

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM F. MITCHELL,

Plaintiff-Appellant,

v

BERNICE ANN MITCHELL,

Defendant-Appellee.

UNPUBLISHED

April 27, 2001

No. 227169

Shiawassee Circuit Court

LC No. 93-002510-DO

Before: Cavanagh, P.J., and Markey and Collins, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from a circuit court order granting defendant's motion for summary disposition regarding plaintiff's motion to modify alimony. We affirm.

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition because the alimony provision in the consent judgment of divorce was modifiable. We disagree. We review a trial court's grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion for summary disposition under MCR 2.116(C)(7), we accept all well-pleaded factual allegations as true and construe them most favorably to the plaintiff. *Fante v Stepek*, 219 Mich App 319, 321-322; 556 NW2d 168 (1996). This Court considers affidavits, admissions, depositions, and other documentary evidence along with the pleadings. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). A motion for summary disposition under MCR 2.116(C)(7) is properly granted where no factual development could provide a basis for recovery. *Id.*

In addition, we review a trial court's factual findings regarding the modification of alimony for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). Clear error exists where this Court is left with a definite and firm conviction that a mistake has been made. *Id.* at 654-655. If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the circumstances. *Id.* at 655.

Generally, a court's judgment, including a consent judgment, is final and binding and precludes relitigation of issues previously determined. *Staple v Staple*, 241 Mich App 562, 564, 572; 616 NW2d 219 (2000). The principle of finality, however, does not apply to settlements

regarding alimony and MCL 552.28; MSA 25.106 unambiguously gives either party to an alimony judgment the right to petition the court for modification of the alimony provision. *Id.* at 573. Likewise, the statute provides a court with the power to make necessary modifications of an alimony judgment where appropriate. *Rickner v Frederick*, 459 Mich 371, 379; 590 NW2d 288 (1999).

The right to seek modification of an alimony award pursuant to MCL 552.28; MSA 25.106 may be waived by the parties if they specifically forgo their statutory right to petition the court for modification of alimony and agree that the alimony provision is final, binding, and nonmodifiable. *Staple, supra* at 578. To be enforceable, agreements to waive the statutory right to seek modification of alimony must clearly and unambiguously establish that the parties (1) forgo their statutory right to petition the court for modification and (2) agree that the alimony provision is final, binding, and nonmodifiable. *Id.* at 581. The judgment of divorce entered pursuant to the parties' settlement should reflect the parties' agreement. *Id.*

In this case, the property settlement agreement clearly and unambiguously established that the parties elected to forgo their statutory right to petition the court for modification of the alimony award and agreed that the alimony provision was nonmodifiable. The agreement itself specifically provided that its terms could not be modified or waived unless in writing and signed by both parties. In addition, at the pro confesso divorce hearing, one of plaintiff's attorneys specifically stated that the alimony was intended to be nonmodifiable. While plaintiff contends that the trial court should not have given any weight to the attorney's statement, the attorney was acting on behalf of plaintiff at the time that he made the statement, and the property settlement agreement clearly evidenced plaintiff's intent that the alimony be nonmodifiable except in writing and signed by both parties. In addition, at the pro confesso divorce hearing defendant expressed her understanding that the alimony provision was to be nonmodifiable. Therefore, the record clearly shows that the parties agreed to forgo their statutory right to seek modification of alimony and that they intended the alimony provision to be final, binding, and nonmodifiable. *Staple, supra* at 581.

Furthermore, the consent judgment of divorce reflected the parties' agreement. It stated that alimony was payable pursuant to the dictates of the property settlement agreement, thereby incorporating the provisions of the agreement into the consent judgment. In addition, the consent judgment of divorce contained no contrary provision rendering the alimony provision modifiable. Therefore, the consent judgment of divorce reflected the parties' agreement as suggested by this Court in *Staple, supra* at 581. Consequently, because the parties waived their right to seek modification of the alimony judgment, the trial court did not err by determining that the alimony award was nonmodifiable and granting defendant's motion for summary disposition.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Jeffrey G. Collins