

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2084

September Term, 2014

CHARLES W. GEMMILL, JR., ET AL.

v.

MICHAEL GEMMILL FISHER, ET AL.

Woodward,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: January 8, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case began as a dispute between siblings regarding their deceased mother's estate. That case was settled. Now, two of the siblings ask this Court to vacate the settlement agreement.

BACKGROUND

Appellants Charles W. Gemmill, Jr. and Eliza Gemmill Wierzbic, brother and sister, (“Charles” and “Eliza,” respectively) filed a complaint in the Circuit Court of Baltimore County against their sisters, Michael Gemmill Fisher and Mary C. Gemmill, and their niece, Amelia Clarkson (“Michael,” “Mary,” and “Amelia,” respectively). The complaint alleged that Michael and Mary acted improperly with regard to their deceased mother's estate.¹ Michael, Mary, and Amelia answered, denying the claims.

On March 10, 2014, the parties settled the case and a settlement agreement was placed on the record before the trial court (the “Settlement Agreement”). The Settlement Agreement included three provisions that are relevant to this appeal. *First*, Mary would execute a deed (the “Deed”) for 2808 Benson Mill Road (the “Property”), which would provide Mary a life estate in the Property and grant the remainder to Charles, Eliza, Michael, and Mary, as co-tenants. *Second*, Mary would designate Charles and Eliza as beneficiaries of her life insurance policy so that, upon Mary's death, Charles and Eliza

¹ Charles and Eliza's complaint included allegations of improper and tortious actions; constructive fraud; breach of confidential relationship; breach of fiduciary duty; unjust enrichment; fraud; and undue influence over the parties' mother in the preparation of deeds to real property in Baltimore County, and in the creation, maintenance, and disbursal of monies from bank and brokerage accounts.

would together receive \$125,000. *Third*, Michael, Mary, and Amelia would pay Charles and Eliza a total of \$25,000. The trial court found that the parties knowingly, voluntarily, and intelligently entered into the Settlement Agreement. Charles and Eliza's attorney prepared a draft of the Settlement Agreement, as the trial court instructed, and sent copies to Michael, Mary, and Amelia's attorney.

Upon reviewing the draft Settlement Agreement, the parties became concerned about whether it provided that Charles and Eliza's heirs and assigns would be beneficiaries to Mary's life insurance policy, if either or both Charles and Eliza predeceased Mary. Fortunately, the parties were able to work out that disagreement, and at a status conference, held on July 10, 2014, the parties presented a clarifying amendment (the "Amendment") to the Settlement Agreement. The Amendment stated that if either Charles or Eliza predeceased Mary, the surviving party (of Charles or Eliza) would receive the full \$125,000. If, however, both Charles and Eliza predeceased Mary, their heirs and assigns would not become beneficiaries of the policy. The parties approved the Amendment and the remaining terms of the Settlement Agreement, as previously drafted. The trial court found that the parties fully, knowingly, and intelligently amended the Settlement Agreement.

Charles and Eliza's attorney prepared a draft of the Settlement Agreement, and emailed the documents to Michael, Mary, and Amelia's attorney. That same day, Michael, Mary, and Amelia executed the Settlement Agreement, the Deed, the life insurance beneficiary designation, and a \$25,000 check made payable to Charles and Eliza's attorney.

Michael, Mary, and Amelia's attorney emailed Charles and Eliza's attorney, indicating that Michael, Mary, and Amelia had executed the documents and requesting that the parties exchange the documents and notify the trial court. Charles and Eliza, however, refused to sign the Settlement Agreement.

Michael, Mary, and Amelia filed a Motion to Enforce the Settlement Agreement and on October 28, 2014, the trial court conducted a hearing. Michael, Mary, and Amelia submitted into evidence the Settlement Agreement and proof that they had done what it required: a copy of the revised Deed, a copy of the written designation of life insurance beneficiaries and coverage letter, and a copy of the \$25,000 check. Charles and Eliza, now unrepresented by counsel, argued that Michael, Mary, and Amelia had not met the terms of the Settlement Agreement. The trial court disagreed and found that Michael, Mary, and Amelia had complied with the Settlement Agreement. The trial court also found that, at the March and July hearings, both Charles and Eliza had fully understood the terms of the Settlement Agreement and were willing to be bound by it. Therefore, the trial court found the Settlement Agreement was enforceable, ordered that it be enforced, and appointed a Trustee for Charles and Eliza to complete the Settlement Agreement.

On December 8, 2014, the Trustee executed the Settlement Agreement.² Michael, Mary, and Amelia delivered to the Trustee copies of the Deed, the insurance documents,

² The Trustee made two minor changes to the Settlement Agreement: (1) the Trustee changed the date of the Agreement from July 2014 to December 8, 2014, (2) and replaced Charles and Eliza's former attorney's name with his own, as the person to whom the \$25,000 should be paid.

and the \$25,000 check. Mary caused the Deed to be recorded in the Land Records for Baltimore County. Michael, Mary, and Amelia received confirmation from the life insurance company that Mary's policy existed and that Charles and Eliza were designated as beneficiaries. The Trustee deducted his costs and fees from the \$25,000 and distributed the balance to Charles and Eliza, who negotiated their respective checks.

Charles and Eliza filed this timely *pro se* appeal.

DISCUSSION

On appeal, Charles and Eliza allege that the trial court erred in enforcing the Settlement Agreement. In response, Michael, Mary, and Amelia first request that this Court dismiss this appeal because Charles and Eliza have received and retained the benefits of the Settlement Agreement and, therefore, have recognized the validity of the trial court's decision to enforce the Settlement Agreement. Beyond that, Michael, Mary, and Amelia contend that the trial court properly ordered the enforcement of the Settlement Agreement and that Charles and Eliza's allegations of error are not preserved. We first deny Michael, Mary, and Amelia's Motion to Dismiss, concluding that they have failed to show that Charles and Eliza voluntarily acquiesced in the Settlement. In turning to the merits of Charles and Eliza's appeal, however, we conclude that they didn't raise these issues in the trial court and, therefore, their arguments are not preserved. Accordingly, we affirm the trial court's enforcement of the Settlement Agreement.

I. Motion to Dismiss

Michael, Mary, and Amelia ask this Court to dismiss this appeal, arguing that Charles and Eliza have voluntarily received and retained the benefits of the Settlement Agreement and, therefore, have acquiesced in the trial court's decision to enforce it. As such, they contend that Charles and Eliza are precluded from appellate review of the trial court's decision to enforce the Settlement Agreement. Charles and Eliza have not filed an opposition to this Motion to Dismiss, but based on their opposition to Michael, Mary, and Amelia's Motion to Supplement the Record, it is clear that they dispute that Michael, Mary, and Amelia have satisfied the Settlement Agreement's requirements. Because we conclude that a factual dispute remains as to the voluntariness of Charles and Eliza's acceptance of the Settlement Agreement's benefits, we deny the Motion to Dismiss.

In Maryland, "the right to an appeal may be lost by acquiescence in, or recognition of, the validity of the decision below." *Franzen v. Dubinok*, 290 Md. 65, 68 (1981) (quoting *Rocks v. Brosius*, 241 Md. 612, 630 (1966)). "[I]f a party, knowing the facts, voluntarily accepts the benefits accruing to [it] under a judgment, order, or decree, such acceptance operates as a waiver of any errors in the judgment, order, or decree and estops that party from maintaining an appeal therefrom." *Fry v. Coyote Portfolio, LLC*, 128 Md. App. 607, 616 (1999).

In reviewing the Motion to Dismiss, we are persuaded that Michael, Mary, and Amelia have made out a *prima facie* case that they have met the Settlement Agreement's requirements, but it is not clear whether Charles and Eliza voluntarily accepted those

benefits—something of which we must be persuaded to conclude that Charles and Eliza have surrendered their right to appeal. As they are required to do by the Settlement Agreement, Michael, Mary, and Amelia: (1) changed and recorded the Deed; (2) designated Charles and Eliza as beneficiaries of Mary’s life insurance policy; and (3) caused a \$25,000 check to be sent to the Trustee. Therefore, Charles and Eliza have received the benefits of the Settlement Agreement: (1) they have recorded interests as remainderpersons in the Property; (2) they are beneficiaries to Mary’s life insurance policy for the amount of \$125,000; and (3) they have received and negotiated the proceeds of the \$25,000. It is not clear, however, whether Charles and Eliza voluntarily accepted those three benefits. Charles and Eliza did not voluntarily accept the Settlement Agreement’s first two benefits because there was no action that they had to take to accept. The changes to the Deed and to Mary’s life insurance policy were unilaterally made by Michael, Mary, and Amelia on their behalf. Thus, Charles and Eliza did not demonstrate voluntary acceptance as to those benefits.

As to the third benefit—the receipt of the \$25,000 check—there is a factual dispute about the voluntariness of Charles and Eliza’s acceptance. Michael, Mary, and Amelia provided an affidavit to the effect that they paid \$25,000 to the Trustee, that the Trustee gave the money to Charles and Eliza, and that Charles and Eliza negotiated the check. Charles and Eliza argue, however, that their former attorney told them that the \$25,000 was paid for rental income for other property and was unrelated to the Settlement Agreement. Therefore, we are left with a factual dispute about the voluntariness of Charles and Eliza’s

acceptance of the payment and whether the \$25,000 was for the Settlement Agreement or was payment for something else.

Because this factual dispute remains, Michael, Mary, and Amelia have failed to demonstrate the necessary voluntariness. Therefore, we cannot conclude that Charles and Eliza are precluded from appellate review on this basis. We could remand for the trial court to make factual findings on voluntariness, but given our decision in Section II, below, we conclude that it is not necessary.

II. Charles and Eliza's Allegations of Error

Charles and Eliza present four arguments for our review.³ None, however, were raised in front of the trial court, and therefore, all four are unpreserved and waived.

³ As they have framed them, Charles and Eliza ask:

1. Whether the Baltimore County Circuit Court erred in upholding Defendants Motion when the parties have not reached a complete agreement and are not able to determine terms and conditions.
2. Whether the Defendants refusal to sign the March 10, 2014 Settlement Agreement resulted in changes in terms of the settlement, that only benefited the Defendants.
3. Whether the Judge should have recused herself from enforcing the settlement agreement where she was present and actively involved in the negotiations outside the presence of both parties and the Judge's impartiality may be reasonably questioned.
4. Whether the Emory/ING Insurance documents presented as evidence in court by the defendants were unsubstantiated copies and should have been disallowed by the Court.

“Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court.” Md. Rule 8-131(a). “A contention not raised below either in the pleadings or in the evidence and not directly passed upon by the trial court is not preserved for appellate review.” *Zellinger v. CRC Dev. Corp.*, 281 Md. 614, 620 (1977). “[W]hen a party has the option of objecting, his [or her] failure to do so while it is still within the power of the trial court to correct the error is regarded as a waiver estopping [the party] from obtaining a review of the point or question on appeal.” *Lohss v. State*, 272 Md. 113, 119 (1974). This preservation rule applies to Charles and Eliza as *pro se* litigants because it applies equally to both *pro se* litigants and attorneys. *See Tretick v. Layman*, 95 Md. App. 62, 68 (1993) (“The principle of applying the rules equally to *pro se* litigants is so accepted that it is almost self-evident.”).

Charles and Eliza did not present any of their four appellate arguments to the trial court, thus, they failed to preserve their arguments for appeal.

First, Charles and Eliza contend that the trial court erred in granting the Motion to Enforce the Settlement Agreement because, they argue, the parties had not reached a complete agreement and, as a result, they are unable to determine the Settlement Agreement’s terms and conditions. Charles and Eliza, however, never made this argument to the trial court. Neither Charles nor Eliza raised any objections to the Settlement Agreement or any of its terms or conditions when the trial court questioned them individually at the July 10, 2014 hearing. In fact, at the July 10 hearing, both Charles and

Eliza told the trial court that they fully understood the Settlement Agreement's terms and that it was final. Therefore, this argument is not preserved for our review.

Second, Charles and Eliza argue that Michael, Mary, and Amelia's refusal to sign the original March 2014 Settlement Agreement (before the Amendment) resulted in changes that only benefitted Michael, Mary, and Amelia. Charles and Eliza dispute the Amendment, which clarified that Charles and Eliza's heirs and assigns would not be beneficiaries to Mary's life insurance policy. At the July 10 hearing, however, Charles and Eliza both agreed to the Amendment without objection. Therefore, this argument is not preserved for our review.

Third, Charles and Eliza contend that the trial judge should have recused herself from enforcing the Settlement Agreement at the October 28, 2014 hearing, because, they argue, she was present and actively involved in the negotiations outside the parties' presence, and therefore, her impartiality can be reasonably questioned. Additionally, Charles and Eliza contend that the trial judge placed them under "extreme duress" and was "angry and intimidating" and "pressured them" to accept the terms of the Settlement Agreement at the July 10 hearing. None of these arguments are preserved, however, because Charles and Eliza never asked the trial judge to recuse herself and, at the time of the hearings, never claimed duress.

Fourth, and finally, Charles and Eliza argue that the insurance documents that Michael, Mary, and Amelia presented as evidence at the October 28 hearing were unsubstantiated copies, and therefore, the trial court should not have admitted the

documents. Charles and Eliza made no objection to the admission of the documents, however, at the time that Michael, Mary, and Amelia offered them into evidence. Therefore, this issue is also not preserved.

Because none of Charles and Eliza's arguments are preserved for our review, we decline to decide any of the presented issues. Accordingly, we affirm the trial court's enforcement of the Settlement Agreement.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**