



PROFESSOR LEX

BY HARVEY I. HAUER

Dear Professor Lex:

My client was recently divorced. She now wishes to maintain an action against her former spouse for a tort that she claims occurred during their marriage. She told me that there never was mention of this alleged tortious conduct made during the marriage. Can we now bring a tort action against her former spouse?

Practitioner

Dear Practitioner:

Before commencing any action, carefully review all relevant data in the divorce action including the pleadings and the Judgment of Divorce. If, in the Judgment of Divorce, there is a release of all claims, your client is likely barred from bringing a tort action. Read that release carefully. Assuming you find nothing in the divorce case that specifically bars such an action, I would need to know more details regarding the alleged tortious conduct.

In *Goldman v Wexler*, 122 Mich App 744, 333 NW2d 121 (1983), an ex-wife brought a tort action against her ex-husband alleging that he committed a battery during the marriage. In granting his motion for accelerated judgment, the trial court:

...relied on the fact that the divorce judgment provided that plaintiff was to receive a large proportion of the marital assets, several unexplained cash awards were made to her, and she was awarded \$1,000 for medical expenses incurred during the marriage. Therefore, the court ruled that plaintiff's claim in this action was barred by the prior divorce judgment.

The Appellate court reversed the trial court's ruling. It held:

[1] It is clear that plaintiff was entitled to maintain an action against defendant for torts committed during their marriage. Hosko v Hosko, 385 Mich 39 187, NW2d 236 (1971). Defendant contends that, because the property settlement which was incorporated into the divorce judgment took into account the fault of the parties and because plaintiff received at least partial compensation for the injuries she suffered as a result of the alleged battery, res judicata precludes this action.

In Howell v Vito's Trucking & Excavating Co., 386 Mich 37, 41-42, 191 NW2d 313 (1971), the Supreme Court clarified the doctrine of res judicata as it relates to the separate principles of bar-merger and collateral estoppel. In so doing, the Court quoted from Restatement Judgments, § 68, pp 293-294:

" It is important to distinguish the effect of a judgment as a merger of the original cause of action in the judgment or as a bar to a subsequent action upon the original cause of action from its effect by way of collateral estoppel in a subsequent action between the parties based upon a different cause of action. If a judgment is rendered in favor of the plaintiff, the cause of action upon which the judgment is based is merged in the judgment, and the plaintiff cannot thereafter maintain an action on the original cause of action (see § 47). If the judgment is rendered in favor of the defendant on the merits, the original cause of action is barred by the judgment (see § 48). In either case the original cause of action is extinguished by the judgment no matter what issues were raised and litigated



in the action, or even if no issues were raised or litigated and judgment was rendered by default.

" 'On the other hand, where the subsequent action is based upon a different cause of action from that upon which the prior action was based, the effect of the judgment is more limited. The judgment is conclusive between the parties in such a case as to questions actually litigated and determined by the judgment. It is not conclusive as to questions which might have been but were not litigated in the original action. This is the doctrine of collateral estoppel.' "

The prior action between these parties was one for divorce based on the Michigan no-fault divorce statute. M.C.L. § 552.1 et seq.; M.S.A. § 25.81 et seq. The present action is for a battery which is alleged to have occurred during the course of the marriage. Although we agree that fault continues to be a consideration in property division disputes in a divorce action, *Davey v. Davey*, 106 Mich.App. 579, 581, 308 N.W.2d 468 (1981), we cannot agree, nor does defendant seriously contend, that both claims constituted but a single cause of action. Consequently, this claim is neither barred by, nor merged into the divorce judgment. *Howell v. Vito's Trucking Co.*, supra; *Curry v. Detroit*, 394 Mich. 327, 331, 231 N.W.2d 57 (1975).

[2] Defendant's reliance on collateral estoppel is also misplaced. From the record before us, it appears that, if the issue of whether defendant battered plaintiff was in fact decided in the prior proceeding, it was resolved that a battery did occur. If that is the case, defendant is now bound by that determination. *Howell v. Vito's Trucking Co.*, supra, p. 43, 231 N.W.2d 57; *City of Mason v. Mason State Bank*, 63 Mich.App. 288, 234 N.W.2d 489 (1975). Therefore, defendant's claim must fail.

[3] There exists another reason why collateral estoppel cannot foreclose plaintiff's action. The property division which was incorporated into the divorce judgment resulted from a negotiated settlement agreed upon by the parties. It is well established in this jurisdiction that consent judgments are not to be given collateral estoppel effect. *American Mutual Liability Ins. Co. v. Michigan Mutual Liability Co.*, 64 Mich.App. 315, 326-327, 235 N.W.2d 769 (1975); *Berar Enterprises,*

Inc. v. Harmon, 101 Mich.App. 216, 300 N.W.2d 519 (1980); *Peterson v. Lapeer*, 106 Mich.App. 148, 155-156, 307 N.W.2d 744 (1981). See also Anno: Modern Views of State Courts as to Whether Consent Judgment is Entitled to Res Judicata or Collateral Estoppel Effect, 91 A.L.R.3d 1170, 1183.

[4] For the foregoing reasons, we find that plaintiff's claim is not precluded by the prior judgment. If defendant intended that all claims which grew out of the marriage be thereafter foreclosed by the divorce judgment, a release providing for the same should have been incorporated into that judgment.

The above is not meant to suggest that plaintiff is entitled to double recovery. If the consideration which was given plaintiff as part of the property settlement constituted payment, at least in part, for the injuries she suffered as a result of the alleged battery, defendant may raise that issue by way of affirmative defense and attempt to obtain a set-off against any judgment plaintiff obtains in this action.

The Court of Appeals, however, in *Gubin v. Lodisev*, 197 Mich App 84, 494 NW2d 782 (1992), made it clear that the Goldman case does not stand for the proposition that all torts committed during the marriage can become the subject matter of an independent action outside of the divorce case. In *Gubin*, husband's alleged tortious conduct was fraudulently inducing wife to marry him. The Appellate Court held:

Although it is well established in Michigan that one spouse may maintain an action against the other for certain torts committed during their marriage, *Hosko v. Hosko*, 385 Mich. 39, 187 N.W.2d 236 (1971), we note that the actions that were permitted involved torts that are not bound so intimately with the breakdown of the marriage itself. See *McCoy v. Cooke*, 165 Mich.App. 662, 419 N.W.2d 44 (1988), and *Goldman v. Wexler*, 122 Mich.App. 744, 333 N.W.2d 121 (1983), where this Court ruled that res judicata did not bar a divorced woman from maintaining against her former husband a tort action for an alleged battery and intentional infliction of emotional distress committed after the divorce judgment had been entered. See also *Courtney v. Feldstein*, 147 Mich.App. 70, 382 N.W.2d 734 (1985), where this Court stated that res judicata did not bar the plaintiff from maintaining an independent claim for damages arising from the defendant's alleged fraudulent conduct in their prior divorce proceedings regarding the value of his property.



We nevertheless believe that allowing an independent action for fraud in the context of a divorce action where the allegations of fraud relate to the very existence of the marital relationship would, as the court observed in *Mims, supra*, pp. 789-790, "turn every, or almost every, dissolution case into two cases—one to secure a dissolution ... and another, to secure damages from a jury or trial judge, for the 'wrongs' done by tortious spouse." Not only would the allowance of a separate cause of action for fraud that is intimately related to the breakdown of the marriage lead to a multiplicity of lawsuits, but also it would result in an inefficient allocation of judicial resources. Here, the denial of plaintiff's fraud claim does not leave her without a remedy, because the trial court may take into account those same costs and losses in fashioning an award of alimony or property. *Thames v. Thames*, 191 Mich.App. 299, 477 N.W.2d 496 (1991); *Sparks v. Sparks*, 440 Mich. 141, 485 N.W.2d 893 (1992). The trial court, sitting as a court of equity, in the divorce action, is capable of righting the wrong and putting plaintiff in

the same position she would have been in if defendant had not deceived her. A separate tort action is thus rendered unnecessary, because plaintiff could obtain relief for her damages as part of the divorce action.

As in all family law matters, knowing your facts is as important as knowing the law.

**Answer respectfully submitted by
Harvey I. Hauer, Hauer & Snover.**

Please send questions for Professor Lex to HHauer@hauersnover.com. Include "Professor Lex" in the e-mail's subject line.

The above response is not meant to serve as a solution to a case. That would require complete disclosure of all facts in the case, including client consultation. Rather, the intent is to provide informal guidance based upon the facts that have been presented. The inquiring lawyer bears full legal responsibility for determining the validity and use of the advice provided herein.

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