

The Court of Civil Appeals



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September 5, 2013

2120920

Ex parte Sheila Stone Schoen. PETITION FOR WRIT OF MANDAMUS (In re: Kasandra Larrivee, f/k/a Kasandra Tolbert v. Nicholas Tolbert) (Baldwin Circuit Court: DR-11-900031.02)

ORDER

Petition for Writ of Mandamus having been filed and the same having been submitted and duly examined and understood by the Court,

IT IS ORDERED that the petition be, and the same is hereby granted. Trial court is directed to grant the mediator's motion to quash subpoenas and motion for protective order, prohibiting the parties from seeking to compel testimony from the mediator regarding any aspect of the mediation.

Thompson, P.J., and Pittman, Thomas, and Donaldson, JJ., concur.

I, John H. Wilkerson, Jr., Clerk of the Court of Civil Appeals of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this 5th day of September, 2013.


John H. Wilkerson, Jr.

The Court of Civil Appeals



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August 1, 2013

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FILING NOTICE

This petition has been docketed in this cause. Future correspondence should refer to the appellate case number shown above.

A handwritten signature in cursive script that reads "John H. Wilkerson, Jr.".

John H. Wilkerson, Jr.
Clerk, Court of Civil Appeals

cc: Hon. Michelle M Thomason
Hon. Jody W. Campbell
Brien Carter Isphording, Esq.
W. Donald Bolton, Jr, Esq.
Kelly A McGriff, Esq.

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

TOLBERT KASANDRA,
Plaintiff,

V.

TOLBERT NICHOLAS,
Defendant.

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Case No.: DR-2011-900031.02

ORDER

This matter having come before the Court on 7/10/2013 on a Motion to Quash and Motion for Protective Order filed by the Mediator in this cause, and further, on verbal motion by the Defendant to reconsider the Court's denial of the Defendant's Motion to Strike; Plaintiff was present with her attorney of record, Don Bolton, Esquire; Defendant was present with his attorney of record Kelly McGriff, Esquire; and the Mediator, Sheila Shoen, Esquire, was present with her attorney of record, Brian Isphording, Esquire. Upon hearing argument in this cause, the Court hereby makes the following findings and further, hereby ORDERS, ADJUDGES and DECREES as follows:

1. The Plaintiff in this case seeks to set aside an agreement reached in mediation, wherein she was self represented. The Plaintiff alleges that the mediator made statements to her that were in the nature of legal advice when an attorney was not present, and further made statements that were coercive and which caused her to enter into the said agreement under duress.
2. The issue at bar is whether or not a mediator can be compelled to testify in a hearing, when the testimony being sought does not involve the substance of the case or negotiations of the parties, but the alleged improper conduct of the mediator.
3. Upon review of the applicable rules and law in this area, and upon hearing argument from learned counsel, the Court ORDERS as follows: (a) the motion to quash and the motion for protective order over the testimony of the mediator at deposition and in court are hereby denied; subject, of course, to any protective rights that would be afforded to any witness in any case pursuant to the 5th Amendment of the Constitution of the United States; and (2) the Defendant's motion to reconsider the Motion to Strike the Motion to Block Judgment and Set Aside the Mediation Agreement is hereby denied.

In support of this Order, the Court makes the following findings:

1. First and foremost, the Court acknowledges that the mediator in this case, a member in good standing with the Baldwin County Bar Association, has not been found to have committed any act of misconduct or malfeasance as it relates to her duties or her role as mediator in this case.

Nothing in this Court's Order is intended to pass judgment on the ultimate issue in this matter, to-wit: whether or not the mediation agreement should be set aside due to misconduct of the mediator.

2. The Court believes that Rule 11, Civil Court Mediation Rules, clearly prevents a mediator from being compelled to give testimony or evidence related to statements made by the parties during negotiations or about the substance of the parties' litigation during the mediation. Without a doubt, those rules were promulgated in order to protect the integrity of the negotiations and the mediation process; however, this Court does not believe the Rules' effect should be to provide protection for a mediator's actions outside the scope of those Rules. Therefore, the Court finds that the Motion to Quash is due to be denied.

3. In this case the allegations are about coercion, duress and statements made that were in the nature of legal advice. The Defendant moves to strike the motion of the Plaintiff and the affidavit in support thereof. First, the Court finds that the affidavit is not due to be stricken, as it creates no more than a verified motion or petition when combined with the motion that was filed. Further, the motion is not due to be stricken based on the Court's ruling herein that the testimony and evidence sought to be introduced is not protected by Rule 11, or falls within an exception thereto.

4. Further, the Defendant's argument that the Plaintiff's motion should be stricken because the allegations, if they were in fact made, would not rise to the level of coercion or duress are also without merit. The determination of whether or not a certain set of facts rise to the level of coercion or duress is for the trier of fact to determine, after hearing evidence. The threshold issue is whether or not certain statements were in fact made; upon that determination, the Court would determine if those statements rise to the level of coercion or duress.

5. It has been argued that this Court's decision will undermine the integrity of the mediation process. The Court recognizes that this could be viewed as requiring a balancing of competing public interests. However, the Court does not believe that this ruling in any way compromises the mediation process or should cause concern to mediators who act in good faith and follow the mediation rules and those of professional conduct. Further, for the Court to rule otherwise in this case would be to prevent any avenue of recourse to a party when a mediator is in fact guilty of misconduct during the mediation process.

DONE this 11th day of July, 2013.

/s/ MICHELLE M THOMASON
CIRCUIT JUDGE