

STATE OF MICHIGAN
COURT OF APPEALS

KERI HARBRECHT,

Plaintiff-Appellee,

v

KIM GUNTHER,

Defendant-Appellant.

UNPUBLISHED

July 29, 2008

No. 278657

Livingston Circuit Court

LC No. 06-022288-CZ

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court order granting plaintiff's motion to voluntarily dismiss her lawsuit and denying defendant's motion for costs, including attorney fees. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

While attending a music program at their children's school, defendant took two photographs of plaintiff while she was turned away. Defendant later added text to the photographs, which we conclude the plaintiff rightfully viewed as insulting and embarrassing. Defendant sent the pictures to others by an email. Plaintiff also received a copy of the email with the attached pictures. Defendant refused to tell plaintiff who had received the email and attached pictures despite plaintiff's indication that she would file a lawsuit if defendant refused to provide the information. After filing this lawsuit, plaintiff learned by deposing defendant that the photographs had only been sent to four other people. Plaintiff then decided to voluntarily dismiss her complaint, at which point defendant sought attorney fees in the amount of \$20,705.

In denying sanctions, the trial court noted that \$7,000 of the requested attorney fees were incurred after plaintiff conveyed her intention to seek dismissal of the lawsuit. The court opined that the lawsuit was not frivolous and that, given defendant's "nasty" actions, the equities balanced in plaintiff's favor. For these reasons, the court denied sanctions.

On appeal, defendant argues that the lawsuit was frivolous and that the attorney's certification of the lawsuit violated MCR 2.114(D). This rule provides that an attorney's signature on a pleading certifies "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, [that] the document is well grounded in fact" MCR 2.114(D)(2). If signed in violation of this rule, the court should impose a sanction that "may include an order to pay to the other party or parties the amount of the reasonable expenses

incurred because of the filing of the document, including reasonable attorney fees.” MCR 2.114(E) (emphasis added). MCL 600.2591(1) and (2) require an award of costs and fees, including attorney fees, if a frivolous claim is brought. Subsection (3)(a) defines “frivolous” to include a situation where “[t]he party had no reasonable basis to believe that the facts underlying that party’s legal position were in fact true.” MCL 600.2591(3)(a)(ii). A trial court’s finding with regard to whether a claim or defense was frivolous will not be disturbed on appeal unless the finding is clearly erroneous. *Farmers Ins Exchange v Kurzmann*, 257 Mich App 412, 423; 668 NW2d 199 (2003).

An invasion of privacy claim based on public disclosure of embarrassing private facts about the plaintiff requires that the disclosed information concern the plaintiff’s private life and be highly offensive to a reasonable person and of no legitimate concern to the public. Additional information about matters that are already public will not suffice. It is sufficient if the publication is to church members, family, or neighbors, and consequently we conclude it would also suffice if publicized to the parents of plaintiff’s child’s schoolmates. See *Tobin v Civil Service Comm*, 416 Mich 661, 672; 331 NW2d 184 (1982); *Fry v Ionia Sentinel-Standard*, 101 Mich App 725, 730; 300 NW2d 687 (1980).

We find no clear error in the trial court’s determination that plaintiff’s claim was not frivolous. Although the photographs were taken in public, it was not the photographs per se, but the photographs with the added comments or captions, that were “highly offensive to a reasonable person”; they certainly were of no legitimate concern to the public. The photographs were in fact sent to others who were plaintiff’s friends or parents of children at the school, which would constitute a public whose knowledge of those facts would be embarrassing to plaintiff.

Having determined that plaintiff’s claim was not frivolous, we review the trial court’s decision to deny attorney fees for an abuse of discretion. *Farmers Ins, supra*. We find no such abuse.

Affirmed.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello