STATE OF MICHIGAN

COURT OF APPEALS

LYNN W. FINK,

Plaintiff-Appellant,

v

DANIEL L. FINK,

Defendant-Appellee.

UNPUBLISHED
February 14, 1997

No. 188167
Oakland Circuit Court
LC No. 95-492076-NO

Before: White, P.J., and Griffin and D. C. Kolenda*, JJ.

PER CURIAM.

Plaintiff appeals as of right orders of the circuit court entered in favor of defendant. We reverse and vacate the award of $500 in sanctions for violation of MCR 8.111(D)(3), but in all other respects affirm.

The parties were married in 1971. Plaintiff filed for divorce in 1992. Pursuant to MCR 8.111(B), plaintiff's divorce action was randomly assigned to Oakland Circuit Judge Steven N. Andrews. On April 7, 1993, the parties entered into a consent judgment of divorce that included a "Mutual Release." The release states that "each party shall and does hereby release and forever discharge the other from any and all actions . . . whatsoever which either of them ever had, now has or may hereafter have against the other by reason of any matter, cause or thing up to the date of the entry of the judgment."

Notwithstanding the executed release, plaintiff filed the present action seeking damages for torts allegedly committed by defendant during the marriage. Plaintiff's suit was randomly assigned to Oakland Circuit Judge Francis X. O'Brien. Thereafter, the Oakland Circuit Court granted defendant's motion for reassignment, ruling that plaintiff's claims arose from the same transaction or occurrence as her previous divorce action and, therefore, should have been assigned to Judge Andrews in accordance with MCR 8.111(D)(1). The lower court then granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) on the basis that the release barred plaintiff's claims. Moreover, the trial court awarded defendant $500 in attorney fees because plaintiff violated MCR 8.111(D)(3) by stating

* Circuit judge, sitting on the Court of Appeals by assignment.

in her summons and complaint that there existed "no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint." Additionally, the trial court awarded defendant $1,500 in attorney fees pursuant to MCR 2.114(E) after finding that plaintiff's suit was frivolous.

On appeal, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). She contends that a triable issue of fact exists whether the consent judgment for divorce is void because she entered into it while mentally incapacitated. We disagree. In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(7), we accept plaintiff's well-pleaded allegations as true, *Shawl v Dhital*, 209 Mich App 321, 323; 529 NW2d 661 (1995); *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 376-377; 532 NW2d 541 (1995), and examine any pleadings, affidavits, depositions, admissions, and documentary evidence submitted by the parties in a light most favorable to the nonmovant. MCR 2.116(G)(5); *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 617; 513 NW2d 428 (1994). If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the trial court must enter judgment without delay. MCR 2.116(I)(1); *Skotak, supra* at 617; *Nationwide Mutual Ins Co v Quality Builders, Inc*, 192 Mich App 643, 647-648; 482 NW2d 474 (1992).

We hold that the trial court properly ruled that the release agreement bars the present lawsuit. Absent factors like fraud or duress, this Court generally upholds release provisions executed pursuant to consent judgments of divorce. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). However, because consent judgments are contractual in nature, *id.*, a court may pronounce such judgments void if one party lacked the mental capacity to contract at the time the parties entered into the agreement. See *Tinkle v Tinkle*, 106 Mich App 423, 426; 308 NW2d 241 (1981).

A contract made by a mentally incompetent person prior to an adjudication of mental incompetency is voidable. *Gojcaj v Moser*, 140 Mich App 828, 834; 366 NW2d 54 (1985). A mentally incompetent person is one who is so mentally affected as to be deprived of sane and normal action. A person may be incapable of conducting business successfully and still not be mentally incompetent. *In Re Erickson Estate*, 202 Mich App 329, 333; 508 NW2d 181 (1993). To void a contract it must appear not only that the person was of unsound mind or insane at the time of contracting, but that the unsoundness or insanity was of such character that he could not reasonably perceive the terms or nature of the contract. *Howard v Howard*, 134 Mich App 391, 396; 352 NW2d 280 (1984). Because of its unique opportunity to observe the witnesses, we afford substantial deference to a trial court's determination whether a party was competent to contract. *In Re Erickson, supra*.

Plaintiff alleged that, during the marriage, defendant abused her physically and mentally. She avers that defendant's abuse caused her severe emotional distress and inspired her nervous breakdown. In support of her claims, plaintiff submitted an affidavit from her treating psychiatrist who stated that plaintiff was severely depressed during her divorce. The psychiatrist also stated that he prescribed antidepressants to plaintiff and believed her to be partially psychiatrically disabled. Further, plaintiff's

psychiatrist opined that plaintiff "was incapable of fully comprehending the complexities of the proceedings and negotiations for settlement, particularly as to their impact upon her future and the future of her children." And further . . . "[that plaintiff] was incapable of acting in her own best interests as she remained a victim to the intimidation and influence of her then-husband."

After reviewing the documentary evidence submitted by plaintiff in support of her claim of incompetency and accepting her well-pleaded allegations as true, we conclude that plaintiff failed to raise a genuine issue of material fact whether the parties' consent judgment of divorce was void due to incompetency. Plaintiff's claim of incompetency involved only her apparent inability to act in the best interests of either herself or her children. Although plaintiff's allegations support the inference that she was incapable of prudently conducting business during her divorce proceedings, plaintiff's documentary evidence does not support the conclusion that she was bereft of sane, normal conduct. Nor does plaintiff's psychiatrist's affidavit support the conclusion that plaintiff was mentally incapable of contracting. See *In Re Erickson*, *supra*. Therefore, the trial court correctly granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) on the basis that the release provision in the parties' consent judgment of divorce barred the present lawsuit.

Next, plaintiff contends that she raised a genuine issue of fact that defendant fraudulently procured her consent to the divorce judgment. Plaintiff made only passing reference to fraud in her answer to defendant's motion for summary disposition and then stated only that she had alleged the existence of fraud in her prior divorce action. Plaintiff has failed to supply this Court with the lower court record wherein those allegations were raised. Therefore, we decline to review her allegation of fraud. *McNeil v Quines*, 195 Mich App 199, 201; 489 NW2d 180 (1992). Moreover, because plaintiff has failed to cite any case law in support of her position on the issue of fraud, she has abandoned consideration of this issue on appeal. *Roberts v Vaughn*, 214 Mich App 625, 631; 534 NW2d 79 (1995).

Furthermore, plaintiff alleges generally that her agreement to the consent judgment of divorce was the product of mistake and duress. However, plaintiff has failed to argue these issues on appeal and therefore has abandoned them. *Singerman v Municipal Service Bureau, Inc*, 211 Mich App 678, 684; 536 NW2d 547 (1995). Hence, we decline to address these issues.

Plaintiff further claims that the trial court clearly erred in finding plaintiff's action frivolous and awarding defendant attorney fees for plaintiff's violation of MCR 2.114(F). We disagree. A trial court should impose sanctions upon finding that a pleading was signed in violation of MCR 2.114. *In Re Forfeiture of Cash and Gambling Paraphernalia*, 203 Mich App 69, 73; 512 NW2d 49 (1993); *Contel Systems Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990). This Court reviews a trial court's assessment of sanctions under MCR 2.114 for clear error. *Contel*, *supra*. A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

Here, plaintiff's consent judgment of divorce clearly released defendant from "any and all actions, causes of action, suits, debts, claims and obligations whatsoever . . . up to the date of the entry

of the judgment." Although plaintiff claims good faith in her argument that the consent judgment was invalid because it was a product of duress, fraud, mistake, and incapacity, the trial court that heard plaintiff's divorce suit ruled twice that plaintiff possessed no cognizable incapacity defense. Additionally, plaintiff has consistently neglected to provide any support for her theories of duress, mistake, and fraud. After thorough review, we are not left with a definite and firm conviction that the trial court erred in finding that plaintiff's action was frivolous. MCR 2.114. See also MCL 600.2591(3)(a); MSA 27A.2591(3)(a).

Next, plaintiff argues that the trial court followed improper procedures in reassigning the case. We agree. MCR 8.111(D)(1) provides that "if one of two or more actions arising out of the same transaction or occurrence has been assigned to a judge, the other action or actions must be assigned to that judge." Where an action arising out of the same transaction or occurrence as another action is assigned to a judge other than the one assigned to the related action, the proper remedy is reassignment to the proper judge. MCR 8.111(D)(1); see also *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 155-157; 532 NW2d 899 (1995). The Michigan court rules grant the chief judge the sole authority to reassign cases. MCR 8.111(C). Whether the trial court's action was proper under the court rules is an issue of law to be reviewed by this Court de novo. See *People v Rich*, 172 Mich App 494, 496; 432 NW2d 352 (1988).

The present action was originally assigned to Oakland Circuit Judge O'Brien pursuant to a system of random assignment by lot as provided by MCR 8.111(B). However, this case should have been assigned to Oakland Circuit Judge Andrews, because he was assigned plaintiff's divorce case. Here, after defendant filed a motion to reassign the case, Judge Andrews ruled that he should have been assigned the case and thereafter entered an order reassigning the case to himself. Subsequently, Oakland Circuit Chief Judge Hilda R. Gage entered a second order reassigning the case to Judge Andrews.

We hold that the original order of reassignment, signed by Judge Andrews, was entered in violation of the court rules. MCR 8.111(B) clearly vests the chief judge with the sole authority of reassignment. However, we need not reverse where a procedural irregularity was not motivated by impermissible considerations and the correct result was achieved. See *Armco Steel Corp v Dep't of Treasury*, 111 Mich App 426, 438-439; 315 NW2d 158 (1981), aff'd 419 Mich 582; 358 NW2d 839 (1984). Although plaintiff argues that Judge Andrews' reassignment of the case to himself created the appearance of impropriety, plaintiff has not alleged actual bias or prejudice on the part of Judge Andrews. Nor does the evidence support the conclusion that Judge Andrews was motivated by considerations other than a desire to comply with MCR 8.111(D). Furthermore, the reassignment order entered by Judge Andrews was remedied procedurally when the chief judge entered an order of reassignment in accordance with MCR 8.111(C). Therefore, we find no error requiring reversal.

Finally, plaintiff asserts that Judge Andrews erred in awarding defendant $500 in attorney fees for plaintiff's counsel's violation of MCR 8.111(D)(3). We agree.

MCR 8.111(D)(3) requires the attorney for a party who brings a subsequent action arising out of the same transaction or occurrence to notify the clerk of the court of the fact in writing. MCR 2.113(C)(2) requires the complaint to contain a statement verifying whether "a civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed" and if so the court in which the previous action was filed, the previous action's docket number, and the name of the judge to which it was assigned.

In turn, MCR 2.114(D) provides that an attorney's signature is certification that: (1) the attorney or party has read the pleading; (2) to the best of the attorney's or the party's knowledge, information, and belief formed after reasonable inquiry, the pleading is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and (3) the pleading is not interposed for any improper purpose. *In Re Forfeiture*, *supra* at 71. If a pleading is signed in violation of this rule, the trial court must impose sanctions. *Id.* Therefore, sanctions must be imposed where an attorney signs a document which includes a knowingly false statement regarding the existence of two or more actions arising out of the same transaction.

We acknowledge that there is little case law interpreting the meaning of the phrase "same transaction or occurrence" as it exists in MCR 8.111(D)(3). In *Wayne Co Prosecutor*, *supra* at 156, we stated that "actions arise from the same transaction or occurrence only if each arises from the identical events leading to the other or others. For instance, several actions separately brought by various passengers of a train which derailed would arise out of the same transaction or occurrence." See also *Ross v Onyx Oil & Gas Co*, 128 Mich App 660, 669; 341 NW2d 783 (1983).

Here, the exclusive link between the parties' divorce and the present case is that the allegations inspiring this case played a role in plaintiff's decision to divorce defendant. However, the issue of abuse was not litigated in the divorce proceeding and this Court has never held that each and every factor that played a role in the decision whether to divorce one's spouse constitutes part of the same transaction as the divorce itself. Under these circumstances, we conclude that the trial court erred in assessing sanctions for violation of MCR 8.111(D)(3). Accordingly, we hereby vacate the $500 sanction imposed.

We reverse and vacate the $500 sanction award for violation of MCR 8.111(D)(3). In all other respects, we affirm. Defendant may tax costs.

/s/ Richard Allen Griffin