

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0317

LAURA HOLTZ,

Plaintiff and Appellant,

v.

GEORGE LUTHER, NANCY LUTHER,
And CORY LUTHER,

Defendants and Appellees.

FILED

SEP 01 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

**APPELLEES' RESPONSE TO MOTION TO RESCIND
RELEASE AND STIPULATION**

On Appeal from the Montana Sixteenth Judicial District Court, Rosebud County,
The Honorable Joe L. Hegel, Presiding

APPEARANCES:

LAURA HOLTZ
P. O. Box 63
Rosebud, Montana 59347
(406) 259-7983
lauravickery2001@yahoo.com

APPELLANT – PRO SE

A. LANCE TONN
Lucas & Tonn, P.C.
513 Main Street
P. O. Box 728
Miles City, Montana 59301
(406) 232-4070
(406) 232-4093
ltonn@midrivers.com

ATTORNEYS FOR APPELLEES

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CASE

This case was tried to the Honorable Joe L. Hegel, sitting without a jury, on June 26th, 2008. Judge Hegel issued his Findings of Fact and Conclusions of Law on May 2, 2009 and a Judgment on May 9, 2009. From that decision, Ms. Holtz appeals.

Appellate mediation was conducted on August 14th, 2009 with William D. Lamdin, III acting as mediator. At the conclusion of mediation, both parties executed a Settlement Agreement and Mutual Release and the cash consideration was delivered by the Luthers to Ms. Holtz. Ms. Holtz now seeks to rescind the Settlement Agreement and Mutual Release.

FACTS

Ms. Holtz graduated from Boston University Law School and was at one time licensed to practice law in the State of New York. (Holtz Affidavit in Reply, dated August 25th, 2009 P.1) For the past five years, Ms. Holtz has been working as a temporary secretary with Snelling Personnel Agency. (Transcript P. 174 L. 16 and 17) During the course of her employment as a temporary secretary, she was employed by Mr. Lamdin, the mediator. Ms. Holtz and Mr. Lamdin were well acquainted and Ms. Holtz suggested Mr. Lamdin as the mediator (Holtz e-

mail dated June 16, 2009 attached as Exhibit "A"). I consented to Mr. Lamdin's participation.

The mediation was held at the offices of Patten, Peterman, Bekkedahl & Green PLLC. (Tonn Affidavit) The mediation began at 10:00 a.m. with Mr. Lamdin making initial remarks to all parties in a conference room. Immediately thereafter, Mr. Lamdin and Ms. Holtz went to a second room to visit in private leaving the Luthers and their counsel in the conference room.

The mediation occurred in normal course with Mr. Lamdin shuttling back and forth between Ms. Holtz and the Luthers. An Agreement was struck shortly after noon. (Tonn Affidavit) Mr. Lamdin suggested that the parties return to the place of mediation at 3:00 p.m. to review a Settlement Agreement and Mutual Release that he was going to prepare.

During the intervening time, the Luthers obtained a certified check for \$2,200.00 payable to Ms. Holtz. The parties reconvened at 3:00 p.m. and the Luthers and their counsel were provided with a draft of the Agreement as apparently was Ms. Holtz in another room. The Luthers approved the Agreement. Ms. Holtz noted some typographic and grammatical errors and requested that they be corrected. (Tonn Affidavit) Mr. Lamdin contacted his office to have the changes requested by Ms. Holtz made, the Agreement was signed, the

consideration was delivered, and the parties left the building at approximately 3:35 p.m. (Tonn Affidavit) Mr. Lamdin also prepared a Stipulation for Dismissal of Appeal with Prejudice which was signed by both parties.

Mr. Lamdin filed the Mediator's Report indicating that the case was settled, but noting that Ms. Holtz had contacted him indicating that she wished to rescind the Agreement.

Ms. Holtz has not tendered the check representing the Release proceeds back to the Luthers.

Ms. Holtz's Exhibit 2 attached to her Affidavit reflects that a radiograph of her foot was taken on July 30th, 2009, two weeks prior to the mediation. I did observe that Ms. Holtz was wearing what I would explain as a lace up medical shoe. Her foot was not in a walking cast or other appliance and she did not require crutches or a cane. (Tonn Affidavit) Ms. Holtz indicated during our initial meeting that she was working one floor below for another attorney. The building in which the mediation was conducted had an elevator and it would not have been necessary for Ms. Holtz to walk up or down stairs. (Tonn Affidavit)

ISSUE

WHETHER MS. HOLTZ CAN RESCIND THE MUTUAL
RELEASE AND SETTLEMENT AGREEMENT IN ACCORDANCE WITH THE
PROVISIONS OF SECTION 28-2-1711(1), M.C.A.?

LAW AND DISCUSSION

At the outset, it should be noted that Ms. Holtz's motion, while accompanied by her Affidavit, is not accompanied by a supporting brief. Ms. Holtz's motion should be summarily denied.

Ms. Holtz's motion states that it is brought pursuant to Section 28-2-1711(1), M.C.A. I will, therefore, disregard discussion of subsections (2) through (5). Ms. Holtz's Affidavit seems to raise the issues of undue influence and duress as a basis for rescission of the contract.

DURESS

Duress is statutorily defined by Section 28-2-402, M.C.A. It would appear that subsections (1) and (2) do not apply. Ms. Holtz apparently relies on subsection (3) arguing that she was held in a small room by Mr. Lamdin in such a manner so as to unlawfully obtain her consent to the Settlement Agreement and Mutual Release.

The Court is reminded that the mediation occurred in a busy law office with a number of attorneys and staff members and perhaps clients present.

Ms. Holtz orally agreed to the settlement at approximately 12:30. She returned to her place of work for the approximately two and one-half hour period between the oral agreement and the time Mr. Lamdin requested the parties to return for the purposes of reviewing and executing the Mutual Release and Settlement Agreement. One would assume that if Ms. Holtz had suffered such a harrowing experience at the hands of Mr. Lamdin, that she would not have returned to the same room once she made her escape. One would also assume that she would have, upon her return, flatly refused to sign the Mutual Release and Settlement Agreement, but rather saw fit to correct typographical and grammatical errors and then signed the second draft.

UNDUE INFLUENCE

Ms. Holtz next suggests that she should be relieved from the contract as her consent was obtained by the undue influence of Mr. Lamdin. The Court is again reminded that Ms. Holtz had known Mr. Lamdin previously, had worked for Mr. Lamdin as a temporary legal assistant, and suggested Mr. Lamdin as mediator.

Undue influence is statutorily defined by Section 28-2-407, M.C.A.

This Court has interpreted the above statute, saying:

“Influence exerted must be such as to destroy the free will of the influenced person with the will of

another substituted.” Heintz v. Vestal 185 Mont. 233, 237, 605 P.2d 606, 608 (1980).

In Heintz, supra, the Court also stated that it must take into consideration the mental and physical health of the party being influenced and all of the surrounding circumstances.

Ms. Holtz’s unfounded allegations against Mr. Lamdin do not reach the threshold of the above test. Ms. Holtz felt comfortable with Mr. Lamdin. A two and one-half hour period elapsed between when the oral agreement was made and it was presented to the parties for their review and signature. During that time Ms. Holtz had returned to her work place which was one floor below the office suite where the mediation occurred. Furthermore, upon her return to review the agreement, she did not state her intention to renounce the agreement, but rather corrected typographical and grammatical errors before signing a second draft.

Ms. Holtz makes much of the fact that she had a fractured bone in her foot. The fracture had occurred two weeks prior and Ms. Holtz was walking on the foot without the assistance of any medical appliances. I personally do not question Ms. Holtz’s mental health, I see her antics as being that of a sport litigant.

One who executes a written contract is presumed to know the contents of the contract and to assent to those specific terms. Quinn v. Briggs, 172 Mont.

468, 565 P.2d 297 (1997), Gilko v. Belt Valley Bank, 2006 MT 30, 331 Mont. 112, 130 P.3d 155.

Ms. Holtz is perhaps one of the most qualified litigants to come before this Court. She makes much of the fact that she is appearing Pro Se. One must consider, however, that she is a graduate of a prestigious law school and was licensed to practice law in the State of New York. It appears Ms. Holtz's license is on an inactive status as a result of non-payment of fees. Ms. Holtz understood the contract, she read it carefully as evidenced by her request that typographical and grammatical errors be corrected, and signed the contract of her free will. Her inappropriate accusations against Mr. Lamdin, a senior partner in the Crowley Law Firm, and a well respected attorney, should be seen for what they are; nonsense.

CONCLUSION

The Court should deny Ms. Holtz's Motion summarily for failure to file a brief and in the alternative on its merits. This case should be concluded and the appeal dismissed with prejudice.

RESPECTFULLY SUBMITTED this 31 day of August, 2009.

LUCAS & TONN, P.C.

Attorneys for Defendants and Appellees

By: _____

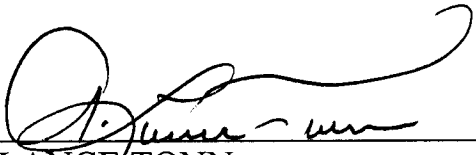

A. Lance Tonn

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing APPELLEES' RESPONSE TO MOTION TO RESCIND RELEASE AND STIPULATION to be mailed to:

Laura Holtz
P. O. Box 63
Rosebud, Montana 59347

DATED: August 31, 2009.



A. LANCE TONN

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 1,424 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.



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Subject: choice of mediator

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Mr. Tonn:

As I read Rule 7, if we cannot jointly and voluntarily select a mediator, the clerk of the supreme court will appoint one. I believe Bill Lamdin is respected by both of us. But I don't think he does mediation work.

- Laura Holtz

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