctrine, where "the parties to one contract execute another whose terms are so inconsistent with the first that they both cannot stand, the first agreement is conclusively presumed to have been superseded by the second."[3] *Balboa Ins. Co. v. K & D & Assoc.*, 589 S.W.2d 752, 758 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.). "An integration clause is in essence the merger doctrine memorialized." *Smith v.*

[3] "Before one contract is merged into another, the last contract must be between the same parties as the first, must embrace the same subject matter, and must have been so intended by the parties." *Smith v. Smith*, 794 S.W.2d 823, 828 (Tex. App.—Dallas 1990, writ withdrawn).

Smith, 794 S.W.2d 823, 828 (Tex. App.—Dallas 1990, writ withdrawn). Here, the parties' Rule 11 agreement merged into their later settlement agreement. *See id*. Thus, the settlement agreement controls.

An agreed judgment based upon a settlement agreement must be in strict or literal compliance with the terms of that agreement. *Vickrey v. Am. Youth Camps, Inc.*, 532 S.W.2d 292, 292 (Tex. 1976) (per curiam). A trial court has no power to supply terms, provisions or conditions not previously agreed upon by the parties. *Matthews v. Looney*, 123 S.W.2d 871, 872 (Tex. 1939); *Tinney v. Willingham*, 897 S.W.2d 543, 544 (Tex. App.—Fort Worth 1995, no writ); *McLendon v. McLendon*, 847 S.W.2d 601, 610 (Tex. App.—Dallas 1992, writ denied). If the terms of an agreed judgment conflict with the terms of the underlying settlement agreement, the judgment will be unenforceable. *Nuno v. Pulido*, 946 S.W.2d 448, 451 (Tex. App.—Corpus Christi 1997, no writ); *Tinney*, 897 S.W.2d at 544. If the discrepancy in the terms results from a clerical error,[4] the appellate court may modify the conflicting term to conform to the settlement agreement. *McLendon*, 847 S.W.2d at 610. However, a judgment based upon judicial error[5] must be reversed and remanded to the trial court for entry of a judgment that conforms to the terms of the parties' settlement agreement. *Donzis v. McLaughlin*, 981 S.W.2d 58, 63 (Tex. App.—San Antonio 1998, no pet.); *Clanin v. Clanin*, 918 S.W.2d 673, 678 (Tex. App.—Fort Worth 1996, no writ); *McLendon*, 847 S.W.2d at 610. Whether an error is judicial or clerical is a question of law. *Finlay v. Jones*, 435 S.W.2d 136, 138 (Tex. 1968). Here, the "agreed judgment" contains terms which contradict the parties' settlement agreement. It also contains terms that are not found in either the Rule 11

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[4] A clerical error is a mistake or omission which prevents the judgment as entered from accurately reflecting the judgment that was actually rendered. *Universal Underwriters Ins. Co. v. Ferguson*, 471 S.W.2d 28, 29–30 (Tex. 1971).

[5] A judicial error arises from a mistake of law or fact that requires correction through judicial reasoning or determination. *West Tex. State Bank v. Gen. Res. Mgmt. Corp.*, 723 S.W.2d 304, 306 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

agreement or the mediated settlement agreement.

1. Injunction

The mediated settlement agreement explicitly incorporated all of the Rule 11 agreement except for the injunction provision purporting to enjoin Ms. Hall from allowing her attorney to be in the presence of the parties' minor children. That provision states:

> *All provisions of Rule 11 Agreement*, attached hereto as Exhibit A, shall be incorporated by reference *except those crossed* out which shall remain unresolved. It is acknowledged that the parties may litigate the future enforceability of Rule 11 Agreement pertaining to #2 David Ronin.

Both parties acknowledge that the following injunction provision was crossed out in an attachment to the mediated settlement agreement:

> EMMA MARIA HALL is enjoined from allowing her previous attorney, David Ronin, to be in the presence of the minor children, . . . [S. A. H. and M. R. H.], at any time. Specifically, this injunction prevents David Ronin from being in the presence of the minor children or on any premises in which the minor children may be present. EMMA MARIA HALL shall make sure that David Ronin complies with this injunction.

According to the express language of the parties' mediated settlement agreement, this injunction provision was to have been omitted from any agreed judgment incorporating the terms of the parties' settlement agreement. Instead, the "agreed judgment" included the injunction provision, stating:

> IT IS FURTHER ORDERED that EMMA MARIA HALL is enjoined from allowing her previous attorney, DAVID RONIN, to be in the presence of the minor children, [S. A. H. and M. R. H.], at any time. Specifically, it is the ORDER of this Court that this injunction prevents DAVID RONIN from being in the presence of the minor children or on any premises where the children may be present. IT IS FURTHER ORDERED that EMMA MARIA HALL shall take whatever steps necessary to make sure that DAVID RONIN complies with this injunction.

The trial court found (1) the injunction provision survived the settlement agreement and (2) the terms of both the Rule 11 agreement and the mediated settlement agreement were "correctly set forth in the judgment of the court." The settlement agreement's explicit exclusion of the injunction provision contradicts the Rule 11 agreement's inclusion of it. Thus, both agreements cannot be "correctly set forth" in the trial court's judgment.

2. College Education Expenses

The settlement agreement provided that Mr. Hall would pay for *both* children's college education expenses. However, the "agreed judgment" provided that Mr. Hall would pay for "*either or both*" children's college education expenses.[6] Changing the language from "both" to "either or both" significantly altered Mr. Hall's obligations, as set forth in the parties' settlement agreement. Instead of providing for both children's educational expenses, the "agreed judgment" gives Mr. Hall the option of paying for only one child's education. This seemingly minor change in wording constitutes a material change in the terms of the parties' settlement agreement.

Ms. Hall further complains that the "agreed order" incorrectly requires payment of 50% of these educational expenses *before* Mr. Hall becomes obligated to pay the other 50%. Item 17 of the settlement agreement provides:

> [Husband] agrees to pay 50% of both children's cost of tuition, room, board & books in a Texas supported higher institution facility, other than sums received from scholarships &/or grants, as long as other 50% is paid. [Husband] will match $ for $ payment by another party.

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[6] The "agreed order" states, in pertinent part:

> The Court finds that the parties have agreed that WILLIAM JOE HALL has agreed and will be obligated to pay 50% of either or both children's cost of college tuition, room, board, and books, in a Texas supported higher education facility.

Although the wording of this "match" provision differs in the "agreed order," the meaning is the same. The settlement agreement clearly contemplates another's payment as a condition precedent to Mr. Hall becoming obligated to pay, i.e. Mr. Hall is to pay 50% of certain education expenses "as long as the other 50% is paid. [Husband] will match $ for $ *payment by another party*." Mr. Hall cannot match "$ for $" a payment which has not been made. Therefore, we find the provision in the "agreed order" requiring him to match an already made payment for college expenses accurately reflects the parties' agreement.

3. Child Support Modifications

Ms. Hall also complains that the "agreed order" altered the parties' settlement agreement as to potential child support modifications over the next three years. We agree. The parties' settlement agreement clearly contemplated that an increase in child support could be had, but that any such increase would be offset against an acknowledged, pre-paid child support credit of $7,200.00. The "agreed judgment" provides for the same $7,200.00 credit in the event of an increase but further provides that Ms. Hall agrees "*to not have child support increased over the next three years . . . .*" Nothing in the record suggests Ms. Hall ever agreed to a three-year moratorium on requests for child support increases.

Because the "agreed order" did not strictly or literally comply with the terms of the parties' mediated settlement agreement, it is void and unenforceable. *See Samples Exterminators v. Samples*, 640 S.W.2d 873, 875 (Tex. 1982); *Tinney v. Willingham*, 897 S.W.2d 543, 544 (Tex. App.—Fort Worth 1995, no writ) (citing *Vickrey v. Am. Youth Corps., Inc.*, 532 S.W.2d 292, 292 (Tex. 1976)).

C. Correction of Trial Court Error

While an appellate court may correct a mere clerical error by modification of the trial court's judgment, it must reverse and remand a judgment based on judicial error so that the trial

court may enter an agreed judgment that strictly conforms to the terms of the parties' settlement agreement. *Donzis v. McLaughlin*, 981 S.W.2d 58, 63 (Tex. App.—San Antonio 1998, no pet.); *McLendon v. McLendon*, 847 S.W.2d 601, 610 (Tex. App.—Dallas 1992, writ denied). Because the altered and additional terms of the "agreed judgment" in this case are not the product of mere clerical error, we cannot correct them by modifying the judgment and rendering an appropriate judgment in its place; rather, we must reverse and remand.

III. CONCLUSION

The trial court apparently intended to sign and render a judgment that reflected the parties' Rule 11 agreement and mediated settlement agreement.[7] However, the "agreed order" cannot incorporate both the Rule 11 agreement and the mediated settlement agreement because the two agreements are mutually exclusive, at least insofar as the injunction provision is present in the Rule 11 agreement and explicitly excluded from the mediated settlement agreement. Moreover, the "agreed order" contained terms other than those set forth in the mediated settlement agreement. Thus, by signing the "agreed order," the trial court effectively altered the parties' settlement agreement. Consequently, the "agreed order" is void and unenforceable. Ms. Hall's sole point of error is sustained. The judgment of the trial court is reversed and this case is remanded for further proceedings consistent with this opinion.

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[7] The trial court issued findings of fact stating, in relevant part:

> The parties entered into a T.R.C.P. Rule 11 agreement and subsequent mediated settlement agreement, *the terms of which are correctly set forth in the Judgment approved and entered by the Court*.

(emphasis added).

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed February 15, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).