

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LINDA COLYER,

Plaintiff-Appellant,

v

RONALD L. COLYER, PHILLIP J.  
LESKEY, P.C., and CATHERINE COLE,

Defendants-Appellees.

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UNPUBLISHED

June 24, 1997

No. 193117

Wayne Circuit Court

LC No. 95-531819 NZ

Before: Markman, P.J., and Holbrook, Jr. and O'Connell, JJ.

PER CURIAM.

In this unusual fraud action, plaintiff appeals as of right the order of the circuit court granting summary disposition in favor of defendants. We affirm.

Divorcing, plaintiff Linda Colyer and defendant Ronald Colyer entered into a property settlement agreement. Defendant Colyer was represented in the divorce action by defendant Catherine Cole, an attorney associated with defendant Phillip J. Lesky, P.C. Defendant Cole submitted a proposed judgment of divorce pursuant to the seven day rule, MCR 2.602(B)(3), ostensibly reflecting the settlement agreement. Though counsel for plaintiff in that action, who is counsel for plaintiff in this action as well, maintains that he filed objections to the proposed judgment, the trial court had no record of objections having been filed, and the judgment was entered. Counsel for plaintiff then repeatedly filed motions to modify the divorce judgment, contending that it did not accurately reflect the settlement agreement. The trial court declined to modify the judgment in any significant way.

Counsel for plaintiff claimed an appeal from the judgment of divorce. Unfortunately, the claim was not timely, and was dismissed on this Court's own motion on July 11, 1996.

However, before claiming an appeal in the divorce action, plaintiff filed the present suit. In this independent action, plaintiff contended, in essence, that defendants had perpetrated a fraud on the court in the divorce action, knowingly submitting a proposed judgment that did not comport with the terms of the settlement agreement. Alternatively, plaintiff argued that a mutual mistake had been made, or, again in the alternative, that defendant Colyer had breached the settlement agreement (as opposed to the

judgment of divorce). The remedies sought by plaintiff were as follows: modification of the judgment of divorce, “damages sustained by [plaintiff] in connection with losses sustained by her,” attorney fees, and “exemplary damages for the emotional damage suffered because of outrageous tortious conduct by these Defendants.”

Defendants moved for summary disposition pursuant to various subsections of MCR 2.116(C). The court granted summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff now appeals as of right. Our review is de novo. *Grebner v Clinton Charter Twp*, 216 Mich App 736, 740; 550 NW2d 265 (1996).

#### Plaintiff’s Claims Against Defendant Colyer

With respect to plaintiff’s claims against defendant Colyer, these were plainly barred by the doctrine of res judicata. See generally *Jones v State Farm Mutual Automobile Ins Co*, 202 Mich App 393; 509 NW2d 829 (1993). Plaintiff either raised her present claims in the prior divorce action or, by the exercise of reasonable diligence, could have raised these claims. Therefore, her claims against defendant Colyer are barred. *Id.*, p 401. Summary disposition was appropriate pursuant to MCR 2.116(C)(7), which requires dismissal of a claim or claims barred by prior judgment.

#### Plaintiff’s Claims Against Defendants Cole

#### and Phillip J. Lesky, P.C.

Because plaintiff’s claims of fraud, mutual mistake, and breach of the settlement agreement differ from each other analytically in the context of the remaining defendants, we address each in turn.

With respect to plaintiff’s fraud claim against the remaining defendants, the prior judgment in the divorce action does not bar this claim as because it was not nor could it have been litigated in the prior action. *Couyoumjian v Anspach*, 360 Mich 371, 382; 103 NW2d 587 (1960). Neither defendant Cole nor defendant Phillip J. Lesky, P.C., were parties to the divorce action, meaning a judgment effective against these defendants could not have entered. Further, a lawyer is not, in general, in privity with his client for purposes of res judicata. *Williams v Logan*, 184 Mich App 472, 478; 459 NW2d 62 (1990).

However, though plaintiff’s fraud claim against the remaining defendants is not barred by res judicata, plaintiff’s claim fails as a matter of law for other reasons. To establish fraud, a plaintiff must prove that the defendant knowingly made a material misrepresentation intending that the plaintiff rely on the misrepresentation, and that the plaintiff did, in fact, rely on the misrepresentation, suffering injury as a result. *Kassab v Michigan Basic Property Ins Association*, 441 Mich 433, 442; 491 NW2d 545 (1992). Here, plaintiff alleges that the proposed judgment submitted by defendants constituted a misrepresentation of the settlement terms. However, plaintiff may not reasonably contend that she *relied* on this alleged misrepresentation where she claims to have filed objections pursuant to MCR 2.602(B)(3) to this selfsame judgment because it did not comport with the settlement terms. Entering

written objections would seem to be the antithesis of reliance. Therefore, plaintiff's fraud claim against the remaining defendants fails as a matter of law.

Plaintiff's claim that defendant Colyer breached the settlement agreement does not pertain to defendant Cole and defendant Phillip J. Lesky, P.C. Therefore, to the extent this claim was meant to encompass the alleged actions of these defendants, it was properly subject to summary disposition.

Plaintiff's final claim in the context of defendants Cole and Phillip J. Lesky, P.C., is that a mutual mistake was made with respect to the divorce judgment. However, assuming that plaintiff could prove that a mutual mistake of fact was made, the only appropriate remedy would be modification or rescission of the judgment. These remedies would not be available to plaintiff in the present action because, of course, the court in the instant proceeding would be powerless to alter the judgment entered in the distinct divorce proceeding. As stated in *Cohen v Cohen*, 632 SW2d 172, 174 (Tex App, 1982), "[a] divorce judgment . . . regular on its face is not subject to collateral attack in a subsequent suit." Therefore, even were plaintiff able to prove that a mutual mistake of fact had been made, the court in the instant suit could offer no remedy, meaning summary disposition was appropriate. MCR 2.116(C)(8).

#### Plaintiff's Remaining Claim

Finally, plaintiff argues that it was error to allow the judge who participated in the underlying divorce suit to hear defendants' motions for summary disposition in the present case. After reviewing the record on appeal and the relevant court rule, MCR 8.111(D), we find no error.

Affirmed.

/s/ Stephen J. Markman  
/s/ Donald E. Holbrook, Jr.  
/s/ Peter D. O'Connell