IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 21-0491

LILY M. SMITH and **VERNON T. LINDEMULDER,**

Petitioners and Appellees,

v.

SAMUEL B. LINDEMULDER, individually
and as Trustee of the Alice M. Lindemulder Trust,

Respondent and Appellant
and

DANIEL G. LINDEMULDER, individually
and as Trustee of the Alice M. Lindemulder Trust,

Respondent and Appellee.

APPELLEES' RESPONSE TO APPELLANT'S OPENING BRIEF

On Appeal from the Montana Twenty-Second Judicial
District Court, Stillwater County
Lower Court Docket No. DV-19-54
Before District Judge Matthew J. Wald

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A. IS THE AGREEMENT IN MEDIATION ENFORCEABLE?

B. ARE THE CONTRACT FOR DEED ISSUES MOOT?

C. IF NOT MOOTED, DID THE DISTRICT COURT ERR IN FINDING THE CONTRACT ENFORCEMENT BARRED BY LACHES, ESTOPPEL, OR WAIVER?

STATEMENT OF THE CASE

Vernon T. Lindemulder and Lily M. Smith (hereinafter "Vernon" and "Lily") petitioned the court to enforce a Trust which their mother, and the mother of Samuel and Daniel Lindemulder (hereinafter "Samuel" and "Daniel"), put in place for the benefit of all four. (District Court Doc. 1, *Petition*). The matter was contested and the parties ultimately settled on December 1, 2020. (Appellees' Supplemental Appx. at 1–6, *Agreement in Mediation*). After a few weeks, the parties memorialized their agreement in a document entitled Agreement in Mediation. (*Id.*).

Vernon and Lily sought to enforce the Agreement in Mediation. (District Court Doc. 56, *Petitioners' BIS Approving Settlement Agreement*). Samuel, not Daniel, sought to avoid the Agreement in Mediation and enforce an ancient contract for deed which Samuel found in a box in a closet. (District Court Doc. 65, *Resp. Br.*). The contract for deed purported to sell to Samuel land that the parties had agreed was owned by the Trust (*id.*), an understanding which the parties came to and

memorialized in the document entitled Agreement in Mediation. (Appellees' Supplemental Appx. at 1–6). From the Court Order requiring performance of the Agreement in Mediation, Samuel appeals. Appellees Lily and Vernon by and through their counsel of record, respond with their own statement of facts, in conformity with the record.

STATEMENT OF THE FACTS

Samuel recites in Appellant's Opening Brief a series of "facts" but sometimes references his own affidavit (Appellant's Opening Br. at p. 4) and, in one instance, Daniel's deposition (*id.* at p. 5)—neither of which were part of the trial record. Samuel conflates the testimony given by himself and his wife at the hearing with findings of facts.

Reciting testimony is not fact finding. *In re Mental Health of E.P.B.*, 2007 MT 224, ¶ 13, 339 Mont. 107, 168 P.3d 662. The facts governing this case are those that were found by Judge Wald at a contested hearing where the parties were allowed cross-examination. Samuel should not state with certainty that a matter has been determined as a fact unless and until the Court has determined that it is a fact. Samuel made no effort to challenge the factual findings of Judge Wald or suggest that they were not supported by substantial evidence. Any challenge to Judge Wald's findings not raised in Appellant's Opening Brief are waived. *Loney v. Milodragovich, Dale*

& Dye, P.C., 273 Mont. 506, 511, 905 P.2d 158, 161 (1995).

Here are the established unchallenged facts. On September 26, 2019, Lily and Vernon filed a Verified Petition for Enforcement of Beneficiary Rights and for Breach of Fiduciary Duties naming Samuel and Daniel, individually and as Trustees of the Alice M. Lindemulder Trust. (District Court Doc. 1, *Petition*). The Petition alleged that Samuel and Daniel were trustees of the Alice M. Lindemulder Trust established February 27, 1997. (*Id.* at ¶¶ 1, 3). On then-held information and belief, Lily and Vernon alleged that Samuel and Daniel were trustees of the Trust. (*Id.* at ¶ 22). The Petition alleged and Samuel and Daniel submitted that, as of September 26, 2019, Lily and Vernon had not received any distribution from the Trust, nor had they received an explanation from Samuel as to why the distribution and the Trust were delayed. (*Id.* at ¶ 19).

Upon receiving the Petition, Samuel and Daniel sought and obtained very competent counsel. (District Court Doc. 71, *Order Granting Mot. to Approve Settlement Agreement* at p. 6). In fact, Westlaw reveals that, since 1995, Samuel's law firm has appeared in the Montana Supreme Court seventy-one (71) times. A court can take judicial notice of a trial counsel's considerable experience and recognized trial work. *State v. Robinson*, 194 Neb. 111, 112–13, 230 N.W.2d 222, 224 (1975). Judge Wald found that counsel was competent and this finding has not been challenged.

(District Court Doc. 71, *Order Granting Mot. to Approve Settlement Agreement* at p. 6). The District Court's docket indicates that the matter was throughly litigated over a good period of time between September 2019 and December 2020, when the parties went to mediation.

The parties mediated the case on December 1, 2020. (District Court Doc. 56, *Petitioners' BIS Approving Settlement Agreement* at p. 4). All parties were present, physically or by electronic means, all were represented by counsel, and a written agreement was executed as a result of that mediation. (Appellees' Supplemental Appx. 1–6, *Agreement in Mediation*). A copy of the agreement without signatures was filed as part of the Appellants' Appendix, but to make it perfectly clear that such agreement exists and was executed, a copy of the fully executed Agreement in Mediation is attached hereto (*id.* at 1–6) as it appeared and was attached to Petitioners' Motion to Enforce the Agreement (District Court Doc. 56, (District Court Doc. 56, *Petitioners' BIS Approving Settlement Agreement*, Ex. I).

Below, some of the material terms of the written agreement are detailed. In the recitals, Samuel and Daniel admit that they are signing the Agreement in Mediation "individually and as Trustees of the 1997 Alice M. Lindemulder Revocable Trust." (Appellees' Supplemental Appx. 1, Recital A). All parties agreed that "[t]he Trust is the owner of at least 2,150.703 acres of real property located in Stillwater County,

Montana . . . ." (*Id.,* Recital B). The Recitals acknowledged what is true in that "[a]s the result of the effort of the parties in Mediation, . . . a full and complete settlement of all claims, disputes, fees, payments, costs, liabilities, and damages was reached between the parties, . . . " and this group of parties includes Samuel, individually. (*Id.,* Recital F).

A description of the property is set forth in paragraph four (4) of the Agreement in Mediation which includes the property presently in dispute. (Appellees' Supplemental Appx. 2–3, ¶¶ 4(A)–(D)). The Agreement afforded Samuel some personal rights to the property, including the right to graze his cattle on Trust property until June 15, 2021, (Appellees' Supplemental Appx. 3, ¶ 5) and reimbursement for the property taxes paid on the disputed property in the amount of $1,773.00 (*id.* ¶ 4(D)). Paragraph 11 of the Agreement sets forth the following:

> The parties warrant and represent to each other that they have attended all settlement negotiations at the Mediation with counsel of their choosing, that they have carefully studied the implications of the Settlement stated herein, that they executed the Agreement in full acknowledgment of their rights, remedies, concerns, claims and tax issues, that they have not acted under duress and that they believe that this Agreement and the Settlement are in their best interests.

(Appellees' Supplemental Appx. 4, ¶ 11). Following the execution of the Agreement in Mediation, which everyone agrees was nearly thirty (30) days after the actual date of the mediation, Samuel protested this Agreement and asserted his buyer's interest

in a contract for deed which had been executed thirty (30) years previously. (District Court Doc. 65, *Resp. Br.*). Samuel says he found in his records a warranty deed, evidently, to be held by his mother until he performed the contract. (*Id.*). The deed was dated February 7, 1990, and Samuel recorded it on February 18, 2021. (*Id.*).

A hearing occurred on April 15, 2021, to determine whether or not to approve and enforce the Agreement in Mediation. (District Court Doc. 71, *Order Granting Mot. to Approve Settlement Agreement* at p. 3). Samuel, but not his co-trustee Daniel, asserted the Agreement in Mediation was not enforceable because Samuel lacked capacity to enter into the contract. (District Court Doc. 65, *Resp. Br.*). Samuel also asserted—*for the first time*—that he had purchased rights under a Contract for deed that had been executed nearly thirty (30) years earlier. (*Id.*). The Court's holding approved the Agreement in Mediation and issued an Order to enforce it. (District Court Doc. 71, *Order Granting Mot. to Approve Settlement Agreement*). Further, the Court struck the Warranty deed from the County Record and held that the Contract for deed was unenforceable based on the statute of limitations and doctrine of laches. (*Id.*).

Samuel appealed these findings and has filed a brief setting forth four (4) issues for review which Lily and Vernon restate as the following two (2) issues for review: (1) Did the district court err in determining Samuel consented to the settlement

agreement? (2) Does Samuel have any rights to pursue remedies under the contract for deed? If this Court determines Samuel consented to the Agreement in Mediation, the validity of the contract for deed or its enforceability is moot no matter what rights Samuel had under the contract for deed, because they were clearly subsumed in the Agreement in Mediation and, therefore, the contract for deed's validity *vel non* should not be adjudicated.

STANDARD OF REVIEW

On appeal, "the court's findings of fact [are reviewed] for clear error and its conclusions of law for correctness, and [this Court will] review discretionary rulings for an abuse of discretion." *Marble v. State*, 2015 MT 242, ¶ 37, 380 Mont. 366, 355 P.3d 742 (citing *Hamilton v. State*, 2010 MT 25, ¶ 7, 355 Mont. 133, 226 P.3d 588).

SUMMARY OF THE ARGUMENT

In accordance with decades of solid Supreme Court precedent, the District Court ordered enforcement of a signed written settlement agreement executed after months of litigation, a day-long mediation, and a month of drafting. The order follows clear and well established law.

Samuel's effort to breathe life into a long forgotten contract for deed should fail because the contract for deed rights and obligations all merged into the Agreement in Mediation. Once merged, the contract for deed issues are moot. However, even if this

Court were to adjudicate Samuel's rights to claim rescission, the facts alleged are insufficient to state a claim for rescission as a matter of law.

Lily and Vernon are entitled to attorneys' fees on appeal.

ARGUMENT

I. THE AGREEMENT IN MEDIATION IS ENFORCEABLE

A. When the parties have had ample time, competent counsel, and a settlement agreement, the Supreme Court enforces the agreement.

The first issue with respect to determining the enforceability of any contract is to determine whether or not the record contains objective facts sufficient to support the existence of a contract. In this case, no party disputes that the Agreement in Mediation was the signed and memorialized Agreement between the parties.

This Supreme Court has not been shy about enforcing settlement agreements between parties, especially in those instances when there has been a rich history of litigation, plenty of time for discovery, the parties have been represented by counsel, and the parties provide some sort of memorialization of their agreement. *See e.g.*, *Hetherington v. Ford Motor Co.,* 257 Mont. 395, 846 P.2d 1039 (1993). In *Hetherington*, this Court held that a simple exchange of letters between attorneys constituted a settlement agreement, and stated that the parties' latent intentions to not be bound by an agreement until it was formally signed were not relevant or important.

257 Mont. at 399.

The rules set forth in *Hetherington* have been repeated in *Kluver v. PPL Montana*, *LLC*, 2012 MT 321, ¶ 33, 368 Mont. 101, 293 P.3d 817. In *Kluver*, the parties resisting the enforcement of the settlement agreement, which they never signed, chronicled in the record a great deal of disharmony between themselves and their counsel—all for naught. *Id.* at ¶ 4. *Kluver* is instructive here. A subtheme to much of his argument, Samuel weaves into his narrative certain differences and allegations of miscommunication between himself and his counsel. However, it is clear that a party seeking to enforce a settlement agreement is not tasked, as a threshold issue, with the additional burden of ensuring a harmonic relationship between the opposing party and their counsel.

We see this Court give the same treatment to written settlement agreements in *Marta Corp v. Thoft*, 271 Mont. 109, 894 P.2d 333 (1995) and *Lockhead v. Weinstein*, 2003 MT 360, 319 Mont. 62, 81 P.3d 1284. The issue, then, becomes whether or not the District Court's finding that Samuel consented to the agreement was supported by substantial evidence.

B. Samuel's competence is supported by substantial evidence.

The District Court is the ultimate fact finder on the issue of whether or not Samuel had the capacity to enter the Agreement in Mediation. In that regard, this

Court has held that its review is limited to determining whether substantial evidence supports the finding of competence. *Wilkes v. Est. of Wilkes*, 2001 MT 118, ¶ 10, 305 Mont. 335, 27 P.3d 433 (citing *Interstate Prod. Credit Ass'n of Great Falls v. DeSaye*, 250 Mont. 320, 322–23, 820 P.2d 1285, 1287 (1991)).

The District Court did not make a finding that Samuel lacked capacity to contract at the initial mediation. Although there was testimony by Samuel's wife regarding Samuel's medical condition, in Montana there is ample precedent for rejecting an attempt to prove a person is susceptible to undue influence when no medical testimony has been provided. *In re Marriage of Gorton & Robbins*, 2008 MT 123, ¶ 41, 342 Mont. 537, 182 P.3d 746 (citing *Wilkes*, ¶¶ 12–16) (holding the district court was within its discretion to hold, in the absence of medical testimony to support the contrary, that the wife had the medical capacity to execute a settlement agreement and was not subject to undue influence).

The record is clear that Samuel was lucid, healthy, represented by counsel, and that Samuel signed the agreement—which his sister and brother chose to enforce—at a time when he was lucid and not laboring under any of the problems presented by COVID or any other relevant condition.

C. There is not sufficient evidence to support a claim of rescission.

Section 28-2-1711, MCA, provides five (5) instances in which a party to a

contract may rescind, and only subsection (1) (which includes duress and undue influence) even arguably applies to this case. Under subsection (1), a party to a contract can rescind only if the duress, menace, fraud, or undue influence is "exercised by or with a connivance of the party as to whom the party rescinds or any other party to a contract jointly interested with the party . . . ." § 28-2-1711(1), MCA. None of what Samuel suggests is duress or undue influence is a type for which the Montana Code provides the right of rescission. There is no evidence that Lily and Vernon exercised any duress, menace, fraud, or undue influence and, therefore, the entire body of Samuel's theory finds no statutory basis.

Nonetheless, a contract that is voidable solely for want of due consent may be ratified by subsequent conduct under section 28-2-304, MCA. In this case, it is clear the mediation agreement, which Lily and Vernon seek to enforce, was executed and ratified by Samuel at a time in which he did not suggest any deficiencies.

A survey of various other jurisdictions quickly reveals law in conformity with the relevant Montana Code section, Montana district court rulings, and common sense. For instance, a party cannot claim duress or undue influence emanating from their own attorney in an effort to avoid a mediated agreement. *Bistany v. PNC Bank, NA*, 585 F. Supp. 2d 179, 183 (D. Mass. 2008) ("[I]n general, duress must emanate from the opposing party to an agreement, not one's own attorney, unless the opposing

party knows of the duress.").

Legally cognizable duress, unlike that which Samuel claims, "must have originated from the [opposing party]." *Mandavia v. Columbia Univ.*, 912 F. Supp. 2d 119, 127–28 (S.D.N.Y. 2012), *aff'd,* 556 F. App'x 56 (2d Cir. 2014) (citations omitted); *see also Evans v. Waldorf-Astoria Corp.*, 827 F. Supp. 911, 914 (E.D.N.Y. 1993), *aff'd,* 33 F.3d 49 (2d Cir. 1994) ("Duress by other than the opposing party to a contract cannot constitute compulsion sufficient to void the contract."); *Murphy v. Inst. of Int'l Educ.*, No. 19CIV1528ALCRWL, 2020 WL 6561603, at *13 (S.D.N.Y. July 27, 2020), *report and recommendation adopted*, No. 19-CV-1528 (ALC), 2020 WL 5658628 (S.D.N.Y. Sept. 23, 2020) (citations omitted) ("Threats made or undue influence applied by a party's own agent (such as her attorney) or by a third party (including the Mediator) do not constitute duress as a matter of law."); *Kosowska v. Khan*, 929 S.W.2d 505, 508 (Tex. App. 1996), *writ denied* (June 12, 1997) (citations omitted) ("[Appellant] alleges that the duress emanated from her own attorney and not from [Appellee]. Therefore, as a matter of law, she has failed to state a claim that the contract is unenforceable due to duress or undue influence.").

II. THE CONTRACT FOR DEED ISSUES ARE MOOT

The Montana Supreme Court does not address moot issues, nor does it issue advisory opinions. *Houden v. Todd*, 2014 MT 113, ¶ 27, 375 Mont. 1, 324 P.3d 1157

(citing *Serena Vista, LLC v. Mont. State Dept. of Natl. Resources & Conserv*., 2008 MT 65, ¶ 14, 342 Mont. 73, 179 P.3d 510). A settlement agreement moots the issues of the underlying lawsuit. *Colida v. Motorola, Inc*., 77 F. App'x 516, 517 (Fed. Cir. 2003). The ownership of the land encompassed by the contract for deed was squarely the matter being litigated, and whatever can be said of this ancient contract for deed, it is clear this disputed transaction predates the Agreement in Mediation. Those issues are thus moot.

III. MOOTNESS NOTWITHSTANDING, THE DISTRICT COURT RULED CORRECTLY ON THE CONTRACT FOR DEED ISSUES

A. The District Court ruled correctly on the statute of limitations issue.

Samuel contends "in the district court's order of June 29, 2021, the district court agreed with the petitioner's (sic) that Sam's finding of the warranty deed violated the applicable statute of limitations." (Appellant's Opening Br. at p. 14). The District Court did not claim that the filing of the warranty deed violated the statute of limitations. More precisely, the court stated that Lily and Vernon argued the contract for deed executed February 7, 1990, was no longer enforceable due it being long past any pertinent statute of limitations under section 27-2-202, MCA, to which Judge Wald said, "the Court agrees." (District Court Doc. 71, *Order Granting Mot. To Approve Settlement Agreement* at p. 7).

Judge Wald's Order went on to point out that the Trust over a period of years took actions inconsistent with Samuel's claim that he had a fee interest in the disputed land. (*Id*.). Samuel never brought the issue to the court's attention, never filed suit, and never did anything to contradict the Trust's position that it owned the land. (*Id.*). The court, however, recognized that the facts supporting the proposition that the Trust had taken action contrary to Samuel's interest in the property thus triggered Samuel's obligation to bring a lawsuit or suffer the consequences of a lapsed statute of limitations. (*Id*.).

B. The District Court did not err when it held Samuel's claim was barred by laches.

The District Court was aptly troubled by Samuel's complete lack of diligence in failing to assert his claim through negotiations and, ultimately, executing an Agreement in Mediation quieting title to the land in the Trust. (*Id.*).

> The doctrine of laches is an equitable remedy—asserted as an affirmative defense under M. R. Civ. P. 8(c)(1)—"by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting a claim, when the delay or negligence has prejudiced the party against whom relief is sought."

Algee v. Hren, 2016 MT 166, ¶ 8, 384 Mont. 93, 375 P.3d 386 (citations omitted). "Although time is a factor when determining laches' elements, 'laches is not a mere elapsed time, but rather, it is principally a question of the inequity of permitting a

claim to be enforced.'" *Algee*, ¶ 8 (quoting *Cole v. State ex rel. Brown*, 2002 MT 32, ¶ 25, 308 Mont. 265, 42 P.3d 760).

The facts supporting the statute of limitations defense also support—perhaps more precisely—a defense of waiver or latches. Samuel waited decades to assert ownership by recording the warranty deed. Samuel's Opening Brief asserts, with some merit, that a party seized of land and whose ownership is not in question should not have been obligated to bring a quiet title action until his ownership is challenged. But, here, the mischief about which the District Court seemed most concerned was of more recent origin.

The District Court was particularly concerned that Samuel allowed the ownership of the trust land to be adjudicated and to be the focus of a mediation and a material term in the Agreement in Mediation, to only then—after the issue is settled, in writing—raise his grievance with little or no proof he satisfied the terms of the contract for deed and with only Samuel having knowledge of his claimed interest. Samuel watched these events unfold, signed the agreement, and ultimately agreed that the land belonged to the Trust and his claim should be barred by the doctrine of laches.

C. The District Court did not err in determining Samuel waived his right to the land.

The District Court had jurisdiction over this matter and made a proper and enforceable finding that Samuel waived his right to the land and that the Agreement in Mediation was to be enforced.

Personal jurisdiction was established over Samuel, personally, by his voluntary appearance in the matter. *See Wenz v. Schwartze*, 183 Mont. 166, 175, 598 P.2d 1086 (1979) (quoting Rule 4(b)(2), M.R.Civ.P.) ("Jurisdiction may be acquired by our courts over any person through service of process as herein provided; Or by the voluntary appearance in an action by any person either personally, or through an attorney, or through any other authorized officer, agent or employee."). Unlike compatible proceedings in probate—where a probate court exercises limited jurisdiction over property—the district court can exercise general jurisdiction in a trust proceeding. § 72-38-302, MCA. Lastly, courts have the power to enforce agreements that settle disputes before the court. *Miller v. State Farm Mut. Auto. Ins. Co.*, 2007 MT 85, ¶ 15, 337 Mont. 67, 155 P.3d 1278 (citing *Dambrowski v. Champion Int'l Corp.*, 2003 MT 233, 317 Mont. 218, 76 P.3d 1080; *Hetherington*, 257 Mont. 395.

Samuel argues that he "neither waived his right to object to the Agreement in Mediation nor his ownership of Sections 8, 9, and 20." (Appellant's Opening Brief

at p. 18). Samuel's contention seemingly recognizes the obvious—that his signature on the Agreement in Mediation constituted a waiver—and he tries to avoid this certainty by arguing "his signature was not voluntary." However, the District Court found the opposite, Samuel has not shown a lack of substantial evidence to support that finding, and Samuel's right to the land is waived.

CONCLUSION/RELIEF REQUESTED

There is no case that describes the phenomenon but all involved in the law understand it. Cases settle with the thinnest of involvement of counsel, if any, and with no litigation and no exchange of discovery. Others, on the opposite end of the spectrum, settle only after the parties seek and obtain counsel, litigate a year or more, enlist a seasoned mediator, and take weeks to carefully craft the necessary documents to memorialize an agreement. The former, more informally negotiated and documented agreements usually get enforced, but are also subjected to more scrutiny. The latter type of settlement, barring fraud, or some other aberrational hijynx, is enforced in all cases.

The Appellees Lily and Vernon request an affirmation of the District Court's Order with a limited remand for purposes of assessing attorneys' fees.

DATED this 14th day of March, 2022

/s/ Mark D. Parker
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed in double spaced, proportionately-spaced, 14-point, Times New Roman Typeface, and the word count calculated by Microsoft Word is 3,954 excluding the table of contents, table of authorities, certificate of service and certificate of compliance.

DATED this 14th day of March, 2022.

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THIS IS TO CERTIFY that a copy of the foregoing document was served upon opposing counsel of record by causing the same to be deposited in the U.S. Mail, postage prepaid, addressed as follows:

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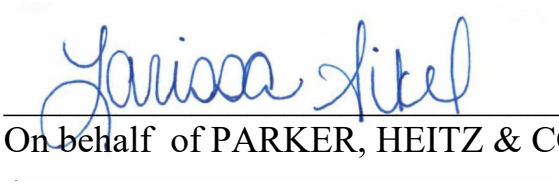

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