STATE OF MICHIGAN

COURT OF APPEALS

LARRY ALLEN BUZAS,

Plaintiff-Appellee,

v

MARY REGINA BUZAS,

Defendant-Appellant.

UNPUBLISHED
October 2, 1998

No. 200870
Ottawa Circuit Court
LC No. 94-019823 DM

Before: MacKenzie, P.J., Whitbeck and G.S. Allen, Jr.*, JJ.

PER CURIAM.

This case comes before this Court pursuant to a Michigan Supreme Court order of remand for consideration "as on leave granted." *Buzas v Buzas*, 454 Mich 854 (1997). For the reasons developed in this opinion, we now dismiss the appeal, with costs to plaintiff.

In this divorce action, on the date scheduled for defendant's deposition, the parties negotiated a purported settlement of many major issues, including custody, visitation, alimony, and some of the questions relating to the division of property. In lieu of conducting defendant's deposition, the agreement was placed on the record, and recorded by the court reporter. Neither party was asked to sign the deposition transcript after it was prepared.

Among the unresolved issues were whether defendant could take the children with her when she traveled on business out of town, or whether defendant would be required to leave the children in plaintiff's custody, a calculation of child support payments based on the child support guidelines, and the division of personal and other property. When the case came up for trial on the disputed issues, plaintiff's counsel represented to the court that the parties had reached an agreement resolving other issues. A transcript of the deposition was supplied to the trial judge, reflecting the terms of the settled issues. Plaintiff asked the court to enter judgment in accordance with the settlement agreement as placed on the deposition record, and to decide the unresolved issues identified by the parties.

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

In response, defendant argued the settlement agreement was not properly recorded and that, by virtue of it being incomplete, it was not enforceable. Based on the foregoing, she asked the court to set aside the agreement. The trial court, however, enforced the agreement after ascertaining that defendant did not deny the making of the agreement, but had had a change of heart over its terms. That ruling by the trial court occurred prior to this Court's decision in *Brunet v Decorative Engineering, Inc*, 215 Mich App 430, 432-436; 546 NW2d 641 (1996). Therein, this Court held that a party denies the existence of a settlement agreement for purposes of MCR 2.507(H) when the party argues that a settlement was never reached because there was no meeting of the minds. This Court further noted that a settlement is not made "in open court" when it is placed on the record at a deposition. Defendant's denial of the existence of a legally binding settlement agreement, and her contention that she was confused about the terms of the agreement and pressured into consenting to it, would seem to have been a sufficient denial to defeat the enforceability of the settlement under MCR 2.507(H). *Metropolitan Life Ins Co v Goolsby*, 165 Mich App 126, 128-129 & n 1; 418 NW2d 700 (1987).

Initially, defendant filed a claim of appeal, but the purported judgment of divorce from which the claim of appeal was filed did not resolve the issue of child support, which was referred to the Friend of the Court for a recommendation. Because a judgment of divorce must specify the amount of support, MCR 3.211(E)(1), this Court determined that the order from which appeal was claimed was only a partial judgment. Thus it was not a final judgment because it did not dispose of all the issues, MCR 2.604(A). Such orders are not appealable as of right, *Zimmerman v Zimmerman*, 177 Mich App 8, 9-10; 440 NW2d 906 (1989), and this Court accordingly dismissed for lack of jurisdiction. The Supreme Court remanded for consideration as on leave granted.

We find no occasion to resolve the merits of the appeal, because, when the case was called for oral argument, substitute counsel for defendant informed this Court that his client now wished to dismiss the appeal. Plaintiff's counsel, expressing outrage at the expense and travail visited upon his client by the pendency of the appeal, voiced no opposition to dismissing the appeal. However, although he suggested that his client now desired to have the judgment set aside, he asserted that his client should be awarded costs and attorney fees, and promised to file a motion to that end. Such a motion has been duly filed for our consideration. Defendant has answered the motion and filed a motion to dismiss.

At oral argument, this Court asked the parties to submit a written stipulation agreeing to dismissal of the appeal. Defendant prepared and presented such a proposed stipulation, but plaintiff refused to sign it because it did not provide for costs and attorney fees. That is the posture in which this Court must now adjudicate the matter.

Michigan common law recognizes the absolute right of an appellant to dismiss an appeal, with the proviso that the appellant pay taxable costs. This has been the rule since *Birch v Brown*, 5 Mich 31 (1858). See also *Castator v Boyes & Blandford*, 221 Mich 591, 593; 192 NW 696 (1923). However, the question arises whether that common law privilege of the defendant survives MCR 7.218(B), which provides:

> The parties to a case in the Court of Appeals may file with the clerk a signed stipulation agreeing to dismissal of an appeal or an action brought under MCR 7.206. On

> payment of all fees, the clerk will enter an order dismissing the appeal or the action under MCR 7.206, except that class actions or cases submitted on a session calendar may not be dismissed except by order of the Court of Appeals.

At first blush, it may seem as though the principle of *inclusio unius est exclusio alterius* applies, and in the absence of a signed stipulation agreeing to dismissal, that the appeal may not be dismissed on this basis. However

> [*Expressio unius est exclusio alterius*] is applied to statutory interpretation, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions. 'When what is expressed in a statute is creative, and not in a proceeding according to the course of the common law, it is exclusive, and the power exists only to the extent plainly granted. Where a statute creates and regulates, and prescribes the mode and names the parties granted right to invoke its provisions, that mode must be followed and none other, and such parties only may act.' The method prescribed in a statute for enforcing the rights provided in it is likewise presumed to be exclusive. [*Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 363 n 11; 459 NW2d 279 (1990), quoting 2A Sands, Sutherland Statutory Construction (4th Ed), § 47.23, p 194.]

Since the rules of statutory construction apply to the construction of court rules, *Bush v Beemer*, 224 Mich App 457, 461; 569 NW2d 636 (1997), these principles apply to the task at hand.

MCR 7.218(B) is not "creative" in the sense that terminology appears in *Feld, supra*. Rather, the common law already recognized the right of the appellant to dismiss the appeal on payment of costs. The rule is thus properly seen as, within that common law context, allowing for dismissal of appeals without taxation of costs upon written stipulation, if all fees are paid, except an order of this Court is required if the case has been submitted on a session calendar or involves a class action. It should be borne in mind that reference in the court rule to "fees" is to fees payable to the court, as distinguished from costs taxable in favor of an adverse party. *Gaffier v St Johns Hospital*, 68 Mich App 474, 477; 243 NW2d 20 (1976). Given the principle that enactments in derogation of the common law are narrowly construed and not extended by implication to abrogate the established rules of the common law, *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 507-508; 309 NW2d 163 (1981), MCR 7.218(B) cannot be properly construed as abrogating the common law right of an appellant to dismiss an appeal upon payment of taxable costs.

Plaintiff's motion for costs is therefore granted to the extent such costs are taxable pursuant to MCR 7.219. To the extent plaintiff's motion seeks actual costs above and beyond taxable costs, as well as attorney fees, such an award may be made only pursuant to an authorizing statute or court rule. Michigan follows the "American rule", pursuant to which each party to litigation bears its own attorney fees and costs, other than taxable costs, unless a specific statute or court rule provides to the contrary. *In re Sloan Estate*, 212 Mich App 357, 361; 538 NW2d 47 (1995); *State Farm Mutual Automobile Ins Co v Allen*, 50 Mich App 71, 74; 212 NW2d 821 (1973). Costs and attorney fees

are separate and distinct items and must be separately, specifically authorized by court rule or statute. *Nemeth v Abonmarche Development, Inc*, 457 Mich 16, 37-38; 576 NW2d 641 (1998).

Here, the only conceivably applicable basis for awarding costs or attorney fees would be MCR 7.216(C). However, the introductory portions of this opinion suggest that the appeal was meritorious, and no contention has been made that the appeal has not been pursued in conformity with the court rules or for the purpose of hindrance or delay. Accordingly, plaintiff's motion for costs in excess of taxable costs and for attorney fees is denied.

Finally, it should be noted that plaintiff's change of position, by virtue of which he now seeks to have the trial court order enforcing the partial settlement set aside, is not cognizable, because plaintiff filed neither an appeal nor cross appeal. In the absence of his own appeal, plaintiff cannot assert defendant's appellate opportunities. *Kewin v Board of Education of Melvindale- Northern Allen Park Public Schools*, 65 Mich App 472, 483; 237 NW2d 514 (1975); *Burke v Gaukler Storage Co*, 13 Mich App 536, 538; 164 NW2d 691 (1968)[1].

Pursuant to defendant's request, made in open court, the appeal is dismissed; defendant's motion to dismiss is therefore dismissed as moot. Plaintiff may tax costs, e.g. plaintiff is entitled to the ordinary prevailing party taxable costs to the extent they are available under MCR 7.219, not to attorney fees or actual costs.

/s/ Barbara B. MacKenzie
/s/ William C. Whitbeck
/s/ Glenn S. Allen, Jr.

[1] Even granting *arguendo* that the substantive challenge to the trial court's order *by defendant* is meritorious, plaintiff would in any event be estopped from obtaining appellate relief on the same basis. In the trial court, plaintiff urged the court to take precisely the action in question (enforcement of the purported stipulation). Under the doctrine of invited error, plaintiff is foreclosed from raising as error on appeal any action or decision which he successfully advocated below. *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964); *Harville v State Plumbing and Heating, Inc*, 218 Mich App 302, 323-324; 553 NW2d 377 (1996).