

STATE OF MICHIGAN
COURT OF APPEALS

HELEN LEVY,

Plaintiff-Appellant,

v

PAUL J. NICOLETTI,

Defendant-Appellee.

UNPUBLISHED

April 16, 1999

No. 204900

Oakland Circuit Court

LC No. 96-515050 CK

Before: Hood, P.J., and Holbrook, Jr. and Whitbeck, JJ.

PER CURIAM.

Summary disposition was granted in favor of defendant pursuant to MCR 2.116(C)(7) after the trial court determined that plaintiff's claims in this legal malpractice action were merged and barred by a consent judgment entered into between the parties in a separate suit and thus, were barred by res judicata. We reverse and remand.

Plaintiff retained defendant attorney to represent her in a divorce proceeding. Subsequent to the judgment of divorce, plaintiff filed an appeal to this Court, which found that the alimony, COBRA and property awards were fair and equitable, but remanded the case for a reevaluation of certain property. *Levy v Levy*, unpublished opinion per curiam of the Court of Appeals, issued November 12, 1996 (Docket No. 180486). Thereafter, defendant filed an action to collect his fee for services rendered in the divorce. Before resolution of that matter, plaintiff filed this action alleging legal malpractice. The parties then reached a settlement in the attorney fee matter and a consent judgment was entered by the court. The parties agreed on an amount to which defendant's law firm was entitled for representing plaintiff in the divorce action, and the judgment was secured by a lien on plaintiff's residence. The court also ordered as follows:

IT IS FURTHER ORDERED AND ADJUDGED that post judgment proceedings and foreclosure proceedings with reference to the property described herein shall be stayed pending resolution in Oakland County Circuit Court of the matter captioned as *Helen Levy v Paul J. Nicoletti, Nicoletti & Watson, P.C. and Federlein & Keranen, P.C.*, Case #96-515050-CK.

After the consent judgment was entered by the court in the attorney fee action, defendant moved for summary disposition in this legal malpractice action pursuant to MCR 2.116(C)(7) and (C)(8). The trial court granted the motion pursuant to MCR 2.116(C)(7). Plaintiff thereafter moved for reconsideration, which motion was denied.

This Court reviews de novo decisions on motions for summary disposition to determine if the moving party was entitled to judgment as a matter of law. *Pamar Enterprises, Inc v Huntington Banks of Mich*, 228 Mich App 727, 738; 580 NW2d 11 (1998). "When reviewing a motion granted pursuant to MCR 2.116(C)(7), we consider all affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construe the pleadings in favor of the plaintiff." *Id.*, citing *Smith v YMCA of Benton Harbor/St Joseph*, 216 Mich App 552, 554; 550 NW2d 262 (1996). A motion under MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery. *Id.* A trial court's denial of a motion for reconsideration is reviewed for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

Plaintiff argues that the trial court erred when it disregarded the intentions of the parties and the express language of the consent judgment that was entered into by the parties in the attorney fee case. She argues that settlement of the attorney fee case did not merge and bar the underlying legal malpractice action. We agree.

A consent judgment is a "product of voluntary agreement," and thus, reflects the agreement of the parties. *Klawiter v Reurink*, 196 Mich App 263, 266; 492 NW2d 801 (1992) (citations omitted). Moreover, "[a]n agreement to settle a lawsuit is a contract that is subject to the legal principles generally applied to contracts." *Reed v Citizens Ins Co*, 198 Mich App 443, 447; 499 NW2d 22 (1993). And, it is permissible for a party to settle a lawsuit while reserving the right to litigate other related claims. See *In re Stafford*, 200 Mich App 41, 43-44; 503 NW2d 678 (1993). In this case, the language of the consent judgment was clear and unambiguous that the parties did not intend to merge and bar the malpractice suit and its claims, but rather intended for the malpractice action to proceed to resolution. Plaintiff took steps to preserve her malpractice claims when the settlement was reached in the attorney fee case, and defendant agreed to this preservation by agreeing to the consent judgment. The consent judgment should not be construed to relinquish plaintiff's rights in the malpractice case. The trial court's ruling to the contrary, that the malpractice action was barred as a result of the settlement reached in the attorney fee action, was in error where it failed to take into consideration the clear and unambiguous language of the consent judgment, which indicated that the parties did not intend the consent judgment to extinguish the malpractice claims. Therefore, we reverse the trial court's grant of summary disposition.

On appeal, defendant also argues that even if the trial court's decision was incorrect, collateral estoppel bars plaintiff's legal malpractice action. The trial court was presented with this issue, but did not decide it. We may, however, properly review this issue where the question is one of law and the facts necessary for its resolution have been presented. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1993).

We hold that collateral estoppel may operate to bar some or all of plaintiff's claims of malpractice. In *Alterman v Provizer, Eisenberg, Lichtenstein & Pearlman, PC*, 195 Mich App 422, 424; 491 NW2d 868 (1992), the Court stated general principles of the doctrine of collateral estoppel:

The doctrine of collateral estoppel holds that, where the first and second causes of action are different, "the judgment [rendered in the first cause of action] is conclusive between the parties in such a case as to questions actually litigated and determined by the judgment." By the "very definition" of the doctrine, "one of the critical factors" is "whether the respective litigants were parties or privy to a party." "In other words, [t]he estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it had it gone against him." [Citations omitted.]

The Court then noted, however, that "lack of mutuality does not always preclude the application of collateral estoppel." *Id.* (citation omitted). *Alterman* was a legal malpractice case where the defendant attorney had entered into a settlement on the plaintiff's behalf in an underlying lawsuit. The plaintiff later moved to set aside the settlement from that suit on the grounds that he was not competent at the time he entered into it. The federal trial court denied the motion. The plaintiff then sued the defendant attorney for malpractice, alleging that he was negligent for allowing or causing the plaintiff to settle when he was not competent to do so. *Id.* at 423-424. This Court held that the plaintiff was collaterally estopped from relitigating that issue because of the federal court ruling, even though the parties were not identical in the underlying federal lawsuit and no mutuality existed. *Id.* at 427. In doing so, the Court noted:

In *Caveney v Kirkpatrick*, unpublished opinion per curiam, decided August 13, 1991 (Docket No. 124149), this Court held that a wife's malpractice action against her divorce attorney based on the inadequacy of the property settlement was barred by an appellate decision in the divorce proceeding holding that the settlement was fair and equitable. [*Id.* at 426.]

In this case, this Court held that the property settlement was fair and equitable, and decided other issues with regard to the divorce judgment. *Levy, supra*. Any issues decided by this Court in the divorce proceeding, which also form the basis of the malpractice claim, are barred. On remand, the trial court shall determine what claims, if any, are barred by the doctrine of collateral estoppel.

Defendant also argues, in the alternative, that summary disposition should have been granted pursuant to MCR 2.116(C)(8). We disagree.

MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. A motion under this subsection determines whether the opposing party's pleadings allege a prima facie case. The court must accept as true all well-pleaded facts. Only if the allegations fail to state a legal claim is summary disposition pursuant to MCR 2.116(C)(8) valid. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

Plaintiff had the burden of adequately alleging the existence of an attorney-client relationship; negligence in the legal representation of the plaintiff; that the negligence was a proximate cause of an injury; and the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). A duty to use and exercise reasonable skill, care, discretion and judgment in the conduct and management of a client's case exists as a matter of law if there is an attorney-client relationship. *Id.* at 655-656. Plaintiff's pleading, notwithstanding potential collateral estoppel problems, does not fail to state a claim. She alleged the existence of an attorney client-relationship and alleged that defendant was negligent in his representation, including making specific allegations that defendant negligently advised her with regard to the mediation evaluation, that he failed to accept the mediation evaluation pursuant to her requests, that he negligently advised her about her chances at trial, and that he failed to request a qualified domestic relations order pertaining to her husband's pension. Plaintiff also alleged that the defendant's negligent conduct was the direct and proximate cause of her damages, which damages were set forth in extensive detail.

We also disagree with defendant's proposition that plaintiff's complaint fails to state a claim because all of the allegations of negligence amount to tactical decisions, which cannot form the basis of a malpractice case. A motion for summary disposition pursuant to MCR 2.116(C)(8) is tested on the pleadings alone. *Simko*, supra at 654. Where we are not presented with sufficient supported facts or transcripts from the underlying divorce action, and where we are looking only to the pleadings, we cannot and will not rule on the issue of whether the alleged negligent acts were merely tactical decisions by defendant.

Finally, defendant also argues, in the alternative, that plaintiff's failure to respond to his affirmative defenses provides an additional basis to affirm dismissal in this case. We disagree because the lower court record contains within it a timely response to defendant's affirmative defenses.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Donald E. Holbrook, Jr.

/s/ William C. Whitbeck