STATE OF MICHIGAN

COURT OF APPEALS

JERALD SHATZMAN,

Plaintiff/Counterdefendant-Appellant,

v

JOSEPH W. CUNNINGHAM,

Defendant-Appellee,

and

PLANTE & MORAN, LLP,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
December 17, 2002

No. 231712
Oakland Circuit Court
LC No. 98-009515-NM

Before: Kelly, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Plaintiff commenced this action alleging negligence (or malpractice) and breach of fiduciary duties against Joseph Cunningham, an accountant, in connection with his services of valuing certain business assets pursuant to a court order in an underlying divorce action between plaintiff and his ex-wife. Also named as a defendant was Cunningham's employer, the accounting firm of Plante & Moran, LLP ("Plante & Moran"). Defendant Plante & Moran filed a counterclaim for fees and costs associated with Cunningham's services.[1] The trial court granted defendants' motion for summary disposition. Plante & Moran's counterclaim was subsequently dismissed. Plaintiff now appeals as of right. We affirm.

We believe the procedural history in this case merits attention. In February 1996, pursuant to a stipulated court order in plaintiff's underlying divorce action the court appointed Cunningham, a certified public accountant and attorney, to serve as "binding independent master . . . for the sole and express purpose of determining the values of the parties' respective business

[1] For purposes of this opinion, we will refer to plaintiff Shatzman as "plaintiff," and will refer to defendants Cunningham and Plante & Moran in either their individual capacities or collectively as "defendants" where appropriate.

and business-related interests as of February 1, 1996." Specifically, the court charged Cunningham with determining the values of the interests of plaintiff's ex-wife in KPMG Peat Marwick and the values of plaintiff's interests in Shatzman and Associates, P.C., and the Ecology Group, Inc. A subsequent order in the divorce action referred to Cunningham as an "arbitrator" and directed Cunningham to determine the values of "all property that has not been either evaluated or previously adjudicated."

After entry of the divorce judgment, plaintiff filed the instant action alleging negligence or malpractice and breach of fiduciary duties in connection with Cunningham's services, and alleging respondeat superior liability on the part of Plante & Moran.[2] A case evaluation[3] hearing was conducted in the matter on April 29, 1999. The case evaluation was $75,000 for plaintiff's claims and $6,000 for Plante & Moran's counterclaim. Defendants accepted both awards conditioned on plaintiff accepting both awards. Plaintiff accepted the $75,000 award, but was silent with regard to the counterclaim and thus the circuit court deemed his response a rejection. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and (8), holding that defendants were immune from suit for their actions as court-appointed arbitrators. Thereafter, plaintiff moved to amend his mediation acceptance on the ground that he intended to accept both the mediation award for his claims and Plante & Moran's counterclaim. The circuit court granted plaintiff's motion to amend his mediation acceptance, and at the same time allowed defendants the opportunity to either reiterate their acceptance or to reject the case evaluation. Plaintiff accepted, and defendants rejected the case evaluation. The circuit court later dismissed Plante & Moran's counterclaim against plaintiff by stipulated order. The instant appeal followed.

On appeal, plaintiff argues that the circuit court erred in finding that "defendant-appellee accountant" was entitled to arbitral immunity. We construe plaintiff's claim as involving only the question whether Cunningham is entitled to immunity based on his court-ordered appointment in the divorce case.[4] The appropriate subrule to apply in reviewing a motion for

[2] The divorce judgment was subsequently modified in June 1999, and appealed by plaintiff to this Court. We have taken judicial notice of our own internal records of the appeal of the divorce action, as well as this Court's opinion reversing in part and remanding for further proceedings in *Shatzman v Shatzman*, unpublished opinion per curiam of the Court of Appeals, issued September 14, 2001 (Docket No. 222943). *LaGuire v Kain*, 185 Mich App 239, 246, n 4; 460 NW2d 598 (1992), rev'd on other grounds 440 Mich 367 (1992).

[3] Although the parties and the circuit court refer to the case evaluation as "mediation evaluation," due to the change in terminology in the court rules effective August 1, 2000, we will use the term "case evaluation" in this opinion. See staff comment to MCR 2.401.

[4] We deem any claim concerning Plante & Moran's derivative liability, under a respondeat superior theory, to be abandoned because plaintiff has not separately briefed that question on appeal. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001). We similarly deem abandoned any claims concerning the trial court's refusal to consider Cunningham's deposition testimony on the basis that it was not timely filed, and the trial court's ruling denying plaintiff's motion for reconsideration, because plaintiff does not address these issues in his brief. Lastly, because the parties have not raised and briefed any question regarding any supposed duty defendants might have to plaintiff in their court appointed capacity, we render no decision in that regard.

summary disposition alleging that a claim is barred by immunity is MCR 2.116(C)(7). *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001). When reviewing a motion under MCR 2.116(C)(7), the contents of the plaintiff's complaint are accepted as true unless contradicted by supportive materials submitted by the parties to the trial court. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). If there are no factual disputes, whether a claim is barred by immunity is a question of law. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000).

The doctrine of arbitral immunity is generally recognized for reasons of public policy, regardless of whether arbitration was statutory, the arbitrators were court-appointed, or arbitration arose from a contractual agreement between the parties. *Boraks v American Arbitration Ass'n*, 205 Mich App 149, 151; 517 NW2d 771 (1994). The court appointed Cunningham to determine the value of certain assets in the divorce action. Regardless of the label attached to his role, we conclude that he is entitled to quasi-judicial immunity because he served as "an arm of the court" and "performed a function integral to the judicial process." *Diehl, supra*, 242 Mich App 133.

We find that plaintiff's reliance on *Levine v Wiss & Co*, 97 NJ 242; 478 A2d 397 (1984),[5] as supporting the proposition that Cunningham is not entitled to immunity, is misplaced. Although the instant case, like *Levine*, involved a stipulated order entered in a contested divorce action, "'[s]tipulations differ in character, some being mere admissions of fact relieving a party from the inconvenience of making proof, while others embody all the essential characteristics of a contract.'" *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 379; 521 NW2d 847 (1994), quoting 73 Am Jur 2d, Stipulations, §1, p 536. A stipulation is an agreement between the parties regarding some matter incident to a judicial proceeding, but only the parties' stipulations of facts are binding on a court. *Staff v Johnson*, 242 Mich App 521, 535; 619 NW2d 57 (2000).

The proofs submitted in the instant case do not establish factual support for the proposition that plaintiff and his former wife agreed to accept Cunningham's valuation findings as conclusive for purposes of the divorce action, regardless as what process Cunningham employed. To the contrary, plaintiff filed objections to Cunningham's findings in the divorce action. Absent evidence of a stipulated order in the divorce action intended to embody an agreement by plaintiff and his former wife to have the trial court in the divorce action accept Cunningham's findings as conclusive facts, we conclude, as a matter of law, that Cunningham was acting as an arm of the trial court in the divorce action when valuing certain assets.[6] *Diehl, supra*, 242 Mich App 133.

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[5] We note that the court in *Cap City Products, Inc v Louriero*, 332 NJ Super 499, 508; 753 A2d 1205 (2000), indicated that *Levine* has been modified to the extent that it suggests a different principle or result because the party performing the decision-making function is termed something other than an arbitrator. As previously indicated, we do not find the term assigned to Cunningham's role to be controlling for purposes of determining whether he is entitled to immunity.

[6] Even if we were to find a factual dispute concerning whether Cunningham was acting as an arm of the trial court in the divorce action, our failure to reverse would not be inconsistent with substantial justice. MCR 2.613(A). The fact that plaintiff has been afforded an opportunity to

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Because a court speaks through its orders, Cunningham's function can be determined from the orders entered in the divorce action.[7] *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 54; 436 NW2d 70 (1989). The actual conduct of Cunningham in carrying out his function and, in particular, the question of whether he committed errors or omissions, is not material because a claim of immunity necessarily implies that a "wrong" occurred. *Pohutski v Allen Park*, 465 Mich 675, 690; 641 NW2 219 (2002). With this in mind, our review of the record reveals that Cunningham performed a function integral to the judicial process. *Diehl, supra*, 242 Mich App 133.

Judicial acts include performance of the function of resolving parties' disputes or authoritatively adjudicating private rights. *Atkinson-Baker & Associates, Inc v Kolts*, 7 F3d 1452, 1454 (CA 9, 1993). The valuation of assets in a divorce case is a judicial fact-finding function. See *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Hence, regardless of whether Cunningham's valuations in plaintiff's divorce case are deemed findings of a "master," "arbitrator," or even an "expert," we hold that plaintiff's action against Cunningham is barred based on quasi-judicial immunity because Cunningham's actions arose from his court-ordered appointment to resolve valuation disputes between the parties to the divorce action, a fact-finding function that involves judgment independent of the parties. *Diehl, supra*, 242 Mich App133. Accordingly, while the trial court incorrectly gave weight to the use of the term "arbitrator" in the divorce case, we uphold its decision because the court reached the correct result. *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993).

Plaintiff also challenges the trial court's decision to treat his response to a case evaluation in the case at bar as a rejection because it did not conform to the court rules. Because defendants' acceptance of the case evaluation in its entirety was conditioned on plaintiff accepting all awards as to all parties pursuant to MCR 2.403(L)(3), the only relevant question is whether plaintiff's response to the case evaluation included an acceptance of Plante & Moran's counterclaim. Because plaintiff's response contained an acceptance of the $75,000 evaluation for the claims in his principal complaint, but was silent regarding Plante & Moran's counterclaim, the trial court correctly treated plaintiff's response as a rejection. Clearly, plaintiff was constrained by the court rules to accept the case evaluation for both the complaint and the counterclaim. MCR 2.403(L)(1) and (3); *Minority Earth Movers, Inc v Walter Toebe Construction Co*, 251 Mich App 87, 92-93; 649 NW2d 397 (2002); *Henderson v Sprout Bros, Inc*, 176 Mich App 661, 667; 440 NW2d 629 (1989).

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challenge Cunningham's findings in the divorce action pursuant to this Court's September 14, 2001, opinion in plaintiff's divorce action renders moot any claim of binding stipulations of fact. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) (an issue is moot if an event occurs that renders it impossible for a reviewing court to grant relief).

[7] We note that Cunningham was appointed in plaintiff's divorce action before this Court decided *Carson Fisher Potts & Hyman v Hyman*, 220 Mich App 116, 121; 559 NW2d 54 (1996) (a trial court lacks authority to delegate judicial functions to an "expert"). However, the proper resolution of Cunningham's entitlement to immunity is not dependent on the validity of the orders entered in the divorce case. As a general rule, an order issued by a trial court with proper jurisdiction must be obeyed until reversed by orderly and proper proceedings. *State Bar of Michigan v Cramer*, 399 Mich 116, 125; 249 NW2d 1 (1976).

Plaintiff's additional claim regarding the trial court's decision to allow the parties to amend their responses to the case evaluation is not properly before us because it is outside the statement of the questions presented. MCR 7.212(C)(5); *Meagher v McNeely & Lincoln, Inc,* 212 Mich App 154, 156; 536 NW2d 851 (1995). However, since the issue is one of law for which the record is factually sufficient, we will address the issue. *Id.*; *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 337; 512 NW2d 74 (1994). We review a trial court's factual findings for clear error, MCR 2.613(C), and its ruling whether to allow an amended response to a case evaluation for an abuse of discretion. *Rieth v Keeler,* 230 Mich App 346; 583 NW2d 552 (1998).

A trial court has discretion to provide relief to a party who inadvertently misses the deadline for accepting a case evaluation under MCR 2.403(L)(1). *Rieth, supra*, 230 Mich App 349-350. However, a trial court may only do so if it affords the other party the opportunity to reiterate its acceptance or change it to a rejection. *Id.* at 350. In exercising its discretion, the trial court may consider the effect of the error on the substantial rights of the party that timely accepted the case evaluation (the "acceptor"). *Id.* at 350 From our review of the record, it is apparent that the trial court was satisfied from affidavits submitted by plaintiff that his failure to accept the case evaluation in its entirety was a clerical mistake. Accepting this finding as true, however, we find plaintiff's argument that the court's decision to allow plaintiff the opportunity to amend his acceptance while at the same time allowing defendants the opportunity to change their acceptance to a rejection constituted a "hollow decision" irrelevant. *Rieth* teaches that the trial court while exercising its discretion "may" consider the acceptor's (in this case defendants') substantial rights, however, the substantial rights of the non-conforming party (here, plaintiff) are not material to the analysis. *Rieth, supra,* 230 Mich App 350. We conclude that the trial court did not abuse its discretion by allowing all parties to amend their responses to the case evaluation. *Id*.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Pat M. Donofrio