STATE OF MICHIGAN

COURT OF APPEALS

SEAN M. O'FARRELL, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED November 20, 2012
v	No. 303962 Iosco Circuit Court
KELLY M. O'FARRELL, Defendant/Counter-Plaintiff-Appellant.	LC No. 07-003433-DM

Before: TALBOT, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

In this attorney-fee dispute stemming from defendant Kelly O'Farrell's motion to restrict plaintiff Sean O'Farrell's parenting time and Sean's motion for a change of custody, Kelly appeals of right the trial court's order that Kelly pay Sean's attorney $20,912 in fees and $3,555.86 in costs and reimburse Sean's $738 cost to the Guardian Ad Litem (GAL). We affirm.

I. FACTS AND PROCEDURAL HISTORY

Sean and Kelly divorced in December 2008. The judgment of divorce provided that Sean and Kelly would have joint legal custody of their minor child, who was two years old at the time. The judgment of divorce granted Kelly physical custody of the child until further order of the court and ordered an extensive, detailed parenting-time schedule.

On March 20, 2009, Kelly moved the trial court to suspend or restrict Sean's parenting time. Kelly alleged that Sean did not enter counseling as the judgment of divorce required, would not communicate with her concerning most issues regarding the child, was being disrespectful to Kelly, and was disrupting and negatively impacting the child's life. Sean answered Kelly's motion on April 9, 2009. Sean asserted that he started counseling as ordered by the court, Kelly refused to communicate with him regarding the child, and that there was an "ongoing assault" by Kelly on Sean's relationship with the child, including "hinting that [Sean had] engaged in inappropriate physical contact with [the child]." Furthermore, Sean alleged that Kelly was disrupting the child's life by taking her to "quack therapists" and going against sound medical advice offered by the child's pediatricians. Sean alleged that he feared that either Kelly or Kelly's parents were abusing the child. Sean requested that the court find Kelly's motion

frivolous, award him attorney fees for having to defend the motion, and award him physical custody of the child.

Sean moved the trial court for a change of physical custody on April 24, 2009. Sean alleged that, during the parties' divorce proceedings, four neglect referrals were made to the Department of Human Services (DHS) because Kelly made "veiled accusations" that Sean was abusing the child and of redness of the child's vagina and blood in her stool. Sean further alleged that the child's pediatricians, Dr. McKinnon and Dr. Filek[1], determined that Kelly was subjecting the child to excessive medical testing against their advice to create evidence to restrict Sean's parenting time.

On April 28, 2009, Kelly moved to dismiss Sean's motion to change custody, insisting that it was clear from Sean's motion that there were no changed circumstances justifying a change of custody. On the same day, Kelly filed an amended motion regarding parenting time, alleging that the child displayed the following: withdrawal, self-inflicted physical harm, distress, fear of both men and Sean, inappropriate use of toys, aggression, sleep disruptions, and inability to cope with normal situations. Kelly further reiterated the claims against Sean in her earlier motion.

The trial court appointed a Guardian Ad Litem (GAL) for the child and held hearings in April 2010, May 2010, and December 2010[2] to address the parties' motions. The court received testimony from several witnesses: Sean; Kelly; Dr. Wayne Simmons, an expert in psychology, child development, and custody evaluations who met with the parties and conducted a custody evaluation; Rebecca Johnston, the child's preschool teacher; Dr. Diane Kukulis, the child's play therapist who the court did not qualify as an expert; Dr. Terrance Campbell, an expert in forensic psychology who, in response to an order of the court, was hired by Sean to interview the parties and evaluate their interaction with the child; Melanie Rand, a Child Protective Services (CPS) worker who received a referral regarding the child and observed a forensic interview of the child; and David Breyer, a psychologist who performed a psychological evaluation of the parties and the child at CPS's request.

During a hearing on January 24, 2011, the trial court issued an opinion on the record. It opined as follows, in pertinent part:

> From the start of the case Defendant, Mother, has continued to attempt to limit Father's visitation and interrupt his quality time with his daughter.

[1] Throughout the transcripts of the lower-court proceedings, the names of both doctors are spelled inconsistently. For purposes of consistency, we refer to them as Doctors McKinnon and Filek.

[2] The hearing in December 2010 was held after the trial court granted a motion by Sean to reopen the evidence.

* * *

Mother also tried to limit visitations by taking the child to two different . . . pediatricians who quit because they were being used for gathering evidence. Emergency room visits were also undertaken for weighing before and after visits in an attempt to gather evidence. Then we had the allegations of Attachment Disorder in play therapy without both parents being involved in the therapy.

Now we have allegations that there have been . . . eight referrals to D.H.S.; all unsubstantiated and the last referral, as previously indicated, came the day after the Court cautioned the parents and grandparents that the conduct has to change. D.H.S. did a local investigation and used the services of David Breyer who the Court finds is one of the best evaluators I have witnessed both in private practice and on the bench.

* * *

His conclusions indicate . . . Mother is overly nurturing, in fact, I feel she is smothering the child . . . .

* * *

The Court is mindful that Mother has a medical background and both maternal grandparents do as well. . . . The Court finds that the medical knowledge has been misdirected by attempting to limit Dad's ability to parent and alienate the daughter's affection toward him.

Also, the Court finds that Mother self reports to people she knows are mandatory reporters and the Court finds that they are being used as agents of the mother.

* * *

The severity of the allegations to D.H.S. have increased. There is constant doctoring. The one report indicated there were 120 events that have been charged to Blue Cross Blue Shield. Constant interference and unwillingness to encourage a close and continuing relationship with Father and Daughter.

* * *

The moral fitness of the parties; no believable testimony or evidence against the father regarding the physical or sexual abuse of the child . . . .

* * *

Mother continues to exhibit irrational behavior and accuses father of harming the child and the accusations are escalating.

> Mother's testimony at the May and December hearings is unbelievable. The video's purpose was to show the conduct at the exchange, yet it was started before the child leaves home. No normal person would react the way you did and then have the child go to the visit. Further, you failed to record the actual transfer. Also, the testimony on 12-15-10 that the child constantly brings up complaints and accusations and you don't respond.
>
> * * *
>
> As previously indicated, Mother and, I believe, members of her family . . . have continually rejected Father's rights to have his daughter's love and affection and uninterrupted parenting time. This started out at the early date with claims of having to constantly nurse and continued with multiple unsubstantiated D.H.S. complaints. The Court finds that the mother's parents, sister and play therapist are Defendant's agents; the next time there are allegations directed at Mr. O'Farrell it will be . . . viewed as the straw that tips the scale to Mr. O'Farrell for custody. That is how close this case is. Several factors, including this one, favor Mr. O'Farrell.
>
> I'm just shy of finding clear and convincing evidence that it is in the best interests of [the child] to have custody changed to father.

Specifically addressing Kelly's parenting-time motion and the issue of attorney fees, the court stated:

> The Court is thoroughly convinced that Mr. O'Farrell's parenting time should be increased and is ordering it as follows. [The court then articulated how parenting time was to be increased.]
>
> * * *
>
> Okay, there has been an order entered regarding the payment of the G.A.L.'s cost and I find that the cost related to the visitation and custody hearings are the result of [Kelly's] fault. Therefore, Mr. O'Farrell is to be reimbursed for the costs that he has already paid and any unbilled costs should be 100 percent the responsibility of Mrs. O'Farrell as it relates to the custody and visitation issues.
>
> There has also been a request for attorney fees and pursuant to statute, I find that the primary purpose of Mrs. O'Farrell's conduct in the legal proceedings was to harm and injure Mr. O'Farrell's relationship with his daughter. She has tried to harass and embarrass him through the sexual abuse allegations. Any attorney fees he has incurred to defend this conduct are to be computed and put in an affidavit by [Sean's counsel.]

* * *

> The cost of the witness's attendance is also to be included. Dr. Campbell's evaluation costs are the responsibility of Mr. O'Farrell. I know there was a flat fee up front.

On March 10, 2011, the trial court issued a written order that denied both Sean's motion to change custody and Kelly's motion regarding parenting time and that was consistent with the court's oral opinion regarding attorney fees and costs. Kelly moved the trial court for reconsideration, which the court denied. After Sean's attorney submitted an affidavit attesting to the value of his legal services, the court issued a separate order, ordering Kelly to pay Sean's attorney $20,912 in fees and $3,555.86 in costs and to reimburse Sean's $738 cost to the GAL.

II. ANALYSIS

Kelly argues that the trial court erroneously granted Sean's request for attorney fees and costs. We disagree.

We review for an abuse of discretion a trial court's ruling on a request for attorney fees. *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008). A trial court abuses its discretion when it reaches a decision that falls outside the range of reasonable and principled outcomes. *Id.* This Court reviews for clear error a trial court's factual findings that serve as a basis for an award of attorney fees, including the finding that an action is frivolous. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005); *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). A decision is clearly erroneous where the reviewing court is left with a definite and firm conviction that a mistake has been made. *Kitchen*, 465 Mich at 661-662.

'"Awards of costs and attorney fees are recoverable only where specifically authorized by a statute, a court rule, or a recognized exception."' *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010), quoting *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). MCL 600.2591 provides that "if a court finds that a civil action . . . was frivolous, the court . . . shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney." MCL 600.2591(1). "The amount of costs and fees awarded . . . shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees." MCL 600.2591(2). MCL 600.2591(3)(a)(i) defines "frivolous" to include the following: "The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party." MCL 600.2591(3)(b) defines "prevailing party" as "a party who wins on the entire record." Determining whether a claim or defense was frivolous must be based upon the circumstances at the time it was asserted. *Hansen Family Trust v FGH Inds, LLC*, 279 Mich

App 468, 486; 760 NW2d 526 (2008). MCL 600.2591 applies in the context of post-judgment divorce proceedings. See *Keinz*, 290 Mich App at 140-143.[3]

In this case, the trial court denied both Kelly's parenting-time motion and Sean's change-of-custody motion. The court also increased Sean's parenting time. Thus, Sean was the prevailing party for purposes of Kelly's parenting-time motion. Under MCL 600.2591(3)(a)(i), Kelly's motion was frivolous if her primary purpose in initiating the motion was to harass, embarrass, or injure Sean.

The trial court found that "the primary purpose of Mrs. O'Farrell's conduct in the legal proceedings was to harm and injure Mr. O'Farrell's relationship with his daughter. She has tried to harass and embarrass him through the sexual abuse allegations." The trial court appears to have based this conclusion of frivolousness on the following factual findings: Kelly had continuously attempted to limit and interrupt Sean's parenting time and relationship with the child; numerous unsubstantiated DHS referrals were made by agents of Kelly (family members, therapist, and doctors induced by Kelly to make referrals) who Kelly knew were mandatory reporters of suspected child abuse; the severity of the allegations to DHS increased to claims that Sean sexually abused the child; Kelly's testimony and a video she took of the child demonstrating that Sean sexually abused her were not believable; the child did not display separation anxiety or detachment disorder; and there was no evidence that Sean physically or sexually abused the child.

The trial court's factual findings, including its finding regarding frivolousness, were not clearly erroneous. There is considerable record evidence supporting the court's findings, particularly that Kelly's motion to restrict parenting time was part of an ongoing effort to harass Sean and injure his relationship with the child. Evidence of Kelly's conduct before and after she moved the trial court to restrict Sean's parenting time is strong circumstantial evidence of Kelly's intent for filing the motion.

Sean, Dr. Campbell, and Breyer all testified that Kelly was not supportive of a relationship between Sean and the child. Indeed, Dr. Campbell testified that Kelly had an agenda to push Sean out of the child's life; similarly, Breyer opined that Kelly had a desire to limit Sean's involvement with the child and would try hard to make Sean look bad. There was even evidence that Kelly wanted Sean's parental rights terminated, which Dr. Campbell said there was no basis to do. Significantly, Breyer explicitly testified that Kelly was willing to use both the legal system and medical professionals to limit Sean's involvement with the child and that Kelly exhibited a "desire to influence the decisions" in the trial court through allegations that very likely were not factual.

---

[3] Trial courts also "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 the orderly and expeditious disposition of cases.'" *Keinz*, 290 Mich App at 142 n 1, quoting *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006).

Kelly's motion to restrict Sean's parenting time was a legal avenue to limit Sean's involvement with the child. In her amended motion, Kelly alleged that Sean was disrupting and negatively impacting the child's life, explaining that the child displayed characteristics of distress, withdrawal, and fear of men, including fear of Sean. Nevertheless, Dr. Campbell, Rand, and Breyer all opined that, when they observed the child, she did not exhibit signs of distress or any other sign for concern. Breyer testified that the child had an above-average vocabulary and I.Q. and adequate behavioral skills. Thus, the unsound allegations in Kelly's motion illustrate that Kelly moved the court to restrict Sean's parenting time solely to harass Sean and injure his relationship with the child.

Evidence of Kelly's conduct before and after she moved the trial court to restrict Sean's parenting time circumstantially demonstrates that Kelly attempted to harass Sean and injure his relationship with the child through her motion to restrict parenting time. The record evidence illustrates that Kelly made continuous efforts to interrupt Sean's relationship with the child, which began during the divorce proceedings and continued through her motion to restrict Sean's parenting time. Sean testified that Kelly would take the child to the doctor when she was healthy to give her the appearance of being sick solely to harm his relationship with the child. Rand corroborated Sean's assertion; she testified that, upon examining the child's medical records, she noticed a "correlation between when [the child] was being taken to the doctor and when her visits with Sean were happening"—the child "always seemed to come in just after Sean's visits." Rand noticed a pattern of Kelly taking the child to the doctor for reported vaginal irritation, but the medical personnel "did not see it." Kelly testified that there had been numerous DHS referrals against Sean as a result of her meeting with medical professionals both during and after the divorce proceedings; moreover, Kelly acknowledged that the medical professionals that she visited were mandated reporters of suspected child abuse and that she disclosed the child's alleged disclosures of sexual abuse to them. Breyer characterized Kelly's conduct as "a pattern of gradually increasing intensity of allegations against the father from somewhat benign things like questioning an injury to . . . having the child examined by medical professionals before and after visits . . . to maltreatment of the child and then alleged sexual abuse." Breyer testified that Kelly implied to him that Sean was sexually abusing the child. According to Breyer, Kelly appeared aware that the child was not being neglected or abused by Sean and that Kelly's claims of such problems were probably based on a desire to manipulate the custody arrangement and Sean's involvement with the child. Indeed, a video that Kelly recorded of the child demonstrating that Sean touched her inappropriately displays Kelly laughing after the demonstration. Finally, Breyer, Dr. Kukulis, and Kelly testified that none of the allegations of sexual abuse have been substantiated. When Rand observed the child's forensic interview, the child spoke very favorably of Sean and did not report anything concerning.

In sum, both the evidence of the circumstances of Kelly's filing of the motion to restrict Sean's parenting time and the circumstantial evidence of Kelly's conduct before and after the motion demonstrate that the motion was part of an ongoing effort to harass Sean and injure his relationship with the child. Thus, we are not left with a definite and firm conviction that the trial court mistakenly found that Kelly's motion was frivolous. See *Kitchen*, 465 Mich at 661-662; MCL 600.2591. The trial court did not abuse its discretion when it decided to award attorney fees and costs to Sean, the prevailing party on the frivolous motion. See MCL 600.2591(1).

We note that Kelly raises several arguments regarding the amount of attorney fees awarded to Sean: (1) the attorney fees would have been nominal, i.e., $2,000 or $3,000 at best, had the trial court heard Kelly's motion when it was first noticed for a hearing, (2) the matter before this Court got expensive because of Sean's motion to change custody, (3) "[m]aking [Kelly] pay all of [Sean's] attorney fees regardless of what they are for is not authorized by law," and (4) Sean "asked for $2,500 for Dr. Campbell but it has been previously represented that Dr. Campbell charged a flat fee that included testimony . . . ." We conclude, however, that Kelly has abandoned these one-sentence arguments because they are made in a cursory fashion, do not contain citation to supporting authority, and must be elaborated on factually to demonstrate that the amount of attorney fees that the trial court awarded was erroneous. See *Ykimoff v WA Foote Mem Hosp*, 285 Mich App 80, 106; 776 NW2d 114 (2009); *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004); *Begin v Mich Bell Tel Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009).

Affirmed.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Michael J. Kelly