FOURTH DIVISION
September 6, 2012

No. 1-11-0557

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

POOJA VAN DYCK,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellant,	)	Cook County.
	)	
v.	)	09 D330995
	)	
JASDEEP PURDHANI,	)	The Honorable
	)	Edward Jordan and
Respondent-Appellee.	)	Thomas J. Mulroy,
	)	Judges Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶1 HELD: The appellate court reversed the trial court's dismissal of the respondent husband's amended counter-petition for dissolution of marriage on grounds of lack of subject matter jurisdiction based on Supreme Court Rule 369. The court also held there was no basis for dismissal of the entire counter-petition based on the doctrine of *res judicata*. A judgment of dissolution in a prior case was reversed and therefore *res judicata* did not apply to bar litigation on the counter-petition. *Res judicata* applied only to the disposition of property in an oral settlement agreement incorporated in the supplemental judgment in the prior case which was previously affirmed on appeal. Also,

because the parties forever waived any claim or interest in each other's future-acquired property under the settlement agreement, the trial court did not abuse its discretion in limiting discovery regarding property issues. The dismissal of the petitioner wife's petition for dissolution on grounds of extreme and repeated mental cruelty was affirmed, as the trial court's finding of a lack of sufficient evidence for these grounds was not against the manifest weight of the evidence. The matter was remanded for the limited purpose of a trial on respondent's counter-petition for dissolution for the court to determine if grounds existed for dissolution of marriage on the grounds of irreconcilable differences in his counter-petition and, if so, for entry of a final judgment of dissolution of marriage.

¶2 BACKGROUND

¶3 The instant case arose from the most recent dissolution of marriage proceedings between parties who had both previously filed for dissolution of marriage. On July 29, 2003, petitioner, Pooja Van Dyck, first filed a petition for dissolution of marriage from respondent, Jasdeep Purdhani, case number 03 D 8056. On May 2, 2006, however, Pooja filed a motion for voluntary dismissal and the case was dismissed.

¶4 On May 3, 2006, Jasdeep also filed a petition for dissolution of marriage, case number 2006 D 4931. On September 26, 2006, the court bifurcated the dissolution proceedings and entered judgment of dissolution based on irreconcilable differences. Pooja appealed, and while the appeal was pending the court set the case for a phase II trial on all remaining issues regarding property settlement. On November 27, 2006, Pooja moved to stay the trial on the basis that the date of dissolution could not be determined because the dissolution order was currently on appeal. The motion was denied and the case proceeded to trial on the bifurcated proceedings. On February 1, 2007, the parties proved up an oral agreement regarding property and all remaining issues and a supplemental judgment for dissolution of marriage reciting the terms of an oral settlement agreement was entered. Pooja appealed that judgment as well. The order

incorporating the terms of an oral marital settlement agreement was affirmed, but the order entering judgment of dissolution and permitting bifurcation was reversed and remanded. Neither party reinstated the original 2006 case.

¶5 On October 9, 2009, Pooja filed another petition for dissolution of marriage. On January 6, 2010, Jasdeep moved to consolidate the new action with the 2006 action, but his motion to consolidate was denied on March 17, 2010, as the time for reinstatement of actions had passed. Jasdeep's motion to transfer the case to the First District was granted.

¶6 Pooja served a subpoena on respondent's employer and respondent moved to quash the subpoena on February 26, 2010. From March 23-26, 2010, Jasdeep filed and called to hearing a motion to strike and dismiss petitioner's petition and motion to quash petitioner's subpoena on his employer. The motions were heard on May 19, 2010. The subpoenas issued by both parties were stricken as premature. Pooja was granted seven days to amend her petition, and respondent was granted 14 days to reply. Both parties were ordered to file financial disclosures within 28 days. Jasdeep moved to strike certain portions of Pooja's petition for dissolution and petitioner was given leave to amend. Pooja filed an amended petition for dissolution on June 1, 2010. Jasdeep filed a response and counter-petition on June 4, 2010.

¶7 On September 9, 2010, the case was set for trial on October 21, 2010. The court also ordered that all discovery updates must be completed by October 14, 2010, and ordered discovery closed on that date. On September 14, 2010, Pooja served Jasdeep with a financial disclosure statement request, interrogatories, which included two interrogatories about two websites and a notice to produce, which included requests for documents relating to R3 Resources Group and

RISA Enterprises.

¶8 On September 16, 2010, Jasdeep filed a motion to close discovery and on September 20, 2010, the court granted the motion and closed all discovery except one subpoena for each party and financial disclosures. On September 20, 2010, Pooja filed a motion to reconsider the September 9 order, which the court denied on September 30, 2010.

¶9 At the time discovery was cut off, Pooja had not yet answered Jasdeep's amended counter-petition and Jasdeep had not answered Pooja's amended petition. Pooja answered the amended counter-petition on September 30, 2010, and Jasdeep answered the amended petition on October 5, 2010.

¶10 On October 19, 2010, Pooja filed her financial disclosure, together with a petition for rule to show cause alleging that Jasdeep had not filed his financial disclosure. A rule issued and the matter was before the court for hearing on November 8, 2010. Jasdeep produced the disclosure by then and the rule was discharged.

¶11 The case was originally set for trial on October 21, 2010, but Pooja moved for a continuance because she was then pregnant and near term. The court granted her motion and continued the trial date to December 10, 2010. On December 2, 2010, based on Jasdeep's financial disclosure, Pooja moved to reopen discovery, but the court denied her motion on December 7, 2010.

¶12 On December 10, 2010, Pooja moved for a second continuance on the advice of her physician. Attached to her motion was an unexecuted affidavit from her physician stating that Pooja needed to avoid stressful activity and that he had advised her to not attend trial. The court

denied her motion and the matter went to trial on December 14, 2010.

¶13 After hearing testimony, the court found that Pooja had not proved the allegations of mental cruelty in her petition. The court granted Jasdeep's motion for a directed finding and proceeding to a hearing on Jasdeep's counter-petition. The court found that Jasdeep had proved the grounds of irreconcilable differences in his counter-petition. The court did not reach the issue of property distribution. Instead, the court directed the parties to supply memoranda regarding the legal impact of the settlement agreement that was connected with the 2006 dissolution proceedings.

¶14 On January 18, 2011, the court entered a written memorandum opinion and order finding that "the judgment for dissolution entered on September 25, 2006 and the Supplemental Judgment entered on February 27, 2007 remains in full force and effect." The court then dismissed the case with prejudice for lack of subject matter jurisdiction, based on Illinois Supreme Court Rule 369(c) (Ill. S. Ct. Rule369(c) (eff. July 1, 1982)), finding that Pooja failed to reinstate the 2006 divorce case after remand.

¶15 ANALYSIS

¶16 Petitioner argues that the trial court erred in the following: (1) dismissing the case for lack of subject matter jurisdiction; (2) failing to consider property distribution pursuant to the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/503(f) (West 2010)); (3) barring discovery; (4) denying her motion to continue the trial date; and (5) entered a directed finding that petitioner had not proved her allegation of mental cruelty.

¶17 1. Jurisdiction

¶18 We first address the jurisdictional argument that the court erred in dismissing petitioners' case based on lack of subject matter jurisdiction.

¶19 A. Supreme Court Rule 369

¶20 The circuit court based its dismissal for lack of subject matter jurisdiction on Supreme Court Rule 369(c), finding that Pooja failed to reinstate the 2006 divorce case. Rule 369(c) provides:

> "(c) Remandment. When the reviewing court remands the case for a new trial or hearing and the mandate is filed in the circuit court, the case shall be reinstated therein upon 10 days notice to the adverse party." Ill. S. Ct. Rule369(c) (eff. July 1, 1982).

¶21 The court also relied on *People v. NL Industries, Inc.*, 284 Ill. App. 3d 1025 (1996), which placed an affirmative duty on the prevailing party on appeal to pursue his or her rights after the mandate issues, and *National Underground Construction Co. v. E.A. Cox*, 273 Ill. App. 3d 830 (1995), and *People v. Eidel*, 319 Ill. App. 3d 496 (2001). However, the instant case is distinguishable and in a different procedural posture. In *E.A. Cox*, as in *NL Industries*, the prevailing parties were the plaintiffs, who had obtained reversals of a summary judgment (*E.A. Cox*) and a dismissal (*NL Industries*) against them, and therefore had to reinstate their cases to start the trial process moving again to pursue their claims.

¶22 Here, the 2006 divorce case was on *Jasdeep*'s petition. Pooja pursued an appeal and won the appeal as to the bifurcation and dissolution of marriage judgment. The circuit court's finding that Pooja somehow lost her victory on appeal by not re-docketing the case is incorrect. "After [Supreme Court] Rules 368 and 369 took effect, a prevailing party has no need to file the

reviewing court's mandate." *Eidel*, 319 Ill. App. 3d at 506. Pooja had no affirmative duty to reinstate that divorce case since she was the *respondent* seeking reversal of a judgment and she prevailed on appeal. Jasdeep had initially obtained a divorce judgment on his petition, and Pooja sought a reversal of that judgment; she was not pursuing the claim. Pooja desired to have the dissolution judgment reversed and that is precisely what happened. Since she was not the petitioner, it was not incumbent upon her to refile the divorce proceedings. On the contrary, if Jasdeep had wished to pursue the entry of a dissolution of marriage judgment, as the petitioner under Rule 369(c) it was incumbent upon *him* to reinstate the case upon remand. Under the holdings of *E.A. Cox* and *N.L. Industries*, it is Jasdeep who lost his right to pursue his 2006 divorce petition by not re-docketing the case. Pooja was not the petitioner and did not pursue dissolution proceedings at that time. The reversal of the divorce judgment stood.

¶23 Therefore, the court's January 18, 2011 memorandum opinion and order finding that because Pooja did not re-docket the 2006 case "the judgment for dissolution entered on September 25, 2006" remained "in full force and effect" was incorrect. *Purdhani v. Van Dyck*, Case No. 1-06-2828, Rule 23 Order (July 25, 2008). The circuit court's reliance on Supreme Court Rule 369(c) in finding that there was a lack of subject matter jurisdiction was not well-grounded and therefore dismissal on this basis was improper.

¶24 B. *Res Judicata*

¶25 Jasdeep maintains that dismissal was nevertheless proper based on the doctrine of *res judicata*. Section 2-619 (a)(4) of the Code of Civil Procedure permits a court to dismiss an action on the grounds that it "is barred by a prior judgment." 735 ILCS 5/2-619 (a)(4) (West

2006). Section 2-619 (a)(4) incorporates the doctrine of *res judicata*, which has three essential elements: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties or their privies. *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 294 (1992). If all three elements are met, then the prior action is conclusive as to all issues that were, or properly might have been, raised in that action. *Burris*, 151 Ill. 2d at 294. Review of a trial court's application of *res judicata* under section 2-619 is *de novo*. *American National Bank & Trust Co. v. Village of Libertyville*, 269 Ill. App. 3d 400, 403 (1995).

¶26 The dissolution judgment cannot be the basis for the application of the doctrine of *res judicata*, since it was vacated on appeal. See *Matter of Estate of Duncan*, 171 Ill. App. 3d 594, 599 (1988) (a dissolution judgment subsequently vacated on appeal could not be used as basis for trial court's determination that husband's estate had 25% proprietary interest in real estate of wife's estate). Section 413 of the Illinois Marriage and Dissolution of Marriage act provides that "[a] judgment of dissolution of marriage or of legal separation or of declaration of invalidity of marriage is final when entered, *subject to the right of appeal*." (Emphasis added.) 750 ILCS 5/413(a) (West 2010). The prior judgment order granting the dissolution of marriage was reversed on appeal because this court found that the required "appropriate circumstances" for bifurcation under section 401(b) of the Act (750 ILCS 5/401(b) (West 2006)) were not shown. See *Purdhani v. Van Dyck*, Case No. 1-06-2828, Rule 23 Order (July 25, 2008) at 2. Since it was reversed, the judgment granting dissolution of marriage was not a final judgment, and thus *res judicata* does not apply. See *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 335 (1996) (for *res*

judicata to apply, there must be a final judgment on the merits).

¶27 However, *res judicata* does apply to the issue of property distribution that is the subject of the supplemental judgment incorporating the settlement agreement, but not to the entire dissolution proceedings below. The "Supplemental Judgment for Dissolution of Marriage" was premised on the initial judgment of dissolution. The Supplemental Judgment for Dissolution of Marriage stated:

> "THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:
>
> 1. That the bonds of marriage heretofore existing between the Petitioner and the Respondent *have been previously dissolved* pursuant to the statute of the State of Illinois *by entry of a Judgment for Dissolution of Marriage on the 25th day of September, 2006,* by the Honorable Judge Edward Jordan." (Emphasis added.)

¶28 Thus, at first blush it appears that since the supplemental judgment was predicated on the prior judgment of dissolution of marriage, and the judgment of dissolution of marriage was reversed, the supplemental judgment incorporating the settlement agreement was not a final judgment. Also, we have held that settlement agreements themselves cannot be the basis for the application of *res judicata*. See *Currie v. Wisconsin Central, Ltd.*, 2011 IL App (1st) 103095 at ¶ 29 ("We agree with the cases that do not view a settlement agreement as a final judgment on the merits and therefore cannot find the settlement agreement *** to satisfy the first requirement for *res judicata*.") (citing *Goodman v. Hanson*, 408 Ill. App. 3d 285, 300 (2011).

¶29 However, in the proceedings in the 2006 case, the circuit court merged the terms of the

settlement agreement into the supplemental judgment. Normally, the provisions of a marital settlement agreement are incorporated in the final divorce judgment or decree. It is well-established that "when the provisions of a written or oral agreement are incorporated into the decree, the contract becomes merged in the decree and is conclusive upon the parties in the same manner as if the court had made the determination." *Stutler v. Stutler*, 61 Ill. App. 3d 201, 204 (1978) (citing *Guyton v. Guyton*, 17 Ill. 2d 439 (1959), *Beattie v. Beattie*, 53 Ill. App. 3d 501 (1977)). While typically supplemental judgments in divorce cases provide that the settlement agreement is merged in the divorce decree, here the supplemental judgment stated that the settlement agreement was "merged into this Supplemental Judgment for Dissolution of Marriage," relying on the validity of the earlier judgment of dissolution of marriage. In the 2006 case, only the divorce decree was reversed. The supplemental judgment approving and incorporating the settlement agreement was affirmed on appeal. The fact that the divorce judgment was reversed therefore had no effect on the validity of the parties' settlement agreement in this case.

¶30 Further, the parties' marriage was not dissolved at that time and the parties remained married until Pooja filed the 2009 petition. Thus, the parties' agreement was a settlement agreement entered into during marriage, a post-nuptial contract.

¶31 Such post-nuptial contracts are valid. A marital settlement agreement's validity is not contingent upon the entry of a divorce decree unless it is based only on section 502 of the Act. *Stern v. Stern*, 105 Ill. App. 3d 805, 810 (1982). "[W]here two parties enter into a marital settlement agreement, and where performance of the agreement is carried out, notwithstanding

the dismissal of the divorce proceedings, we view the agreement as a valid allocation of marital and nonmarital property rights pursuant to section 503(a)(4) of the Act." *In re Marriage of Vella*, 237 Ill. App. 3d 194, 200-01 (1990). In *Vella*, the court held that the terms of the agreement itself, combined with the actions of the parties in performing the agreement, established that the agreement was a valid, post-nuptial contract. *Vella*, 237 Ill. App. 3d at 198.

¶32 Here, the settlement agreement was oral. Oral marital settlement agreements are valid. "[T]he Act permits the parties to enter into a written or oral agreement containing provisions for the disposition of property, the maintenance of either spouse, and the support, custody, and visitation of the parties' children. *In re Marriage of Hightower*, 358 Ill. App. 3d 165, 170-71 (2005) (citing 750 ILCS 5/502(a) (West 2002), *In re Marriage of Sheetz*, 254 Ill. App. 3d 695, 697 (1993)). However, "[t]he settlement of property rights cannot be concluded by the parties' oral consent when it is diligently challenged by one spouse before a decree has been entered." *In re Chaltin*, 153 Ill. App. 3d 810, 813 (1987) (citing *In re Marriage of Perry*, 96 Ill. App. 3d 370, 373 (1981), *Crawford v. Crawford*, 39 Ill. App. 3d 457, 462 (1976)). See *In re Lakin*, 278 Ill. App. 3d 135 (1996) (holding that an oral property settlement should not have been reduced to written judgment where the petitioner, before entry of judgment, raised significant concerns over the disputed provisions of settlement agreement), *appeal denied*, 167 Ill. 2d 554 (1996). Here, the prior dissolution judgment was reversed

¶33 In the proceedings in the previous case, however, Pooja did not object to the terms of the oral settlement before entry of either the divorce decree which was reversed, nor before entry of the supplemental judgment incorporating the settlement agreement. *After* entry of the

supplemental judgment, Pooja appealed and claimed she did not consent to the terms of the settlement. However, in our order of July 25, 2008 affirming entry of the judgment, we held that Pooja raised no objection to the terms of the settlement at the prove-up hearing. See *Purdhani v. Van Dyck*, No. 1-07-1602, Rule 23 Order (July 25, 2008) at 2. We also held that Pooja waived the merits of her claim because she did not provide a sufficient record containing a report of proceedings or reasonable substitute showing she objected, nor did the record contain a copy of her proposed judgment which she claimed she submitted to the circuit court. See *Purdhani v. Van Dyck*, No. 1-07-1602, Rule 23 Order (July 25, 2008) at 4. Thus, Pooja did not validly object to the oral settlement agreement prior to the entry of the supplemental judgment and the judgment was affirmed and so is a final judgment. *Res judicata* applies to the supplemental judgment incorporating the settlement agreement and any issue regarding distribution of that property is *res judicata* and established by the terms of the settlement agreement.

¶34 However, *res judicata* applies only to issues concerning the property which was the subject of the settlement agreement incorporated in the supplemental judgment. Dismissing the entire 2009 case was improper because, as we explain next, the parties continued to remain married after the judgment incorporating the settlement agreement was entered and continued to acquire marital property, which required consideration and distribution by the court. We therefore must reverse the court's dismissal and remand the cause for further proceedings as we instruct next.

¶35 2. Property Distribution

¶36 Petitioner argues that the court failed to consider property distribution pursuant to the

Illinois Marriage and Dissolution of Marriage Act (735 ILCS 503(f) (West 2010)). However, we determine that due to the prior settlement agreement there was no remaining marital property to be apportioned and the court did not err.

¶37 Because there was never a divorce decree in the 2006 case and the parties continued to be married, whatever property they acquired after the entry of the judgment incorporating the settlement agreement would normally be presumed to be marital property, which must be fully disclosed and equitably apportioned. Under section 503 of the Act, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage, including non-marital property transferred into some form of co-ownership between the spouses, is presumed to be marital property. See 750 ILCS 5/503(b)(1) (West 2008).

¶38 However, "[s]ection 503 of the Illinois Marriage and Dissolution of Marriage Act provides that 'marital property' means all property acquired by either spouse subsequent to the marriage except *** *property excluded by valid agreement of the parties*." (Emphasis added.) *In re Marriage of Jelinek*, 244 Ill. App. 3d 496, 501 (1993) (citing Ill. Rev. Stat. 1987, ch. 40, par. 503(a)(4)). Here, the parties' prior settlement agreement was very inclusive and included a release of any and all property owned by the parties at the time of the agreement and all property acquired after the settlement agreement. Section 8(c) of the settlement agreement, in pertinent part as incorporated in the supplemental judgment, provided the following:

> "C. To the fullest extent by law permitted to do so, and except as herein otherwise provided, each of the parties does hereby *forever relinquish, release, waive,*

> *and forever quit claim and grant to the other*, his or her heirs, personal representatives, and assigns, all rights of inheritance, descent, distribution, community interest, and all other right, title, claim, interest, and estate as former husband and wife, widow or widower, or otherwise by reason of their prior marital relationship, under any present or future law, or which he or she otherwise has or might have or be entitled to claim in, or against the property and assets of the other, real, personal, or mixed, or his or her estate, *whether now owned or hereafter in any manner acquired by the other party*, and whether in possession or in expectancy, and whether vested or contingent, and each party further covenants and agrees for himself or herself, his or her heirs, personal representatives, and assigns, that neither of them will, at any time hereafter, sue the other, or his or her heirs, personal representatives, grantees, devises, or assigns, for the purpose of enforcing any or all of the rights specified in and relinquished under this paragraph and further agrees that in the event any suit shall be commenced, *this release, when pleaded shall be and constitute a complete defense* to any such claim or suit so instituted by either party hereto ***." (Emphasis added.)

¶39 Thus, under the terms of the settlement agreement, any property the parties acquired after the settlement agreement would belong to the party who acquired it, and Pooja and Jasdeep agreed to forever release any claim they would have on each other's acquired property.

¶40 Upon remand, the circuit court is required to enforce the terms of the settlement agreement, and under the terms of the settlement agreement the parties forever waived any interests in each other's property. Thus, the remand is for the limited purpose of addressing

Jasdeep's counter-petition and, if his grounds of irreconcilable differences are found to be proven, entering a final dissolution of marriage judgment.

¶41 3. Barring Discovery

¶42 Pooja also argues the trial court abused its discretion in entering the discovery orders limiting discovery and not allowing her to discovery Jasdeep's property. Trial courts are afforded wide latitude in determining the permissible scope of discovery, and their rulings on discovery matters are generally reviewed for an abuse of discretion. *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Limited USA*, 384 Ill. App. 3d 849, 869 (2008) (citing *Mutlu v. State Farm Fire & Casualty Co.*, 337 Ill. App. 3d 420, 434 (2003)). Based on the settlement agreement, we find the court's limitation on discovery was not an abuse of discretion.

¶43 On September 20, 2010, the court granted Jasdeep's motion to close discovery prior to the discovery cut-off date and closed all discovery except one subpoena for each party and financial disclosures. The court denied Pooja's motion to reconsider. Though there was some discussion on the record, the court did not provide any reasoning for its decision to curtail discovery in this manner. Illinois Supreme Court Rule 201(b)(1) provides:

> "(1) Full Disclosure Required. Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter *relevant* to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts." (Emphasis added.) Ill. S. Ct. R.

201(b)(1) (eff. July 1, 2002).

¶44 Pooja alleged that there was evidence that Jasdeep had a business and two income-earning websites he established during the marriage. Pooja contends the requested discovery was relevant regarding the disposition of any marital property in the divorce proceedings. See 750 ILCS 5/503 (West 2008). However, as we discussed above, in the settlement agreement she forever released any interest in Jasdeep's property, including any property and interests acquired after the settlement agreement was executed. Under the terms of the settlement agreement, each party's property, including any property acquired after the agreement, would be separate property. As there was no marital property, any discovery on this issue would be irrelevant.

¶45 Illinois Supreme Court Rule 201(c)(1) limits the breadth of discovery in certain situations by providing for a protective order as follows:

> "(c) Prevention of Abuse.
>
> (1) Protective Orders. The court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." Ill. Sup. Ct. R 201(c)(1) (eff. July 1, 2002).

¶46 Here the limitation of discovery of an issue that was already resolved by the parties' settlement agreement is justifiable under Supreme Court 201(c)(1). We therefore find the court did not abuses its discretion.

¶47 4. Motion to Continue Trial Date

¶48 Given that we are reversing the court's dismissal based on lack of subject matter jurisdiction and remanding, we need not address petitioner's argument regarding the denial of her second motion for a continuance because it is unnecessary for the disposition of the instant appeal. *Estate of Bantsolas v. Bantsolas*, 377 Ill. App. 3d 684, 689 (2007) (citing *Board of Education of Park Heights School District No. 163 v. State Teacher Certification Board*, 363 Ill. App. 3d 433, 441 (2006)).

¶49 5. Finding Regarding Mental Cruelty

¶50 Pooja appeals the court's grant of Jasdeep's motion for a directed finding on her petition, based on its finding that petitioner had not proved her allegation of mental cruelty. One of the grounds for dissolution of marriage under the Act is where the respondent "has been guilty of extreme and repeated physical or mental cruelty." 750 ILCS 5/401(a)(1) (West 2008). "[C]ase law defines 'extreme and repeated cruelty' under [section 401(a)] as a course of unprovoked, offensive conduct toward one's spouse which causes embarrassment, humiliation and anguish so as to render the spouse's life miserable and unendurable, and which actually affects the spouse's physical or mental health." *In re Marriage of Hanson*, 170 Ill. App. 3d 298, 301 (1988). In determining the effect on the complaining spouse, the emotional behavior of that spouse is a critical factor. *In re Marriage of Hanson*, 170 Ill. App. 3d at 302 (citing *In re Marriage of Mitchell*, 103 Ill. App. 3d 242 (1981)). We give substantial deference to the trial court's findings in determining whether mental cruelty exists. *In re Marriage of Hanson*, 170 Ill. App. 3d at 302 (citing *Hollo v. Hollo*, 131 Ill. App. 3d 119 (1985)). "Conduct may be of a nature to fall within accepted definitions of mental cruelty but if it lacks detail, is partially impeached on

cross-examination and has a minimal effect on a party over a long period of tolerance a finding by the trial judge that the proof is insufficient will not be found to be against the manifest weight of the evidence on review." *In re Marriage of Semmler*, 90 Ill. App. 3d 649, 653 (1980) (citing *Rey v. Rey*, 23 Ill. App. 3d 274, 277 (1974)).

¶51 Here, Pooja's evidence of mental cruelty consisted of the fact that Jasdeep would intermittmently leave her for long stretches of time with no way for her to contact him, and that on an alleged family vacation in India he actually spent time with his paramour with whom he had a child and married after the entry of the dissolution judgment in the 2006 case. Further, when Jasdeep was unemployed and living on her grants and student and family loans, he would not add her name to their car insurance and would not drive her to her classes, resulting in her having to ride her bicycle to school. After the parties returned to Illinois from California in 2000, Jasdeep worked but would not give Pooja money for food and clothing and had multiple whispered conversations over the telephone throughout the day, and that there were numerous calls from his mistress asking to speak with him. Also, Jasdeep would withhold his affection and refuse to speak with Pooja for weeks on end after arguments. Pooja also testified that at times she would ask for forgiveness. Pooja cried a lot and was depressed and slept day and night.

¶52 However, the evidence also established that after Pooja moved out of the marital residence in August 2001 and attended graduate school in California, she did not resume living with Jasdeep. Also, while she was in California, Jasdeep paid for all the household expenses. Further, Pooja alleged "irreconcilable differences," and not mental cruelty in her 2003 divorce petition.

¶53 Pooja's citations are distinguishable. In *Burrow v. Burrow*, 126 Ill. App. 3d 752, 754-55 (1984), the respondent repeatedly verbally abused the petitioner in front of the children, accused him of child abuse and of being a homosexual, and criticized the petitioner's background and education. In *West v. West*, 77 Ill. App. 3d 828, 831 (1979), the parties' repeated arguments escalated into physical violence. In *Jackson v. Jackson*, 24 Ill. App. 3d 810, 812 (1974), the husband let the air out of the wife's tires, pushed her out of bed, demeaned her sexual adequacy, and disparaged her in comparison with white women.

¶54 Giving proper deference to the trial court's finding, the court's finding that Pooja failed to establish extreme and repeated mental cruelty was not against the manifest weight of the evidence. Jasdeep's conduct in having an affair and periodically leaving her, as alleged by Pooja, while unseemly, does not rise to the level of "extreme and repeated mental cruelty." We affirm the trial court's dismissal of Pooja's petition for a dissolution on the grounds of extreme and repeated mental cruelty.

¶55 CONCLUSION

¶56 We affirm the trial court's directed finding on Pooja's petition, as the trial court's determination that she failed to prove extreme and repeated mental cruelty was not against the manifest weight of the evidence.

¶57 However, we reverse the trial court's dismissal of Jasdeep's amended counter-petition for dissolution of marriage on grounds of lack of subject matter jurisdiction based on Supreme Court Rule 369. We also determine there was no basis for dismissal of the entire counter-petition based on the doctrine of *res judicata*. The prior dissolution judgment was reversed and therefore

res judicata does not apply to the dissolution. *Res judicata* applies only to the disposition of property in the oral settlement agreement incorporated in the supplemental judgment which was previously affirmed on appeal. Because the parties forever waived any claim or interest in each other's future-acquired property under the settlement agreement, the trial court did not abuse its discretion in limiting discovery regarding property issues. On remand, the court must conduct a trial on Jasdeep's counter-petition for dissolution to determine whether sufficient grounds exist for dissolution of marriage and, if so, for entry of a final judgment of dissolution of marriage.

¶58 Affirmed in part, reversed in part, and remanded.