

STATE OF NORTH CAROLINA
COUNTY OF FORSYTH

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
00 CvS 6676

KATHY A. ANCHO,
Plaintiff,

v.

ORDER

AMERICAN FAMILY LIFE
ASSURANCE COMPANY OF
COLUMBUS, DOUGLAS HOOD,
And MARGARET HOOD,
Defendants,

This matter came on for hearing before the undersigned judge presiding at the March 26, 2001, term of court on a Show Cause Order entered by the Hon. Judson D. DeRamus, Senior Resident Superior Court Judge, on March 9, 2001. After a brief hearing concerning scheduling issues on March 26, the matter was held open until March 29, at which time a full hearing was held. Present were B. Ervin Brown, counsel for the plaintiff; H. Lee Davis, counsel for defendant American Family Life Assurance Company; and Stephen G. Teague, counsel for defendants Douglas and Margaret Hood. No parties were present. The court gave each attorney an opportunity to present evidence and to be heard. Based on the evidence of record in the court file and the evidence presented, the Court finds and concludes as follows:

1. This case and its relevant participants were properly ordered into mediation pursuant to NCGS 7A-38.1 and the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions ("MSC Rules") by Order dated November 15, 2000, which order was properly served on counsel for all parties.
2. Rule 2 of the MSC Rules provides that if the parties agree on a mediator, "[t]he plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order." Mr. Teague agreed that Mr. Brown and Mr. Davis could select the mediator. Mr. Brown and Mr. Davis agreed that Thorns Craven should serve as mediator and Mr. Brown agreed to file the Notice of Selection of Mediator by agreement with the Court. Mr. Brown did not file this form with the Court.
3. NCGS 7A-38.1(h) specifically provides that "Upon failure of the parties to designate a mediator within the time established by the rules of the Supreme Court, a mediator shall be appointed by the senior resident superior court judge." No form having been filed within 21 days, the time allowed by the Rules, the Court thereafter on December 11, 2000, appointed Tad W. Lowdermilk as the mediator to conduct the

mediated settlement conference. The Court timely caused copies of the appointment to be served upon all counsel herein.

4. Thereafter Mr. Brown and Mr. Davis discussed Mr. Lowdermilk's appointment. They agreed that they would rather have Melvin F. Wright, Jr., serve as mediator. Mr. Brown agreed to seek court approval of the substitution of Mr. Wright for Mr. Lowdermilk. Mr. Davis received an email saying that Mr. Brown had done so, but in fact Mr. Brown did not do so. No such papers were filed and court approval for the substitution was never obtained. Mr. Brown did notify Mr. Lowdermilk that the parties had agreed on a different mediator.

5. At no time thereafter did Mr. Brown notify the Court that the parties had selected a different mediator, nor did Mr. Brown ask the Court to relieve the appointed mediator of his appointment.

6. The parties scheduled a mediated settlement conference with Mr. Wright for February 9, 2001.

7. A few days beforehand, it was brought to the attention of all parties that substitution of Mr. Wright for Mr. Lowdermilk had not been obtained from the Court. When all parties, counsel, and Mr. Wright arrived at the mediated settlement conference, the situation was discussed. All parties, counsel, and the mediator agreed to go forward since the conference involved numerous parties and lawyers and some were from out of town. Mr. Wright was fully advised and aware that he had not been substituted for Mr. Lowdermilk in the court ordered mediation.

8. The parties proceeded with a mediated settlement conference. As a result the plaintiff settled with one defendant, American Family Life Assurance Company. No settlement was reached with defendants Hood. Mr. Wright thereafter filed a Report of Mediator form reporting that the conference had been held.

9. On February 21, 2001, Mr. Teague sent a letter to the Senior Resident Superior Court Judge indicating that the parties had agreed to use Mr. Wright as mediator and that they had done so. Mr. Teague in effect asked that the parties be excused from conducting a second mediation with Mr. Lowdermilk. Mr. Davis and Mr. Brown were shown as receiving copies of this letter. Neither Mr. Davis nor Mr. Brown communicated with the Court.

10. No party offered to pay or paid Mr. Lowdermilk the administrative fee required by Rule 7 of the MSC Rules when the parties seek a late substitution of a selected mediator in place of an appointed mediator.

11. On February 26, 2001, Mr. Lowdermilk wrote the Senior Resident Superior Court Judge advising him of the status of this matter and asking for guidance.

12. The MSC program has been in effect in this judicial district for several years and all counsel regularly appear in Forsyth County Superior Court. The MSC Rules clearly and specifically require plaintiff's counsel to advise the court when the parties select and agree upon a particular mediator. Rule 2.A. provides:

Selection of certified mediator by agreement of parties. The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order, however, any party may file the notice.

13. The MSC Rules clearly and specifically require parties who fail to timely advise the Court that a mediator has been selected who thereafter wish to use a selected mediator rather than the appointed mediator to seek and obtain court approval of the substitution of the selected mediator for the appointed mediator and then to pay the appointed mediator the administrative fee. Rule 7.C. provides:

Change of appointed mediator. Pursuant to Rule 2.A., the parties have twenty-one (21) days to select a mediator. Parties who fail to select a mediator within that time frame and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. If the court approves the substitution, the parties shall pay the court's original appointee the \$125 one time, per case administrative fee provided for in Rule 7.B.

14. Failure to comply with these duties makes work for the Court and court staff and makes work for the appointed mediator. It has the potential to cause delays in court proceedings. It shows disrespect for court orders. It interferes with appropriate court supervision of the mediated settlement conference process, which is court-ordered.

15. The Order signed by the Senior Resident Superior Court Judge appointing Mr. Lowdermilk imposed a number of duties on Mr. Lowdermilk as mediator. See Rule 6. For example, the mediator must schedule the mediated settlement conference and must conduct it before the deadline imposed by the Court order. The mediator must also report the results to the court. The court-appointed mediator remains under these duties unless and until he is relieved of those duties by the Senior Resident Superior Court Judge. When a lawyer fails to comply with the Rules, he is being inconsiderate and rude to the court-appointed mediator and making work for the mediator for no good purpose. In this case, for example, as a result of Mr. Brown's failure to comply with the Rules, Mr. Lowdermilk had to write a letter to the Senior Resident Judge for guidance.

16. Mediation pursuant to the statute offers some substantial protections to the parties and the mediator. Negotiations are not admissible, and the mediator has judicial immunity. Had the parties implied to Mr. Wright that he had been properly designated, this would have implied to Mr. Wright that he had judicial immunity for his acts, when in fact he did not. However, in this case Mr. Wright was fully and accurately informed of the status of the matter before the mediated settlement conference took place. No

attorney or party misled Mr. Wright as of the date he conducted a mediated settlement conference.

17. Parties to a lawsuit may voluntarily participate in any alternative to litigation at any time if they all consent. That appears to be what happened here on February 9. The mediated settlement conference that occurred on that day did not occur pursuant to statute and rules and was not a court-ordered mediated settlement conference. But as all parties agreed to it, there was certainly nothing wrong with it happening.

18. B. Ervin Brown, counsel for the plaintiff, failed to notify the Court that the parties had selected a mediator within 21 days of the date this case was ordered to mediation. Such failure violated the requirements of Rule 2 of the MSC Rules.

19. B. Ervin Brown, counsel for the plaintiff, failed to seek substitution of a selected mediator for an appointed mediator from the Court as allowed by the Rules when he had agreed with other counsel that he would do so. He failed to notify the Court that the parties had agreed upon another mediator in a timely fashion and disregarded the Court's Order appointing Mr. Lowdermilk as mediator. He did not pay or offer to pay the administrative fee to Mr. Lowdermilk required by Rule 7.C. Such failures violated the requirements of the Rules.

20. Mr. Brown asserts that he asked his office staff to take care of what he deemed to be the clerical tasks of filling out the needed forms and filing them with the Court. However, he admits that this was his ultimate responsibility and acknowledges that he made mistakes in meeting his responsibilities in this case.

21. Mr. Brown by his actions and inactions set forth herein violated RRPC 1.3 and further violated his professional obligations to his client and to the Court. He further neglected to insure that he had carried through on promises made to opposing counsel on which they were reasonably relying. By his failure to comply with the Rules, he exposed his client to the possibility of sanctions. His actions and inactions further resulted in accusations against the defendant and defense counsel.

22. Mr. Brown has on at least one other occasion failed to comply with his obligations under the MSC Rules. See Sands. v. R.J. Reynolds Tobacco Co., 00 CvS 2603, Forsyth County Superior Court.

23. While Mr. Wright had no obligation to file a report with the Court about the results of the mediation as the mediation was not court-ordered, Mr. Wright did file such a report. It is now of record and is a certification by Mr. Wright, who is a certified mediator, that he conducted the mediated settlement conference pursuant to the Rules and statutes governing court-ordered mediation. Under all the circumstances, the Court will not require a second mediated settlement conference to be conducted.

24. Stephen Teague and H. Lee Davis reasonably relied on Mr. Brown to notify the Court that the parties had selected a mediator within 21 days of the date this case was

ordered to mediation. They thereafter reasonably relied on Mr. Brown to obtain court-approval of the substitution of Mr. Wright for Mr. Lowdermilk. At no time did Mr. Teague or Mr. Davis mislead the Court, either directly or indirectly or by their silence, about the status of the mediated settlement conference.

25. Stephen Teague has not violated any of the Rules governing Mediated Settlement Conferences or any of the Revised Rules of Professional Conduct in connection with his actions in this case and as to him the Show Cause Order should be dismissed and expunged.

26. H. Lee Davis has not violated any of the Rules governing Mediated Settlement Conferences or any of the Revised Rules of Professional Conduct in connection with his actions in this case and as to him the Show Cause Order should be dismissed and expunged.

27. The plaintiff does not appear to be responsible for Mr. Brown's failures in this case other than vicariously and she did not herself violate the Rules. In the Court's discretion the Court will not impose any sanctions on the plaintiff and will dismiss the Show Cause Order as to the plaintiff.

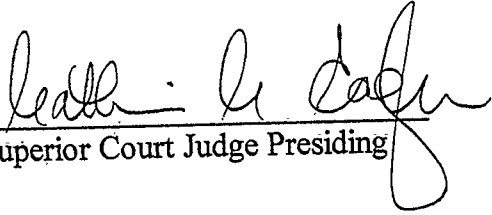
28. Neither defendant took any action in violation of the Rules and the Court will dismiss the Show Cause Order as to each defendant.

In the Court's discretion based on the evidence and the law, after consideration of lesser and more serious sanctions, and in its inherent authority and duty to supervise attorneys and enforce its own Rules, it is therefore ORDERED that:

1. The Show Cause Order against H. Lee Davis is DISMISSED and EXPUNGED.
2. The Show Cause Order against Stephen Teague is DISMISSED and EXPUNGED.
3. The Show Cause Order against the plaintiff and each defendant is DISMISSED.
4. B. Ervin Brown is REPRIMANDED for his violation his professional obligations to his client and to the Court and for his violation of the Revised Rules of Professional Conduct in connection with his actions in this case.
5. B. Ervin Brown SHALL within ten days of the date of this Order pay to Tad W. Lowdermilk the sum of \$125 as the administrative fee required under the terms of Rule 7. He SHALL mail a copy of this Order to Mr. Lowdermilk.
6. B. Ervin Brown SHALL within ten days of the date of this Order read and study the statute and Rules governing Mediated Settlement Conferences in Superior Court. He SHALL obtain a copy of the current Rules from the Dispute Resolution Commission. He SHALL within ten days of the date of this Order write letters of apology to the Senior Resident Superior Court Judge, to H. Lee Davis, to Stephen Teague, and to Tad W. Lowdermilk.

7. B. Ervin Brown SHALL within ten days of the date of this Order prepare and implement a written procedure for use within his office to insure that the Rules concerning selection and substitution of mediators are complied with and that he is taking personal responsibility for this compliance.
8. B. Ervin Brown SHALL file an affidavit showing compliance with this Order within fifteen days of the date of this Order. He SHALL attach copies of the letters of apology required by this Order, a copy of the Rules he has reviewed and studied, and a copy of the written procedure required by Paragraph 6.
9. B. Ervin Brown is warned that further violations of the Rules governing Mediated Settlement Conferences and the Revised Rules of Professional Conduct can result in suspension of his privilege to practice law in the Superior Court.
10. Tad W. Lowdermilk is relieved of the appointment to serve as mediator in this case.
11. The parties are relieved of their obligation to participate in a court-ordered mediated settlement conference.
12. The Clerk shall mail a copy of this Order to all counsel of record.

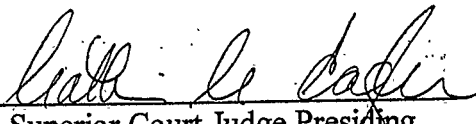
This 5th day of April, 2001.



Superior Court Judge Presiding

3. B. Ervin Brown SHALL within ten days of the date of this Order pay to Jennifer Labosky the sum of \$125 as the administrative fee required by Rule 7. He SHALL further within ten days of the date of this Order pay to Jennifer Labosky the sum of \$500 to compensate her for her time in attending the hearings during the week of March 26 and as a sanction. He SHALL further within ten days of the date of this Order pay to Jennifer Labosky the sum of \$125 to compensate her for her time on January 29.
4. B. Ervin Brown SHALL within ten days of the date of this Order read and study the statute and Rules governing Mediated Settlement Conferences in Superior Court. He SHALL obtain a copy of the current Rules from the Dispute Resolution Commission. He SHALL within ten days of the date of this Order write letters of apology to the Senior Resident Superior Court Judge and to Jennifer Labosky. He SHALL mail a copy of this Order to Jon Harkavy.
5. B. Ervin Brown SHALL within ten days of the date of this Order prepare and implement a written procedure for use within his office to insure that the Rules concerning selection and substitution of mediators are complied with and that he is taking personal responsibility for this compliance.
6. B. Ervin Brown SHALL file an affidavit showing compliance with this Order within fifteen days of the date of this Order. He SHALL attach copies of the letters of apology required by this Order, a copy of the Rules he has reviewed and studied, and a copy of the written procedure required by Paragraph 6.
7. B. Ervin Brown is warned that further violations of the Rules governing Mediated Settlement Conferences and the Revised Rules of Professional Conduct can result in suspension of his privilege to practice law in the Superior Court.
8. Jennifer Labosky is relieved of the appointment to serve as mediator in this case.
9. The parties are relieved of their obligation to participate in a mediated settlement conference.
10. The Clerk shall mail a copy of this Order to all counsel of record and to Jennifer Labosky.

This 5th day of April, 2001.


Superior Court Judge Presiding

