STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
PORT ST. LUCIE DISTRICT OFFICE

Susan Norvell-Murphy, Employee/Claimant, vs. Place At Vero Beach, Employer, and Cambridge Integrated Services, Inc., Carrier/Servicing Agent.	OJCC Case No. 04-005503RDM Accident date: 11/18/2003

PRELIMINARY EVIDENTIARY RULING ON MOTION TO ENFORCE SETTLEMENT INCLUDING MOTION IN LIMINE; NOTICE OF MERITS HEARING

PROCEDURAL HISTORY

On June 24, 2008, the parties conducted a mediation settlement conference before Olivia Devonmille, a prior Judge of Compensation Claims (JCC). Claimant was represented by Ronald R. Rider and the employer/carrier (E/C) by Anthony M. Amelio.

A settlement was reached on all issues pursuant to section 440.20(11)(c). Claimant recovered $21,250.00. An attorney’s fee of $2,875.00 would be deducted from this amount for Mr. Rider’s attorney fee pursuant to section 440.34(1). Additionally, claimant was to reimburse Mr. Rider $1,375.00 in costs allegedly advanced. Claimant also agreed to execute a voluntary resignation letter and a general release. It was agreed E/C would terminate the authorization for medical care the following day.

E/C alleges proposed settlement papers were sent to Mr. Rider on June 25, 2008. This paperwork was not processed by Mr. Rider and returned to defense counsel as expected. Hence, settlement papers were never submitted to the JCC for consideration.

On July 16, 2008, the carrier mailed a check directly to Mr. Rider for one half the gross settlement amount or $11,375.00. A second check was issued by the carrier in the same amount and was mailed by defense counsel to Mr. Rider on August 11, 2008. This second check was accompanied by an escrow letter instructing Mr. Rider to place the money in his trust account pending JCC approval of the settlement.

The reasoning behind making this advance payment, especially before having the settlement paperwork in hand, is unexplained. Of course, delivering a settlement check to counsel in this fashion precludes overlooking making payment after the settlement is approved by the JCC thereby resulting in a penalty.

During this general timeframe Mr. Rider was investigated by the Florida Bar. This investigation resulted in Mr. Rider's emergency suspension for the misappropriation of client funds. *The Florida Bar v. Rider*, Case Number SC08-2253 (Fla., December 23, 2008). Criminal charges are pending connected to Mr. Rider's alleged misappropriation. Payments made by the carrier in this case are apparently among the funds that were stolen.

When settlement papers were not returned to defense counsel, E/C filed a motion to enforce settlement. A hearing was conducted December 12, 2008, attended by claimant, but not Mr. Rider. Claimant made an oral motion to discharge Mr. Rider which was granted. A hearing on the motion to compel was postponed pending claimant obtaining another attorney.

On January 9, 2009, Michael K. Horowitz appeared for claimant and filed a Petition for Benefits (PFB). In her PFB claimant seeks a correction of average weekly wage, additional medical care and temporary disability benefits.

Eventually, E/C renewed its motion to compel. By way of an order entered September 28, 2010, I declined to rule on E/C's motion in summary fashion, instead requiring an evidentiary hearing although the scope of matters to be admitted into evidence remains to be seen.

STATUS CONFERENCE

Although it was not reviewed point by point, discussions with counsel at a status conference conducted October 18, 2010, indicate agreement with the foregoing summary of events. The matter to be heard at the evidentiary hearing noticed below will be limited to issues directly bearing on E/C's motion to compel. Issues attached to the PFB are severed. *See*, § 440.25(4)(d), *Fla. Stat.* (2009) (last sentence). Claimant raised, but has not pled, the possibility its position may include (in essence) that even if she is compelled to complete the settlement, the payment to Mr. Rider described above does not constitute payment to claimant. I find this position is integral to E/C's motion to compel and, if claimant goes forward with this position, should be taken up at the hearing noticed below.

The other issue to be addressed at the upcoming hearing is whether a binding settlement was actually reached. Claimant's position asserted at the status conference and during negotiations between counsel is that because of undue duress, a valid settlement agreement was not reached at the mediation conference. Essentially claimant asserts that Mr. Rider, but not E/C or Ms. Devonmille, placed her under undue duress thereby voiding the agreement. E/C responds by denying this allegation but, in any event, asserts claimant cannot testify because any such testimony is privileged and inadmissible.

MOTION IN LIMINE

On the last point, E/C concedes the attorney/client privilege is claimant's to waive, but that under the Workers' Compensation Law mediation communication of any nature may not be divulged, over objection, at subsequent proceedings. Specifically, section 440.25(3) provides:

> "Any information… relating to a mediation conference under this section obtained by any person performing mediation duties is privileged and confidential and may not be disclosed without the written consent of all parties to the conference…. Each party to a mediation conference has a privilege during and after the conference to refuse to disclose and to prevent another from disclosing communications made during the conference…." … "(A)ny conduct or statements made during a mediation conference or in negotiations concerning the conference are inadmissible in any proceeding under this chapter."

E/C argues this language is abundantly clear and applicable to the very thing claimant proposes to do at the upcoming hearing.

Claimant, on the other hand, asserts the mediation privilege does not contemplate conversations with her own attorney and, in any event, undue duress is an exception to the mediation privilege.

The parties do not cite, nor could I find, decisional law on the question of whether the mediation privilege applied between an individual party and her own attorney. However, the statutory language is all inclusive. The language utilized in section 440.25(3) is identical in several respects to that employed at section 440.102(3). Accordingly, civil cases serve as a guide in reaching a decision.

Moreover, there is no practical reason to believe the privilege cannot be applied as E/C asserts. Common experience teaches that a party wishing to negate a settlement agreement will, from time to time, blame that party's own attorney for some misdeed whether it be undue pressure, failing to explain the ramifications of the settlement, etcetera. Allowing this to occur undermines the mediation process, a process which is firmly supported by our appellate courts. *See, e.g., Cordovez v. High-Rise Installation, Inc.,* Case Number 1D09-5786 (Fla. 1st DCA October 29, 2010) (not final).

Perhaps the strongest appellate case for holding the privilege does not apply is *Dr Lakes, Inc. v. BrandsMart USA of West Palm Beach*, 819 So. 2d 971 (Fla. 4th DCA 2002). Dr Lakes, Inc., contended the parties made a mutual mistake in reducing the settlement to writing resulting in a $600,000.00 error. The trial court held the statutory mediation privilege or confidentiality, in essence, left Dr Lakes, Inc., without means to prove its assertion. The court held a literal interpretation of statutory language should not be utilized where the result would be "ridiculous." *Id* at 974. The court also seems to say the reason for the mediation privilege is to eliminate the use of statements made during mediation as an admission against interest in subsequent proceedings which in turn would reduce the effectiveness of the mediation process. "Once the parties in mediation have signed an agreement, however, the reasons for confidentiality are not as compelling." *Id* at 974.

The mediation privilege is mentioned in *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (Fla. 4th DCA 2001). The appellant wife contended the mediation agreement should not be given effect because of alleged misconduct by the mediator himself. The court rejected appellant's contention that the agreement was void because of third party duress pointing out that for improper influence to be considered, it must come from a party to the agreement. *Id* at 1096.

The district court, however, observes, "During a court-ordered mediation, the mediator is no ordinary third party, but is, for all intent and purposes, an agent of the court carrying out an official court-ordered function. We hold that the court may invoke its inherent power to maintain the integrity of the judicial system and its process by invalidating (an)… agreement obtained through violation and abuse of the judicially-prescribed mediation procedures." *Id* at 1099 (The sequel is the trial court found there was no mediator misconduct. *Vitakis v. Valchine*, 987 So. 2d 171 (Fla. 4th DCA 2008).) However, as noted in *Dr Lakes, Inc. v. BrandsMart USA of West Palm Beach*, the appellate opinion does not reflect the mediation privilege was raised at the trial level. *Dr Lakes, Inc.* at 973.

Cohesive conduct by a party's own attorney is touched on in *Mckinley v. Mckinely*, 648 So. 2d 806 (Fla. 1st DCA 1995). However, this assertion appears inconsequential to the court's decision. (Of a potential importance is that *Mckinley* points out that in accordance with section 90.507 that by presenting evidence of proceedings that are otherwise subject to privilege, the party doing so, waives that privilege as to the presentation of contrary evidence.)

Bad legal advice may not be the basis of unwinding a settlement agreement. *Casto v. Casto*, 508 So. 2d 330 (Fla. 1987). Even if a party can show that agreeing to a settlement is rooted in the malfeasance of that party's own attorney, this cannot be the basis for setting aside a settlement. This is true even if the reviewing court "…is dismayed by the lack of competence and professionalism with which a member of the bar handled… this case, which resulted in great harm to the client…." *Peralta v. Peralta Food Corp.*, 506 F. Supp. 2d 1274, 1283 (SD Fla. 2007).

I cannot locate any decision finding the conduct of a party's own attorney can be the basis for finding a party acted under duress. In *Miami v. Kory*, 394 So. 2d 494 (Fla. 3rd DCA

1981) the court explains, "Duress is a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act to make a contract not of his own volition." *Id* at 497. However, to constitute duress it must be shown (1) that the act sought to be set aside was effected involuntarily and thus not as an exercise of free choice or will and (2) this condition of mind was caused by improper or coercive conduct *of the opposite side*. *Id* at 497.

I can find no basis under the law for allowing claimant to present evidence pertaining to her own attorney's misconduct during mediation at least where this misconduct consists of mere verbal pressure. Hence, the motion in limine is provisionally granted subject to the observations below.

TRIAL PROCEDURE

A motion in limine typically deals with more fully developed facts and is more likely applicable in a jury trial. E/C's motion is, in essence, a request for a preliminary ruling.

Claimant should decide whether she wishes to present detailed evidence of events believed to be the basis for voiding the mediation agreement as opposed to a summary of that evidence presented through counsel. Likewise, E/C may present evidence in either fashion as well especially if the parties wish to streamline a potential appellate review of the case based on the alternative rulings founded on testimony of occurrences at mediation being admitted as opposed to not being admitted per the provisional ruling above.

It should be noted this order does not address the potential applicability of the hearsay rule.

PRETRIAL PROCEDURE

Counsel for the parties are ORDERED to meet and discuss the following:

1. If they agree, in whole or in part, to the "procedural history" outlined in the first nine paragraphs of this order.
2. The witnesses and exhibits to be introduced by each party.
3. As discussed above, the intentions of the respective parties as to the method of presenting evidence pertaining to mediation conduct will be presented, that is in detail or by summary.
4. Whether claimant will go forward with its contention that E/C's payment to Mr. Rider does not constitute payment to claimant, and
5. If E/C wishes to go forward with that aspect of the mediation agreement providing for the execution of release and a resignation letter, whether the specific wording of the document can be agreed upon and, if there is a ruling in E/C's favor, whether claimant will execute those documents.

Given the well-known professionalism of both attorneys, a pretrial stipulation may be filed with the JCC at the option of the parties.

TRIAL DATE

A merits hearing will be held in this matter on January 11, 2011, at 10:30AM, at Office of Judge of Compensation Claims, Port Saint Lucie District, 544 NW University Boulevard, Suite 102, Port Saint Lucie, Florida.

DONE AND ORDERED this 10th day of November, 2010, in Port St. Lucie, St. Lucie County, Florida.

Robert D. McAliley
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I HEREBY certify that a true and correct copy of the foregoing has been emailed to the attorneys listed on this 10th day of November, 2010.

Assistant to the Judge of
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