

STATE OF MICHIGAN
COURT OF APPEALS

DIANE MARIE KEINZ,
Plaintiff-Appellant,

FOR PUBLICATION
September 16, 2010
9:00 a.m.

v

KENNETH CARL KEINZ,
Defendant-Appellee.

No. 292781
St. Clair Circuit Court
LC No. 04-001820-DM

Before: WILDER, P.J., and CAVANAGH and M. J. KELLY, JJ.

WILDER, P.J.

Plaintiff appeals as of right from the circuit court's order denying her motion to shift her attorney fees and costs to defendant. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The parties' 2005 divorce judgment granted plaintiff primary physical custody of the parties' two minor children, and required defendant to pay child support in the amount of \$682.88 per month for two children and \$449.51 per month for one child "until Defendant returns to his employment from Disability," after which the obligation would be \$785.27 for two children and \$516.67 for one child.

In 2008, plaintiff moved to increase defendant's support obligations. At the attendant hearing in July 2008, both parties proceeded without assistance of counsel. Defendant stated that his biweekly gross income was \$1,594.56 (annual income would therefore total \$41,458.56) and produced a letter from his employer that mirrored his representations. Defendant explained that his gross income is based on his "usual[]" work schedule including 36 hours in one week and 48 hours the next week at his hourly pay rate of \$17.84. After inquiring about plaintiff's income, and the parties' sundry expenses, the referee recommended that defendant's general care assessment be \$734 for the two children and \$481 for one child.

Plaintiff filed objections, on the grounds that the referee did not ask defendant what his income was in 2007, and that defendant had not provided his W-2 form for that year. Nonetheless the referee's recommendation was adopted in a court order. Plaintiff filed a motion to set aside that order. The trial court granted the motion, and the question of attorney fees was reserved. The matter was referred to the Friend of the Court for the purpose of calculating child support for two minor children in accord with the true incomes of the parties.

A new recommendation followed, this time for support in the amounts of \$1,090 for two children and \$709 for one child. Plaintiff filed a motion for entry or an order consistent that recommendation, and for sanctions.

The parties appeared for an evidentiary hearing and settled the support issue. Plaintiff's attorney reported that, in addition to agreements concerning healthcare expenses, "[t]he parties have come to agreement regarding the Uniform Child Support Order by modifying it retroactive to April 29th, 2008 wherein [defendant] will pay to [plaintiff] child support for two children in the amount of \$1,175, and for one child the amount of \$800." The hearing continued on the issue of sanctions. Plaintiff argued that defendant misrepresented his income at the initial hearing on the motion to increase defendant's support obligations thereby causing numerous court appearances, which would have otherwise been unnecessary.

Defendant admitted that, by the time of the first hearing in July 2008, when he reported a biweekly gross income that would total \$41,458.56, he had already earned \$40,000 and he ultimately earned \$81,808.32 in 2008. Defendant's attorney averred that defendant excluded voluntary overtime when reporting his usual schedule because he had reduced expectations for similar future income as a result of the economy and a health condition causing a doctor to recommend he work 60 hours per week or less. Defendant's attorney also averred that expenses from the divorce had made it difficult for defendant to get back on his feet.

At the conclusion, the trial court held as follows:

There was not an intentional or deliberate act or motive on the part of the Defendant which could . . . give rise to a consideration that is lack of or intended . . . misleading information to the Friend of the Court, particularly in reviewing the transcript of the Friend of the Court hearing on July 7th, 2008, which would cause the Court to conclude that . . . there should be leveled . . . the reimbursement of an attorney fees or costs in this case and, therefore the request by the Plaintiff for . . . attorney fees and/or cost[s] is denied.

On appeal, plaintiff argues that she is entitled to costs and fees on the grounds that she was the prevailing party, and that defendant caused unnecessary court appearances and delayed resolution of the case by maintaining positions with no reasonable basis in law or fact.

This Court reviews a trial court's ruling on a motion for costs and attorney fees for an abuse of discretion. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996); see *In re Condemnation of Private Property for Highway Purposes (Dep't of Transp v Curis)*, 221 Mich App 136, 139-140; 561 NW2d 459 (1997). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006). A trial court's findings of fact, such as whether a party's position was frivolous, may not be set aside unless clearly erroneous. MCR 2.613(C); see *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002).

"Awards of costs and attorney fees are recoverable only where specifically authorized by a statute, a court rule, or a recognized exception." *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). MCL 600.2591(1) grants a court authority to award sanctions, in

the form of attorney fees and costs, to a prevailing party if an action or defense is deemed “frivolous.” To be considered “frivolous,” at least one of the following conditions must be met:

- (i) The party’s primary purpose in initiating the action . . . was to harass, embarrass, or injure the prevailing party.
- (ii) The party had no reasonable basis to believe that the facts underlying that party’s legal position were in fact true.
- (iii) The party’s legal position was devoid of arguable legal merit. [MCL 600.2591(3)(a).]

Plaintiff first argues that she was a “prevailing party” for purposes of MCL 600.2591(1). The trial court did not resolve this question, instead concluding that the defense was not frivolous. Nevertheless, according to MCL 600.2591(3)(b), a “prevailing party” is “a party who wins on the entire record.” Because the parties’ settlement resulted in a higher support award, we agree with plaintiff’s argument that she is the prevailing party on her motion.

Defendant relies on MRE 408 to argue that consideration of the settlement should be precluded. MRE 408 provides, in relevant part:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible . . . This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Because the settlement is not offered to prove defendant’s liability for the amount of child support agreed upon, but rather to prove whether plaintiff is a prevailing party, we reject defendant’s argument.¹

Plaintiff next argues that defendant deceived the referee by offering evidence that his biweekly gross income totaled \$1,594.56, when he knew that he actually earned more, thereby requiring additional proceedings, including the motion to set aside the order resulting from the

¹ We also note that trial courts possess the inherent authority to sanction litigants and their attorneys. “This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases.” *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006).

referee's recommendation, and delaying resolution of the matter. We agree. In light of defendant's admission that he had already earned \$40,000 by the time of the July 2008 hearing and that he ultimately earned \$81,808.32 in 2008, defendant had no reasonable basis to believe that the biweekly gross income he reported to the referee, which would total \$41,458.56 annually, was true. Consequently, we agree with plaintiff that defendant's initial opposition to the motion to increase child support was frivolous.

Defendant explains that his self-serving omission of evidence regarding his voluntary overtime was based on an anticipated loss of that overtime in the future. Defendant then correctly argues that a trial court has discretion to deviate from the child support formula when application of the formula would be unjust or inappropriate. See MCL 552.605(2). However, even if the anticipated loss of overtime would have made application of the formula based on his actual income in July 2008 unjust, defendant had no reasonable basis to believe that the biweekly gross income he reported to the referee was true and it was in the referee's discretion, not defendant's, to recommend a deviation from the formula after it had been calculated based on accurate facts.

Because plaintiff is the prevailing party and defendant asserted a frivolous defense, we conclude that the trial court abused its discretion by denying plaintiff's motion for attorney fees and costs pursuant to MCL 600.2591(1). We reverse and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly