2013 IL App (2d) 130303-U
Nos. 2-13-0303 & 2-13-0363, cons.
Order filed November 20, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF CURT MITCHELL, Counter-Respondent-Appellant, and MARY MITCHELL, Counter-Petitioner-Appellee.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 11-D-171 Honorable Rodney W. Equi, Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justice McLaren and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in determining that (1) the marital settlement agreement was valid and enforceable, and (2) grounds existed for dissolution of the marriage.

¶ 2 The counter-respondent, Curt Mitchell, appeals from determinations by the circuit court of Du Page County that (1) an alleged marital settlement agreement (MSA) between Curt and the counter-petitioner, Mary Mitchell, was valid and enforceable; and (2) irreconcilable differences existed between the parties that supported the entry of a judgment of dissolution. As to the MSA, Curt argues that there was no acceptance of the offer, no adequate consideration, and a material

mistake of fact; and that the MSA was unconscionable. As to the grounds, Curt argues that they were not adequately proven. We affirm.

¶ 3 BACKGROUND

¶ 4 The parties were married in 1991 and had two sons, Daniel and Timothy. At the time the judgment of dissolution was entered, Daniel was 21 years old and Timothy was 19. Curt was a Managing Director and Portfolio Director for an investment firm, Chicago Equity Partners. In that position, he managed investment portfolios for large institutional pension funds, foundations, and endowments. In 2011, he became a partner with that firm. His base salary was $175,000. However, due to bonuses, Curt's gross annual income was about $886,000 in 2011, and was about $1 million in 2012 and 2013. During the marriage, Mary worked periodically as a nurse and then in nursing management, either full- or part-time. However, her most recent job was working part-time at Macy's. At the time of the dissolution, she was unemployed.

¶ 5 In the spring of 2010, Curt moved out of the marital home. Curt filed a verified petition for dissolution of marriage on January 21, 2011. In it, he alleged that irreconcilable differences had arisen between the parties and that the marriage was irretrievably broken. Approximately three months later, Mary filed a counter-petition for dissolution containing similar allegations regarding the breakdown of the marriage. On September 29, 2011, the parties entered into a custody agreement and a joint parenting agreement. The parties exchanged discovery and financial records, and trial was set for November 2012.

¶ 6 On November 5, 2012, Mary filed a motion asserting that the parties had entered into an MSA, and seeking the enforcement of the MSA and the entry of a judgment for dissolution. (She

also successfully sought a postponement of the trial date.) The following facts are drawn from the evidence adduced at the hearing on the motion to enforce.

¶ 7 The parties and their attorneys engaged in settlement negotiations for several months in 2012. At about 2:30 p.m. on Friday, October 12, 2012, Mary's attorney, Lisa Giese, emailed an MSA that was signed by Mary to the attorney for Curt, Jamie Ryan. After Ms. Ryan received the MSA, she forwarded a copy to Curt, and also met with Curt at her office regarding the MSA. As a result of Curt's meeting with his attorney, he made three handwritten changes to the MSA, initialed them, and signed the MSA. Ms. Ryan then emailed the revised MSA ("Asserted MSA") to Ms. Giese. The parties contemplated that, if an agreement was reached, they would appear in court the following Monday to prove up the dissolution as an unscheduled matter.

¶ 8 The Asserted MSA was received by Ms. Giese at her office a few minutes after 5 p.m. She sent it to Mary. She then left her office for the weekend. She testified that her office received the Asserted MSA, signed by Mary and with the three changes initialed by her, at about 6:30 p.m. It is undisputed that Ms. Giese did not send the Asserted MSA that was signed and initialed by Mary to Ms. Ryan until after the weekend.

¶ 9 The parties dispute whether Mary and her attorney conveyed Mary's acceptance of Curt's modifications to Curt or his attorney before 2 a.m. on the morning of Sunday, October 14, 2012. Ms. Giese testified that she communicated with Ms. Ryan "many times" over that weekend, and that she told Ms. Ryan sometime between Friday night (October 12) and Saturday evening (October 13) that Mary had initialed the changes. Ms. Ryan testified that she left her office immediately after sending the Asserted MSA to Ms. Giese at about 5 p.m. She had no further communication with Ms. Giese on Friday night. She also testified that she had no conversations with Ms. Giese on Saturday,

although she may have received an email. She asserted that she did not know either on Friday night or Saturday whether Mary had accepted the three changes.

¶ 10 On Saturday, October 13, Curt provided the Form K-1 from Chicago Equity to his accountant so that the accountant could prepare the parties' 2011 income tax returns. Beginning in 2011, Curt's income had begun being recorded on an accrual basis (*i.e.*, when the money was earned) rather than a cash basis (when the money was actually received), and accordingly, the K-1 for 2011 included Curt's 2011 bonus, despite the fact that he did not receive the bonus payment until 2012. This resulted in an additional tax liability of about $100,000 for 2011. It appears that the additional tax liability became the subject of discussion among the parties almost immediately. At about 12:40 p.m. on Saturday, Mary sent Curt the following email:

> "I am going out on a limb here but I have some concerns with the Taxes that are not reflected on MSA. I also have a [question on COBRA] payments and found an error where percentages were not updated according to the new court date of 10/15. I am not trying to make trouble but I am planning on court Monday. Do you want to know from me or should I wait to have [Ms. Ryan] discuss with you Monday before court? If changes need to be made, I don't know how they'd handle."

At about 5:40 p.m. on Saturday, Ms. Giese sent the following email to Ms. Ryan:

> "Just an FYI, we just learned there is 100k tax liability for the 2011 returns. The MSA says he is responsible for what is from his income, but we need to spell this out. Also, we need to specify a time frame for the health insurance payments since there isn't one in there. Neither of these are changes and shouldn't be a big deal, but we need to clarify. Let's have the parties there at 830am [*sic*] Monday."

¶ 11 At about 2 a.m. on Sunday morning (October 14), Curt sent an email to Ms. Giese (copying Ms. Ryan), that was apparently in response to a communication from Ms. Giese. The email said: "$100,000 is not a big deal? F*** you, Lisa. You just want to ram this thing through so you don't have to deal with Mary's crazy a** anymore. No way. No deal."

¶ 12 Ms. Giese testified that she was in court on the morning of October 15, 2012. She did not say whether she was there in connection with the parties' case. Neither Ms. Ryan nor Curt was in court, nor does it appear that Mary was present.

¶ 13 On October 22, 2012, Ms. Giese sent Ms. Ryan a letter stating that there may be an enforceable MSA between the parties. On November 5, 2012, Mary filed a motion seeking to enforce the Asserted MSA and for the entry of a judgment of dissolution. Paragraph 3 of Mary's motion stated that "[o]n October 12, 2012, the parties ultimately executed a Marital Settlement Agreement, which resolved all issues between the parties."

¶ 14 On January 3, 2013, Curt filed a response to the motion to enforce. The response stated that paragraph 3 of the motion to enforce was admitted but went on to assert a defense of mutual material mistake of fact based on the increased 2011 income tax liability. The response was signed by Curt's attorney, and was not signed or verified by Curt. On January 17, 2013, Curt filed an amended response that denied paragraph 3 of the motion, and was verified by him.

¶ 15 The hearing on the motion to enforce the Asserted MSA commenced on February 13, 2013. Both Ms. Giese and Ms. Ryan temporarily withdrew from representing their clients so that they could testify at the hearing. They testified as described herein regarding settlement negotiations and the Asserted MSA. In addition, Mary and Curt testified regarding the parties' financial dealings and assets.

¶ 16 Throughout the marriage, Curt invested the family's funds. Beginning in 2007, Curt invested in double-leveraged exchange-traded funds to try to profit as the stock market fell. In April 2010, Curt began a new investment plan that was similar to the plan he had been using before, but which involved triple-leveraged funds. Curt invested the funds from the parties' Charles Schwab accounts and Mary's Vanguard account, with her knowledge. During 2010, the investments lost money but then regained it. However, in 2011 the investments lost between $2 and $2.5 million. The losses became a further source of friction between the parties. In the spring of 2011, Curt sent emails to Mary and to Curt's attorney, stating that he would assign his portion of the value of the marital home to Mary as indemnification against any losses due to his investment of family funds.

¶ 17 Additionally, in 2011 Curt invested funds on behalf of Mary's mother and one of Mary's friends, with resulting losses to both. According to Mary, the investments on behalf of her mother had lost about $500,000 as of October 2012.

¶ 18 In early 2012, the parties attempted to reach a settlement regarding the financial aspects of the dissolution. The diminishment of the family funds continued to be a source of discord. Ms. Giese testified that, initially, Curt's Vanguard 401(k), which had a value of slightly less than $300,000, was to be split between the parties. However, in July or August of 2012, Mary learned (through Curt's answers to discovery) that Curt had another investment loss of about $300,000. Curt thereafter agreed to assign 100% of his Vanguard 401(k) to Mary in the MSA as restitution for this loss. The parties continued negotiating. According to Curt, the version of the settlement agreement that became the Asserted MSA was the product of about six weeks of continuous negotiation.

¶ 19 Curt testified that, prior to signing the Asserted MSA, he had been experiencing insomnia. In addition, he was under considerable stress because Mary had threatened to sue him (and help her

mother sue him) for the investment losses. Mary wanted Curt to reimburse her mother for her losses, and according to Curt, brought the matter up about once a week, which made him feel "terrible." In September 2012, Mary also told him that she was going to publicly humiliate him in front of his friends, his family, and his co-workers, and that she was going to write the president of Chicago Equity to tell him about Curt's investment losses. Curt testified that this "terrorized" him, and all of this entered into his decision to sign the Asserted MSA.

¶ 20 The Asserted MSA itself was admitted into evidence. Under its terms, Curt was to pay 40% of his gross annual income to Mary as maintenance, plus an additional $1,500 per month from October 2012 through March 2013. In addition, Curt was to pay up to $12,000 per year of Mary's health insurance costs.

¶ 21 The marital assets were to be distributed as follows: Curt's deferred compensation for 2010, 2011, and three-quarters of his 2012 deferred compensation and bonus (a total of $1,202,516) were to be divided equally between the parties. (The remaining one-quarter of Curt's bonus and deferred compensation for 2012 ($202,750) was to be considered as income and divided between Curt and Mary as any other of Curt's income.) Mary was to receive her Vanguard and Schwab 401(k) accounts and the parties' joint Schwab money market account, which together totaled $45,800. Curt was to receive his Schwab 401(k) and money market accounts, and the parties' checking account, which together totaled $41,309.10. Mary received a car valued at $40,000, while Curt received two cars which together were valued at $20,000. Curt received about 79% of his LLC shares, while Mary received the remaining 21%. No evidence of the market value of these shares was presented, but the Asserted MSA stated that Curt paid $140,930 for them over the course of a five-year period. As offered by Curt, Mary was to receive all of the value of the marital home and Curt's Vanguard

401(k) account, which together were valued between $1.073 million and $1.141 million. Curt was to be liable for the parties' credit card debt (about $38,000), and the 2011 taxes. The Asserted MSA recited that Mary's Schwab IRA account ($294,000) was "acquired by way of inheritance" and was Mary's nonmarital property, as was a Schwab money market account ($181,000) and certain residential real estate in Florida.

¶ 22 The Asserted MSA included a provision (section 17.1) stating as follows:

> "Husband acknowledges that the disproportionate division of assets as set forth above is based largely upon certain investment losses caused by him which occurred immediately prior to the filing of the Petition for Dissolution of Marriage as well as throughout the pendency of the case. In consideration for the division of the marital estate as set forth in this agreement, Wife hereby releases Husband of any liability relating to those losses and agrees not to sue or encourage any other third parties or participate in the initiation of a lawsuit against Husband."

¶ 23 On February 21, 2013, the trial court found that the parties had formed a valid agreement and that the Asserted MSA was enforceable. On the issue of execution, the trial court found that Mary had accepted the Asserted MSA, including the three changes made by Curt, and that Ms. Giese had communicated Mary's assent to Curt and his attorney. The court then turned to the defenses of procedural and substantive unconscionability. The court noted that the agreement had been negotiated over the course of several months and that Curt was represented by counsel throughout. As to procedural unconscionability, specifically Curt's contention that his execution of the Asserted MSA was the product of duress, the court applied the definition of "duress" expressed in *Kaplan v. Kaplan*, 25 Ill. 2d 181, 185 (1962): "a condition where one is induced by a wrongful act or threat of

another to make a contract under circumstances which deprive him of the exercise of his free will." The court noted that, in *Kaplan*, the supreme court had held that a wife's threat to publicize compromising photos of her husband with another woman and to sue the other woman did not constitute duress. The trial court found that the threats made by Mary were comparable to those in *Kaplan* and did not meet the legal requirements for the defense of duress.

¶ 24 As to substantive unconscionability, the trial court noted that it did not find anything unconscionable about the division of Curt's income (via maintenance), but the allocations of marital property required more scrutiny because they were "not anything near equal." The court found, however, that Mary's waiver of her right to sue contained in section 17.1 amounted to valid consideration for the Asserted MSA's division of the marital estate. The court further commented that, in ruling on Mary's motion to enforce, it was not being asked to determine in the first instance a just distribution of the marital property, but rather to determine whether the parties' agreed-upon distribution of marital property (as reflected in the Asserted MSA) was so one-sided or unfair as to be substantively unconscionable. In that posture, the trial court could not conclude that the Asserted MSA was substantively unconscionable. Accordingly, the trial court found that the Asserted MSA was "valid, binding, and enforceable."[1]

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[1]Curt filed a notice of appeal from this ruling. That appeal was given the number 2-13-0303. Following the entry of the judgment of dissolution on April 9, 2013, Curt filed another appeal, number 2-13-0363. The two appeals were consolidated. We lack jurisdiction in appeal 2-13-0303 because the notice of appeal was premature. S. Ct. R. 304(a) (eff. Feb. 26, 2010); *In re Marriage of Leopando*, 96 Ill. 2d 114, 120 (1983). That appeal therefore must be dismissed. However, the dismissal of 2-13-0303 has no practical effect, as the appeal in 2-13-0363 encompasses all of the

¶ 25 In March 2013, Curt requested and was granted leave to voluntarily dismiss his petition for dissolution. Thereafter, the case proceeded on Mary's counter-petition for dissolution. On April 9, 2013, a hearing on the grounds for dissolution was held. Although both parties were present, the only testimony came from Mary, who testified that: she and Curt last resided in the same household in March 2010, and they had been living separate and apart for more than two years; irreconcilable differences had arisen between her and Curt; she and Curt engaged in marriage counseling "throughout many years" and also attempted to resolve their differences among themselves, but they were unsuccessful; and she believed that the marriage was irretrievably broken. Curt objected to Mary's testimony on several of these points, contending that Mary was testifying to legal conclusions rather than facts, but all of his objections were overruled by the trial court. At the close of the hearing, the trial court entered a judgment of dissolution of marriage, finding that Mary had established the grounds of irreconcilable differences. Curt filed a notice of appeal the following day.

¶ 26 ANALYSIS

¶ 27 On appeal, Curt raises four issues with respect to the Asserted MSA. He first argues that no contract was ever formed because Mary never accepted the Asserted MSA and instead proposed changes to which he did not agree. He next argues that, if a contract was formed, the extent of the parties' 2011 income tax liability was unknown and unanticipated by the parties, constituting a material mistake of fact sufficient to warrant rescission of the contract. He also asserts that there was insufficient consideration for the agreement, and that it was unconscionable. Finally, he contends that the judgment for dissolution should be reversed because Mary did not present sufficient evidence of irreconcilable differences. We take each argument in turn.

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issues which Curt sought to raise in 2-13-0303.

¶ 28 Offer and Acceptance

¶ 29 Marital settlement agreements are encouraged by section 502 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 502 (West 2010)), and courts look upon such agreements with favor and will not set them aside without proof of fraud, duress, or variance with public policy. *In re Marriage of Kloster*, 127 Ill. App. 3d 583, 585 (1984). A marital settlement agreement is a type of contract, and its formation and terms are governed by ordinary contract law. *Id*. at 584. A contract is formed where there is an offer, an acceptance strictly conforming to the offer, and consideration. *In re Marriage of Bennett*, 225 Ill. App. 3d 828, 832 (1992). Whether a contract exists is a question of fact to be decided by the trier of fact. *Kloster*, 127 Ill. App. 3d at 586. We will not reverse the trial court's determination of a question of fact unless that determination is contrary to the manifest weight of the evidence. *Id*.

¶ 30 Curt's argument that no agreement was ever formed rests on the following view of the events of October 12 and 13, 2012. He views the tendering to his attorney of an MSA signed by Mary as an offer. He did not accept that offer, but made three changes to the MSA which he initialed and signed. The forwarding of that initialed and signed MSA (the Asserted MSA) to Mary's attorney at approximately 5 p.m. on Friday, October 12, constituted a counteroffer. In Curt's view, Mary did not accept this counteroffer because neither she nor her attorney communicated her assent to his counteroffer before he withdrew the counteroffer by emailing Mary's attorney that there was "no deal" at about 2 a.m. on Sunday, October 14. Curt further contends that Mary's email to him at noon on Saturday, October 13, and the email from Mary's attorney to his attorney later that same day both demonstrated that Mary had rejected his counteroffer. He argues that this rejection precluded Mary from later accepting his counteroffer. Mary responds that her attorney testified that she did tell

Curt's attorney, sometime on Friday evening or Saturday, that Mary had agreed to the changes proposed by Curt, and that neither of the Saturday emails from her and her attorney were rejections of the Asserted MSA.

¶ 31 At the hearing on Mary's motion to enforce, the trial court heard evidence, including the conflicting testimony by each party's attorney, as to whether Mary's attorney communicated Mary's acceptance of Curt's counteroffer to Curt's attorney. Curt does not dispute that Mary in fact initialed the three changes he had made and sent the initialed agreement to her attorney's office at about 6:30 p.m. on Friday. However, both sides acknowledge that, in order to be effective, an acceptance must be objectively manifested by being communicated to the offeror. *Rosin v. First Bank of Oak Park*, 126 Ill. App. 3d 230, 234 (1984). Accordingly, the issue is whether Mary's attorney in fact communicated Mary's acceptance of the Asserted MSA to Curt or his attorney.

¶ 32 The resolution of such a disputed issue of fact is a matter squarely within the province of the trial court, which is in the best position to weigh the evidence presented, determine credibility, and make factual findings. *In re Marriage of Matchen*, 372 Ill. App. 3d 937, 946 (2007). We will not substitute our judgement for that of the trial court unless the trial court's factual finding is against the manifest weight of the evidence; that is, unless "the opposite conclusion is clearly evident or the [factual] finding is arbitrary, unreasonable, or not based in evidence." *Samour, Inc. v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 530, 544 (2007). On appeal, the primary evidence Curt offers to support his view that Mary's assent was not communicated on Friday or Saturday is the testimony of his attorney, but that testimony was contradicted by the testimony of Mary's attorney. The trial court's decision to resolve this direct conflict by crediting the testimony of Mary's attorney is not against the manifest weight of the evidence.

¶ 33 Curt also points to the emails sent by Mary and her attorney on Saturday, contending that both of them show that Mary wanted to make further changes to the Asserted MSA, and thus there was no final meeting of the minds. However, neither of these emails meets the legal requirements for a counterproposal, and thus they are not rejections of the Asserted MSA. "A mere inquiry regarding the possibility of different terms, a request for a better offer, of a comment upon the terms of the offer, is ordinarily not a counteroffer." Restatement (Second) of Contracts § 39, Comment *b*, at 106-07 (1981). Moreover, "simply because a communication discusses the possibility of modification does not necessarily mean that the communication is a demand for modification." *Hubble v. O'Connor*, 291 Ill. App. 3d 974, 980 (1997). Finally, if an offer has been accepted, an agreement has been formed, and a later request for changes is not a counteroffer that acts as a rejection; rather, it is simply an offer for a new agreement. *Id.*; see also *Patel v. McGrath*, 374 Ill. App. 3d 378, 382-83 (2007).

¶ 34 Mary's email stated that she had "concerns" about taxes that were not reflected in the Asserted MSA and questions about health insurance payments, and she commented that if changes needed to be made, she did not know how their attorneys would handle it. However, the email contained no explicit rejection of the Asserted MSA. Although Mary's email can be viewed as expressing a desire for additional clarification of some of the terms relating to taxes and health care, it did not demand that the Asserted MSA be changed to incorporate such clarification. Indeed, Mary expressed doubt that the Asserted MSA could be changed, saying that she did not know how the attorneys would handle such changes. The email also stated that Mary was "planning on court on Monday," an indication that Mary still viewed the parties as having reached an agreement. Similarly, the email sent by Mary's attorney to Curt's attorney later in the day advised Curt's attorney of certain

matters not included in the Asserted MSA that still needed to be worked out between the parties, but it contained no changes to that agreement and indeed stated that "[n]either of these are changes." It also stated an intention to have the parties come to court on Monday morning, in accordance with the plan to request a prove-up of the parties' dissolution. Although Curt notes that the parties did not, after all, appear in court on Monday morning, it is reasonable to conclude that their failure to do so was caused by his 2 a.m. Sunday email, not any prior belief on the part of Mary or her attorney that no agreement had been reached.

¶ 35 In sum, based upon the record before us, the trial court's finding that the parties reached an agreement (the Asserted MSA) was not against the manifest weight of the evidence.

¶ 36 Mistake of Fact

¶ 37 Curt next argues that, even if the parties agreed to the Asserted MSA, his agreement was based upon a material mistake of fact, specifically, the extent of his liability for 2011 taxes. Under the Asserted MSA, Curt was to pay all of the parties' 2011 taxes and all of the 2012 taxes that were a result of his income. Curt argues that neither party knew, at the time they entered into the Asserted MSA, that they would be taxed on Curt's 2011 bonus in 2011 instead of in 2012 (with the result that about $100,000 was owed one year earlier than expected), and accordingly he should be permitted to rescind the contract.

¶ 38 Under some circumstances, a valid contract may be rescinded because of a mistake of fact if the party seeking the rescission can show the following: "(1) the mistake is of a material nature; (2) the mistake is of such consequence that enforcement in unconscionable; (3) the mistake occurred notwithstanding the exercise of due care; and (4) rescission can place the other party in *status quo*." *In re Marriage of Agustsson*, 223 Ill. App. 3d 510, 519 (1992). Where there has been an evidentiary

hearing, we will not reverse a trial court's determination of a factual issue unless it is contrary to the manifest weight of the evidence. *Samour*, 224 Ill. 2d at 544; *Kloster*, 127 Ill. App. 3d at 586.

¶ 39 In this case, our review of the material mistake issue is hampered by the fact that, although Curt raised the issue in his response to the motion to enforce, he largely failed to address the issue at the hearing on that motion. Curt's opening statement did not refer to the issue of material mistake of fact. The sole testimony on the issue occurred late in Curt's testimony, when Curt's attorney asked Curt what effect his elevation to partnership had on the parties' 2011 income taxes, and Curt explained that when that occurred, his income began being reported on an accrual basis rather than on a cash basis. As a result, his 2011 taxable income included both his 2010 bonus (which was actually paid to him in 2011) and his 2011 bonus (which was earned by him in 2011 but not paid until 2012). Curt testified that this change in status "accelerated the taxes due" (on the 2011 bonus). Because he had received an extension, the 2011 tax return and payment was due on October 15, 2012, a few days after he entered into the Asserted MSA. He "was not able to determine" his 2011 tax liability until his accountant did his taxes, which occurred on Saturday, October 13, 2012. At that point, his accountant determined that, due to the inclusion of the 2011 bonus, the parties owed about $100,000 of additional taxes beyond those that were previously withheld.

¶ 40 At this point in Curt's testimony, the trial court paused to hear an objection to a question asking Curt where in the Asserted MSA the higher 2011 tax liability was addressed. The trial court commented that, despite the fact that Curt had raised the issue of material mistake in his response, the first evidence on the issue was being raised in Curt's redirect examination, but it would allow Curt to present evidence on the issue anyway. The trial court then sustained the objection to the specific question on the ground that it called for a legal conclusion, saying, "The document [the

Asserted MSA] tells us how the tax liability is to be handled. It doesn't say, *** there's an additional $100,000 due this year instead of next year as a result of the change. So, that's my interpretation and why I think that's a legal conclusion."

¶ 41 Thereafter, Curt's attorney moved on to other subjects. A short time later, Curt was asked to provide details about an earlier statement that the Asserted MSA "contained some surprises." Curt said that he "did not fully appreciate *** the long term implications and ramifications of some of the changes" that had been made to the MSA during the months-long negotiation process, specifically the total amount he would be paying due to the provisions on maintenance, health insurance premiums, and college expenses. Curt did not identify the amount of his 2011 tax liability as one of those "surprises." Curt's attorney did not raise the issue of material mistake based on the 2011 tax liability in his closing argument. The trial court did not include any discussion of the issue in its ruling, and Curt did not seek any further resolution of the issue.

¶ 42 Under these circumstances, we would be justified in finding that Curt abandoned this issue. It is the responsibility of the party raising an issue to bring it to the trial court's attention and have it resolved. Where no ruling has been made on an issue, the presumption is that the issue was waived or abandoned. See *Janousek v. Slotky*, 2012 IL App (1st) 113432, ¶ 35. Moreover, this is an issue potentially involving disputed facts (*i.e.*, whether Curt acted with diligence to discover the amount of the 2011 tax liability he would bear under the Asserted MSA), and fact-finding is the province of the trial court, not a reviewing court. Even if the issue had not been abandoned, however, we would not find that Curt had established a right to rescission.

¶ 43 As noted above, two of the elements that must be shown to justify rescission based upon mistake are that the mistake is of a material nature and that the mistake is of such consequence that

enforcement is unconscionable. Curt has not established either. Although he emphasizes that the parties did not expect that his 2011 bonus would be included in his 2011 taxable income, and that the bonus resulted in a significant amount of tax owed ($100,000), there is no dispute that Curt agreed to pay the tax on this bonus regardless of whether it was reported on the 2011 tax return or the return for 2012. Curt also argues that the inclusion of his 2011 bonus did not simply accelerate his payment of the tax on that bonus, it also resulted in penalties and interest being assessed. However, Curt has not identified anything in the record to support this argument, nor does he say how much these penalties and interest amounted to. Curt's income was about $1 million per year and the marital estate was substantial. In the absence of any citation to supporting evidence in the record, Curt has not shown that the mistake was material or that it was of such consequence that enforcement of the Asserted MSA would be unconscionable.

¶ 44 Curt contends that this court's decision in *Agustsson* supports his claim of material mistake. *Agustsson* is distinguishable, however, because that case involved an MSA in which a material term—who would be responsible for paying taxes on certain payments from a retirement account—was omitted from the MSA, and the parties had different understandings on this point. Accordingly, there was no meeting of the minds. *Agustsson*, 223 Ill. App. 3d at 519. Here, by contrast, the parties specifically covered the issue of liability for their 2011 and 2012 income taxes in the Asserted MSA, and the "mistake" or unknown fact—the fact that a larger-than-expected portion of these taxes were due in connection with the 2011 taxes rather than the following year—did not change the essential terms of the agreement, *i.e.*, that Curt would pay the taxes for both of these years. Thus, Curt has not established that he is entitled to rescission of the Asserted MSA based upon a material mistake of fact.

¶ 45 Sufficiency of Consideration and Unconscionability

¶ 46 Curt next argues that the Asserted MSA was unenforceable because the consideration was "so grossly inadequate" that enforcement would be unconscionable. Because this argument overlaps with Curt's argument that the terms of the Asserted MSA are unconscionable (see *Ahern v. Knecht*, 202 Ill. App. 3d 709, 715 (1990) (courts generally do not inquire about the adequacy of the consideration for a contract, but may do so where the contract has other inequitable or unconscionable aspects)), we address these arguments together.

¶ 47 A trial court is authorized to enforce a settlement agreement entered into by the parties while the suit is pending. *Pritchett v. Asbestos Claims Management Corp.*, 332 Ill. App. 3d 890, 896-97 (2002). As we have noted, courts look upon MSAs with favor and will not set them aside without proof of fraud, duress, or variance with public policy. *Kloster*, 127 Ill. App. 3d at 585.

¶ 48 A finding of unconscionability may be based on procedural unconscionability (where some impropriety in the formation of the contract deprived one party of any meaningful choice), substantive unconscionability (significant unfairness in the terms of the contract), or some combination of the two. *In re Marriage of Tabassum and Younis*, 377 Ill. App. 3d 761, 774-75 (2007). To the extent that a trial court determines that, as a matter of law, a contract is procedurally or substantively unconscionable, we review that determination *de novo*. To the extent that the determination is based on findings of fact (such as the existence of duress), however, we will not overturn those findings unless they are contrary to the manifest weight of the evidence. *Tabassum*, 377 Ill. App. 3d at 775, 777.

¶ 49 In this case, Curt contends that the Asserted MSA was procedurally unconscionable because he was under duress at the time he signed it, and that it was substantively unconscionable because

there was inadequate consideration by Mary and the terms are one-sided and oppressive. The trial court found that the Asserted MSA was not unconscionable.

¶ 50 We begin with Curt's assertion that he signed the contract under duress. Duress occurs "where one is induced by a wrongful act or threat of another to make a contract under circumstances which deprive him of the exercise of his free will." *Kaplan*, 25 Ill. 2d at 185. The acts creating the duress must be wrongful in some sense, either criminal, tortious, or wrongful in a moral sense. *Id*. at 186. Curt argues that he was under duress because he feared Mary's threats to sue him and expose him as a poor investor, which could have caused him significant harm in his career. However, "it is well established that it is not duress to institute or threaten to institute civil suits, or for a person to declare that he intends to use the courts to insist upon what he believes to be his legal rights, at least where the threatened action is made in the honest belief that a good cause of action exists, and does not involve some actual or threatened abuse of process." *Id*. at 187. Similarly, a threat to do something that will cause embarrassment does not rise to the level of duress. *Id*. at 187-88 (supreme court found no duress sufficient to deprive husband of the mental judgment necessary to form a contract where wife threatened to publicize compromising photographs of her husband with another woman). Although Curt cites case law in which courts vacated MSAs based in part on duress, all of the cited cases involve substantial misrepresentations made by one of the divorcing parties regarding the extent or nature of the marital assets. Accordingly, we find them inapposite. Finally, we note that Curt has failed to cite any case in which a court set aside, because of procedural unconscionability, an MSA that was the product of months of negotiations in which both sides were represented by attorneys, as in this case. The trial court did not err in refusing to set aside the Asserted MSA on the basis of duress.

¶ 51 We also reject Curt's claim of substantive unconscionability. As to the division of Curt's income via the award of maintenance, the trial court found that it was not unconscionable and Curt does not argue otherwise. Rather, Curt's primary complaint is that the division of marital assets under the Asserted MSA was so one-sided as to be unconscionable. We begin by rejecting as incomplete and skewed the analysis contained in Curt's brief, which suggested that he received only 1% of the marital assets under the Asserted MSA while Mary received 99%. To the contrary, the record reveals that many of the marital assets, including the parties' checking accounts, money market accounts, most of their 401(k) accounts, and their cars, were divided almost evenly: the total value of these was $147,109.10, of which Mary received 58.3% and Curt received 41.7%. Curt's deferred compensation that was earned by him during the marriage (a total of $1,202,516) was split equally between the parties. Mary did receive all of two major assets: the marital home and Curt's Vanguard 401(k). These were substantial assets, which together were worth between $1.073 million and $1.141 million. Curt received 79% of his LLC shares, the value of which was not shown. Curt also became liable for virtually all of the parties' credit card debt (totaling about $38,000) and the 2011 and 2012 income taxes.

¶ 52 Taking all of this into account, under the terms of the Asserted MSA, Curt received approximately 20% of the marital assets, while Mary received 80%. Considering Curt's far greater earning capacity, the length of the marriage, and Curt's offers to compensate Mary for his investment losses of the family funds by giving her all of the marital home and his Vanguard 401(k) account, we determine the Asserted MSA's division of the marital assets is not unconscionable.

¶ 53 Curt contends that the consideration for the Asserted MSA was so inadequate as to be unconscionable in itself. Consideration is "any act or promise which is of benefit to one party or

disadvantageous to the other." *Ahern*, 202 Ill. App. 3d at 715. The trial court found that Mary's waiver of her right to sue Curt for his investment losses of the family's funds (contained in section 17.1 of the Asserted MSA) was of some value, and constituted adequate consideration for the Asserted MSA. Curt argues that this waiver conferred no benefit, as the Asserted MSA contained a separate general waiver of claims between the parties. Even assuming that section 17.1 is merely duplicative of the more general waiver, however, the fact remains that, under the Asserted MSA, Mary waived her potential legal claims against Curt. An agreement to forbear legal action is generally sufficient consideration to support a contract. *Tabassum*, 377 Ill. App. 3d at 764. Moreover, due to the uncertainty and expense of litigation, mutual promises to terminate such litigation generally constitute a benefit to both parties. *Johnson v. Hermanson*, 221 Ill. App. 3d 582, 584 (1991). That a party may later weigh his chances differently and regret his decision to settle a case is not grounds to set a settlement agreement aside. We therefore affirm the finding of the trial court that the Asserted MSA was not unconscionable, and that it was a valid and enforceable agreement.

¶ 54 Irreconcilable Differences

¶ 55 Curt's final argument on appeal is that the trial court erred in finding that the grounds for dissolution of irreconcilable differences had been proven because Mary did not present sufficient evidence on the issue. There is no merit to this argument.

¶ 56 A trial court's finding of grounds for dissolution is a factual finding that will not be reversed unless it is against the manifest weight of the evidence. *In re Marriage of Kirkpatrick*, 329 Ill. App. 3d 202, 212 (2002). Here, all of the evidence presented indicated that the marriage was irretrievably broken. Curt presented no evidence to the contrary. Mary testified that she believed the marriage

to be irretrievably broken and that differences had arisen between the parties that could not be overcome. Curt himself alleged, in his verified petition for dissolution, that irreconcilable differences had arisen between the parties and that the marriage was irretrievably broken. Despite the fact that Curt later withdrew his petition, his statement was a judicial admission. *Janousek*, 2012 IL App (1st) 113432, ¶ 17 ("Any admission *** included in an original verified pleading *** which is not the product of inadvertence or mistake constitutes a binding judicial admission" that "withdraws a fact from issue in the case, making it unnecessary for the opposing party to present evidence in support thereof").

¶ 57 Curt argues that Mary's testimony and his admissions did not constitute evidence because they were expressions of a legal conclusion—that irreconcilable differences existed—not statements of fact that would support that conclusion. He cites no legal support for this proposition, however, and we think that the parties' testimony and admissions on this issue can, at a minimum, be viewed as expressions of the parties' beliefs or opinions that the marriage was irretrievably broken. Moreover, Mary presented evidence that went beyond generalities, testifying that she and Curt last lived together in March 2010 (about three years before the hearing on grounds), and that they had undergone marriage counseling on several occasions throughout the years but had not resolved their differences. Although Curt criticizes this testimony as insufficiently detailed, he does not contest its truthfulness. Finally, we note that many of the documentary exhibits admitted into evidence in the case, including emails, reflect entrenched animosity by both parties against each other. In sum, the trial court's determination that irreconcilable differences had arisen in the parties' marriage and that there were grounds for dissolution was not against the manifest weight of the evidence.

¶ 58 CONCLUSION

¶ 59 For the reasons stated, we dismiss appeal 2-13-1303 and, in appeal 2-13-0363, affirm the judgment of the circuit court of Du Page County.

¶ 60 Dismissed as to appeal 2-13-0303; affirmed as to appeal 2-13-0363.