

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

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MARY MARGARET COLLINS,  
Plaintiff-Appellant,

UNPUBLISHED  
November 4, 2003

v

CHAD ALAN COLLINS,  
Defendant-Appellee.

No. 246123  
Shiawassee Circuit Court  
LC No. 02-008493-DM

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MARY MARGARET COLLINS,  
Plaintiff-Appellee,

v

CHAD ALAN COLLINS,  
Defendant-Appellant.

No. 247886  
Oakland Circuit Court  
LC No. 2003-674651-DM

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Before: Donofrio, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

In these two divorce actions, plaintiff appeals by leave granted from a January 9, 2003, order of the Shiawassee Circuit Court setting aside an order of voluntary dismissal under MCR 2.504(A)(1)(a).<sup>1</sup> Defendant appeals by leave granted from a March 5, 2003, order of the Oakland Circuit Court denying his motion for summary disposition under MCR 2.116(C)(6).<sup>2</sup> We affirm the ruling of the Shiawassee court and reverse the decision of the Oakland court.

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<sup>1</sup> We granted plaintiff's application for leave to appeal, and, on our own motion, expedited the appeal. *Collins v Collins*, unpublished order of the Court of Appeals, issued April 11, 2003 (Docket No. 246123).

<sup>2</sup> We granted defendant's application, and, on the same day, consolidated these appeals. *Collins* (continued...)

Plaintiff and defendant were married in December 1992, had two minor children and resided in Shiawassee County. In September 2002, plaintiff filed a petition for divorce in Shiawassee County.<sup>3</sup> In December 2002, the Friend of the Court made a recommendation that, among other things, the parties share joint physical and legal custody of the children, and that defendant pay child support and a share of childcare costs. This recommendation was adopted by the Shiawassee court.

However, plaintiff, who was dissatisfied with this recommendation,<sup>4</sup> sought to have the trial court voluntarily dismiss the action pursuant to MCR 2.504, which provides, in part:

Subject to the provisions of MCR 2.420 and MCR 3.501(E), an action may be dismissed by the plaintiff without an order of the court and on the payment of costs

(a) by filing a notice of dismissal before service by the adverse party of an answer or of a motion under MCR 2.116, whichever first occurs . . . .

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a dismissal under subrule (A)(1)(a) operates as an adjudication on the merits when filed by a plaintiff who has previously dismissed an action in any court based on or including the same claim.

Although defendant's attorney attended various hearings on defendant's behalf, he had not yet filed an answer in the divorce action.

Plaintiff submitted an order to the trial court attesting that she sought to have the action voluntarily dismissed, and that she had paid all costs and fees, as required under the court rule. Thereafter, the Shiawassee court signed the order on January 6, 2003. That same day, plaintiff filed the second divorce action in Oakland Circuit Court. In addition to filing her complaint, plaintiff submitted an ex-parte motion to the Oakland court regarding child custody, parenting time, and child support, which the court approved.

Defendant was subsequently served with notice of the Oakland action, which included notice that the Shiawassee action had been dismissed. Defendant sought to have the Shiawassee court set aside its dismissal of the case on the grounds that plaintiff was forum shopping in an

(...continued)

*v Collins*, unpublished order of the Court of Appeals, issued April 11, 2003 (Docket No. 247866).

<sup>3</sup> All domestic relations cases brought in Shiawassee Circuit Court are subject to the rules set forth in that court's Administrative Order 1993-009, which sets out that:

"A Friend of the Court hearing shall be held in all domestic relations actions prior to entry of an Ex-Parte or Temporary Order unless the Order is entered upon stipulations of all the parties, and, if child support is appropriate, that child support be set in conformity with the Michigan Child Support Guidelines."

<sup>4</sup> Plaintiff expressed her dissatisfaction about her attorney's handling of this issue in a letter she wrote to him by which she terminated his services.

attempt to obtain a more favorable order of custody, visitation, and child support, and that plaintiff signed the order herself, as opposed to having her counsel sign it. The Shiawassee court granted defendant's motion. Thereafter, defendant moved for summary disposition in the Oakland County action under MCR 2.116(C)(6), which permits such a disposition where other actions between the parties involving the same claims are pending. The Oakland court denied defendant's motion, ruling that jurisdiction was proper in Oakland Circuit Court. These appeals ensued.

A trial court's denial of a motion for voluntary dismissal is reviewed for whether it was without justification. *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 570-571; 525 NW2d 489 (1994). We interpret this standard to apply to the instance before us, where a trial court sets aside an order of voluntary dismissal. Under the language of MCR 2.504(A)(1)(a), plaintiff was entitled to voluntary dismissal. However, defendant contends that the order submitted by plaintiff for such a dismissal was void because it was not signed by her attorney. MCR 2.114(C)(1) requires that "every document of a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney must sign the document." Plaintiff's motion for voluntary dismissal was not signed by her attorney of record at the time it was filed; rather, plaintiff signed the motion personally. An unsigned document must be stricken "unless it is signed promptly after the omission is called to the attention of the party." MCR 2.114(C)(2).

Plaintiff responds to this argument by contending that she had terminated her attorney, Mr. Hoy, at this point in the proceeding. The lower court file includes a letter written by plaintiff to Hoy articulating her displeasure at his failure to object to the Shiawassee County Friend of the Court recommendation. Plaintiff's argument is that, because she terminated Hoy and was proceeding in propria persona, she was not required to have an attorney sign her request for voluntary dismissal. While MCR 2.114(C)(1) states that, in instances where the party is not represented by counsel, only the party must sign, we disagree that plaintiff's assertion that she terminated her counsel is dispositive of the issue whether her attorney remained the "attorney of record." That is so because MCR 2.117 requires that "an attorney who has entered an appearance may withdraw from the action or be substituted for *only on order of the court*." Here, there was no such court order.

The plain language of MCR 2.117 requires this Court to conclude that a court order must be obtained in every instance in which a party changes his or her attorney of record. In this case, while plaintiff's counsel was not "withdrawing," plaintiff was substituting his representation with her own. Because the switch from being represented by counsel to representing herself amounted to a "substitution" of counsel, plaintiff was required to obtain the permission of the court. Absent the permission of the court, Hoy remained the "attorney of record"<sup>5</sup> and his signature was required for the order. Therefore, because plaintiff submitted a document to the

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<sup>5</sup> We point out that the order of voluntary dismissal which plaintiff submitted included Hoy's name in the caption.

court that was not signed by her attorney of record, that document must be deemed a nullity, and the trial court's ruling setting aside the order of dismissal was appropriate.

Plaintiff argues that she had a right to a voluntary dismissal. That, however, is not the issue here. We are not concerned with whether plaintiff was entitled to take a voluntary dismissal, but with whether she properly took that dismissal. We agree with the trial court that she did not.

Further, plaintiff's argument that the Shiawassee circuit court lacked jurisdiction to set aside the dismissal because the Oakland circuit court had jurisdiction is similarly without merit. Because the voluntary dismissal of the Shiawassee court was never properly filed, the Shiawassee court never actually relinquished jurisdiction.

Indeed, it is those two points which distinguish this case from *Baskin v Wayne Circuit Judge*, 236 Mich 15; 209 NW 925 (1926), which plaintiff identifies as the leading case on this issue. In *Baskin*, the wife filed for divorce in Wayne County. The defendant husband answered and subsequently convinced his wife to stipulate to a dismissal, apparently under pretense of reconciliation. A week after the wife's suit for divorce in Wayne County was dismissed, the husband filed his own divorce action, this time in Huron County. The wife successfully moved in Wayne County to set aside the dismissal. The husband brought a writ of prohibition in the Supreme Court seeking to restrain the Wayne circuit judge from exercising jurisdiction. The Supreme Court agreed. While it did so on the basis that Huron circuit was exercising jurisdiction, there are two significant differences between *Baskin* and the case at bar. First, in *Baskin* the dismissal was stipulated to, not unilateral. Second, the wife voluntarily submitted to jurisdiction in Huron County, while in the case at bar defendant responded to the Oakland County case by filing a motion for summary disposition.

As for whether defendant should have proceeded by way of an ex parte motion, there certainly was an urgency to the matter given plaintiff's filing of a new divorce action in Oakland county hours after taking the voluntary dismissal in Shiawassee County. In any event, because plaintiff has been afforded an opportunity for a review of that decision, the matter of it being ex parte is now moot.

Turning to the Oakland court's denial of defendant's motion for summary disposition under MCR 2.116(C)(6), the court believed that the necessary inquiry on such a motion was whether a case was pending at the time the Oakland action was filed. This was wrong. When looking at motions for summary disposition brought under MCR 2.116(C)(6), the relevant inquiry is whether another action was pending *at the time the motion for summary disposition is decided*. *Fast Air v Knight*, 235 Mich App 541, 545; 599 NW2d 489 (1999). Here, because we conclude that the Shiawassee court properly set aside the order of voluntary dismissal, and thus another action was properly pending at the time the motion was decided, the Oakland court's denial of defendant's motion for summary disposition was erroneous. We reverse.

Affirmed in docket number 246123; reversed in docket number 247886.

/s/ Pat M. Donofrio  
/s/ David H. Sawyer  
/s/ Peter D. O'Connell