STATE OF MICHIGAN

COURT OF APPEALS

TAMARA JOANNE TIMMER,

Plaintiff-Appellee,

v

JAMES SCOTT TIMMER,

Defendant-Appellant.

UNPUBLISHED
October 30, 2007

No. 269275
Muskegon Circuit Court
LC No. 00-011377-DM

Before: Whitbeck, C.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by delayed application for leave the trial court's modification of the alimony provision in this post judgment divorce action. We reverse.

I. Marital History

This divorce was highly contentious and acrimonious, spanning almost 18 months of litigation. Plaintiff and defendant were married on June 14, 1986, and are the parents of one minor child.

Plaintiff initiated divorce proceedings on December 18, 2000. Just days before filing her complaint for divorce, plaintiff secured a personal protection order (PPO) against defendant, asserting he had physically assaulted her by striking her in the jaw with his fist and slamming her head into the floor. Plaintiff also filed a separate civil action alleging "severe emotional harm and distress" based on counts of assault, battery, and the negligent and intentional infliction of emotional distress by defendant. The counts in the civil complaint arose from the same behavior and incident alleged in the PPO secured by plaintiff. Although plaintiff also contended that past incidents of violence had occurred in the marriage, these alleged events were never fully delineated or described in the lower court record. Plaintiff further asserted that defendant repeatedly violated the PPO by appearing at and entering the marital home.

Defendant denied the incidents of alleged abuse, asserting plaintiff had fabricated the incidents in order to gain an advantage during the divorce proceedings and to assure an award of custody. Defendant claimed that plaintiff had carried on an extramarital affair. Contrary to plaintiff's contention that she was a homemaker and had no viable source of income, defendant argued that plaintiff had been involved in various advertising or promotional pursuits and successfully brokered sales for art and antiques during the marriage. Defendant further asserted

that significant monies realized from these pursuits was diverted by plaintiff to members of her family and her paramour in order to hide income and bolster her contention that she required substantial financial support. Defendant also alleged that plaintiff had improperly transferred items of personal property to her boyfriend's residence or family to preclude distribution.

Before entry of the judgment of divorce, the prosecutor sought dismissal of the aggravated domestic violence charges against defendant based on plaintiff's PPO allegations. The charges were dismissed *nolle prosequi*, based on the prosecutor alleging:

> In an unrelated matter, a witness testified that the complainant, Tamara Timmer, admitted that she falsified charges in this case and that she lied to the police. The complainant also, in an effort to discredit other witnesses identified herself as an employee of the Muskegon County Prosecutor's Office.

The judgment of divorce also contained provisions for withdrawal and dismissal, with prejudice, of both the PPO action and plaintiff's civil action alleging assault and battery and seeking damages for emotional distress.

II. Judgment of Divorce

On February 8, 2002, following protracted negotiations and a failed attempt at reconciliation, the parties entered into a settlement agreement and proofs were placed on the record for entry of the judgment of divorce. Following delineation by counsel of the specific terms to be contained within the judgment, including provisions for property distribution, custody, child support, insurance and spousal support, plaintiff indicated under oath that she heard and understood the terms placed on the record. Plaintiff acknowledged having participated in the negotiations and that she had been kept informed by her attorney of all settlement figures discussed, had input with regard to the settlement provisions and was satisfied with counsel's representation. Plaintiff averred that she understood she might have realized a different outcome, for better or worse, had she elected to proceed to trial rather than consent to settlement and comprehended that she was "bound by each and every one of the terms of this settlement of divorce." In placing the proofs on the record, plaintiff also acknowledged:

> *Q.* Do you understand that absent their [sic] being fraud or failure to disclose information in regards to the property settlement you cannot come back at a later time and claim that you should have gotten more money?
>
> *A.* Yes.
>
> *Q.* Do you understand that absent a substantial change of circumstances in regards to income or in regards to issues about parenting time you cannot come back to the court and ask to change that condition of the settlement?
>
> *A.* Yes.
>
> *Q.* Do you understand that in this matter that you are receiving spousal support essentially for the term of three years?

A. Yes.

Q. Do you understand that the maximum amount that you will receive under this spousal support is $100,000.00?

A. Yes.

Q. Do you understand that if you had gone to Court that this court what [sic] if it had awarded spousal support essentially would have to leave that spousal support open [sic] modification according to the law, do you understand that?

A. Yes.

Q. You have agreed here in Court today that you are not going to pursue a reservation or a modification of that spousal support after three years and that you expressly waive that right, do you understand that?

A. Yes.

Q. Do you understand you're giving up a right that was guaranteed to you by statute?

A. Yes.

The judgment of divorce was entered on May 20, 2002, and contained the following provision in conformance with the oral recitations made before the trial court pertaining to spousal support:

> IT IS FURTHER ORDERED that Plaintiff is awarded spousal support to be paid by Defendant for a period of three years in the total amount of $100,000.00. Said sum is to be paid monthly beginning March 1, 2002 in the amount of $2,916.66/month for the first two years and continuing the third year at the rate of $2,500.00/month until the last payment is made on March 1, 2005. Defendant is to pay the above spousal support directly to Plaintiff. In the event Defendant fails to timely pay the Court ordered spousal support, Plaintiff may petition the Court to have the amount paid through the Friend of the Court through an Order of Income Withholding. Said spousal support is to end at the conclusion of three years, assuming all of the above stated amounts are timely paid and paid in full. At the conclusion of the payment of all of the above ordered spousal support on a timely basis, any further award of spousal support is expressly waived, forever barred and not subject to modification or reservation except as further set forth herein.

Spousal support was to be deductible to defendant and taxable to plaintiff. Defendant's obligation to pay spousal support would not cease on plaintiff's remarriage; however, the payments would convert to a trust account for the minor child's benefit. If defendant predeceased plaintiff, his estate would continue to be obligated for payment of his support

obligation, but defendant's obligation to pay spousal support would cease if plaintiff predeceased him. Only the following condition was identified to allow for modification of spousal support:

> Plaintiff's individual income for tax years 2002 or 2003 exceed the adjusted gross income of $85,000.00 for that taxable year according to the Plaintiff's tax return.

If plaintiff's adjusted gross income exceeded $85,000, defendant was to be entitled to receive a "dollar for dollar reduction in spousal support payments for every dollar Plaintiff's adjusted gross income" exceeded $85,000. The judgment contained a further provision:

> IT IS FURTHER ORDERED that in addition to the above award of spousal support, spousal support is reserved to ensure Defendant or Plaintiff pays the obligations assigned to him or her in this Judgment of Divorce holding Plaintiff or Defendant harmless from payment of same. In the event Plaintiff or Defendant fails to pay said obligations, then Plaintiff or Defendant may petition this Court for an award of alimony to compensate him or her for those debt obligations assigned to Defendant or Plaintiff. Upon payment of said debt obligations, there shall be no further award/reservation of spousal support in gross to either party and spousal support in gross is forever barred and hereby expressly waived by all parties herein as to alimony in gross.

III. Post Judgment Proceedings

One day shy of the one-year anniversary for entry of the judgment of divorce, plaintiff filed a petition to vacate or modify the judgment. Plaintiff contended that subsequent to entry of the judgment of divorce she was diagnosed with posttraumatic stress disorder (PTSD) and was, therefore, "incapable of understanding the import and effects upon her of agreeing to the terms of the settlement placed on the record." Plaintiff further alleged that defendant's move to an alternative law practice shortly before the settlement occurred, and the lucrative nature of that employment change, was not fully accounted for in the divorce proceedings. Plaintiff asserted defendant had not supplemented discovery responses and had fraudulently concealed his interests in various real properties and business entities. As such, plaintiff argued that the judgment of divorce was unconscionable and sought equitable intervention by the trial court to amend the judgment.

Defendant responded by challenging plaintiff's characterization of their marital history, asserting plaintiff had been in various forms of counseling and demonstrated emotional and psychological problems since the outset of the relationship, as well a history of substance abuse. Defendant contended that plaintiff had been involved in a number of business enterprises but that they had all ended acrimoniously with charges of misconduct and disputes between plaintiff and her various partners. Defendant asserted that plaintiff engaged in a number of inappropriate sexual liaisons throughout the marriage and spent any income she had earned on exorbitant luxuries rather than in furtherance or maintenance of the marital assets. Defendant contended plaintiff was quite aware and informed throughout the divorce proceedings and that her behavior of incurring extensive expenses, removing and writing checks without defendant's knowledge or permission, and constant efforts to provoke arguments were all designed to procure an upper hand in the proceedings and that plaintiff constantly threatened defendant with arrest and false claims regarding violation of the PPO. Defendant asserted that plaintiff had intentionally

interfered with his relationship with their minor child, resulting in emotional trauma to the child and a denial of parenting time. Citing plaintiff's purposeful and planned manipulations and fraudulent allegations, defendant denied that plaintiff either lacked the necessary capacity to contract or met the requisite standard for mental disability to set aside the judgment of divorce.

At trial, plaintiff presented psychiatrist Frank Ochberg, MD, as an expert specializing in PTSD. When questioned, Dr. Ochberg acknowledged plaintiff, at the time of the divorce settlement, "would not have reached the threshold on that day for lack of competency." Dr. Ochberg agreed that "[u]nder any Michigan holding of competence, on that she was competent to, the way we would define competence, to make decisions and she made a decision." However, Dr. Ochberg likened plaintiff's behavior to that of a "hostage" attempting "to get out of captivity," resulting in her agreeing to things that she would not "want to be held to." Ultimately, Dr. Ochberg admitted that plaintiff's judgment at the time in question was not "so far below the standard that she couldn't think at all for herself," but that "she was impaired." Dr. Ochberg further opined:

> PTSD per se is not exculpatory, it doesn't per se to diminish capacity, we have to look at this case as a person who has PTSD and the PTSD is severe enough and the additional conditions are severe enough so that they pass some threshold for a Court decision in our State. I, I believe in this case it passes a threshold and it's taken as a whole. It's not that we could say, with regard to this decision she was impaired but with regard to that decision she wasn't.

In addition, plaintiff's retained counsel at the time of entry of the judgment of divorce, Shon Cook, testified regarding plaintiff's demeanor and understanding at the time of entry of the proofs and judgment. Cook acknowledged that extensive negotiations between counsel and their clients occurred on the date of entry of the proofs into the record. Cook asserted that it was her standard practice to "inquire very seriously of my client to make sure that they understand that this is it, that we can't keep coming week after week, that if once you commit to this on the record that even it [sic] if is not in writing, we're done." Cook averred that if a client showed any hesitation she would not proceed with the placement of proofs.

Cook described plaintiff as appearing "much calmer" than in prior meetings or proceedings because the "the hostility between the parties seemed to have lessened by that point." Cook opined that plaintiff "appeared to understand things that day and the time coming up to that day better than she had throughout the entire course of the case." In Cook's view, when she and plaintiff "went into the Courtroom, [plaintiff] understood the terms of the settlement," had "helped participate and negotiate in the terms of that settlement," and was "apprized of all of the information that went back and forth between the attorneys."

Finally, plaintiff's treating psychiatrist, Dr. Virgilio Vasquez, testified based on his clinical history with plaintiff. Vasquez indicated that plaintiff had reported various and assorted traumas, which had occurred to her throughout the marital relationship, including the alleged incident of physical abuse in 2000 by defendant and that these reports substantiated the PTSD diagnosis. Vasquez acknowledged that there had been no independent verification obtained of plaintiff's verbal reports or allegations. When asked to address Dr. Ochberg's opinion regarding plaintiff's level of comprehension at the time of entry of the divorce settlement terms, Vasquez

acknowledged plaintiff was oriented and that "from the cognitive point of view I think Tamara was competent." Vasquez explained by stating:

> She was oriented as to time, place and person and her memory for recent events was satisfactory. The incompetency comes about emotional, she was emotionally overwhelmed by events to the extent that her judgment was clouded, was emotionally clouded. She was not able to make a decision as far as recognizing the impact of the consequences of the decision or recognizing the legal ramifications of that decision. So from the emotional point of view, I wouldn't have trusted her even to go to the store and buy anything. She was not competent in that particular area.

In sum, Vasquez asserted, at the time of settlement, plaintiff was "emotionally overwhelmed," but "not cognitively impaired."

In reviewing the evidence and arguments of the respective parties, the trial court noted plaintiff's full participation in the proceedings leading up to entry of the judgment of divorce. The trial court indicated plaintiff "assisted her counsel, made her positions known well and at the settlement . . . she consented clearly on the record to the settlement." The trial court determined that plaintiff's contentions of fraud by defendant and the failure to properly value his business interests were not substantiated. Specifically, the trial court stated that there was asset disclosure with defendant being "turned inside out for his various assets." The trial court recalled the arguments regarding valuation of defendant's business assets, finding the valuation issue was fully explored resulting in the parties' settlement. As a result, the trial court opined that it could not "find . . . that Mrs. Timmer did not comprehend, at least, to the level needed to set it aside the property settlement that was entered into."

Despite its determination that plaintiff's level of comprehension was adequate for upholding the property settlement provisions of the judgment, the trial court believed it was necessary revisit the issue of spousal support stating, in relevant part:

> Now at that time, no one knew that Tamara Timmer was suffering from this diagnosis, this illness of PTSD. And let me make it very clear, it's a very rare, it's a very real condition, a very real illness. It may be emotional and psychological in nature but it's still a very real illness. And um, if we were here today and we found out that at that time, for example, she had a diagnosed case of MS or Lou Gehrig's Disease, or cancer or some type of long term illness and had we learned that that had been the case when this all, this was agreed to, I don't think there's anyone that would argue that in a situation like that, that the area of spousal support would not be subject to reconsideration due to the mutual mistake of the parties at the time and not being aware of that condition. It would be um, unfair, in my view, um, and certainly inequitable based on this mutual mistake of the parties in learning of this condition that is going to cause her long term, cause her to have long term emotional and psychological problems on top of what she already had, of course, Mr. Timmer knew about her, may [sic] of her conditions even before they were married or early on in the marriage.

Although the trial court did not believe it necessary to "reopen the entire" judgment, based on its determination of mutual mistake, the judgment of divorce was modified to allow for an increase in spousal support payments to plaintiff of $4,800 a month, beginning April 1, 2005, and continuing for a period of three years, with inclusion of an inflation clause. "[A]ll other aspects of the judgment" were to "remain in effect as originally presented."

At a subsequent hearing, the trial court addressed its finding of mutual mistake, stating:

> Now, why did I say there was a mutual estate [sic], well, no one knew at the time that the settlement was entered into that she had this diagnosis. We knew that she had a lot of problems, we knew that Mr. Timmer had a lot of problems, but we did not know that she had this particular, what can be looked upon as a devastating diagnosis, at least at that time for the foreseeable future.

While acknowledging that this diagnosis did not give plaintiff license to malinger or entitlement to an open-ended award of spousal support, the trial court opined plaintiff required additional time to deal with recovery from her diagnosis of PTSD and, therefore, additional financial support during this period. The trial court went on to explain:

> That's what I meant by mutual estate [sic] and that even though I found that she was competent at the time to enter into the agreement based on what we knew at that time, this was an execution mistake on all our parts and we didn't [sic] that she had this condition at the time and she didn't know it.

IV. Analysis

Defendant's primary contention on appeal is that the trial court improperly modified a provision for alimony in gross based on an erroneous finding of mutual mistake. Specifically, defendant asserts that the alimony in gross provision is not modifiable and that plaintiff had not asserted mutual mistake as a basis to set aside the settlement agreement on this issue. Further, defendant argues plaintiff does not meet the requirements for relief under the mutual mistake doctrine and that plaintiff was aware of her diagnosis of PTSD before entry of the judgment. Finally, defendant contends that any award of additional spousal support based on PTSD is barred by res judicata due to the dismissal of the separate civil suit alleging the same disabilities and problems related to her extreme emotional distress as a result of abuse.

In divorce cases, this Court reviews a trial court's findings of fact for clear error. *Sparks v Sparks,* 440 Mich 141, 151; 485 NW2d 893 (1992). If a trial court's findings are upheld, we determine whether the dispositional ruling was fair and equitable under the circumstances. *Id.* at 151-152. We will affirm the ultimate dispositional ruling unless we are left with the firm conviction that it was inequitable. *Id.* at 152.

Initially, we must address the modifiability of the alimony provision. Although not specifically disputing that the provision constituted an award for alimony in gross, plaintiff asserts that the judgment of divorce failed to include a valid waiver of the right to seek modification. This is argument is both specious and disingenuous.

Spousal support may be classified as either alimony in gross or periodic alimony. *Staple v Staple,* 241 Mich App 562, 566; 616 NW2d 219 (2000). While periodic alimony is modifiable upon the demonstration of a change in circumstances, MCL 552.28, alimony in gross is not modifiable. *Staple, supra* at 566. Alimony in gross is defined as "a sum certain and is payable either in one lump sum or in periodic payments of a definite amount over a specific period of time." *Bonfiglio v Pring,* 202 Mich App 61, 63; 507 NW2d 759 (1993). Alimony in gross is considered to be exempt from modification under MCL 552.28. In *Staple*, this Court adopted "a modified approach that allows the parties to a divorce settlement to clearly express their intent to forego their statutory right to petition for modification of an agreed-upon alimony provision, and to clearly express their intent that the alimony provision is final, binding, and thus nonmodifiable." *Staple, supra* at 568. This Court went further to state:

> If the parties to a divorce agree to waive the right to petition for modification of alimony, and agree that the alimony provision is binding and nonmodifiable, and this agreement is contained in the judgment of divorce, their agreement will constitute a binding waiver under M.C.L. § 552.28; MSA 25.106. In brief, we opt to honor the parties' clearly expressed intention to forgo the right to seek modification and to agree to finality and nonmodifiability. [*Id.*]

The requirements outlined by this Court for waiver indicate only that "the parties' or the court's intent should be clearly and unequivocally expressed upon the record and in the ultimate instrument that incorporates the alimony provision." *Id.* at 580. Indicating that there are no "magic words," for a waiver to be enforceable, the agreement "to waive the statutory right to petition the court for modification of alimony must clearly and unambiguously set forth that the parties (1) forego their statutory right to petition the court for modification and (2) agree that the alimony provision is final, binding and nonmodifiable." Such an agreement "should be reflected in the judgment of divorce entered pursuant to the parties' settlement." *Id.* at 581.

There can be no dispute, that at the time of the placement of proofs on the record, that the plaintiff clearly and unequivocally indicated her understanding and agreement that the alimony provisions would not be modifiable and the parameters of that agreement. Plaintiff specifically averred that she waived the right to pursue a reservation or modification of spousal support and that she was foregoing a statutory right. In addition, the judgment of divorce provided that "any further award of spousal support is expressly waived, forever barred and not subject to modification or reservation." The judgment included additional language that after the finalization or payment of any debt obligations by either party that "there shall be no further award/reservation of spousal support in gross to either party and spousal support in gross is forever barred and hereby expressly waived by all parties herein as to alimony in gross." Given the explicit and repetitive indications, both at the time of entry of proofs and within the written document, there can be no viable contention that the spousal support provision did not comprise an award of alimony in gross and, thus, was nonmodifiable.

Once parties enter into a settlement agreement and obtain approval from the trial court, modification is not permitted unless there is fraud, duress, mutual mistake, or "any for such other causes as any other final judgment may be modified." *Marshall v Marshall,* 135 Mich App 702, 708; 355 NW2d 661 (1984). Specifically, MCR 2.612(C) provides as grounds for relief from judgment:

> (1) 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.

If relief is granted under the provisions of MCR 2.612(C)(1)(a), (b), or (c), the motion must be made "within one year after the judgment, order, or proceeding was entered or taken." MCR 2.612(C)(2). Otherwise, the motion for modification must be made within "a reasonable time." *Id.*

We would first note that defendant's argument that the trial court's modification of the judgment based on mutual mistake was in error due to plaintiff's failure to seek modification under this theory is not sustainable. MCL 552.28 provides that a "court may revise and alter the judgment, respecting the amount of payment of the alimony or allowance . . . and may make any judgment respecting any of the matters that the court might have made in the original action." In addition, MCR 2.116(C)(1)(f) specifically provides a court with the authority to grant relief from a judgment for "[a]ny other reason justifying relief from operation of the judgment." The inherent equitable authority of the trial court was recognized by this Court in *Walworth v Wimmer,* 200 Mich App 562, 564; 504 NW2d 708 (1993), when it concluded:

> A divorce case is equitable in nature, and a court of equity molds its relief according to the character of the case; once a court of equity acquires jurisdiction, it will do what is necessary to accord complete equity and to conclude the controversy.

As such, defendant's implication that the trial court was limited, in the exercise of its equitable authority, to the grounds raised by plaintiff in her motion is erroneous.

Rather, the integral issue to be addressed is whether the trial court erred in determining that plaintiff's diagnosis of PTSD comprised a mutual mistake necessitating or permitting modification of the spousal support provisions within the consent judgment. We find plaintiff's subsequent diagnosis did not comprise a mutual mistake and that modification of the alimony in gross provision was in error.

The doctrine of mutual mistake is primarily used as a contractual defense to an otherwise valid contract. In order to establish mutual mistake of fact, an individual must demonstrate that both parties were mistaken regarding an existing fact that was material to their agreement. *Gortney v Norfolk & Western Railway Co,* 216 Mich App 535, 542; 549 NW2d 612 (1996). The trial court determined that the alimony in gross provision of the divorce judgment was based on the parties' mutual mistake regarding the severity of plaintiff's emotional or psychological condition. It is readily acknowledged that a family court is authorized to vacate a judgment when it determines that the parties share a mistaken belief, which led to their consent to the judgment. *Villadsen v Villadsen,* 123 Mich App 472, 477; 333 NW2d 311 (1983). A mutual mistake exists when the parties share a common intention induced by a common error. *Id.* However, relief from judgment should not be granted where the party seeking the relief or their counsel "made ill-advised or careless decisions." *Id.* (citation omitted). Further, if at the time when the settlement occurred "the parties had access to the information on which the allegations of error are now based, their agreement should not be disturbed." *Id.*

Even though Dr. Vasquez did not diagnose PTSD until July 9, 2002, two months after entry of the judgment of divorce and five months after entry of the proofs, plaintiff had a prolonged history of psychological and psychiatric treatment both before and during the divorce proceedings. We find it significant that plaintiff's complaints regarding depression, anxiety, and other emotional and somatic issues, which existed before and during the divorce, do not differ significantly from the symptoms described for PTSD. In effect, plaintiff's condition has not altered. Rather, the only thing that has changed is the attribution of a diagnostic label subsequent to the conclusion of the divorce.

In addition, defendant asserts plaintiff was aware of her PTSD diagnosis before entry of the proofs and judgment of divorce and that her knowledge of the condition precludes a finding of mutual mistake. Specifically, defendant provides psychological treatment notes from October 2001, indicating a diagnosis of PTSD coinciding with a diagnosis of "309.81" in the Diagnostic Service Manual IV (DSM-IV).[1] Because plaintiff had access to her own medical and treatment records, any "mistake" regarding her diagnosis could not be mutual. *Villadsen, supra* at 477. In addition, a treatment note from October 25, 2001, addresses plaintiff's participation in the divorce settlement conference and her intention to "retreat" on certain agreements attained. Plaintiff's asserted intent to alter or revoke portions of the agreements is in sharp contradiction to Dr. Ochberg's opinion that plaintiff was inclined to agree to anything in order to avoid prolongation of her situation and the proceedings.

Because both parties were aware of plaintiff's history of psychological treatment and concerns, even if they were mistaken regarding the nature or extent of plaintiff's alleged

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[1] We would note that plaintiff contends defendant's submission of these records constitutes an improper expansion of the lower court record and that the issue was not properly preserved. However, we would note the documents and arguments were presented by defendant in conjunction with his motion for reconsideration and, thus, are part of the lower court record and properly preserved for our review. MCR 7.210(A)(1); *Miller v Inglis,* 223 Mich App 159, 168; 567 NW2d 252 (1997).

condition, such a mistake would not vitiate their agreement, as plaintiff has failed to demonstrate that the parties did not intend the alimony provision to be nonmodifiable. Specifically, plaintiff has failed to demonstrate the existence of mistake because she has not shown that the parties maintained an erroneous belief regarding the content or effect of the judgment of divorce, only its future impact. There is no indication that plaintiff was unaware of her own emotional or mental condition; rather it had merely not been given a diagnostic label. Importantly, neither psychiatric expert presented by plaintiff suggests she was incompetent to contract, but merely "emotionally impaired." Surprisingly, even though her current psychiatrist would not trust her decision making abilities to even permit her making of a simple purchase, he does not question her ability to function as the primary custodian of the minor child or raise any concerns regarding potential risk to the minor child due to plaintiff's emotional impairment, nor does he call into question the remainder of the validity of the settlement agreement, in which plaintiff obtained over $500,000 in assets. It is inconsistent to assert that the parties were mistaken regarding plaintiff's ability to negotiate and comprehend the impact of her alimony agreement, yet this mutual mistake does not extend to her competency to enter into an agreement regarding the remainder of the parties' assets or the award of custody of the minor child.

The opinion of plaintiff's own expert, Dr. Ochberg, that plaintiff agreed to things that she would not "want to be held to" is merely an expression of buyer's remorse. However, a change of heart has never been deemed sufficient to justify the setting aside of a settlement agreement. The contractual defense of mutual mistake only applies "to a fact in existence at the time the contract is executed," i.e., "the belief which is found to be in error may not be, in substance, a prediction as to a future occurrence or non-occurrence." *Lenawee Co Bd of Health v Messerly,* 417 Mich 17, 24; 331 NW2d 203 (1982). In this instance, the parties were aware of plaintiff's problems at the time the proofs and judgment were entered. The fact that the parties were unaware that plaintiff's condition would later result in a need for additional therapy or time to attain a more productive level of functioning comprises a later consequence and not a fact that was either present or misunderstood when the divorce was finalized. A party's prediction or judgment regarding events, which might occur in the future, even if erroneous, does not meet the definitional requirement to comprise a "mistake." As a result, a mutual mistake did not exist to substantiate a modification of the judgment of divorce.

In addition, we would note that prior decisions of this Court have held that when "a party alleges that his or her consent, while actually given, was influenced by circumstances of severe stress, the standard to be applied is that of mental capacity to contract." *Howard v Howard,* 134 Mich App 391, 396; 352 NW2d 280 (1984), citing *Tinkle v Tinkle,* 106 Mich App 423; 308 NW2d 241 (1981) and *VanWagoner v VanWagoner,* 131 Mich App 204; 346 NW2d 77 (1983). As a result, the proper test to be applied is:

> [W]hether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he is engaged. However, to avoid a contract it must appear not only that the person was of unsound mind or insane when it was made, but that the unsoundness or insanity was of such a character that he had no reasonable perception of the nature or terms of the contract. [*Howard, supra* at 396 (citations omitted).]

In this instance, although both psychiatrists believed plaintiff to be emotionally impaired they acknowledged she did not meet the criteria to be deemed incompetent at the time of her divorce.

Additionally, the trial court indicated that plaintiff was sufficiently able to comprehend the property settlement and "consented clearly on the record to the settlement." Using the proper method for evaluating plaintiff's competency to contract, it is clear that there exists no basis for setting aside the alimony in gross provision of the judgment of divorce.

Based on our ruling that the trial court erred in modifying the alimony in gross provision of the divorce judgment based on mutual mistake, it is unnecessary to address defendant's additional argument pertaining to res judicata, which is challenged on the basis of preservation by plaintiff. We would further note that plaintiff's assertion of entitlement to attorney fees based on defendant's filing of a vexatious appeal is not supported by our decision and is not properly before this Court for consideration. MCR 7.211(C)(8).

Reversed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood