STATE OF MICHIGAN

COURT OF APPEALS

STEVEN NOWICKI,

Plaintiff-Appellant,

v

MARY ANN SOLECKI-NOWICKI,

Defendant-Appellee,

and

JULIE HLYWA,

Appellee.

UNPUBLISHED
December 22, 2009

No. 288775
Macomb Circuit Court
LC No. 1993-003060-DC

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders awarding defendant attorney fees and costs and denying plaintiff's motions for disqualification and change of venue. We affirm in part, vacate in part, and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The orders at issue are part of an extensive course of litigation concerning plaintiff's child custody dispute and child support obligation. In May 2008, the trial court sua sponte ordered plaintiff's fee waiver no longer in force. The waiver had been granted in 1996, and the court required plaintiff to establish his indigence before another waiver would be issued. This prompted plaintiff to move for the trial judge's disqualification, disqualification of the entire Macomb Circuit bench, and change of venue.

The trial court heard plaintiff's motions on May 19, 2008. Plaintiff had representation at the hearing. The court stated that the waiver of fees for plaintiff should be reviewed because it was granted 12 years earlier and had not been reviewed since. The court also denied plaintiff's motions for disqualification, stating that ordering him to pay fees was not a showing of prejudice, and for change of venue, stating that plaintiff's purported reason—that he could not get a fair hearing in Macomb—was "not why we change venue." Defense counsel asked for $750 in attorney fees because "this is the third time he's made this request." When the court indicated it would grant this ("This is a frivolous motion as far as I'm concerned"), plaintiff's

counsel argued that he was entitled to an evidentiary hearing. The court agreed, saying, "You're absolutely right." Plaintiff sought review of the court's disqualification decision. In July 2008, the opinion and order of Chief Judge of the Macomb Circuit Court, Richard Caretti, was entered. He found that the trial judge had no bias or prejudice toward plaintiff, and so disqualification was not required.

The evidentiary hearing on attorney fees was held on October 10, 2008. Plaintiff was not present, but his attorney appeared. Defense counsel stated she had prepared an affidavit of her fees, totaling $3,295.50. When plaintiff's counsel objected to the reasonableness of the fees, the court said:

> I'll be more than happy to have a hearing in this matter. That's why I set a hearing, for the reasonableness of the fees. Your client has failed to appear. As far as I'm concerned, he's in default. I'm going to accept her side. You can't testify.

The resulting order, awarding defendant $3,295.50 in fees, states that defendant's attorney's request for fees in the amount requested was granted "[d]ue to [plaintiff's] failure to appear for the duly noticed Evidentiary Hearing relative to the attorney fees issue." On appeal in this Court, plaintiff seeks review of this order as well as the May order denying his motions for disqualification and change of venue.

Plaintiff does not challenge the court's basis for awarding fees, but instead argues that the trial court erred in granting the award without first determining whether plaintiff has the ability to pay when the record shows plaintiff is disabled, unemployed, and indigent; awarding $3,295.50 in attorney fees to defendant without any evidence beyond defense counsel's unsworn statement; and prejudicially issuing a default judgment against plaintiff for failing to appear and refusing to listen to plaintiff's counsel, who was present.

A trial court's decision to grant or deny attorney fees is reviewed for abuse of discretion. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007). The trial court has not abused its discretion if the outcome of its decision is within the range of principled outcomes. *Id*. Factual findings on which the decision is based are reviewed for clear error. *Id*.

In support of his assertion that the court must consider his inability to pay defendant's fee, plaintiff points to MCR 3.206(C)(2)(a), which states, "A party who requests attorney fees and expenses must allege facts sufficient to show that . . . the party is unable to bear the expense of the action, and that the other party is able to pay[.]" However, it is clear from the May 19 hearing that the court was awarding fees as a sanction for filing a frivolous claim, MCR 2.114(F); MCR 2.625(A)(2). This ground does not require a showing of the sanctioned party's ability to pay. Thus, the court was not required to take evidence regarding plaintiff's ability to pay. Moreover, the record established that plaintiff was getting social security disability payments and had over $6,000 in assets.

However, plaintiff's argument regarding the lack of evidence supporting the amount of the award has merit. MCR 2.114(F) provides that "[i]n addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). . . ." MCR 2.625(A)(2) provides that "[i]n an action filed on or after October 1, 1986, if the court

finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591 states in relevant part:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action 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.
>
> (2) The amount of costs and fees awarded under this section 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.

In determining whether the attorney fees are reasonable, the trial court must examine: (1) the professional standing and experience of the attorney; (2) the skill, time, and labor involved; (3) the fee charged and the results achieved; (4) the degree of difficulty; (5) the expenses incurred; and (6) the nature and length of the professional relationship between the attorney and client. *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 171-172; 712 NW2d 731 (2005). The burden of establishing that the fees are reasonable is on the requestor. *Smith v Khouri*, 481 Mich 519, 531-532; 751 NW2d 472 (2008); *Reed v Reed*, 265 Mich App 131, 165-166; 693 NW2d 825 (2005). We review for clear error a trial court's award of sanctions for filing a frivolous action. *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 532; 644 NW2d 765 (2002) (internal citations omitted).

A trial court is not required to hold a hearing to determine the reasonableness of fees if the court has sufficient evidence to determine the amount of attorney fees and costs. *John J Fannon Co*, *supra* at 171. However, "[w]hen requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services. The trial court may not award attorney fees . . . solely on the basis of what it perceives to be fair or on equitable principles." *Reed*, *supra* at 166.

In this case, fees were contested and no real hearing was held. Moreover, defense counsel provided no evidence of her fees at all. In May, she made an unsworn statement, without evidentiary support, that her fee was $750. She had requested fees in her response to plaintiff's motion but did not in her brief identify the amount nor did she attach a billing statement, affidavit, or other documentation. By the time of the October hearing, the amount had somehow increased to $3,295.50, even though there is no indication in the record that she was granted fees for anything else. In October, defense counsel said she had an affidavit but none appears in the record and plaintiff was given no opportunity to identify what charges he considered unreasonable. The court simply accepted defense counsel's unsworn statement on its face. Thus, the court erred in entering an award for fees without any evidence regarding what would be a reasonable amount, let alone how they were incurred. Although either of these amounts alone might appear reasonable given the amount of work defense counsel had to do (with which the court was very familiar), the fact that the amount changed for no apparent reason between May and October is by itself reason to conclude the court erred in making the award. This fact distinguishes this case from *John J Fannon Co*, *supra*, where this Court affirmed an award of fees without a hearing where the trial court was very familiar with the case and counsel

had submitted billing statements that were part of the record. Thus, we vacate the court's awarding fees without any evidence that they were reasonable. On remand, the court must identify what evidence supports the amount to be awarded.

The trial court also erred in prohibiting plaintiff's counsel from arguing at the hearing and in awarding fees because plaintiff himself was not present at the hearing.[1] "An appearance by an attorney for a party is deemed an appearance by the party. Unless a particular rule indicates otherwise, any act required to be performed by a party may be performed by the attorney representing the party." MCR 2.117(B)(1). The trial court did not order plaintiff to appear in person at the hearing. His attorney's presence at the hearing was sufficient to serve as plaintiff's appearance. Thus, to the extent the court punished plaintiff for not showing up in person when he had not been ordered to do so, it erred. However, in light of our reversal on the amount of fees, this error could be seen as harmless. There was nothing for plaintiff's counsel to argue because defense counsel presented no evidence of her fee. On remand, the court must allow plaintiff or his counsel to identify and argue against any fees he considers unreasonable.

Defendant's final argument is that the trial court and the entire Macomb Circuit bench should have been disqualified and venue changed. The rule governing the disqualification of a judge is MCR 2.003. "A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which . . . [t]he judge is personally biased or prejudiced for or against a party or attorney." MCR 2.003(B)(1). "As a general rule, a trial judge is not disqualified absent a showing of actual bias or prejudice." *Ireland v Smith*, 214 Mich App 235, 250; 542 NW2d 344 (1995).

Initially, we note that there is no court rule provision for disqualifying an entire circuit court bench, other than one at a time. Nor can the actions of the Friend of the Court or the Chief Judge of the Macomb Circuit Court be attributed as showing bias by the trial judge. Plaintiff's only real allegation of bias by the trial judge was the judge's refusal to keep the 1996 fee waiver in place without review. "If prejudice or bias is the reason alleged for disqualifying a judge, there must be prejudice or bias in fact, and it can never be based solely upon a decision in the due course of judicial proceedings." *Kolowich v Ferguson*, 264 Mich 668, 670; 250 NW 875 (1933) (quotation omitted). Ruling against plaintiff is not the same as showing bias or prejudice, especially when all plaintiff had to do was establish his lack of income with some evidence. Plaintiff's motion for disqualification was groundless.

Change of venue is controlled by MCR 2.222, which provides:

> The court may order a change of venue of a civil action, or of an appeal from an order or decision of a state board, commission, or agency authorized to promulgate rules or regulations, for the convenience of parties and witnesses or when an impartial trial cannot be had where the action is pending. In the case of

[1] No "default" was ever entered as an order, despite the court's statement, so plaintiff's specific argument that the trial court erred in ordering a default is without merit.

> appellate review of administrative proceedings, venue may also be changed for the convenience of the attorneys. [MCR 2.222(A).]

Plaintiff is not going to trial and does not argue that some other forum is more convenient. It cannot be said that the trial judge abused his discretion in denying plaintiff's motion to change venue. *Hickman v Gen Motors Corp*, 177 Mich App 246, 251; 441 NW2d 430 (1989). The motion had no legal support.

We vacate the trial court's award of attorney fees and remand for further proceedings on that issue, and affirm the denial of plaintiff's motions for disqualification and to change venue. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck