STATE OF MICHIGAN

COURT OF APPEALS

PATRICK B. WELSH, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED October 18, 2012
V	No. 306402 Emmet Circuit Court
CHRISTINE VIOLA WELSH, Defendant/Counter-Plaintiff-Appellee.	LC No. 08-001177-DO

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

Following a remand from this Court, plaintiff appeals as of right from the September 19, 2011 order granting permanent spousal support to defendant. We reverse and remand.

The parties divorced in 2008, after a 35-year marriage, pursuant to a consent judgment. The only issue they litigated was spousal support. Defendant sought permanent spousal support of $3,000 a month. Originally, the trial court granted only $1,000 a month for a period of three years. In *Welsh v Welsh* (*"Welsh I"*), unpublished opinion per curiam of the Court of Appeals, issued June 22, 2010 (Docket No. 288928), this Court determined that some of the trial court's factual findings were erroneous and that it consequently did not render a fair and equitable award. This Court remanded and directed the trial court to determine an increased amount and duration of spousal support. On remand, the trial court reconsidered the original record in light of *Welsh I* and ordered permanent spousal support in the amount of $2,060 a month.

Plaintiff argues that the trial court erred in awarding permanent spousal support for several reasons. Plaintiff argues that the law of the case doctrine prevented the trial court from awarding permanent spousal support. We disagree.

A trial court's determination in regards to spousal support is reviewed for an abuse of discretion. *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Id.* (citation omitted). However, the trial court's findings of fact are reviewed for clear error. *Id.* If the factual findings are not clearly erroneous, the award will be evaluated to see if it was fair and equitable in light of the facts, or was an abuse of discretion. *Id.* A trial court's award of spousal support should be affirmed unless "this Court is left with the

firm conviction that the division was inequitable." *Id.* at 355-356 (quotation marks and citation omitted).

The law of the case doctrine holds that an appellate court's ruling on an issue is binding on the appellate court and lower courts. *New Properties v Newpower*, 282 Mich App 120, 132; 762 NW2d 178 (2009). "If an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Grievance Administrator v Loptain*, 462 Mich 235, 259; 612 NW2d 120 (2000) (quotation marks and citation omitted). However, this doctrine only applies to issues actually determined, expressly or implicitly, in the prior appeal. *Id.* at 260.

Plaintiff asserts that the trial court was bound on remand by the *Welsh I* Court's opinion. We agree: the trial court is indeed bound by *Welsh I*, as are we. However, we disagree with plaintiff's interpretation of *Welsh I*. This Court did not state, explicitly or implicitly, that the trial court correctly denied permanent spousal support. Indeed, even if this Court had impliedly so held, our review is for either an abuse of discretion or clear error. *Woodington*, 288 Mich App at 355. At most, this Court could have held that denying permanent spousal support was not clearly erroneous. This Court has thoroughly explained why such a holding is *not* a holding that denying permanent spousal support would be the only correct or permissible outcome, but rather, by definition, a holding that it was *a* permissible outcome and thus not binding under the law of the case doctrine. See *Hill v City of Warren*, 276 Mich App 299, 307-309; 740 NW2d 706 (2007). This Court determined that the trial court made factual errors that necessitated reconsideration and *some unspecified* increase in spousal support. *Welsh I* did not preclude the trial court by the law of the case doctrine from awarding permanent spousal support.

Likewise, this Court in *Welsh I* found that the trial court erred in concluding that plaintiff was unable to pay additional spousal support, but this Court did so only on the basis of the trial court failing to consider all of the evidence. Consequently; this was also not a binding conclusion that precluded the trial court from again finding on remand that plaintiff was unable to pay additional spousal support. Finally, the trial court was permitted to revisit its original order in its entirety, *Hill*, 276 Mich App at 307, so long as the trial court did nothing inconsistent with this Court's prior opinion.

We find, however, that the trial court did not comply with this Court's opinion in *Welsh I*. In our view, the gravamen of *Welsh I* was that the trial court did not have enough evidence before it to arrive at a just and equitable outcome. This Court pointed out several specific errors the trial court made *on the record then before it*, and alluded to several more unidentified errors that we now hold the trial court may disregard because this Court did not identify them.[1] But this Court specifically found that the trial court lacked evidence *whether* plaintiff had the ability to pay more spousal support and evidence of what plaintiff's living expenses were. Furthermore, the trial court's conclusion that defendant had a meaningful ability to secure better employment

[1] Put another way, the trial court is bound to correct the specific mistakes explicitly identified in *Welsh I*, but it is not bound to guess at, much less correct, any mistakes not explicitly identified.

within any particular time period also needed evidentiary support. This Court unambiguously held that the trial court's mistaken credit to defendant of the $119,000 loan against his $207,000 award of assets warranted *some* increased spousal support, and that the record then before it likewise did. We conclude that the core holding of *Welsh I* was that trial court was obligated on remand to obtain this evidence and consider it, rather than make assumptions as to either.

Because the trial court was clearly obligated to take more evidence, we now explicitly hold that the trial court must hold a new evidentiary hearing and, among other things, consider up-to-date information about the parties' respective situations. Pursuant to *Welsh I*, the trial court must not credit defendant's loan against his award of assets[2] and it must not double-credit plaintiff for capital improvements to his business; and it must take and consider evidence of both parties' living expenses. This Court has held that on the basis of the prior record, defendant was entitled to more spousal support than originally awarded; we now hold that the trial court shall make a new record and consider the spousal support factors, which this Court enumerated in *Welsh I*, anew on the basis of that new record. We do not now hold that the trial court must, on that new record, arrive at any particular result.

Perhaps this Court's prior opinion was not clear to the parties and the trial court. We appreciate that the parties agreed that no further evidence need be taken. We also appreciate that the trial court and the parties will understandably be frustrated by our decision today. We are, however, bound by *Welsh I*, and we conclude that the holding in *Welsh I* was that the original record was inadequate.

In light of our conclusion above, we decline to consider any of plaintiff's remaining arguments. We recognize that defendant seeks attorney fees from plaintiff for filing an allegedly frivolous motion for a new trial. However, defendant's assertion that she "feels" plaintiff filed a frivolous motion is not proof that plaintiff violated any court rule or court order under MCR 2.114(E), and while she has at least articulated an inability to pay under MCR 3.206(C), she has not shown that plaintiff does have the ability to pay. We cannot find that defendant has established at this time that this Court should make an exception to the rule of each party bearing their own legal expense. *Spectrum Health v Grahl*, 270 Mich App 248, 252-253; 715 NW2d 357 (2006).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Stephen L. Borrello
/s/ Michael J. Riordan

[2] Although it would not necessarily be inappropriate for the trial court to consider the *interest* plaintiff is likely paying on the loan, as distinct from the loan itself.