STATE OF MICHIGAN

COURT OF APPEALS

NATHAN M. BROWN, Plaintiff-Appellant,	UNPUBLISHED April 26, 2016
v	No. 326058 Clinton Circuit Court Family Division
LYNN ANN BROWN, Defendant-Appellee.	LC No. 09-021478-DM

Before: SAWYER, P.J., and MURPHY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals by right from an order of the trial court awarding defendant the costs and attorney fees incurred in defense of plaintiff's motion to hold her in contempt for violating MCL 552.603b, and fining plaintiff $100 for filing and pursuing the motion in bad faith. For the reasons stated below, we affirm the trial court's award of costs and attorney fees, but vacate the $100 fine.

I. FACTS

The parties have been in court numerous times since their divorce in 2010, primarily regarding parenting time, but also addressing disputes about custody, personal protection orders, and, more recently, court-ordered counseling. Following an April 2014 parenting-time review hearing, the court ordered the Friend of the Court (FOC) to conduct a child support review, for which the parties were to complete a questionnaire, and submit copies of their W-2 forms for the last three years and four current paystubs.

The support order in effect at the time the trial court ordered the review was from September 2012, and required plaintiff to pay $2,044 in monthly support for the parties' three minor children. In addition, because plaintiff had violated MCL 552.603b by failing to report sales commissions as part of his income, the trial court modified plaintiff's support obligation retroactively, requiring him to pay $2,044 from September 1, 2012. We denied plaintiff's delayed application for leave to appeal. *Brown v Brown*, unpublished order of the Court of Appeals, entered December 10, 2013 (Docket No. 315911). The Supreme Court also denied plaintiff's application for leave to appeal. *Brown v Brown*, 495 Mich 1003; 546 NW2d 51 (2014).

The court-ordered support review resulted in a reduction of plaintiff's monthly support obligation to $1,303, starting in April 2014. Defendant filed an unspecified objection to the support recommendation, and while her objection was pending, plaintiff filed the motion at issue, alleging that defendant had violated certain child support orders by not informing the FOC when she began working at Sparrow Hospital late in May 2013. More significantly, plaintiff alleged, defendant had also violated MCL 522.603b by failing to report her new job, thus entitling plaintiff to retroactive modification of his support obligation back to May 2013, resulting in a credit of $13,338.[1]

Approximately two weeks before the hearing on his motion, plaintiff received a letter from FOC Senior Enforcement Officer Terri Paradise confirming that defendant had in fact notified the FOC about her new part-time job at Sparrow Hospital during a June 5, 2013 telephone conversation, at which time Paradise had updated the FOC's internal records to reflect defendant's new employment. Consequently, at the hearing on his motion, plaintiff withdrew his request that the court hold defendant in contempt. After further discussion between the parties' attorneys on the withdrawn allegations, the trial court opined that plaintiff had not brought his motion in good faith, supposing it to be "payback" for the court's previous sanction of him pursuant to MCL 522.603b, and issued a corresponding order finding that plaintiff had filed and pursued his motion in bad faith, ordering him to pay the costs and attorney fees incurred by defendant "in this frivolous motion," and ordering that he pay a $100 fine to the Circuit Court Clerk.

II. ANALYSIS

A. COSTS AND ATTORNEY FEES

Plaintiff assumes that, because the trial court characterized his motion as "frivolous," the court awarded costs and attorney fees to defendant under MCR 2.114(F), MCR 2.625(A)(2), and MCL 600.2591 (providing for sanctions related to the prosecution or defense of a civil action). The trial court did not cite the authority on which it relied for imposition of the sanction. However, "the trial court's determination did not involve a claim or defense in a civil action. See MCR 2.114(F); MCL 600.2591; MCR 2.625(A)(2). Accordingly, it appears that the trial court ordered sanctions under MCR 2.114(E)." *Kaeb v Kaeb*, 309 Mich App 556, 565; 873 NW2d 319 (2015) (parenthetical omitted).

We review a trial court's decision to award sanctions under MCR 2.114, including its findings of fact, for clear legal error. *Contel Sys Corp v Gores*, 183 Mich App 706, 710-711; 455 NW2d 398 (1990). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Id*. "When a court incorrectly chooses, interprets, or applies the law, it commits

[1] Plaintiff's motion also contained the unrelated allegation that defendant had violated the trial court's order regarding co-parenting counseling.

legal error that the appellate court is bound to correct." *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

The Court has explained the issuance of sanctions under MCR 2.114(E) as follows:

> Whenever an attorney or party signs a motion, that person's signature constitutes "certification" that he or she has "read the document" and, "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law," and that the motion was not made for "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." MCR 2.114(D). If a party brings a motion that has been signed in violation of MCR 2.114(D), the trial court must "impose upon the person who signed it, a represented party, or both, an appropriate sanction. . . ." MCR 2.114(E). The trial court may not assess punitive damages, but may order the person who signed it or a represented party to pay "the other party or parties the amount of the reasonable expenses incurred because of the filing . . . ." MCR 2.114(E). . . . [*Kaeb*, 309 Mich App at 565.]

The motion at issue alleged that defendant had violated MCL 552.603b[2] by failing to report her part-time employment at Sparrow Hospital. However, as plaintiff admitted, he knew in the fall of 2013 that defendant had reported her job to the FOC because hearings to arrive at a suitable parenting-time schedule involved extensive discussion of her work schedule. Furthermore, the hearing referee's July 15, 2014 response to plaintiff's inquiries clearly informed plaintiff that defendant had submitted the required documentation for the pending support review, and he had found no evidence of a new source of income. While the referee's response might plausibly be interpreted to mean that defendant did not report her job at Sparrow Hospital until the April 2014 support review, and therefore had violated MCL 552.603b by not reporting it in May 2013, mitigating against this interpretation is the meaning plaintiff gives to the phrase "new source of income."

At the hearing on his motion, plaintiff indicated that defendant's earnings above the $20,000 per year imputed to her constituted a "new source of income" that she should have reported. Plaintiff contends that his position, i.e., that more income received from the same employer constitutes a reportable "new source of income," is reasonably based on the trial

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[2] The statute provides as follows:

> If an individual who is required by the court to report his or her income to the court or the office of the friend of the court knowingly and intentionally fails to report, refuses to report, or knowingly misrepresents that income, after notice and an opportunity for a hearing, the court may retroactively correct the amount of support.

court's "previous interpretation of MCL 522.603b." Plaintiff's reference is to the position he alleges the trial court took when it regarded his commissions as a source of income and found him in violation of MCL 552.603b for failing to report them. However, what the trial court found was that plaintiff was in violation of MCL 552.603b because he reported his salary, but knowingly and intentionally failed to report the substantial commissions he had received. See MCL 552.602(n)(*i*).

On appeal, plaintiff asserts that he "twice sought confirmation from FOC as to whether Defendant had reported her change in status from part-time to fulltime [sic]." Because what plaintiff asked the FOC was whether defendant had reported "a new source of income," the effect of this assertion is to characterize a change in status from part-time to full-time as a "new source of income." However, plaintiff's assertion that defendant's employment changed from part-time to full-time is unsupported by the record. Defendant's payroll records show that, from June 6, 2013 through June 19, 2014, she averaged 62 hours per two-week pay period, which is consistent with her testimony at the April 15, 2014 hearing indicating that she worked 48 to 72 hours per pay period. Defendant's hours increased in the fall of 2013, such that she averaged between 71 and 72 hours for the 10 pay periods from February 2014 through June 19, 2014. Nevertheless, this still is consistent with defendant's testimony that she was a part-time employee.

It is true that defendant's earning power exceeded the $20,000 per year imputed to her. But while her actual earnings were important for purposes of modifying the support order going forward, it provided no legal basis for retroactive modification of her support obligation. Generally, payments due under a support order are not subject to retroactive modification and may be modified only from the date that notice of a petition for modification was given to the other party. MCL 552.603(2). Exceptions to this general rule apply where the parties agree to retroactive modification, MCL 552.603(5), or where a party with a duty to do so fails to report his or her income to the court or the FOC, MCL 552.603b. Neither of these exceptions applies in the instant case.

Fully aware that the FOC had been informed of defendant's employment, plaintiff asked the FOC if she had reported a "new source of income," reasonably understood by the FOC as a source of income in addition to her job at Sparrow Hospital. In addition, plaintiff's claim that he "investigated the situation with both Defendant's employer and the FOC, analyzed the records, compared it to her previous testimony and set out his position," does not necessarily lead to the conclusion that his motion was "well-grounded in fact."

Plaintiff further contends that the amount of the assessment constitutes an abuse of discretion because the motion deemed frivolous was combined with a motion that was not deemed frivolous, and the parties were in court anyway on defendant's objections to the FOC's support recommendation. Because plaintiff did not raise the issue of the amount of the assessment in his statement of the questions involved, as required by MCR 7.212(C)(5), and it is not necessary to resolve this appeal, we need not consider it. See *Atkinson v City of Detroit*, 222 Mich App 7, 11; 564 NW2d 473 (1997).

B. SANCTIONS

The trial court ordered plaintiff to pay $100 to the Clinton County Clerk, in addition to the costs and attorney fees defendant incurred "in defense of this frivolous action." *People v Herrera (On Remand)*, 204 Mich App 333, 357; 514 NW2d 543 (1994), provides the following relevant analysis:

> MCR 2.114(D) imposes various requirements of good faith and reasonable inquiry upon the signatories of legal pleadings. MCR 2.114(E) provides that, "[i]f a pleading is signed in violation of this rule, the court . . . shall impose . . . an appropriate sanction . . . which may include an order to pay . . . reasonable expenses incurred . . . including reasonable attorney fees." Because the rule could be interpreted to allow the imposition of fines, it was amended on April 1, 1991, to resolve a split between panels of this Court and clarify that "[t]he court may not assess punitive damages." See MCR 2.114(E) and (F) . . . . [*Herrera*, 204 Mich App at 337.]

In light of *Herrera*, the trial court clearly erred in imposing a $100 fine on plaintiff in the case at hand.

We affirm that portion of the trial court's order awarding costs and attorney fees to defendant pursuant to MCR 2.114(E), vacate that portion ordering plaintiff to pay a $100 fine, and remand the matter for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Amy Ronayne Krause