



In The
Eleventh Court of Appeals

No. 11-16-00084-CV

DAWN GAGLIONE, Appellant

V.

**EDWARD P. RIVAS AND
CYNTHIA RUCKER ALLEN, Appellees**

**On Appeal from the 326th District Court
Taylor County, Texas
Trial Court Cause No. 46369-C**

MEMORANDUM OPINION

The trial court granted Edward P. Rivas’s motion for partial summary judgment and denied the relief sought by Dawn Gaglione in her amended petition for “Post-Divorce Division of Property.” Because the trial court correctly concluded that res judicata barred the relief sought by Gaglione, we affirm.¹

¹We note that judgment was also entered against Gaglione in favor of Rivas’s attorney, Cynthia Rucker Allen.

Gaglione and Rivas were married in 1992 and divorced in 2013. The parties were not represented in their divorce. They filled in the blanks on a preprinted form of a divorce decree; both parties approved the decree and presented it to the trial court. The trial court approved and signed it.

Gaglione filed an amended petition for “Post-Divorce Division of Property,” in which she sought “rescission of the Final Decree of Divorce and that the Decree, fraudulently obtained, be set aside and that she be awarded her interest in the military retirement.” Gaglione claimed that her signature on the divorce decree was induced by Rivas’s fraudulent misrepresentation regarding his intent to share his military benefits and that, in the absence of that misrepresentation, she would not have signed the proposed decree.

Rivas filed an answer and an amended answer to Gaglione’s pleadings and also filed a motion for partial summary judgment. In his motion for partial summary judgment, Rivas asserted that Gaglione’s claim was barred by the doctrine of res judicata.

By the agreed decree, the trial court, among other things, awarded Rivas all of his “employment benefits, including retirement, pension, 401(k), profit-sharing, and stock option plans . . . along with all individual retirement accounts.” The record shows that, throughout their marriage, Rivas worked for the United States Air Force.

Notwithstanding the language of the divorce decree, Gaglione claims that Rivas promised her that she would receive a share of his military retirement benefits. However, when Rivas retired in 2015, he informed Gaglione that he would not give her any of his military retirement benefits. In her affidavit in response to Rivas’s motion for partial summary judgment, Gaglione stated that she signed the divorce decree only because she believed Rivas’s promises that he would divide the military retirement benefits and give “[her] portion” to her when he retired.

A trial court must grant a motion for summary judgment if the moving party establishes that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991). In order for a defendant to be entitled to summary judgment, the defendant must either disprove an element of each cause of action or establish an affirmative defense as a matter of law. *Am. Tobacco Co. v. Grinell*, 951 S.W.2d 420, 425 (Tex. 1997).

We review the granting of a motion for summary judgment de novo. *Natividad v. Alexis, Inc.*, 875 S.W.2d 695, 699 (Tex. 1994). When reviewing a summary judgment, we consider all the evidence and take as true all evidence favorable to the nonmovant. *Am. Tobacco*, 951 S.W.2d at 425; *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985).

The Family Code allows a trial court to order postdivorce division only as to property not divided or awarded to a spouse in the final decree of divorce. TEX. FAM. CODE ANN. § 9.201(a) (West 2006). With respect to property actually divided in the divorce decree, a trial court may enter further orders to enforce the division of property or clarify the earlier decree. *Id.* § 9.006(a) (West Supp. 2017), § 9.008(a).

However, a trial court may not enter an order that alters or changes the substantive division of property in a final divorce decree. *Id.* § 9.007(a). Even if a trial court incorrectly divides marital property, the decree bars relitigation of the property division. *Pearson v. Fillingim*, 332 S.W.3d 361, 363 (Tex. 2011). This is because res judicata applies to a final divorce decree just as it does to any other final judgment. *Baxter v. Ruddle*, 794 S.W.2d 761, 762 (Tex. 1990).

Appellant does not dispute that the decree fully divided Appellee’s retirement benefits; she argues that the decree’s division was induced by fraud. Only if the community property was not divided by the divorce decree could Appellant

successfully ask the trial court to partition the community property by postdivorce division of property. *Haas v. Otto*, 392 S.W.3d 290, 292 (Tex. App.—Eastland 2012, no pet.); *Mayes v. Stewart*, 11 S.W.3d 440, 448 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). The agreed decree of divorce awarded Rivas all of his retirement benefits. Because Rivas’s retirement benefits were community assets that were awarded to Rivas in the divorce decree, Appellant could not relitigate her interest in them.² The relief sought by Gaglione is barred by res judicata. The trial court did not err in its ruling.

We affirm the judgment of the trial court.

JIM R. WRIGHT
SENIOR CHIEF JUSTICE

March 22, 2018

Panel consists of: Willson, J.,
Bailey, J., and Wright, S.C.J.³

²A postdivorce division of property is a distinct cause of action from a bill of review, which is “a separate suit in equity, brought to set aside a [final] judgment in the same court in an earlier suit.” *Law v. Law*, 792 S.W.2d 150, 153 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (citing *State v. 1985 Chevrolet Pickup Truck*, 778 S.W.2d 463 (Tex. 1989)). We acknowledge that bills of review allow a trial court to consider setting aside property divisions in a divorce decree on grounds of fraud, but we do not reach the issue of fraud based on Appellant’s choice of pleading. *See, e.g., Morrison v. Rathmell*, 650 S.W.2d 145 (Tex. App.—Tyler 1983, writ dismissed) (holding that genuine issue of material fact as to whether wife was induced to agree to property settlement agreement precluded summary judgment as to wife’s bill of review to vacate divorce decree).

³Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.