STATE OF MICHIGAN

COURT OF APPEALS

NANCY ANNE JOYCE, Plaintiff-Appellee,	UNPUBLISHED November 19, 2009
v	No. 281175 Oakland Circuit Court
DENNIS ALLEN JOYCE, Defendant-Appellant.	LC No. 2005-713656-DO

Before: Saad, P.J., and O'Connell, and Zahra, JJ.

PER CURIAM.

Defendant Dennis Joyce appeals the trial court's order that modified the parties' judgment of divorce. The court ruled that a mutual mistake occurred and that plaintiff, Nancy Joyce, is entitled to a portion of defendant's pension, referred to as the "early retirement supplement."[1] For the reasons set forth below, we affirm.

Defendant argues that the trial court improperly modified the consent judgment pursuant to MCL 2.612(C)(1)(a) because there is no evidence that a mutual mistake occurred. We review a trial court's decision on a motion under MCR 2.612 for abuse of discretion. *Peterson v Auto-Owners Ins Co*, 274 Mich App 407, 412; 733 NW2d 413 (2007). In general, a property settlement provision in a judgment of divorce is final and cannot be modified by the trial court. *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999). "Absent fraud, duress, or mutual mistake, courts must uphold divorce property settlements reached through negotiation and agreement of the parties." *Id*. MCR 2.612(C)(1), however, permits a trial court to modify a

[1] Defendant initially filed a claim of appeal and this Court dismissed it for lack of jurisdiction. *Joyce v Joyce*, unpublished order of the Court of Appeals, issued August 3, 2007 (Docket No. 279458). Defendant then filed a delayed application for leave to appeal, which this Court denied "for lack of merit in the grounds presented." *Joyce v Joyce*, unpublished order of the Court of Appeals, entered April 2, 2008 (Docket No. 281175). This Court also denied defendant's motion for reconsideration. *Joyce v Joyce*, unpublished order of the Court of Appeals, entered May 21, 2008 (Docket No. 281175). However, defendant filed an application for leave to appeal to the Michigan Supreme Court, and the Court remanded the case to this Court "for consideration as on leave granted." *Joyce v Joyce*, 482 Mich 1012; 756 NW2d 711 (2008).

final judgment on the grounds of mistake. A mutual mistake occurs when the parties had a common intention, but the intention was induced by a common error. *Villadsen v Villadsen*, 123 Mich App 472, 477; 333 NW2d 311 (1983). "Once the trial court has found that both parties share a mistaken belief which led to their consent to a settlement, it has the power to vacate the judgment." *Id.*

Here, the trial court did not abuse its discretion when it ruled that a mutual mistake occurred when the parties erroneously referred only to the early retirement subsidies in the consent judgment while intending to distribute the early retirement supplement as well. The record reflects that most pension plans and the Employee Retirement Income Security Act (**"**ERISA") include early retirement supplements within the definition of early retirement subsidies. However, the General Motors pension plan is unique in that it distinguishes between a supplement and a subsidy. Though plaintiff was presented with defendant's pension documents that referenced an early retirement settlement, nothing in the record demonstrates how the parties defined the word subsidy in the judgment and whether they intended supplements to come within that judgment. However, the record clearly shows that the parties intended to equally divide the marital portion of the pension. No evidence supports the notion that either party intended to exclude any portion of the pension. On the record, it appears that neither party understood that the early retirement subsidy referenced in the consent judgment and the early retirement supplement were separate and distinct components of the pension. Because both parties intended to distribute the martial portion of the pension and because there was a common error regarding the distinction between a subsidy and a supplement, the trial court's finding of a mutual mistake was not clearly erroneous. The decision to modify the consent judgment was thus within the principled range of outcomes, and the trial court did not abuse its discretion. MCR 2.612(C)(1)(a).

Defendant maintains that the trial court failed to apply the holding in *Quade, supra* at 226, and erroneously considered MCL 552.101(5) as controlling authority. In *Quade*, this Court held that "early retirement benefits are a separate and distinct component of defendant's pension plan . . ." and that "[a]bsent a specific provision in the judgment of divorce, we cannot conclude that the parties intended to include early retirement benefits as part of plaintiff's property settlement." Defendant's reliance on *Quade* is misplaced because, unlike here, the parties' agreement in *Quade* made no reference to any early retirement benefits. *Quade, supra* at 225. Here, unlike in *Quade*, the early retirement benefits were distributed by the parties' consent judgment. The issue here is not whether plaintiff is entitled to early retirement benefits, but what early retirement benefits the parties intended plaintiff to receive.

Further, though MCL 552.101(5) applied to actions filed on or after September 1, 2006 and this case was filed before that date, the trial court did not improperly rely on the statute. The court acknowledged the statute, reviewed it, and noted that, while it does not directly apply, the court found it persuasive. We do not agree with defendant that the trial court found the statute persuasive to justify its finding of a mutual mistake. To determine the intent of the parties, and when it found the mutual mistake, the trial court properly referenced the provisions of the judgment and the "four corners of the documents." It appears that the trial court simply found the statute persuasive support for its conclusion that supplements are considered the same in the context of the pension divisions unless specifically noted. Regardless of the trial court's reference to MCL 552.101(5), defendant is not entitled to relief.

Defendant contends that the merger clause contained within the consent judgment precluded the trial court from considering evidence contained within the mediation transcript. Judgments, including settlement agreements, entered pursuant to the agreement of the parties are a contract and are to be construed and applied as such. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). "Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990). However, parol evidence is admissible to show an alleged mistake. *Hamade v Sunoco, Inc (R & M)*, 271 Mich App 145, 167-168; 721 NW2d 233 (2006); *Scott v Grow*, 301 Mich 226, 239; 3 NW2d 254 (1942). Because plaintiff alleged that a mutual mistake occurred, the court could properly consider parol evidence in the form of the mediation transcript. *Id*. Nevertheless, the trial court appears to have found the parties' intent based on the "four corners of the documents," and it made no reference to the mediation transcript.

Defendant maintains that the mutual release provision of the divorce judgment bars the award of a portion of the early retirement supplement. Defendant has abandoned this issue because he fails to analyze, explain or rationalize his claims. *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Were we to consider the issue, defendant cannot prevail. As previously discussed, MCR 2.612(C)(2)(a) empowers a trial court to modify a final judgment if a mistake occurred. Because a mutual mistake occurred, the trial court was permitted to modify the consent judgment.

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Brian K. Zahra