STATE OF MICHIGAN

COURT OF APPEALS

WESLIEANN OLWELL, Plaintiff-Appellant,	UNPUBLISHED April 26, 2016
v	No. 326220 Ingham Circuit Court Family Division
JEFFREY TRUMAN, Defendant-Appellee.	LC No. 09-000059-DS

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

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's order awarding attorney fees to defendant. We reverse.

The parties are the parents of an eight-year-old girl. In October 2014, the trial court entered an order awarding sole physical custody of the child to defendant with 6 hours of supervised parenting time per week to plaintiff. The trial court ordered plaintiff to undergo a psychological evaluation and to comply with all the terms of her criminal probation and also ordered that plaintiff's parenting time would remain supervised until she demonstrates to the court that her substance abuse and mental health issues had been successfully treated.

In December 2014, plaintiff successfully moved for a change in parenting time. The court granted her parenting time from 9:00 p.m. on December 24, 2014 to 6:00 p.m. on January 4, 2015 as well as supervised parenting time and overnights with the child every other weekend. The trial court entered an order to that effect on December 19, 2014. Less than a month later, on January 8, 2015, plaintiff brought another motion seeking additional parenting time, specifically during the Martin Luther King Jr. and President's Day holidays and during plaintiff's scheduled "week off." The court denied plaintiff's motion and ordered plaintiff to pay $500 to defendant to cover the costs of responding to the motion, deeming it to have been frivolous.

On appeal, plaintiff contends that the trial court abused its discretion and committed clear error in determining that her motion was frivolous and awarding attorney fees to defendant. We review the trial court's findings of fact underlying an award of attorney fees for clear error, *Brown v Home Owners Ins Co*, 298 Mich App 678, 690; 828 NW2d 400 (2012), including a trial court's finding of frivolousness, *John J Fannon Co v Fannon Prods, LLC*, 269 Mich App 162, 168; 712 NW2d 731 (2005). The trial court's decision to award attorney fees and its

determination of the amount of fees will be reviewed for an abuse of discretion. *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006).

MCR 2.625(A)(2) grants a court the discretion to award costs under MCL 600.2591 where the court finds, on a party's motion, that an action or defense was frivolous. MCL 600.2591 provides in part as follows:

> (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.
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> (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.
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> (3) As used in this section:
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> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit.

On their face, the requests made by plaintiff appear reasonable. Her parenting time was to begin on January 16, 2015, but because the child had additional time off corresponding with the Martin Luther King Jr. and President's Day holiday weekends, plaintiff asked for a limited increase in parenting time over these weekends. Plaintiff also asked for additional parenting time during plaintiff's "week off." Plaintiff contended that the motion was motivated by her attempts to reach an agreement with defendant and defendant's response that he would "leave it up to the court."

Although seemingly reasonable, had these requests been brought to "to harass, embarrass, or injure" defendant, MCL600.2591(3)(a)(i), or were otherwise devoid of factual and legal merit, MCL600.2591(3)(a)(ii) and (iii), we would uphold the sanction. However, since the trial court precluded the development of the record in this regard, we are unable to do so.

At the start of the hearing, the trial court chastised the plaintiff for bringing a new motion so soon after the court's most recent parenting time order. Plaintiff indicated that she understood the order but was requesting parenting time in addition to that order. Plaintiff's grounds for requesting additional time may have been without merit; however, the trial court afforded plaintiff no opportunity to offer proof justifying her request. Instead, the trial court summarily

dismissed plaintiff's motion and asked plaintiff if she was going to bring a new motion every month. Plaintiff stated that she would not and attempted to prove her position. The trial court responded by continually interrupting this offer before it could be properly made, eventually commenting that, "You are being persistent, aren't you?"

That defendant is without remedy for responding to what may have been a frivolous motion—had the record been properly developed—is an unfortunate consequence of the trial court's conduct. However, this court "will not construe MCL 600.2591 . . . in a manner that has a chilling effect on advocacy . . . [n]or will we construe the statute in a manner that prevents a party from bringing a difficult case." *Louya v William Beaumont Hosp*, 190 Mich App 151, 163; 475 NW2d 434 (1991). Given the trial court's summary treatment of plaintiff and the inadequacies of the resulting record, we are unable to find that plaintiff's motion was frivolous and the award of attorney fees proper.

The award of attorney fees is reversed. Because we conclude that neither party should be punished for what was really a mistake made by the trial court, we direct that each party shall bear their own costs. MCR 7.219(A).

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