STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE FERNANDEZ, Plaintiff-Appellee,	UNPUBLISHED June 24, 2014
v	No. 315584 Genesee Circuit Court Family Division
RAPHAEL FERNANDEZ, Defendant-Appellant.	LC No. 09-288897-DM

Before: DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

In June 2010, the trial court entered a judgment effectuating the parties' divorce, which reserved for future adjudication plaintiff's tort claims and the division of some property and marital debt. After a trial, the court entered an opinion and order finding for plaintiff on her claims of assault and battery and intentional infliction of emotional distress, awarding plaintiff $10,000 in damages for pain and suffering, awarding defendant $3,000 in damages for his loss of personal property, requiring defendant to pay two-thirds of the parties' marital debt totaling $29,678.62, and equally dividing among the parties $72,739 in proceeds from the sale of marital real estate. Defendant appeals as of right. We affirm.

I. PLAINTIFF'S TORT CLAIMS

Defendant first submits that insufficient evidence supported the trial court's ruling that defendant intentionally inflicted emotional distress on plaintiff. However, defendant failed to preserve this issue in the trial court. To preserve a challenge to the sufficiency of the evidence, a civil litigant should raise the issue in a motion for a directed verdict or other postverdict motion. *Napier v Jacobs*, 429 Mich 222, 229-230; 414 NW2d 862 (1987); *Shaw v City of Ecorse*, 283 Mich App 1, 22; 770 NW2d 31 (2009). A civil litigant's failure to raise a sufficiency challenge in the trial court waives the issue absent a "showing of compelling or extraordinary circumstances amounting to a fundamental miscarriage of justice." *Napier*, 429 Mich at 237-238. Defendant did not move in the trial court to contest the sufficiency of the evidence supporting plaintiff's claim of intentional infliction of emotional distress and offers on appeal no argument that manifest injustice would occur if we do not review the issue.

Irrespective of the lack of preservation, ample evidence supported the trial court's ruling to find defendant liable for intentional infliction of emotional distress. When reviewing the

sufficiency of the evidence, we view the evidence in the light most favorable to the plaintiff and draw every reasonable inference in the plaintiff's favor. *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 17; 837 NW2d 686 (2013). If a review of the evidence reveals that reasonable minds could differ on a relevant matter, we leave the matter to the trier of fact. *Mull v Equitable Life Assurance Society of United States*, 196 Mich App 411, 421; 493 NW2d 447 (1992).

To prove a claim of intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct by the defendant, (2) intent or recklessness by the defendant, (3) causation, and (4) the plaintiff's experience of severe emotional distress. *Walsh v Taylor*, 263 Mich App 618, 634; 689 NW2d 506 (2004). For conduct to qualify as sufficiently extreme and outrageous, it must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. A defendant is not liable for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Lewis v LeGrow*, 258 Mich App 175, 196; 670 NW2d 675 (2003) (quotations and citations omitted).

After reviewing the record in the light most favorable to plaintiff, we conclude that sufficient evidence supported the trial court's finding that defendant inflicted extreme, outrageous, and intentional conduct in the form of several assaults. Plaintiff estimated that during the parties' marriage, defendant had pushed her hundreds of times and struck her repeatedly. Plaintiff testified about three acts of violence that defendant had committed in the marital home on February 13, 2008, June 7, 2009, and June 30, 2009. In plaintiff's recollection, while the parties' young son was sleeping in the house, defendant dragged her across the floor, punched her, struck her face, and threatened that if she considered taking their son, defendant would "disappear with him, and you'll never see him again." On June 7, 2009 in front of the parties' son, defendant called plaintiff a b***h, struck her face with a plastic cup, punched her head, shoved her into a bathtub, again threatened that if she contemplated taking away the boy, "it will never happen while I am alive on this earth," and also threatened to kill her. The police arrested defendant and photographed plaintiff's injures, and plaintiff secured a personal protection order (PPO) against defendant.

Plaintiff described that on June 30, 2009, defendant violated the PPO by entering the marital home, threatening to kill her for ruining his life, wrestling her to the ground, hitting her arms and shoulders, grabbing her throat and strangling her, placing his hands over her nose and mouth, grabbing her head and twisting her neck, striking the back of her head with a reading lamp; plaintiff repeatedly pled for her life during the attack. The police photographed lacerations on plaintiff's head and other abrasions and contusions all over her body. Plaintiff testified that after defendant's initial threats to take their child, she lived in persistent fear of defendant because she believed he would harm her or their child if she tried to leave him. Defendant admitted that the parties had argued and physically fought on February 13, 2008, June 7, 2009 and June 30, 2009, but he blamed the commencement of the fights on plaintiff and her excessive consumption of alcohol. Defendant also acknowledged that on June 30, 2009, he entered plaintiff's house in violation of the PPO.

Although defendant testified that he had acted in self-defense during June 30, 2009 incident, as the trier of fact the trial court possessed the prerogative to weigh the witnesses'

credibility and draw reasonable inferences from the evidence. *Zaremba Equip Inc*, 302 Mich App at 17. The record reasonably supported the trial court's finding that defendant had initiated the assaults and not acted in self-defense. And ample evidence supported the trial court's conclusion that the series of violent acts and threats that defendant undertook against plaintiff qualified as extreme and outrageous. Defendant's conduct went beyond "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities," and also went "beyond all possible bound of decency" such that it is "regarded as atrocious and utterly intolerable in a civilized community." *Lewis*, 258 Mich App at 197 (quotations and citations omitted).

Sufficient trial evidence also demonstrated that defendant's actions caused plaintiff severe emotional distress. Plaintiff testified that between February 13, 2008 and June 30, 2009, she suffered emotional distress and sleeplessness because of defendant's threats to take the parties' son and hurt her. Even after she obtained the PPO, she worried that defendant would try to enter her house. The record also contained evidence that plaintiff suffered significant physical trauma during the brutal attack by defendant, which caused lingering pain in her neck. Plaintiff testified that the trauma from the June 30, 2009 incident required her to treat with a mental health therapist. She further testified that at the time of trial she still suffered nightmares, felt easily startled and afraid, and could not perform her job as effectively as she could before the incident. The evidence thus gave rise to a reasonable inference that defendant's course of conduct caused plaintiff to experience severe emotional distress, a question for the trial court. *LeGrow*, 258 Mich App at 196; *Mull*, 196 Mich App at 421.

II. DIVISION OF PERSONAL PROPERTY

Defendant also argues that the trial court erred in dividing the parties' marital property and debt. In deciding issues on appeal involving the division of marital property, this Court first reviews the trial court's findings of fact. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). We review for clear error the trial court's findings of fact. *Hodge v Parks*, 303 Mich App 552, 554; 844 NW2d 189 (2014). Clear error exists if after reviewing the record, we possess the definite and firm conviction that the trial court made a mistake. *Id*. at 555. We defer to a trial court's findings when based on the credibility of the witnesses. *Id*. "This Court further reviews whether a trial court's dispositional rulings are fair and equitable in light of the trial court's findings of fact." *Id*. (quotation and citation omitted). We may reverse the dispositional rulings only if we possess the definite and firm conviction "that the disposition is inequitable." *Id*. (quotation and citation omitted); see also *Sparks*, 440 Mich at 152.

"The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances." *Berger v Berger*, 277 Mich App 700, 716-717; 747 NW2d 336 (2008). A court "need not divide the estate into mathematically equal portions," but the court should clearly explain "any significant departure from congruence." *Id*. at 717. To achieve an equitable division, the court should take into account the duration of the marriage, the parties' contributions to the marital estate, the parties' stations in life, the parties' earning abilities, the parties' ages, health and needs, a party's fault in the breakdown of the marriage, and any other equitable circumstance relevant to the particular case. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996); *Knowles v Knowles*, 185 Mich App 497, 499-501; 462 NW2d 777 (1990). The court must "make specific findings of fact regarding" the factors it deems relevant. *Sparks*, 440 Mich at 159.

We reject defendant's suggestion that the trial court improperly limited the scope of its inquiry regarding the disputed marital property and debt. The judgment of divorce settled many issues, but preserved for a subsequent resolution at trial issues concerning the division of some marital debt and property and the adjudication of plaintiff's tort claims. The parties agreed to the scope of the issues that the trial court resolved.

Furthermore, the trial court's findings regarding defendant's personal property did not qualify as clearly erroneous. Defendant alleged that plaintiff sold, stole or destroyed his personal property valued in excess of $450,000, including antiques, artwork, music, and other expensive items like computer equipment, a sail boat and snowmobiles. He claimed that he could not recover much of his personal property because of his incarceration after the June 30, 2009 domestic violence incident. Defendant testified that he had recovered only basic items during a first, police-supervised visit to the marital home. He insisted that he could not enter the home during a second visit. Defendant did not produce receipts or other documentation supporting his claim that he lost a significant number of valuable personal property items. The parties do not dispute that plaintiff held a garage or estate sale before vacating the marital home. She reported having generated around $1,000 from the sale.

Plaintiff and her father, Edward Fisher, testified that defendant had entered the marital home during his second visit to retrieve personal property and loaded his SUV and a boat with personal items. Fisher denied that defendant had been limited in the number or type of items he took that day. Fisher also testified that he had told defendant to contact him if he wanted to retrieve anything at a later date. But the evidence reflected that defendant did not return until after his incarceration had ended. Plaintiff testified that she had never seen or heard defendant talk about expensive items that he claimed at trial to possess. Fisher and plaintiff's mother, Donna Fisher, testified that the marital home had been in disrepair, full of worthless junk and did not contain the valuable keepsakes that defendant claimed.

Defendant additionally suggests that the trial court erred in ignoring that plaintiff forged his name to a check she received after surrendering a Saturn SUV. Plaintiff denied recalling with certainty whether she had done so, but acknowledged keeping the $2,000 in proceeds. However, the trial court also heard testimony that defendant had generated and kept for himself around $4,000 from the sale of a 1995 pickup, in direct contravention of the judgment of divorce that required the placement of those funds in escrow. Additional evidence substantiated that defendant may have improperly received an additional $4,000 in proceeds from the sale of two boats also subject to the divorce judgment. We conclude that the trial court properly weighed the parties' conduct in its property distribution, and we detect no error in the court's neglect to specifically criticize or sanction plaintiff for this purported misconduct. *Sparks*, 440 Mich at 158-160.

Our review of the entire record concerning defendant's personal property claims does not leave us with the definite and firm conviction that the trial court made a mistake. *Johnson v Johnson*, 276 Mich App 1, 10-11 (lead opinion by FORT HOOD, J.), 12 (concurring opinion by O'CONNELL, J.); 739 NW2d 877 (2007). In light of the relevant record regarding the parties' personal property, the trial court did not clearly err in finding that defendant likely left some property in plaintiff's possession, but not nearly property of the type or value that he alleged. We decline to revisit the trial court's assessment of witness credibility and "give[] special

deference to [the] trial court's findings . . . based on the credibility of the witnesses." *Johnson*, 276 Mich App at 11 (quotation and citation omitted). We conclude that the trial court reached fair and equitable conclusions concerning the parties' personal property.

III. DIVISION OF MARITAL DEBT

The record likewise supported the trial court's division of the parties' credit card debt. Plaintiff testified that she had several credit cards in her name, which she had used for family living expenses during the marriage. The parties' do not dispute that during the marriage plaintiff continually worked as a registered nurse and defendant did not work for a period of years. To the extent that the trial court assessed the witnesses' credibility regarding the use of credit cards, we defer to the court's determination that plaintiff used her credit cards to provide for the household. *Johnson*, 276 Mich App at 11. With respect to defendant's testimony to his belief that he would incur debt in the future as a consequence of one or more lawsuits that banks intended to file against him, the trial court did not clearly err in finding this debt speculative and inappropriate to include in its division of marital debt. Nor did the trial court clearly err in finding that defendant failed to supply clear evidence of additional credit card debt in his name as constituting marital debt. We conclude that the trial court equitably divided the parties' debt.

IV. DIVISION OF REAL ESTATE SALE PROCEEDS

Finally, we do not possess a definite and firm conviction that the trial court inequitably split evenly the proceeds from the sales of real properties. Plaintiff testified that during the marriage she had contributed significant funds toward the Lake Fenton and Old Hickory properties and the parties bought the Oak Road property with a home equity loan accumulated during the marriage. Although defendant testified that he alone paid for the Lake Fenton parcel, the trial court remained free to accept as credible plaintiff's testimony that she spent some of her retirement funds to help pay off the property and pay taxes on the property. The record also supported the trial court's finding that plaintiff contributed to fees, mortgage payments and taxes on the Old Hickory property. The trial court did not clearly err in finding that the Lake Fenton and Oak Road properties constituted marital property. In light of the evidence showing that both parties contributed to the purchase and maintenance of the Lake Fenton, Oak Road and Old Hickory properties, we conclude that the trial court fairly and equitably awarded each party 50% of the proceeds derived from the sale of the Lake Fenton and Oak Road properties.

We affirm.

/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly