2015 IL App (1st) 123327-U
No. 1-12-3327
Order Filed March 31, 2015

SIXTH DIVISION

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ANN CATHERINE MCGOEY, Plaintiff-Appellee and Cross-Appellant, v. MICHAEL EDWARDS and MELISSA MIZEL, Defendants-Appellants and Cross-Appellees, and BETSY BRACE, BARBARA JOHNSON, HELEN LESSER and DAVID LESSER, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 06 CH 1881 Honorable Michael B. Hyman, Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Justices Lampkin and Rochford concurred in the judgment.

O R D E R

¶ 1 *Held*: Circuit court's order enforcing a settlement agreement was affirmed. The appellants' failed to provide a sufficient record on appeal to support their contention that they did not enter into a valid and enforceable settlement agreement. The oral settlement agreement fell within an exception to the Statute of Frauds. The circuit court did not abuse its discretion in denying the plaintiff's request for sanctions against two of the defendants.

¶ 2 Defendants, Michael Edwards and Melissa Mizel (Edwards/Mizel), appeal from an order of the circuit court of Cook County granting the motions of the plaintiff, Ann Catherine McGoey, and defendants, Barbara Johnson, Betsy Brace, and David and Helen Lesser (the defendants), to enforce a written agreement based on a settlement that was agreed to by the parties. On appeal, Edwards/Mizel contend that the circuit court erred when it ordered the enforcement of the written agreement because: (1) the written agreement contained terms to which Edwards/Mizel had not agreed; and (2) material terms were missing from the written agreement. The plaintiff filed a cross-appeal contending the circuit court erred when it denied her request for Illinois Supreme Court Rule 137 sanctions against Edwards/Mizel. For reasons stated below, we affirm the order of the circuit court enforcing the settlement agreement and denying the plaintiff's request for sanctions. Ill. S. Ct. R. 137 (Feb. 1, 1994).

¶ 3 This is the second appeal in the litigation between the plaintiff, Edwards/Mizel and the defendants. In 2006, the plaintiff filed a complaint for declaratory judgment. The plaintiff alleged that, due to the location of an easement, she experienced severe flooding of her property which at times rendered her residence uninhabitable. The plaintiff sought a judicial declaration permitting her to relocate the easement 70 feet to the east on her property. The plaintiff alleged that the relocation of the easement would not interfere with the use of the easement. She further alleged that Edwards/Mizel and the defendants refused to consent to

the movement of the easement. *McGoey v. Brace*, 395 Ill. App. 3d 847, 848 (2009). Defendant Brace filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615West 2006) (the Code)), which was granted by the trial court, On appeal, this court reversed the order of dismissal and remanded for the trial court to determine if the proposed easement relocation was " 'substantial.' " *McGoey*, 395 Ill. App. 3d at 860 (citing *Sullivan v. Bagby*, 335 Ill. 192 (1929)).

¶ 4 On remand, the circuit court held a pretrial settlement conference which resulted in the court's April 19, 2011, order providing that the case was settled by the agreement of the parties and that counsel would memorialize the agreement in writing. The case was continued for status. Due to issues raised by Edwards/Mizel, on August 10, 2011, the circuit court set pretrial and trial dates.

¶ 5 On October 19, 2011, after a second settlement conference, the circuit court entered an agreed order striking the discovery and trial dates and continuing the case for status as to the written agreement. The agreed order provided in pertinent part as follows:

> "This cause coming to be heard for status and pretrial settlement conference, all parties present through counsel, the court being advised in the premises, and the parties having settled the case by agreement to be reduced to writing:"

¶ 6 On November 8, 2011, Edwards/Mizel circulated a draft of the settlement agreement to the plaintiff and the defendants. The draft contained 15 provisions that other parties objected to on the basis that the terms had not been part of the settlement agreement, particularly the following: "Said relocation *** may cause vehicular headlamps to interfere with [Edwards/Mizel's] enjoyment and full use of their property. Therefore, [Edwards/Mizel] will choose, at their sole discretion, whether to alter traffic along the easement to a one-way East-

West pattern or to install additional landscaping at McGoey and [defendant] Johnson's expense, or neither of the above; ***."

¶ 7 On November 8, 2011, the plaintiff circulated to the parties a drawing of the new driveway location by Marek Kryzanowski of M&M Engineering. Mr. Kryzanowski had attended the October 19, 2011, settlement conference and was instructed by the circuit court to modify his preliminary drawing to reflect the agreement of the parties. On November 28, 2011, the plaintiff circulated a draft agreement editing out the provisions the plaintiff and the defendants maintained were not part of the October 19, 2011, oral settlement agreement.

¶ 8 On January 4, 2012, Edwards/Mizel filed a motion seeking reconsideration of the settlement order, a reconvening of the settlement conference or to set the case for trial. They maintained that there were certain issues in conflict and issues that were not addressed that required resolution "in order to create an agreement that would have enduring value for the current as well as future owners" of the properties.

¶ 9 As the result of the December 16, 2011,status hearing, on January 6, 2012, the court entered an order setting forth the provisions agreed to at the October 19, 2011, settlement conference, and the provisions not agreed to at the conference, which therefore were not to be included in the written agreement. Among those provisions the court found that were not agreed to was the following: "[a]ny provision for landscaping, trees, shrubs, or other improvements to the [Edwards/Mizel] property to be paid for by [the plaintiff] or any other party, for purposes of reducing the intrusion of vehicular headlamps or for any other purpose; ***."

¶ 10 The January 6, 2012, order further provided that: "[t]he revised preliminary drawing prepared by M&M Engineering which resulted from the October 19, 2011 settlement

conference and which depicts the agreed upon location of the relocated driveway on the McGoey and Johnson properties shall be further revised to depict the following information: [t]he portions of the Easement relocated on the McGoey and Johnson properties; and [t]he parking pad to be located adjacent to the south portion of the McGoey garage." The circuit court also ordered the parties to respond to Edwards/Mizel's motion for reconsideration.

¶ 11 In her response to Edwards/Mizel's motion, the plaintiff asserted that the motion was not a proper motion for reconsideration and that a settlement agreement between the parties existed and was enforceable. The plaintiff sought Rule 137 sanctions against Edwards/Mizel for filing a pleading that was factually baseless and constituted an abuse of the judicial process. Ill. S. Ct. R. 137 (eff. Feb. 1, 1994).

¶ 12 On February 2, 2012, following a hearing, the circuit court entered an order denying Edwards/Mizel's motion for reconsideration and denying without prejudice the plaintiff's motion for sanctions. The court pointed out that the October 19, 2011, order provided that the parties agreed the case was settled and therefore, there was nothing to reconsider. The court determined that Edwards/Mizel's motion provided no basis to vacate the settlement or to delay the termination of the case. The court further ordered the parties to execute within 30 days a written agreement that conformed to the court's January 6, 2012 order.

¶ 13 The case was continued a number of times for status on the written agreement. On May 25, 2012, the circuit court ordered the plaintiff to file and serve an affidavit from Mr. Kryzanowski attesting to the accuracy of the revised drawing and ordered Edwards/Mizel to file and serve any counter-affidavit. The court ordered that the written agreement provide Edwards/Mizel easement rights over a small area of sidewalk located on the plaintiff's property.

¶ 14 In his affidavit, Mr. Kryzanowski averred as follows. He was present at the October 19, 2011, settlement conference. At the settlement conference, Edward/Mizel marked on the preliminary drawing of the driveway relocation in blue their preference for the new driveway and the plaintiff marked in red how far she was willing to alter the plan to settle the dispute. He further stated that he was informed that the parties had reached a compromise between the sets of marks. The court then instructed him to generate a new drawing in which "the disputed portion of the driveway should be in between the two sets of pen marks, and approximately 'two to two-and-a-half feet' to the west of the red marks, at the two points of maximum deviation between the red and blue pen marks, with the remainder of the driveway to flow logically from that specification." He averred that to the best of his ability, he executed the revision using the court's guidelines. He further averred that "[i]t was not possible to maintain a uniform two or two-and-a-half foot distance from the red pen marks because the pen marks did not represent a feasible design in and of themselves. Thus at some points, the revised drawing is more than two-and-a-half feet from the red pen marks (i.e. closer to the blue pen marks), and at some points the revised drawing is less than two-and-a-half feet from the red pen marks." Mr. Kryzanowski further averred that the revised and agreed upon location of the driveway was accurately reflected in the March 8, 2012, drawing, which was the current version of the driveway location.

¶ 15 In his counter-affidavit, Edwards/Mizel's engineer, Don Fielding, averred that Mr. Kryzanowski's March 8, 2012, drawing did not conform to the circuit court's order because the path of the driveway was not between the two sets of marks. Mr. Fielding averred that "[w]hile the physical deviation at the Entrance and at the Proposed New Garage Drive may

appear small, the impact is significant since it fails to meet the goal of eliminating the headlight intrusion."

¶ 16 On June 19, 2012, the circuit court held a hearing on the outstanding issues relating to the parties' draft settlement agreement. The court found that Mr. Kryzanowski's March 8, 2012, drawing comported to what was discussed at the settlement conference and what was agreed to by the parties. The court denied Edwards/Mizel's request to modify the settlement to make their easement continuous, finding that it was not a material part of the current litigation or the settlement agreement. The court held that the attorney fee provision in the written agreement was "in substantial form and as discussed in open court." Finally, the court ordered that the written agreement and all the attachments be circulated by June 25, 2012. The parties were directed to sign the written agreement by the next court date, July 10, 2012.

¶ 17 On July 10, 2012, all the parties except Edwards/Mizel had signed the written agreement. The circuit court ordered the parties to file motions addressing the failure of Edwards/Mizel to sign the agreement. The plaintiff and defendants Lessers and Johnson filed motions to enforce the agreement and moved for Rule 137 sanctions against Edward/Mizel. Edward/Mizel filed a response.

¶ 18 On October 26, 2012, the circuit court issued its memorandum opinion and order. The court addressed each of Edwards/Mizel's arguments. The court rejected their argument that the provision of the written agreement dealing with the relocation of the easement was vague, pointing out that the parties agreed to the protocol for the production of the drawing and that the drawing substantially conformed to the parties' agreement. The court rejected Edwards/Mizel's argument that the written agreement contained terms to which they had not agreed, finding that the same terms were contained in the version of the draft of the

agreement they circulated, or the complained-of terms were not, in fact contained in the written agreement. The costs provision in the written agreement was proper since in the January 6, 2012, order, the parties had agreed to share the cost of resurfacing, while the plaintiff and Ms. Johnson agreed to bear the costs for the driveway relocation. The January 6, 2012, order provided that the parties agreed to a non-objection provision which contradicted Edwards/Mizel's position that they did not agree to give the plaintiff and Ms. Johnson authority to represent their interests in future negotiations with the Village of Winnetka. The court rejected Edwards/Mizel's argument that they did not agree to give up their adverse possession claims. At the settlement conference, the parties agreed to "compromise" all their claims and Edwards/Mizel's draft agreement set forth a similar provision.

¶ 19 The court rejected Edwards/Mizel's argument that due process required an evidentiary hearing, finding that there were no factual issues to be resolved. The court also rejected their argument that the oral settlement agreement reached on October 19, 2011, violated the Statute of Frauds. The court observed that the settlement was reached with the "help and in the presence of the court" and that "the court is well aware of the terms of the agreement, and the record accurately reflects those terms." The court also denied the defendants' motion for sanctions, observing that the pleadings were framed in such a way as to "avoid, though barely, requiring Rule 137 sanctions."

¶ 20 Edwards/Mizel appeal from the circuit court's order of October 26, 2012. The plaintiff cross-appeals from that portion of the October 26, 2012, order denying her request for Rule 137 sanctions.

¶ 21 ANALYSIS

¶ 22 I. Edwards/Mizel's Appeal

¶ 23 A. Standard of Review

¶ 24 The parties disagree as to the applicable standard of review. Edwards/Mizel maintain that our review is *de novo*, relying on *City of Chicago v. Ramirez*, 366 Ill. App. 3d 935 (2006). In that case, we stated that "the trial court's decision to grant or deny enforcement of a settlement agreement made on the motion pleadings and attachments, without holding an evidentiary hearing is reviewable *de novo*. *Ramirez*, 366 Ill. App. 3d at 946. The plaintiff and the defendants maintain that the applicable standard of review is set forth in *K4 Enterprises, Inc. v. Grater, Inc.*, 394 Ill. App. 3d 307 (2009). In that case, this court stated that "[w]hen presented with a challenge to a trial court's determination that parties reached an oral settlement agreement, a reviewing court will not overturn that finding unless it is against the manifest weight of the evidence." *K4 Enterprises, Inc.*, 394 Ill. App. 3d at 312.

¶ 25 Edwards/Mizel distinguish *K4 Enterprises, Inc.* on the basis that the trial court's order in that case was entered after an evidentiary hearing, whereas in the present case, there was no evidentiary hearing. See *Kulchawik v. Durabla Manufacturing Co.*, 371 Ill. App. 3d 964 (2007) (where the trial court held an evidentiary hearing to decide the validity of a settlement agreement, the manifest weight of the evidence standard of review applied). However, *K4 Enterprises, Inc.* is not distinguishable on that basis because there was no evidentiary hearing in that case. *K4 Enterprises, Inc.*, 394 Ill. App. 3d at 309 (the jury was dismissed after a meeting between the trial judge and the parties resulted in an oral settlement agreement); see *Steiner v. Eckert*, 2013 IL App (2d) 121290, ¶ 17 (even though there was no evidentiary hearing, the court applied the abuse of discretion standard to its review of a trial court's decision to enforce a settlement agreement).

¶ 26 Thus, it appears that a division as to the applicable standard of review exists between appellate courts and also within this district. We find it unnecessary to resolve the conflict in this case because we would reach the same result regardless of which standard we use. *People v. Anderson*, 407 Ill. App. 3d 662, 675-76 (2011) (noting the conflict in the standard of review applicable to reviewing remarks made in closing argument).

¶ 27 B. Discussion

¶ 28 A settlement agreement is governed by the principles of contract law. *Rose v. Mavrakis*, 343 Ill. App. 3d 1086, 1090 (2003). An oral agreement is binding if there is an offer, an acceptance and a meeting of the minds as to the terms of the agreement. *K4 Enterprises, Inc.*, 394 Ill. App. 3d at 313. For a contract to be capable of enforcement, its terms and provisions must enable the court to determine what the parties agreed to do. *Rose*, 343 Ill. App. 3d at 1091.

¶ 29 Edwards/Mizel contend that a valid settlement agreement was never reached in this case. They maintain that at the October 19, 2011, settlement conference they "offered to accept" a driveway design that conformed to the guidelines set forth by the circuit court at the October 19, 2011, conference. Edwards/Mizel argue that the March 8, 2012, drawing did not conform to what they had agreed to accept. They further argue that the written agreement omitted an essential term, and the drawing did not accomplish their primary purpose, *i.e.* to avoid the headlight intrusion. According to Michael Edwards' affidavit, he objected to the drawing presented at October 19, 2011, settlement conference in part because it would result in headlight intrusion on his property.

¶ 30 We observe that Edwards/Mizel have not supported their contention that a valid contract was never formed with a transcript from the October 19, 2011, settlement conference or that

they requested that the trial court set forth the details of the oral settlement agreement in the trial court's order of October 19, 2011. In *K4 Enterprises, Inc.*, this court determined that although no transcript or record of the parties' settlement negotiations was made, the trial judge's presence and his conclusion that the parties reached a settlement agreement was sufficient to ensure that a contract was made. *K4 Enterprises, Inc.*, 394 Ill. App. 3d at 316; *Rose*, 343 Ill. App. 3d at 1097 ("[w]hen parties reach a settlement agreement during a court-mandated settlement conference conducted in the judge's chambers and state the terms of that agreement in the judge's presence, there is no danger of enforcement of an agreement which was, in fact, never made"). A party may not object to a trial court's finding that there was a settlement agreement and the terms of that agreement as recalled by the judge where the objecting party failed to provide the reviewing court with a way to substantiate his denial that he agreed to the settlement. *K4 Enterprises, Inc.*, 394 Ill. App. 3d at 316-17 (citing *Gevas v. Ghosh*, 566 F.3d 717, 719 (7th Cir. 2009) (where neither party requests that the settlement discussions be placed on the record, the parties assume the risk that the trial judge will recall the discussion differently than they did).

¶ 31 Moreover, Edwards/Mizel's argument is contradicted by the record that we do have. In his affidavit, Mr. Edwards acknowledged his agreement to the compromise contained in the October 19, 2011, order. In his affidavit, Mr. Fielding acknowledged that the physical deviation on Mr. Kryzanowski's March 8, 2012, drawing "was small." Mr. Fielding's averment that the elimination of the headlight intrusion was one of the goals sought in the revision of the preliminary drawing was made only "on information and belief." While the parties' failure to agree on an essential term of the contract indicates that the mutual assent required to make a contract is missing, the lack of a nonessential term will not render a

contract unenforceable. *Rose*, 343 Ill. App. 3d at 1091. Moreover, the "essential term" here was the plaintiff's flooding issue which required the easement to be relocated, not the Edwards/Mizel's headlight concern.

¶ 32 The October 19, 2011, order provided that the parties had settled the case by agreement. The trial court specifically found that Mr. Kryzanowski's March 8, 2012, drawing substantially complied with the parties' agreement. We conclude that a valid agreement was made by the parties on October 19, 2011.

¶ 33 Next, Edwards/Mizel contend that the written contract was not enforceable because the material terms were not ascertainable, relying on *A.S. & W. Club v. Drobnick*, 26 Ill. 2d 521, 525 (1963) (where material terms and conditions are not ascertainable, no enforceable contract is created). In his affidavit, Mr. Edwards averred that the following provisions in the written agreement were material but were either ones they did not agree with or were never discussed: (1) the location and shape of the easement that supports the driveway and sidewalk; (2) vesting plaintiff and defendant Johnson with *carte blanche* authority to speak for and bind all parties in future negotiations with the Village of Winnetka in the event the Village changes the terms of the alleged Settlement Agreement; (3) allocation of construction costs and attorney fees; (4) construction of more than one parking pad on the plaintiff's property or the location of any parking pad not hidden by the plaintiff's garage; (5) Edwards/Mizel's adverse possession claim; and (6) dismissal of Edwards/Mizel's counterclaim.

¶ 34 Once again, Edwards/Mizel's argument must be rejected for the lack of a transcript from the October 19, 2011, settlement conference and/or their failure to have the details of the settlement agreement placed in a written order. Their argument that the trial court did not

witness or verify the details of the settlement agreement the parties reached is belied by the contents of the October 19, 2011, order wherein the trial court stated that it was "advised in the premises." "In the absence of a report of proceedings, particularly when the judgment order states that the court was fully advised in the premises, a reviewing court " 'will indulge in every reasonable presumption favorable to [the] judgment, order or ruling from which the appeal is taken.' " *In re Marriage of Macaluso*, 110 Ill. App. 3d 838, 846 (1982) (quoting *In re Pyle*, 56 Ill. App. 3d 955,957 (1978)). In addition, Mr. Kryzanowski's averment that the trial court instructed him to prepare a new drawing of the disputed portion of the driveway in accordance with the parties' agreement demonstrates that the trial court played an active role in assisting the parties to reach a settlement agreement. The fact that the draft of the settlement agreement circulated by Edwards/Mizel contained several of the provisions that they now claim they never agreed to or discussed further contradicts their argument. Finally, the October 26, 2012, order acknowledged the circuit court's involvement in assisting the parties to reach a settlement agreement, and its familiarity with the terms of their agreement.

¶ 35 As the appellants in this case, it was Edwards/Mizel's burden to provide a sufficient record from which this court could make a fully informed decision on the issues raised on appeal, and any doubt arising from the incompleteness must be resolved against them. *In re Marriage of Macaluso*, 110 Ill. App. 3d at 846. As Edwards/Mizel have failed to carry their burden, we reject their contention that the settlement agreement was not enforceable.

¶ 36 Next, Edwards/Mizel contend that the oral settlement agreement was unenforceable because it violated the Statute of Frauds. Under section 2 of the Statute of Frauds, a contract "for the sale of lands, tenements or hereditaments or any interest in or concerning them for a longer term than one year" is unenforceable unless "such contract *** shall be in writing, and

signed by the party to be charged therewith ***." (740 ILCS 80/2 (West 2010)). Edwards/Mizel maintain that they never signed a writing disposing of or resolving their interest in the current easement or driveway path. Nonetheless, they acknowledge that the oral agreement may be enforceable if it falls within an exception to the Statute of Frauds.

¶ 37 In *Rose*, the issue before this court was "whether a settlement agreement reached during a court-ordered settlement conference conducted in the trial court's chambers, the terms of which are stated in the judge's presence but neither stated in open court or transcribed, is exempted from the writing requirement of the Frauds Act." *Rose*, 343 Ill. App. 3d at 1095. The issue was one of first impression in Illinois, and outside of Illinois, there was conflicting authority on the issue. *Rose*, 343 Ill. App. 3d at 1095. After reviewing decisions from New York and California, we noted that the purpose of the Statute of Frauds was not to allow parties to repudiate agreements they have made but to prevent the enforcement of contracts that were not made. *Rose*, 343 Ill. App. 3d at 1096-97. This court recognized an exception to the Statute of Frauds, observing that the possibility of fraud was negated where the trial judge, having convened the settlement conference in his chambers and was aware of the terms of the parties' agreement, "could resolve disputes as to whether in fact an agreement was reached or the content of that agreement." *Rose*, 343 Ill. App. 3d at 1097.

¶ 38 In the present case, we determined that the parties entered into a valid contract and that the trial court's participation in the parties' settlement conference and subsequent agreement negated the possibility of fraud in this case. Edwards/Mizel argue that, unlike *Rose*, the trial court was neither present during the discussions nor did it take the precaution of repeating the terms of the settlement. Edwards/Mizel failed to provide authority requiring the trial court to place the terms of the parties' agreement on the record, and therefore have waived their

argument. Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008). Moreover, the October 19, 2011, order contradicts Edward/Mizel's argument. The written order provided that the parties had settled the case by agreement and the court was advised in the premises.

¶ 39 We conclude that the oral agreement in this case falls within the exception to the Statute of Frauds recognized in *Rose*.

¶ 40 Having disposed of the issues raised on appeal by Edwards/Mizel, we turn to the plaintiff's cross-appeal.

¶ 41 II. The Plaintiff's Cross-Appeal

¶ 42 The plaintiff contends that the trial court erred when it denied her motion for Rule 137 sanctions against Edwards/Mizel.

¶ 43 A. Standard of Review

¶ 44 We review an order granting or denying sanctions under the abuse of discretion standard. *Peterson v. Randhava*, 313 Ill. App. 3d 1, 9 (2000). An abuse of discretion will only be found where the court's finding is against the manifest weight of the evidence or if no reasonable person would take the view adopted by the court. *Baker v. Daniel A. Berger, Ltd.*, 323 Ill. App. 3d 956, 963 (2001).

¶ 45 B. Discussion

¶ 46 Under Rule 137, a court may impose sanctions against a party or an attorney who files a motion or pleading that fails to have a well-grounded factual basis, that is not supported by existing laws or lacks a good-faith basis for modification, reversal, or extension in law, or that is interposed for any improper purpose. *Peterson*, 313 Ill. App. 3d at 6-7. The purpose of Rule 137 is to prevent the filing of frivolous and false lawsuits and is not intended to penalize litigants and their attorneys merely because they were zealous, yet unsuccessful.

Peterson, 313 Ill. App. 3d at 7. Because the rule is penal in nature, it must be strictly construed. *Peterson*, 313 Ill. App. 3d at 7.

¶ 47 In this case, the trial court worked closely with the parties through two sets of settlement negotiations and their subsequent efforts to reduce the oral settlement agreement to writing. In that portion of its order of October 26, 2012, denying Rule 137 sanctions, the trial court recognized that "[p]en was not put to paper at the time of the October 19, 2011 agreed order, which resulted in delay and the subsequent hearing." The court also observed that "[a]ll of the attorneys have been professional throughout the proceedings, despite the stress the case has taken on neighborly feelings." While the court found that Edwards/Mizel avoided but barely Rule 137 sanctions, it further characterized their arguments as tenuous but not frivolous.

¶ 48 In light of the extensive involvement of the trial court with the settlement negotiations and the subsequent proceedings, we conclude that in denying the plaintiff's request for Rule 137 sanctions, the trial court did not abuse its discretion.

¶ 49 CONCLUSION

¶ 50 The judgment of the trial court is affirmed.

¶ 51 Affirmed.