STATE OF MICHIGAN

COURT OF APPEALS

JEANETTE M. CARRELL,

Plaintiff/Counterdefendant-Appellee,

v

NEAL S. CARRELL,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
December 9, 2003

No. 238103
Wayne Circuit Court
LC No. 98-81283-DO

Before: Murphy, P.J., and Cooper and C. L. Levin*, JJ.

C. L. LEVIN, J. (*dissenting*).

I respectfully dissent.

The plaintiff wife and the defendant husband agreed on the record to a property settlement that provided they would each retain their pensions without sharing his or her pension with the other. Neither had investigated the value of either pension.

Soon after the terms and provisions of the settlement so agreed upon were spread on the record, and approved on the record by the circuit court as a final settlement, the wife began to make inquiries, and to investigate, and learned that her husband's pension was worth considerably more than her pension.[1] In the meantime, a circuit judge entered a judgment of divorce that included, over the wife's objection, the agreed upon terms and provisions of the property settlement. Thereafter, the wife moved for, and was granted, relief from judgment pursuant to MCR 2.612(C)(1).[2]

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

[1] The parties stipulated at an evidentiary hearing, held after the wife moved for relief from judgment, that the wife's pension was worth $30,803.00. One expert set a value of the husband's pension at $89,464.00. Another set a value of $213,703.80.

[2] MCR 2.612(C)(1) provides:

(continued…)

I

A

The circuit judge, who heard the motion for relief from judgment, found that there had not been "mistake" or "excusable neglect" within the meaning of subdivision (a) of the court rule, and that there had not been "fraud" or "misrepresentation, or other misconduct of an adverse party" within the meaning of subdivision (c) of the court rule. The judge went on to rule, however, that relief should be provided under subdivision (f) of the court rule, "any other reason justifying relief from the operation of the judgment".

The judge determined that the following factors justified granting relief: the parties "intended an equitable settlement"; the "values of the pensions are grossly disproportionate"; the husband was aware "of other retirees' monthly benefits"; the wife was "represented by an attorney who was subsequently suspended from the practice of law and lost her file"; and the "challenge was made immediately after the settlement was placed on the record without any lapse of time."

B

While the husband knew that his pension was worth considerably more than his wife's pension, there is no claim or evidence that the husband had obtained an expert evaluation or knew the true worth of the pensions. In all events, the husband had no affirmative duty to volunteer or share with his about-to-be-divorced wife whatever knowledge he may have had

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On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

when they were attempting to negotiate an amicable property settlement, and there were differences of opinion regarding the value of the marital home and other property, and the wife was represented by counsel.[3]

It is not claimed that the husband was asked to make, or that he made, any representation regarding the value of the pension, before the settlement agreement was spread on the record and approved by the court.

There is no claim or evidence that the wife was unaware that the terms of the settlement provided that she would keep her pension and her husband would keep his pension without either sharing his or her pension with the other. It clearly appears on the record, rather, that the wife was so aware; the terms and provisions of the settlement were read on the record by the wife's lawyer in the presence of the wife and the husband.

Nor is there a finding by the circuit judge that the wife's lawyer failed to provide her with adequate representation, or that her lawyer was ordinarily or grossly negligent.[4] Absent such a finding, there is nothing presented for consideration in regard to the adequacy of the lawyer's representation of the wife.

C

The statute provides that the circuit court may include in the judgment of divorce "appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse as appears to the court to be equitable under all the circumstances of the case" if the party "contributed to the acquisition improvement or accumulation of the property." (MCL 552.401.)[5] (Emphasis added).

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[3] In *Nederlander v Nederlander*, 205 Mich App 123, 127; 517 NW2d 768 (1994), this Court affirmed summary disposition for the husband on the wife's claim that he had breached a fiduciary duty by misrepresenting the value of certain assets during divorce proceedings. This court concluded that the husband was entitled to judgment on this claim as a matter of law because, "[a]t the time of the divorce proceedings, there certainly was no reposing of faith, confidence, and trust and the placing of reliance by one party upon the judgment and advice of the other party."

[4] MCR 2.612 is derived from GCR 1963, 538. Section 528 of the 1963 Court Rules was based on Rule 60(b) of the Federal Rules of Civil Procedure.

The federal courts have generally held that ordinary negligence of a party's lawyer is not grounds for relief under Rule 60(b)(1). Some courts have granted relief where there is gross negligence by counsel and an absence of neglect by the party. See 11 Wright, Miller & Kane. Section 2864, p 372, n 44 and the cases there cited.

[5] The statute further provides that a judgment of divorce "shall determine all rights of the husband and wife" in any pension. MCL 552.101(4).

(continued…)

It is, thus, of little, if any, importance whether the parties intended an equitable settlement or had less noble intentions.[6] The wife as well as the husband waived her statutory right to have the court award an equitable distribution of the marital property - whether such was intended by the parties or not - when she agreed to a formal and final settlement on the record, without investigating the values of the pensions.

D

The settlement included terms and provisions allocating to the wife the marital home, and providing for payment of a fixed sum of money by her to the husband therefor; and allocating bank and saving accounts; and tangible and other intangible personal property between the parties.

During the bargaining before the settlement was entered into, the parties had urged different appraisal values of the house, and of other property. The decree modifying the agreed upon settlement did not include a judicial determination whether the husband's or the wife's appraisal of the value of the house and other property was correct, or whether terms and provisions of the settlement other than those relating to the pension needed to be modified to achieve an equitable distribution of the marital property. The failure to so judicially determine what constitute an equitable distribution overall may have resulted in a less than equitable settlement to the detriment of the husband. The decree, modifying the terms and provisions of the settlement relating to the husband's pension, without such an overall judicial determination should, on that ground also, be reversed.

E

In both *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999) and *Kaleal v Kaleal*, 73 Mich App 181; 250 NW2d 799 (1977), cited by the circuit judge and the majority, where relief was granted to the wife under subdivision (f) of the court rule, modifying the terms and provisions of a property settlement, the husbands had engaged in deceptive and manipulative acts over an extended period of time that manifestly constituted affirmative misconduct on the husbands' part.

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[6] In *Marshall v Marshall*, 135 Mich App 702, 704-706, 711-712; 355 NW2d 661 (1984), the parties' divorce settlement was intended to divide property equally by awarding the husband stock in a company, offset by cash payments to the wife. Subsequently, the stock's value unexpectedly dropped, causing the husband's portion of the estate to drop in value while the wife's cash payments remained unchanged. The trial court granted the husband's motion for relief from judgment, and reduced the cash payments. This Court reversed on the ground that the change in the assets' value did not constitute extraordinary circumstances. This Court responded to the trial court's finding that "fairness and equity required the modification," stating that "the assertion that modification of a property settlement can be granted when necessitated by fairness is no more than *obiter dictum.*"

In *Heugel*, the husband persuaded the wife to sign a grossly unequal property settlement by falsely representing that he intended to eventually reconcile with her. The husband went to great lengths to perpetrate his deception. He allowed the wife to live with him long after the date the settlement required her to leave the home. He took trips with her, commingled funds, celebrated their wedding anniversaries, and prepared, but did not record, a deed listing her as a co-owner of the house. After two years of perpetrating this charade, the husband informed the wife that he had never intended to remarry her, and that she had been naive to believe him. The wife, who suffered from a debilitating spinal condition that prevented her from working, was left with a property settlement that gave her only various items of personal property and a $50,000 lump sum payment.[7]

Kaleal similarly presents compelling circumstances. There, the husband assured the wife that he was divorcing her only because his family wanted him to marry his cousin from overseas to enable the cousin and her brothers and sisters to enter the country. The wife believed that it was unnecessary to protect her rights to alimony or property. The wife was not represented by counsel. This Court determined that these were extraordinary circumstances warranting relief from judgment under the predecessor rule, GCR 1963, 528.

There is no evidence or finding of any misconduct on the part of the husband in the instant case.

F

The circuit court was correct in stating at the outset of its opinion:

> In the present case, under MCR 2.612(C)(1)(a), there arguably was a mutual mistake of fact because the parties intended a 50/50 settlement and that did not occur because of the disproportionate value of their pensions which neither was fully aware. However, the ability to obtain information regarding the value of the pensions was available to the parties during the litigation. Apparently neither availed themselves of the opportunity to conduct that discovery before the settlement conference. This falls within the exception identified in Villadsen [v

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[7] Worse, the plaintiff attempted to further diminish the wife's share of the settlement by claiming that money he had given to her during the two years of sham reconciliation, including the payoff of her car loan, should be offset against the $50,000 payment.

This Court said:

> [W]e agree with the trial court that plaintiff "abused the unique nature of the husband-wife relationship" to lead defendant to believe that the entry of the divorce judgment was an irrelevant formality. Relief under subsection f is therefore proper because the judgment was obtained by plaintiff's improper conduct . . . An additional factor justifying relief is that defendant requires spousal support because her physical condition prevents her from working.

> Villadsen, 123 Mich App 472, 479 (1983)], citing Lark v. The Detroit Edison Co., [99 Mich App 280, 283 (1989)] "where the party seeking modification or his counsel made ill-advised or careless decisions and alleges mistake, no relief can be granted." Were the Court to permit the parties to set aside a judgment of divorce whenever one party was mistaken about values that were discoverable, it would destroy the finality of judgments. The Court finds that the settlement cannot be set aside on the basis of mutual mistake of fact. (Emphasis added.)

Subdivision (f) of the court rule does not bestow on the circuit court a general power of dispensation enabling the court to reform a settlement agreement that has been approved on the record to do what the court in its discretion believes is necessary to relieve a party of inexcusable neglect to achieve what, indeed, may be a more just result.

II

There are three preconditions to granting relief under subsection (f): (1) the reason for setting aside the judgment must not fall under subsections a through e, (2)[8] the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice. *Heugel,* p 478. *Heugel* further states, "[g]enerally, relief is granted under subsection f only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered." *Heugel,* p 479. (Emphasis added.)

None of the three stated preconditions were met in this case.

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[8] Most of the federal cases considering the mutually exclusive construction of Federal Rule 60 (b) recognized in *Heugel,* involve a party who might have satisfied subsections (1), (2) or (3), (mistake, inadvertence, excusable neglect, newly discovered evidence or fraud) of rule 60 (b), but failed to act within the one-year limitation period. MCR 2.612(C)(2) similarly provides a one-year limitation period for corresponding subsections (a), (b) and (c).

The United States Supreme Court, in *Pioneer Investment v Brunswick*, 507 US 380, 113 S Ct 1489, 123 L Ed 2d 74 (1993), held that a party who failed to take timely action under Rule 60(b)(1) may not seek relief more than a year after the judgment by resorting to subsection (6), which is not subject to a one-year limitation.

The United States Court of Appeals for the Sixth Circuit observed

> The difficulty in interpreting subsection (b)(6), and perhaps the reason for the paucity of decisions in this area, arises from the fact that almost every conceivable grounds for relief is covered under the first three subsections of Rule 60(b). The "something more," then, must include unusual and extreme situations where principles of equity mandate relief. *Olle v Henry & Wright Corp,* 910 F2d 357, 366 (CA 6; 1990).

A

The wife's reasons for seeking to set aside the judgment fall essentially under subsection (a), "[m]istake, inadvertence, surprise, or excusable neglect," and subsection (c), "[f]raud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." The wife alleged both that she and her counsel were mistaken as to the value of the pension, and that defendant falsely represented that it was worth only $15,000. The circuit court considered both of these grounds, but correctly determined that the wife had not established either.

The circuit court, in effect, found no mistake, inadvertence, surprise, or excusable neglect under subsection (a) because plaintiff failed to avail herself of discovery to learn the pension's true value.[9] The court rejected the wife's claim under subsection (c), fraud, because her evidence of fraud was not clear and convincing.[10] The court then granted relief under subsection (f), any other reason justifying relief.

The court acknowledged that a requirement for relief under subsection (f) is that the reason for setting aside the judgment was not within subsections (a) through (c). The court said, however, that under *Heugel* an exception to this requirement can be made if "additional factors exist that persuade the court that injustice will result if the judgment is allowed to stand." *Heugel*, p 481.

The court found that sufficient additional factors were present, namely the "grossly disproportionate" values of the pensions, defendant's "extensive knowledge regarding the pension board's operations," the wife's lawyer's subsequent suspension and loss of the wife's file, and the immediacy of the wife's challenge to the settlement.

None of these constitute additional factors warranting an exception to the requirement that subsection (f) only be invoked where one of the other subsections is inapplicable. The wife's dissatisfaction with the settlement and her belief that her husband knew about the disparity are so closely associated with her allegations of mistake and fraud that they are not sufficient *additional* factors. The wife's lawyer's subsequent suspension cannot logically count as an additional factor when there is no evidence of a causal connection between the professional shortcomings that led to discipline and the unsatisfactory settlement. The immediacy of the wife's objection to the settlement is not consequential. Since the wife was able to raise her objections soon after the settlement was entered, she clearly could have done so before she entered into the agreed-upon settlement if she had acted as alertly before the settlement as she did soon thereafter.

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[9] (See *Villadsen v Villadsen*, 123 Mich App 472, 477; 333 NW2d 311 (1983), holding that a settlement should not be disturbed on grounds of mistake or fraud if the parties had access to the relevant information.)

[10] (See *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 459; 559 NW2d 379 (1996), holding that generally, fraud must be established by "clear and convincing" evidence, rather than by the preponderance of the evidence.)

The circuit court's application of an "additional factors" exception is inconsistent with Michigan authority addressing this issue.[11] In *Heugel*, the additional factors that justified relief under subsection (f) were the plaintiff-husband's grossly improper conduct and the wife's inability to work. Nothing in the instant case rises to that level.

The circuit court erred in substituting an "additional factors" analysis for an "extraordinary circumstances"[12] analysis. The stated "additional factors" are not -- for reasons already stated -- sufficient to constitute extraordinary circumstances warranting relief under subsection (f).

III

The application of subsection (f) should be viewed in light of this state's strong policy of encouraging settlements by enforcing their finality. This Court's decisions under subsection (f) disfavor the reopening of settlements absent compelling reasons, and generally hold that a party's own error or misjudgment in managing litigation is not a compelling reason. This policy is consistent with the *Heugel* statement that generally relief is granted only where, as in *Heugel*, the judgment was procured by the opposing party's misconduct.

This court's reluctance to disturb the parties' own settlements is shown in *Groulx v Carlson,* 176 Mich App 484, 492; 440 NW2d 644 (1989), where the parties in a breach of contract action reached a consent judgment that was placed on the record. Subsequently, the defendants moved to set aside the consent judgment on the ground that it was not based on a meeting of the minds, and on grounds of mistake, excusable neglect, and fraud. After determining that the defendants failed to establish any of these grounds, this Court said:

> The evidence in this case as revealed in the transcripts of the hearings on this issue in the court below, instead of suggesting mistake, fraud, or excusable neglect suggests that defendants, as stated by defense counsel, were unhesitating in their consent to the terms of the settlement agreement at the time the agreement was formally read into the record, but that shortly thereafter they had a "change of heart." A change of heart is normally insufficient to justify the setting aside of a settlement agreement.

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[11] In *Tomblinson v Tomblinson*, 183 Mich App 589, 455 NW2d 346 (1990) and *Colestock v Colestock*, 135 Mich App 393, 354 NW2d 354 (1984), this Court reversed lower court decisions reopening settlements to address issues that might have been addressed as part of the settlement; remedial legislation, passed three months after the settlement in *Tomblinson*, respecting a decision of the United States Supreme Court holding that a military pension was not divisible as a marital asset upon divorce, and, in *Colestock*, sharing of the husband's tort cause of action pending in a federal court proceeding, of which the wife was aware.

[12] Longhofer, Courtroom Handbook of Michigan Civil Procedure (2002) § 2612.15, p 1074.

Similarly, in *Siegel v Spinney*, 141 Mich App 346, 347-348; 367 NW2d 860 (1985), the parties in a property boundary dispute entered into a consent judgment on the day set for trial. The parties outlined their agreement on the record, but when it came to drafting the consent judgment, they could not agree. Over the plaintiff's objections, the trial court adopted the last effort at a draft. On appeal, this Court rejected the plaintiff's argument that she had the right to unilaterally revoke the consent judgment. Quoting from *Meyer v Rosenbaum*, 71 Mich App 388, 393; 248 NW2d 558 (1976), this Court said:

> As a matter of public policy, it is extremely difficult to find any rationale for permitting a litigant to eschew a bargain knowingly made in open court, on the record of the court, and with the intent that the court and opposite party should rely thereon. ... A great many, if not most, settlements are arrived at on the day of joust, when the jury is in attendance and the judge is waiting with instructions hopefully prepared. The attorneys then must be able to rely upon the knowledge that any stipulated agreement that they make will be final and binding on both parties.

IV

The evidence in the instant case does not present extraordinary circumstances justifying setting aside the agreed upon settlement. The settlement was the result of arm's length negotiations in which the wife was represented by counsel. Although the wife's counsel's professional conduct was later called into question in regard to an unrelated matter, there is no indication of a causal connection between counsel's subsequent difficulties in another matter and the wife's agreement to the settlement.

The wife knew that discovery had not been conducted. She knew that she was entering into the agreement without definite information concerning the values of the pensions. She also knew that her husband had been involved with his union's pension board, and she acknowledged that she did not believe him when he told her after the settlement was formally entered on the record, that his pension was worth $15,000.

The wife assumed the risk of entering into a settlement without investigating the pension's value and on incomplete information, and is not entitled to relief. Her change of heart and regret at not conducting a timely and thorough investigation are not extraordinary circumstances.[13]

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[13] In *Andrulonis v United States*, 26 F3d 1224 (CA 2, 1994), the settlement included awards of post-judgment interest to the plaintiff and third-party plaintiff. Subsequently, the third-party defendant contended that the settlement overpaid the third-party plaintiff by erroneously including an interest payment. The Court said:

> In extraordinary circumstances, Rule 60(b) may be invoked to override the finality of judgments in the interest of justice. See *Nemaizer v Baker*, 793 F2d 58,

(continued…)

V

Where this Court has approved relief under subsection (f), the "extraordinary circumstance" that were sufficient to warrant relief in such cases have been more compelling and unusual than a failure of thorough investigation. In *Coates v Drake*, 131 Mich App 687, 689-695; 346 NW2d 858 (1984), the plaintiffs' counsel settled a case without their knowledge or consent, forged their names on the settlement check, and appropriated the money. When the plaintiffs learned of this conduct, they moved for relief from judgment. The trial court denied the motion, but this Court reversed on the ground that the interests of justice warranted relief from judgment.[14]

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> 61 (CA 2, 1986). However, the Rule does not allow district courts to "indulge a party's discontent over the effects of its bargain," *Kozlowski v Coughlin*, 871 F2d 241, 246 (CA 2, 1989). Accordingly, "[w]hen a party makes a deliberate strategic choice to settle, she cannot be relieved of such a choice merely because her assessment of the consequences was incorrect. *United States v Bank of New York*, 14 F3d 746, 759 (CA 2, 1994); *see also Nemaize*, 793 F2d at 62 ("Mere dissatisfaction in hindsight with choices deliberately made by counsel is not grounds for finding the mistake, inadvertence, surprise or excusable neglect necessary to justify Rule 60(b)(1) relief.") [*Id*., 1235.]

Numerous federal court decisions underscore that extraordinary circumstances is a prerequisite for disturbing a judgment under Rule 60(b)(6). In *Lehman v United State*, 154 F3d 1010, 1017 (1998), the United States Court of Appeals for the Ninth Circuit quoted *United States v Alpine Land & Reservoir Co*, 984 F2d 1047, 1049 (CA 9, 1993), stating that the subrule "has been used sparingly as an equitable remedy to prevent manifest injustice." and that the moving party "must 'show both injury and that circumstances beyond its control prevented timely action to protect its interest.'"

Wright, Miller & Kane, in their discussion of FR Civ P 60(b)(6), emphasize that a court should not exercise this power to correct an undesirable result that could have been avoided through due care:

> [T]he broad power granted by clause (6) is not for the purpose of relieving a party from free, calculated, and deliberate choices he has made. A party remains under a duty to take legal steps to protect his own interests. [11 Wright, Miller & Kane, Federal Practice and Procedure, section 2864, pp 359-360.]

Similarly, *see Jinks v Allied Signal*, 250 F3d 381 (CA 6, 2001).

[14]In *McNeil v Caro Community Hospital*, 167 Mich App 492, 495-498; 423 NW2d 241 (1988), the plaintiff in a medical malpractice/wrongful death action communicated to the trial court, through her counsel, that she consented to the entry of a dismissal with prejudice of her action. The plaintiff subsequently moved to set aside the order of dismissal pursuant to GCR 1963, 529.3(6). (By the time the case reached this Court, this rule had been replaced by MCR 2.612(C)(1)(f)). The plaintiff claimed in an affidavit that she had not authorized her counsel to agree to dismissal. Because the affidavit was undisputed, the trial court agreed that extraordinary circumstances warranted relief from the order of dismissal. *Id.*, 495-496. This Court, however,

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In *Mikedis v Perfection Heat Treating Co*, 180 Mich App 189, 195-196, 200; 446 NW2d 648 91989), the trial court mistakenly believed that a settlement resolving a worker's compensation claim between the plaintiff-employee and defendant-employer also settled the plaintiff's intentional infliction of emotional distress claim. The trial court (by a different judge) subsequently granted the plaintiff's motion to set aside the judgment under subsection (f). This Court agreed that the unique circumstances of the case, including the lack of any "ill-advised or careless decision by counsel," justified relief under subsection (f). *Mikedis* is thus a highly fact specific case, involving confusion that arose when, through no fault of the plaintiff, the trial court was unaware that the personal injury attorney and the workers' compensation insurance carrier had agreed that the redemption agreement was not determinative of the personal injury lawsuit. The instant case, in contrast, involves nothing more than ordinary negligence on the part of the wife, and possibly,[15] of her counsel.

In *Jackson Printing Co Inc v Mitan*, 169 Mich App 334; 425 NW2d 791 (1988), the plaintiff commenced an action claiming misrepresentation. The trial court instructed the jury on exemplary damages as well as compensatory damages. The jury awarded exemplary damages in addition to the full amount of compensatory damages sought by the plaintiff. The defendant unsuccessfully moved for judgment notwithstanding the verdict, and then unsuccessfully filed a delayed application for leave to appeal in this Court. The defendant then returned to the trial court, where he filed a motion for relief under subsection (f) on the ground that the trial court erred in allowing the jury to award exemplary damages. The trial court denied the motion. The defendant appealed under subsection (f) alleging that manifest injustice would result if the improper award of exemplary damages was not vacated. *Jackson* is instructive because it shows that a party's error (failing to object to instructions, failing to file a timely appeal) does not necessarily bar granting relief under subsection (f) *if* it is necessary to grant relief to prevent manifest injustice. Awarding a plaintiff unauthorized exemplary damages in addition to full compensatory damages qualifies as manifest injustice while a less than satisfactory settlement accepted by the court and entered by the court on the record does not.

This sampling of case law, in both domestic relations and other civil cases show that judgments, especially those reached through the parties' own voluntary settlements, are not

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held that because the allegedly erroneous dismissal was the fault of plaintiff's attorney, the trial court erred in concluding that extraordinary circumstances warranted relief. *Id.*, 497-498.

Although not exactly on point, *McNeil* is instructive in the instant case because it illustrates how a party's own errors in managing litigation may not constitute "extraordinary circumstances" warranting relief, even when they can be imputed to the party's attorneys.

The Court in *McNeil, supra,* specifically distinguished *Coates* when it concluded that the plaintiff's attorney's error did not justify relief under subparagraph (f). The *McNeil* Court remarked that the attorney's conduct in *Coates* was far more egregious than the alleged error in *McNeil. Id.*, 498.

[15] As previously noted, there is no finding of neglect by the wife's lawyer.

subject to reopening unless truly extraordinary circumstances so mandate. A party's own misjudgment, lack of diligence, impatience or haste is not an extraordinary circumstance. In the instant case, the wife failed to establish extraordinary circumstances. She merely showed that she proceeded to settlement with inadequate knowledge of the pension's value, and later regretted her haste.

VI

Finally, the revision of the settlement might have detrimentally affected defendant's rights. *Heugel*; see also *Zeer v Zeer*, 179 Mich App 622, 625; 446 NW2d 328 (1989). The circuit court said that modification of the judgment was justified because the parties intended to divide assets equally. The parties, however, made several trades or bargains without the benefit of firm appraisals of the assets' values. The parties disputed the value of the marital home. The wife did not know whether the husband received the report from the wife's real estate appraiser. The parties also disputed the value of the husband's motorcycle, and whether it should be offset against the value of a ring the wife bought. The parties assumed that the wife's masters degree had no value, but there was no expert testimony to support this assumption.

Both parties thus assumed the risk of entering into a settlement without precise information that the assets were in fact being divided equally. By modifying the judgment based on a precise evaluation of a single asset, the circuit court relieved the wife of her risk while leaving the husband to bear his. This imbalance creates the possibility that the husband's rights were detrimentally affected. Even if the circuit court had not otherwise erred in granting relief, it erred in modifying the judgment without directing a thorough evaluation of all the marital assets, and ordering overall an equitable distribution of the marital property.

I would reverse.

/s/ Charles L. Levin