STATE OF MICHIGAN

COURT OF APPEALS

TINA G. PESEK,

Plaintiff-Appellee,

v

ROLAND WARNER PESEK,

Defendant-Appellant.

UNPUBLISHED
July 10, 2001

No. 217856
Macomb Circuit Court
Family Division
LC No. 97-003615

Before: Talbot, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Defendant appeals as of right the family court's entry of a consent judgment of divorce. We affirm.

Plaintiff filed a complaint for divorce from defendant on July 15, 1997. At the time, plaintiff was employed only part-time as a teaching assistant earning approximately $150 per week, and defendant was employed full-time as an engineer for General Motors Corporation earning approximately $84,000 annually.

In March 1998, the parties tentatively agreed to split the cost of having a professional evaluate defendant's pension. Subsequent to this agreement, defendant refused to cooperate with the evaluation, and in August 1998, plaintiff unilaterally retained Gregg Kabacinski to perform the evaluation. The parties also participated in a mediation on June 10, 1998 in which the mediator determined that the adjusted present value of defendant's pension was $50,869.83. Apparently, the parties reached a settlement agreement at the mediation, however, defendant later withdrew his approval of the settlement.

Plaintiff initially instructed Kabacinski to conduct his evaluation assuming defendant would retire at the age of 49, 62, or 65. Sometime after retaining Kabacinski, defendant's attorney informed plaintiff's attorney that defendant intended to retire at age 53, and plaintiff instructed Kabacinski on September 1, 1998, to complete the evaluation based on the assumed retirement age of 53. The parties' attorneys also agreed that they would make an attempt to settle the case at a scheduled court appearance on September 8, 1998. Plaintiff provided defendant with a copy of Kabacinski's completed report for the first time at the September 8 hearing. Kabacinski stated in this report that defendant's pension had a present value of $254,114, and the

report makes clear that this value is based on the assumption that defendant would retire at age 53.

In conjunction with the September 8 hearing, the parties negotiated for several hours, reached an agreement, and placed the terms of their settlement on the record. The parties agreed that plaintiff would receive the marital home and assume the mortgage on the home. The parties further agreed that defendant's stock savings plan at General Motors would be divided so that plaintiff received $217,572 and defendant received $3,752. Regarding defendant's pension, it was agreed that defendant would receive 84 percent of the pension and plaintiff would receive 16 percent. No provision was made for spousal support.

After the parties placed their settlement on the record, the family court carefully questioned the parties to determine if they understood the terms of the settlement and engaged in the following colloquy with defendant:

Q. Mr. Pesek, same questions. You heard the statements of the attorneys?

A. Yes.

Q. Is that your understanding of the settlement you arrived at this afternoon?

A. It is.

Q. Do you have any questions whatsoever you'd like to ask either lawyer or myself regarding the terms of the settlement?

A. No additional questions.

Q. And do you understand that absent the question of child custody, support and parenting time to the three children, absent those issues, everything else is intended to be full, final, and complete as of today?

A. Yes.

Q. Do either counsel have any questions you'd like to ask your client regarding this property settlement?

A. No. I have no other questions.

Following the hearing, counsel for both parties prepared a judgment reflecting the terms of the agreement placed on the record. When defendant refused to sign the judgment prepared by counsel, plaintiff moved the trial court to enter the judgment. At a hearing on September 25, 1998, defense counsel admitted that the judgment accurately reflected the terms of the parties' settlement, but claimed that defendant believed the settlement was inequitable and did not fully understand the terms of the settlement due to his "volatile emotional state." Defendant admitted that he noticed the difference between the mediator's evaluation of his pension and the value determined by Kabacinski, but claimed that he believed the parties' settlement was based on the mediator's figures and did not understand why the two pension values were so different.

Defendant also stated that he did not understand the permanence of placing the settlement on the record and wanted more time to review and consider the agreement. The court entered the judgment, concluding that defendant was properly questioned on his understanding of the settlement agreement and its finality. The court also granted defense counsel's motion to withdraw from representing defendant.

After the judgment was entered, defendant obtained new counsel and filed a motion to set aside the judgment. Defendant also retained Joseph Cunningham to evaluate his pension. Cunningham concluded that the pension's present value was $94,755 based on an assumed retirement age of 65. In his motion, defendant argued that the agreed division of the pension in the consent judgment was based on a mutual mistake, i.e., an erroneous valuation of his pension plan. Defendant claimed that plaintiff's expert erred by assuming that defendant would retire at age 53. Defendant further argued that plaintiff's expert failed to reduce the value of the pension by applicable estimated taxes. According to defendant, this mutual mistake resulted in his share of assets being reduced by $133,861.56, whereas plaintiff's share was only reduced by $25,497.44. In addition, defendant claimed that his attorney pressured him to negotiate a settlement by threatening to withdraw if no settlement was reached.

The family court issued a written opinion on February 3, 1999, denying defendant's motion to set aside the judgment in reliance on this Court's holding in *Villadsen v Villadsen*, 123 Mich App 472; 333 NW2d 311 (1983). The court found that this case was factually similar to *Villadsen, supra*, in that defendant had access to the necessary information to properly evaluate his pension, had an opportunity to retain a professional to perform the evaluation, and had the opportunity to review Kabacinski's report prior to agreeing to the settlement. The court noted that Kabacinski's assumption that defendant would retire at age 53 was "blatant on the face of the valuation." The court concluded that the alleged mistake in this case was not mutual because there was no indication that the parties had a common intention or that the result was obtained through a common error. The court further found that relief was not warranted based on defendant's argument that his attorney pressured him into accepting the settlement because there was no indication that plaintiff participated in the coercion or that defendant suffered the severe stress necessary to negate mental capacity.

On appeal, defendant argues that the family court abused its discretion by basing its findings of fact regarding defendant's motion to set aside the judgment on evidence that was not presented in the case. As a preliminary matter, we note that defendant's argument is based on an incorrect standard of review, i.e., abuse of discretion. To the contrary, we review a court's findings of fact for clear error. MCR 2.613(C); *Triple E Produce Corp v Mastronardi Produce*, 209 Mich App 165, 171; 530 NW2d 772 (1995). A finding of fact is clearly erroneous if no evidence supports it, or if there is evidence supporting it, but we are left with a definite and firm conviction that a mistake has been made. *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999).

Defendant alleges that four findings of fact cited in the court's opinion and order are unsupported by the evidence presented in the case or were derived from evidence outside the record. The four findings at issue are (1) defendant had access to his pension plan information, (2) defendant had an opportunity to retain an economist to perform a valuation of his pension

prior to entering into the settlement agreement, (3) defendant's counsel relied on plaintiff's valuation of defendant's pension during settlement negotiations, and (4) the assumption that defendant would retire at age 53 was blatant on the face of plaintiff's valuation. Contrary to defendant's assertion, each one of these facts was supported by evidence in the record, or was a reasonable inference drawn from the evidence presented to the court.

Regarding defendant's access to his pension information, the court found that plaintiff was able to access the information prior to the settlement negotiation. From this undisputed fact, the court reasonably inferred that if plaintiff could access defendant's pension information, defendant certainly should have been able to do so. In addition, the valuation performed for defendant after the settlement could not have been completed without the pension information. From this evidence that defendant had access to the information after the settlement, the court reasonably inferred that defendant had access to the information before the settlement. Further, defendant admitted in his brief on appeal that, had he been asked whether he had access to the information, he would have conceded that he did. Defendant's argument on this point is without merit.

In addition, from the credible evidence that plaintiff was able to retain an expert to perform a valuation of the pension and the reasonable inference that defendant had access to his pension information prior to settlement negotiations, the court reasonably inferred that defendant should have been able to obtain a valuation prior to the negotiations. It is apparent that defendant had no difficulty retaining an expert to complete a valuation *after* the settlement was entered on the record, and he offered no explanation or evidence to show why he would not have been able to retain an expert before then. We find no error in the court's conclusion on this issue.

It is also apparent that the court did not err in concluding that defendant's counsel relied on the valuation from plaintiff during the settlement negotiations. Plaintiff presented evidence that she used the assumed age of 53 in her valuation because defendant's counsel informed plaintiff's counsel that defendant intended to retire at age 53. The court also had credible evidence that both defendant and his counsel reviewed plaintiff's valuation prior to or during the settlement negotiations, and that extensive discussions regarding the implications of defendant's retirement age occurred during the negotiations. Although defendant disputed this evidence, as the trier of fact, the court was permitted to draw conclusions about the credibility of the witnesses and evidence, and we give deference to the lower court's findings on credibility. MCR 2.613(C); *Triple E Produce*, *supra* at 174; *State-William Partnership v Gale*, 169 Mich App 170, 174; 425 NW2d 756 (1988). As such, the court's finding that defendant's counsel relied on the valuation was not clearly erroneous.

Finally, defendant's argument that the court erred in finding that the assumed age of 53 was blatant in plaintiff's valuation report is completely without merit. Defendant contends that the valuation report and an affidavit by plaintiff's counsel alleging that defense counsel informed him that defendant intended to retire at age 53 were inadmissible hearsay, however, both documents were admitted as evidence without objection from defendant. Because defendant failed to object to admission of the documents, he failed to preserve the issue of their admissibility for review and may not challenge their admission now for the first time on appeal. *Booth Newspapers v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422

(1993). Further, the court did not err in its conclusion that any person reading the report could easily observe the statement on the first page of the report and in at least three other places that the valuation was based on an assumed retirement age of 53.

Defendant also claims that two of the court's findings were irrelevant to the ultimate issue whether the consent judgment was based on a mutual mistake and should be set aside. Specifically, defendant claims that the court's findings that he had access to his pension information and that his counsel relied on plaintiff's valuation of his pension were not relevant to resolution of the issues. However, defendant cites no case law to support his contention that the alleged irrelevancy of these findings of fact would somehow justify reversal of the trial court's conclusions. Defendant's mere statement of an argument without citation to authority is insufficient to raise the issue for appellate review. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Even if the issue of the relevancy of these factual findings was properly before us, defendant's argument fails. At issue in this case was whether the consent judgment was based on the parties' mutual mistake that defendant intended to retire at age 53. A family court has the power to vacate a judgment where it determines that the parties share a mistaken belief that led to their consent to the judgment. *Villadsen*, *supra* at 477. Mutual mistake exists where the parties have a common intention induced by a common error. *Id*. Relief from judgment should not be granted where the party seeking relief or his counsel made ill-advised or careless decisions. *Id*. Further, if at the time of the settlement the parties had access to the information on which the allegations of error are based, their agreement should not be disturbed. *Id*. It is apparent from the holding of *Villadsen*, *supra*, that defendant's and his counsel's access to his pension information and plaintiff's valuation, and defense counsel's reliance on the valuation were relevant to determining whether defendant was entitled to relief from the consent judgment. We conclude that the family court's findings of fact regarding defendant's motion to set aside the judgment were not clearly erroneous or irrelevant to the outcome of the proceeding and do not warrant reversal in this case.

Defendant also argues that the trial court erred in refusing to set aside the consent judgment because the parties negotiated their settlement while operating under the mutual mistake that defendant would retire at age 53, and the agreed upon property division in the judgment is erroneously based on this assumption. Typically, property settlement provisions in a divorce judgment cannot be modified by the court. *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999). Absent evidence of fraud, duress, mutual mistake, or severe stress, the court may not set aside or alter provisions of a divorce judgment reached by negotiation and agreement of the parties. *Quade*, *supra*; *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990). A mutual mistake occurs where the parties have a common intention, but it is induced by a common error. *Villadsen*, *supra* at 477.

In *Villadsen*, we addressed whether a trial court had the authority to modify a consent judgment of divorce because of an alleged mutual mistake. The judgment was entered after the parties reached a settlement on division of their marital property. After entry of the judgment, the defendant moved for a rehearing arguing that the parties' agreement was based on a mutual mistake regarding the value of the defendant's share of an insurance agency. The judgment

provided that the plaintiff would receive 11% of the defendant's interest in the agency, or $41,250 if the defendant retained his stock, and this agreed upon division was based in large part on a financial statement from the agency's accountant. Although the defendant had reason to believe that the accountant's financial figures overstated the value of the agency and had access to the information from which he could determine the value, he made no effort to conduct an independent examination of the agency's records until after the judgment was entered. The defendant then learned that there was a discrepancy between the amount of accounts receivable reported by the accountant, and the actual amount of accounts receivable.

After a hearing on the defendant's motion, the trial court modified the divorce judgment, concluding that the parties were operating under a mutual mistake of fact regarding the value of the agency. We reversed, finding that the defendant had full access to his agency's books and was aware of the irregularities at the time of the settlement. *Id*. at 477. We also concluded that modification of the judgment was not warranted because the defendant presented no evidence of fraud, nor did he allege that the facts were newly discovered. *Id.*

We agree with the family court that the present case is highly analogous to *Villadsen*. Here, defendant had an opportunity to review plaintiff's expert's report prior to entering into the settlement. As the lower court noted, the assumed retirement age of 53 was obvious on the face of the report. Further, defendant admitted that he had access to his pension information. If defendant had doubts about the accuracy or validity of plaintiff's calculations, he could have postponed the settlement negotiations until he could retain his own expert. In addition, defendant presented no evidence of fraud or newly discovered facts. Defendant alleged that his counsel pressured him to agree to a settlement by threatening to terminate her representation, however, coercion by counsel would only justify setting aside the consent judgment if defendant established that plaintiff was involved in the coercion or that counsel's pressure was so severe as to negate defendant's mental capacity to enter into a contract. *Howard v Howard*, 134 Mich App 391, 396-397; 352 NW2d 280 (1984). Defendant failed to establish either of these conditions.

Defendant argues that the present case is analogous to *Regan v Regan*, 23 Mich App 409; 178 NW2d 807 (1970), and that, pursuant to our holding in *Regan*, the family court should have found a mutual mistake of fact and set aside the judgment. In *Regan*, *supra*, the parties agreed in their divorce settlement to divide a single parcel of property. However, the agreed upon dividing line was based on a survey that did not reflect either party's understanding of where the boundary would be drawn. Given this obvious mutual mistake of fact, we upheld the lower court's decision to modify the divorce judgment. *Id*. at 411. Contrary to defendant's argument, there are no apparent similarities between *Regan* and the instant case. Plaintiff was not operating under any mistake of fact. There was no doubt in plaintiff's mind that her expert's calculation of the present value of the pension was based on an assumed retirement age of 53. It was only defendant who was allegedly confused about this assumption, and, as the family court found, the blatant nature of the report made this allegation of mistake somewhat questionable. We will not grant defendant relief where his failure to examine his own pension information, to retain his own expert, and to carefully review plaintiff's report resulted in a careless decision. *Villadsen*, *supra* at 477.

Finally, defendant presents the cursory argument that the judgment should be set aside because it is inequitable. We have held that, in the interest of fairness, a divorce judgment can be modified due to inequity. *Villadsen, supra* at 476; *Alexander v Alexander*, 103 Mich App 263, 266-267; NW2d (1981).[1] However, defendant did not cite any cases in which we found that modification of the property settlement provisions of a consent judgment was justified based on gross inequity.

Our resolution of this issue is further complicated by the parties' disagreement over the impact of the terms of the consent judgment. According to defendant, if he retired at the assumed age of 53, plaintiff would receive approximately $429,230 of the marital assets while defendant would receive approximately $217,027. However, if defendant retired at 65, plaintiff would receive approximately $402,732 in assets and defendant would receive approximately $83,166 in assets. Plaintiff disputes these calculations, arguing that defendant is comparing pre-tax figures from plaintiff's calculations, to after-tax figures from defendant's expert's report. According to plaintiff, if defendant retired at 53 and pre-tax dollars are used to calculate the value of the assets, the judgment would divide the assets nearly 50/50. Even if defendant did not retire until age 65, plaintiff argues that the pre-tax value of his pension is not reduced as dramatically as defendant would have this Court believe.

Because the calculation of pension benefit is in dispute and the family court did not reach this issue, we are unable to conclude which of the parties presents a more accurate picture of the division of marital assets. However, plaintiff offers an argument that we find persuasive on the issue of inequity. According to plaintiff, she waived her right to pursue spousal support in consideration for receiving a more generous distribution of the marital assets. Plaintiff claims that had the parties not settled and the case were tried, she would have requested and may very well have received spousal support. It was undisputed that the parties were married for 28 years, plaintiff was a housewife who had worked only part-time, and defendant had a substantial income. We have held that the length of the marriage and the ability of the parties to support themselves are critical factors in determining whether spousal support is warranted. *Demman v Demman*, 195 Mich App 109, 110-111; 489 NW2d 161 (1992). Plaintiff also argues that her claim for spousal support was considered during the parties' settlement negotiations, and the parties used the hypothetical figure of $300 per week for 14 years.

Although plaintiff may have overestimated the likely spousal support award, we agree with plaintiff that a judgment incorporating spousal support would have been "just and reasonable," MCLA 552.23(1), and was a very likely possibility at a trial of this case. Given plaintiff's waiver of her viable claim for spousal support, we conclude that plaintiff's alleged

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[1] Although our holding in *Villadsen*, *supra*, that inequity is justification for modifying a divorce judgment appears to be good law, more recent decisions of this Court have omitted inequity as grounds for modification, especially where the judgment is based on the negotiated agreement of the parties. *Keyser*, *supra* at 269-270; *Quade*, *supra* at 226. In fact, although we did not specifically overrule *Villadsen*, *supra*, we found in *Quade*, *supra*, that inequity was not a justification for setting aside a property settlement reached through negotiation and consent of the parties. *Id*. at 226.

disproportionate share of the marital assets is not grossly inequitable and would not justify setting aside the consent judgment.

Affirmed.

/s/ Michael J. Talbot
/s/ Martin M. Doctoroff
/s/ Helene N. White