# STATE OF MICHIGAN

# COURT OF APPEALS

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| STEVEN A. GRANITZ,<br><br>Plaintiff/Counterdefendant-Appellee, | UNPUBLISHED<br>November 1, 2007 |
| v | No. 272535<br>Oakland Trial Court |
| DEANNA L. GRANITZ,<br><br>Defendant/Counterplaintiff-Appellant. | LC No. 2005-714418-DM |

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

In this divorce action, defendant appeals as of right the trial court's entry of a judgment of divorce. We affirm in part, vacate in part, and remand.

## I. FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant married in 1994. They had three children who ranged from six to eleven years of age when the divorce judgment was entered. Two of the children suffer from a form of autism and have special needs.

Plaintiff filed for divorce in November 2005. Defendant filed a counterclaim for divorce a month later. The parties contested three issues: child support, spousal support, and the division of property.

The parties stipulated to mediation, which took place on June 10, 2006, a Saturday. At the mediation, the parties negotiated a settlement. The mediator spoke the terms of the settlement into a tape recorder. The settlement terms included child support payments by plaintiff in the amount of $500 a month until the marital home was sold or foreclosed, or until plaintiff failed to pay the mortgage for more than two consecutive months. If any of these contingencies occurred, the child support payments would increase to $1,448.56 a month, the amount required under the Michigan Child Support Formula Manual. The parties agreed that there would be no spousal support except in the event that plaintiff filed bankruptcy and his creditors sought payment from defendant. The tape-recorded property settlement allocated the marital home and 100 percent of its equity to plaintiff. Defendant agreed that she and the

children would vacate the home by August 21, 2006. Plaintiff agreed to pay defendant $25,000, with $10,000 to be paid by June 30, 2006 and the balance on the sale of the marital home.

During the mediator's recitation of the settlement and again at the conclusion, the parties expressed understanding of and agreed with the various articulated terms. In response to questions posed by the mediator, both denied threats or coercion during the mediation process. At the conclusion of the mediation, plaintiff and defendant signed a document titled "Acknowledgment of Consent Settlement," which recited that they had "freely" chosen to be bound by the terms placed on the recording and that they waived their right to a trial "on the agreed upon issues."

On June 12, 2006, two days after the mediation, Steven G. Cohen, a newly retained counsel for defendant, faxed a letter to plaintiff's counsel advising that defendant did "not consider this case settled," and that Cohen intended to seek an adjournment of the trial scheduled for June 16, 2006.

The next day, June 13, 2006, plaintiff moved for entry of a judgment of divorce. That same day, the trial court entered an Order Waiving Proper Notice for this motion and scheduling a hearing for the next morning.

At the hearing on June 14, 2006, Cohen presented the trial court with a signed substitution of counsel document. The trial court refused to sign the substitution, however, and instead inquired of defendant's original attorney, Susan Paletz, whether the parties had reached a settlement pursuant to MCR 3.216(H)(7). Paletz answered in the affirmative. The trial court directed that the settlement terms be placed on the record, after which it found sufficient evidence that the parties had entered into a settlement agreement that complied with the court rule.

Cohen requested that the trial court set aside the settlement "[o]n the basis of duress." In response to an inquiry by the trial court, Paletz denied that any duress had influenced defendant's entry into the settlement. Paletz also advised the trial court that the tape recording of the settlement terms had not yet been transcribed, and therefore, a proposed judgment was unavailable. The trial court replied, "This is my oldest case, so this case is either going to get completed today or it's going to trial Friday." The trial court subsequently took brief testimony from plaintiff, granted a judgment of divorce, and ordered that the parties prepare a judgment by July 5, 2006. The trial court suggested that if defendant had "issues" with the judgment as prepared, she could "bring them before the Court in the proper way." The trial court then signed the substitution and informed Cohen that the initial issue requiring resolution was whether a proposed judgment complied with the mediation agreement. The trial court concluded, "If there are other issues, those are to be raised after the judgment is entered."

Plaintiff filed a proposed judgment under the seven-day rule, MCR 2.602(B)(3). Defendant filed an objection, but did not submit an alternate proposed judgment as required by MCR 2.602(B)(3)(c). Defendant's objections focused on purported inconsistencies between the mediated settlement provisions and the provisions contained in plaintiff's proposed judgment of divorce. She also asserted that the settlement's terms qualified as "unconscionable" and that it had been obtained through fraud or duress.

In response, plaintiff admitted that the proposed judgment included provisions that appeared nowhere in the audio record of the settlement. He asserted that the provisions were mandated by statute or court rule or were customary, but at the hearing on July 5, 2006, he consented to the removal of some of these provisions. The trial court ultimately entered the judgment and admonished Cohen for failing to file an alternate proposed order. Sua sponte, the trial court also found that "under [MCR] 2.114" defendant's objections "were posed for purpose of delay." The following colloquy ensued:

> *The Court*: Do you want attorney fees?
>
> *Plaintiff's counsel*: Yes, your Honor.
>
> *The Court*: How much do you want?
>
> *Plaintiff's counsel*: $1,500.
>
> *The Court*: Granted.

Defendant filed a motion to set aside the judgment of divorce on the basis of the trial court's failure to explain on the record its reasons for deviating from the child support formula. No other issues were raised in this pleading. The trial court denied defendant's motion because settlement of this issue had occurred at the mediation. This appeal followed.

## II. ANALYSIS

Defendant first contends that the trial court erred by shortening the notice period applicable to plaintiff's motion for entry of the judgment of divorce because MCR 2.603, the rule governing the entry of defaults and default judgments, also governs the entry of a divorce judgment incorporating a settlement agreement between the parties.[1] As authority for the proposition that MCR 2.603 applies in this domestic relations action, defendant invokes MCR 3.210(B), which provides in relevant part as follows:

> (1) Default cases are governed by MCR 2.603.
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> (2) A judgment of divorce, separate maintenance, or annulment may not be entered as a matter of course on the default of the defendant because of failure to appear at the hearing or by consent. Every case must be heard in open court on proofs taken, except as otherwise provided by statute or court rule.

By its plain language, MCR 3.210(B) requires that every divorce case must be heard in open court on proofs taken. The rule does not state, however, that cases in which the basis for a

[1] Subrule 2.603(B)(1)(c) contains an inflexible minimum seven-day notice period when a motion for entry of a default is filed.

judgment is the parties' agreement are to be treated as default actions. As contemplated by MCR 2.603(A)(1), a default occurs when "a party against whom a judgment for affirmative relief is sought *has failed to plead or otherwise defend*," not when, as here, a party participates in the proceedings. (Emphasis added). Accordingly, MCR 2.603 does not apply.

We next must consider whether the trial court appropriately decided to shorten the seven-day notice period that generally applies to motions filed under MCR 2.119. We review de novo the legal question involved in interpreting and applying a court rule. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 456; 733 NW2d 766 (2006). Pursuant to MCR 2.119(C)(1), a trial court, for good cause, may shorten the notice period between the service of a motion and the time set for a hearing on the motion. Good cause means "a legally sufficient reason." *In re FG*, 264 Mich App 413, 419; 691 NW2d 465 (2004). The trial court failed to articulate any reason for shortening the seven-day notice period to less than 24 hours. Nevertheless, defendant has failed to demonstrate that she was prejudiced by the trial court's decision to proceed with taking the proofs necessary to enter a judgment of divorce. The court provided the parties with several weeks in which to prepare the judgment, and advised Cohen that he could bring before it at a later time any "issues" with the judgment or the circumstances surrounding the mediated settlement.

Defendant further argues that she was denied a fair opportunity to respond to plaintiff's motion for entry of the divorce judgment because the trial court refused to permit Cohen to speak on her behalf. But defendant has failed to cite any authority supporting her position, thus abandoning appellate review of this claim. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) (observing that an appellant may not merely announce her position and leave it to this Court to discover and rationalize the basis for her claims, nor may she give issues cursory treatment with little or no citation to supporting authority). Moreover, our review of the record reveals no support for defendant's argument that the trial court prohibited Cohen from speaking after it approved the attorney substitution.

Defendant next claims that the trial court erred in ordering child support as agreed to by the parties, without first determining whether the ordered amount was just and appropriate. We review for an abuse of discretion a trial court's ultimate decision to award child support. *Peterson v Peterson*, 272 Mich App 511, 515; 727 NW2d 393 (2006). "Whether a trial court properly operated within the statutory framework relative to child support calculations and any deviation from the child support formula are reviewed de novo as questions of law." *Id.* at 516.

A trial court generally must order child support in an amount determined by the child support formula. MCL 552.605(2); *Peterson*, *supra* at 516. A trial court may enter a child support order that reflects the agreement of the parties and deviates from the child support formula only when it articulates its rationale in accordance with MCL 552.605, which provides in relevant part as follows:

> (2) Except as otherwise provided in this section, the court shall order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau as required in section 19 of the friend of the court act, MCL 552.519. The court may enter an order that deviates from the formula if the court determines from the facts of the case that application

of the child support formula would be unjust or inappropriate and sets forth in writing or on the record all of the following:

> (a) The child support amount determined by application of the child support formula.
>
> (b) How the child support order deviates from the child support formula.
>
> (c) The value of property or other support awarded instead of the payment of child support, if applicable.
>
> (d) The reasons why application of the child support formula would be unjust or inappropriate in the case.
>
> (3) Subsection (2) does not prohibit the court from entering a child support order that is agreed to by the parties and that deviates from the child support formula, if the requirements of subsection (2) are met.

The record reveals that the trial court failed to set forth in writing or on the record any reason for a deviation from the child support formula other than that the parties had negotiated a resolution of this issue. The trial court did not specifically address any of the factors set forth in MCL 552.605(2).

The parties agreed that plaintiff would initially pay only $500 a month in child support because he had assumed the obligations associated with the marital home. But the agreement of the parties does not relieve the trial court of its duty to justify on the record or in writing why ordering child support in accordance with the child support formula "would be unjust or inappropriate." *Burba v Burba (After Remand)*, 461 Mich 637, 645-646; 610 NW2d 873 (2000). Our review of the record leaves the impression that the trial court lacked awareness of its statutory duty pursuant to MCL 552.605(3), because it denied defendant's motion to set aside the judgment of divorce solely on the basis that the judgment accurately reflected the terms of the tape-recorded settlement.

Plaintiff suggests that the trial court properly deviated from the child support formula because § 2.14 of the Michigan Child Support Formula Manual provides that, when "a parent is ordered to pay taxes, mortgage, home insurance, telephone, or utilities in an ex parte or temporary order, those expenses should be subtracted from that parent's net income." We observe, however, that § 2.14 does not apply to the facts of this case, which do not involve any ex parte or temporary child support orders.

Although we agree with defendant that the trial court failed to satisfy its statutory duty under MCR 552.605(3), we reject that the remedy is to vacate the entire judgment of divorce. The trial court's error can be corrected by vacating solely the child support order. Thus, we

vacate that portion of the judgment and remand for the trial court to determine whether requiring plaintiff to pay $1,448.56 a month in child support before he is relieved of paying the obligations associated with the marital home would qualify as unjust and inappropriate.[2]

Defendant additionally insists that we should vacate the judgment of divorce because pages seven through ten contain provisions to which the parties did not agree during the mediation. We find that the parties in fact did agree at mediation to the first four provisions on page seven of the judgment, regarding bankruptcy, dependency exemptions, attorney fees, and attorney liens. The next three provisions, dower release and statutory pension and insurance provisions, along with the last provision of the judgment, the governing law provision, were mandated by statute and court rule. See MCL 552.101(1)-(4), MCR 3.211(B)(1)-(2), MCR 2.602(A)(3). Accordingly, the proposed judgment's inclusion of these provisions did not preclude the trial court from entering the judgment of divorce. The inclusion of the challenged provisions has not prejudiced defendant.

Plaintiff concededly included several provisions in the judgment of divorce, entitled, "constructive trust provision," "mutual release and hold harmless agreement," "finality/retention of jurisdiction," "modification or waiver by parties," "encumbrances on property," and "execution and recording of documents," to which the parties did not agree at mediation, and which were not mandated by statute or court rule. Defendant does not contest, however, that these provisions customarily appear in a judgment of divorce. Defendant also raises no claim that these provisions actually or materially changed the terms of the settlement to which she and plaintiff had agreed at the mediation. Consequently, we cannot conclude that the trial court abused its discretion by entering the judgment of divorce containing these provisions. *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007).

Defendant additionally avers that this Court should vacate the judgment of divorce as unconscionable. Defendant failed to properly present this issue within the statement of questions presented. *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 553; 730 NW2d 481 (2007). Defendant also failed to preserve this issue by raising it in her motion to set aside the judgment, which contended only that the child support order was unconscionable, but made no reference to the balance of the judgment. Despite defendant's suggestion in her prior objections to plaintiff's proposed judgment of divorce that the settlement agreement represented the product of duress and otherwise qualified as unconscionable, defendant at no time thereafter sought an evidentiary hearing regarding the issues of duress or unconscionability. Defendant's failure to pursue these challenges before the trial court render us unable to properly review these claims. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005).

Defendant next asserts that the trial court erred in sanctioning her in the amount of $1,500 pursuant to MCR 2.114(E). We review for clear error a trial court's decision to impose sanctions. *Schadewald v Brulé*, 225 Mich App 26, 41; 570 NW2d 788 (1997). Clear error exists when some evidence supports the trial court's finding, but a review of the entire record leaves

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[2] Our order does not affect the child support orders that were subsequently entered after plaintiff failed to pay the mortgage for more than two consecutive months.

this Court with the definite and firm conviction that the trial court made a mistake. *Id*. This Court reviews for an abuse of discretion a trial court's determination concerning an appropriate amount of sanctions. *Maryland Cas Co v Allen*, 221 Mich App 26, 32; 561 NW2d 103 (1997).

Pursuant to MCR 2.114(D), the trial court sanctioned defendant $1,500 because it found that she objected to plaintiff's proposed judgment of divorce for the purpose of "delay." After reviewing the record, we find that it does not support the trial court's decision to sanction defendant and that under the circumstances in this case, the trial court clearly erred in finding sanctions warranted.

According to MCR 2.114(D)(3), an attorney's signature on a pleading constitutes a certification that "the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." But the trial court's declaration that defendant's objections to the proposed judgment were "posed for purpose of delay" lacks support in the record. Furthermore, the court failed to make any factual findings concerning the nature or extent of the delay before seeking plaintiff counsel's opinion as to an appropriate sanction.

Plaintiff filed his proposed judgment on June 19, 2006, and defendant filed her objections four days later. The trial court held a hearing to settle the objections on July 5, 2006, the date it originally had identified as the outside time limit for entry of the judgment. Defendant's objections thus did not, in fact, cause any delay. We also fail to detect in the record any indication that defendant filed her objections for the *purposes* of delay.

Furthermore, to warrant the imposition of a sanction under MCR 2.114(E), a court must find that a party filed a pleading for an improper purpose, in this case "unnecessary delay." In this case, however, the record is devoid of any evidence that defendant lodged her objections to the judgment for the purpose of *unnecessary* delay. To the contrary, the record reveals that defendant's objections had some merit, as plaintiff agreed to withdraw several provisions form the proposed judgment at the time of the July 5, 2006 hearing. We thus conclude that the trial court clearly erred in deciding to sanction defendant.

Lastly, we deny plaintiff's related request for sanctions for a vexatious appeal pursuant to MCR 7.216(C). Not only has plaintiff failed to properly present his request, MCR 7.211(C)(8), defendant's appeal does not qualify as vexatious because some of her arguments had merit.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher