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STATE OF MICHIGAN

COURT OF APPEALS

PAULA M. FITZSIMONS,

Plaintiff-Appellee,

v

JAMES K. FITZSIMONS,

Defendant-Appellant.

UNPUBLISHED
May 14, 2020

No. 347671
Macomb Circuit Court
LC No. 2011-005175-DM

Before: GADOLA, P.J., and STEPHENS and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] the trial court's order reforming a spousal support settlement agreement between plaintiff and defendant on the basis of mutual mistake. Defendant asserts that the trial court erred when it reformed the settlement because he was not mistaken as to the terms of the settlement. We reverse and remand.

I. BACKGROUND

The parties divorced in 2012. Under the divorce judgment, defendant was obligated to pay $400 per month in modifiable spousal support for 10 years. In 2017, plaintiff filed a motion with the trial court to increase the amount and period of support. The matter was ultimately referred to facilitation with the Friend of the Court, after which time the parties stated that they had reached a settlement. At a hearing, the settlement terms were read into the record by defendant's attorney as follows: "[F]or non-modifiable spousal support in the amount of $750.00 per month commencing August 1st of 2018. The spousal support will terminate upon the death of either party, the remarriage of the Plaintiff [or] the earliest date which she can draw Social Security. So, now we've got a specific term." Counsel then clarified that the cutoff date was the "[e]arliest date she can draw Social Security on [defendant's] record." The court asked plaintiff if that accurately set

[1] *Fitzsimons v Fitzsimons*, unpublished order of the Court of Appeals, entered June 28, 2019 (Docket No. 347671).

forth the settlement and she answered affirmatively and confirmed the decision to accept the settlement.

On October 24, 2018, defendant filed a motion for entry of an order consistent with the language used when the settlement was placed on the record. Plaintiff refused to agree to the order and responded in opposition, arguing that the settlement provided that support would continue until the earliest date that she could draw *full* social security benefits on defendant's record. Plaintiff explained that if she began drawing on defendant's social security at the earliest date allowed, she would only be entitled to approximately 33% of the benefit amount, and not 50% as she thought. The matter was again referred to the Friend of the Court, which recommended that the settlement be entered as requested by defendant. Plaintiff objected and the matter received de novo consideration by the trial court. The trial court concluded that both parties were mistaken as to the effect of the termination provision and reformed the settlement agreement to provide that plaintiff would receive spousal support until she was able to draw full social security benefits. This appeal followed.

III. ANALYSIS

Defendant argues that he was not mistaken about the terms of the settlement agreement. According to defendant, if there was any mistake, it was unilateral, which cannot form the basis for reformation of an agreement. We agree.[2]

A settlement agreement "is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts." *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994).

> To obtain reformation, a plaintiff must prove a mutual mistake of fact, or mistake on one side and fraud on the other, by clear and convincing evidence. A unilateral mistake is not sufficient to warrant reformation. A mistake in law—a mistake by one side or the other regarding the legal effect of an agreement—is not a basis for reformation. [*Casey v Auto Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006).]

The trial court erred by relying on *Wolf v Mahar*, 308 Mich App 120, 126; 862 NW2d 668 (2014), as the basis for finding a mutual mistake. In *Wolf*, the consent judgment of divorce and the subsequent domestic relations orders established that the divorcing parties intended that each would receive 50% of the marital portion of the other party's pension. Those orders also provided that the alternative payee could start receiving benefits at the participant's earliest retirement age.

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[2] We review a trial court's decision to reform a settlement agreement de novo. See *Kaftan v Kaftan*, 300 Mich App 661, 665; 834 NW2d 657 (2013). "We review the trial court's factual findings relating to the award or modification of alimony for clear error." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). "A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made." *Id*. at 654-655.

Id. at 122-123. The defendant began receiving benefits through the plaintiff's pension before the plaintiff retired. The plaintiff then learned that, as a result, her monthly benefits would be reduced when she retired under a state policy known as recoupment. *Id*. at 123-124. The parties stipulated that neither knew of the state policy, but the trial court denied the plaintiff's motion for relief from judgment. *Id*. at 125-126. We reversed on the basis of mutual mistake. We reasoned that the parties intended that each would receive 50% of the other's pension, but the defendant's election to receive early retirement benefits and the mutual mistake about recoupment allowed the defendant to receive a substantially higher amount of the plaintiff's pension. *Id*. at 130-131.

Thus, in *Wolf* the parties did not know about a state policy that effectively prevented them from achieving a stated purpose of the settlement. The instant case is distinguishable on two grounds. First, unlike *Wolf*, there was no stipulation between plaintiff and defendant that a mutual mistake occurred. Essentially, plaintiff realized an unintended, and for her an undesirable, consequence of the settlement after the terms were placed on the record, i.e., drawing social security benefits at the earliest possible age would significantly reduce her share of defendant's benefits. Defendant maintains that the proposed order represents the agreement reached, at least as he understood it. Accordingly, plaintiff has only shown a unilateral mistake. Second, the record does not support the trial court's finding that the intent of the settlement was to assure that plaintiff would not receive less than $750 per month until she could apply for full Social Security benefits. Defendant denies that this was the parties' intent, and we find nothing in the record to support plaintiff's assertion that it was. During the July 26, 2018 hearing, plaintiff and defendant were asked by the trial court whether they understood that the settlement terms placed on the record were "intended to be a final settlement." Both parties responded affirmatively. Unlike *Wolf*, the mistake in this case did not defeat the parties' shared intent in reaching the settlement agreement. In sum, we conclude that the trial court clearly erred when it found both parties were mistaken because the record was devoid of any evidence that defendant was mistaken about the terms of the settlement.

Plaintiff argues that we should affirm the trial court under alternative grounds, asserting that she was under duress and severe stress during the hearing when the settlement was read into the record. Plaintiff raised this argument in her objection to the Friend of the Court's recommended order, but the trial court did not address it. Because this Court is not suited to make factual determinations as required by plaintiff's claim, we remand to the trial court to address whether the settlement should be set aside on the basis of duress or severe stress.

Next, plaintiff suggests that we affirm the trial court's order by concluding that the parties have abandoned or disaffirmed the settlement. Plaintiff does not cite legal authority in support of this argument. Thus, the issue is deemed abandoned. See *Hooker v Moore*, 326 Mich App 552, 557 n 2; 928 NW2d 287 (2018); *Patterson v Allegan Co Sheriff*, 199 Mich App 638, 640; 502 NW2d 368 (1993). Even if we did not consider the issue abandoned, the fact that defendant is pursuing this appeal to enforce the settlement agreement negates any argument that defendant has disaffirmed or abandoned the agreement.

Finally, plaintiff asks us to dismiss defendant's appeal by applying the fugitive disentitlement rule on the basis that defendant is in contempt of court. Under the fugitive disentitlement doctrine, a "defendant's fugitive status 'disentitles [defendant] to call upon the resources of the Court for determination of [defendant's] claims.' " *Friend v Friend*, 486 Mich

1035, 1036 (2010) (CORRIGAN, J., dissenting), quoting *Molinaro v New Jersey*, 396 US 365, 366; 90 S Ct 498; 24 L Ed 2d 586 (1970). Such a rule has not been adopted in Michigan,[3] and we see no reason to consider such a rule in the context of this case as defendant is not a fugitive. Accordingly, plaintiff is not entitled to relief on that basis.[4]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Cynthia Diane Stephens
/s/ Douglas B. Shapiro

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[3] Our Supreme Court recently had occasion to adopt such a rule and declined to do so. *Friend*, 486 Mich at 1036 (CORRIGAN, J., dissenting).

[4] In *People v Kilpatrick*, unpublished opinion of the Court of Appeals, issued October 23, 2012 (Docket No. 304991), this Court rejected the prosecutor's invitation to apply the doctrine to the defendant, concluding that although the defendant "failed to comply with court orders and has been less than honest or forthcoming," application of the doctrine was "questionable" to the facts of the case. Unpublished opinions are not binding but may be relied on for their persuasive value. *Eddington v Torrez*, 311 Mich App 198, 203; 874 NW2d 394 (2015).