FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-1600

JULIE SHAW,

Appellant,

v.

ROBERT MARK SHAW,

Appellee.

On appeal from the Circuit Court for Santa Rosa County.
John F. Simon, Jr., Judge.

February 18, 2021

JAY, J.

Former Wife appeals from the trial court's Supplemental Final Judgment in which it granted, in part, and denied, in part, Former Husband's Supplemental Petition for Temporary and Permanent Modification of Alimony and Child Support. We affirm, without further comment, all points raised by Former Wife in her appeal with the exception of the trial court's ruling that she bear the responsibility of paying her own attorney's fees. On that point, we find merit in Former Wife's argument that the trial court failed to make the requisite findings before denying her motion for attorney's fees. Consequently, on that single point, we reverse.

I.

To say that Former Wife contested Former Husband's petitions for modification is an understatement; she fought them tooth and nail, filing motions to dismiss, motions for summary judgment (3), and motions for contempt. The transcript of the final hearing reveals a level of animosity between the parties bordering on the visceral. Yet, the trial court kept a tight rein on the trial proceedings, and, despite the incessant and disruptive bickering, gently reproved the parties when it announced its decision on their respective motions for fees and costs:

> Frankly, to tell you the truth, I think that y'all could have resolved this a long time ago, if you had cooler heads. I honestly do. When it got down to it and we got down to the final issues in this case, the only issue was the – not even the Petition to Relocate. It was revamping the schedule.
>
> The contempt, maybe a little bit, but the main issue was the temporary reduction in alimony. That was really what we were here about today. And it ended up blowing up like this because of all the things that were done and all the allegations and not everything that everybody wanted on this case.
>
> So, that being said, the Court is denying attorney fees on both sides. You are both responsible for your attorney fees. That's why I am going to encourage you to work out your problems before you come to court. Really, I mean, it will be much more beneficial if you do.

II.

In the Supplemental Final Judgment, the trial court did nothing more than order that "[e]ach party shall be responsible for his or her own attorney fees, costs, and suit money." As she did in her Motion for Reconsideration, Former Wife points to the glaring absence in the final judgment, and on the record, of a single finding of fact concerning need and ability to pay, or, for that matter, any of the other factors set forth in *Rosen v. Rosen*, 696 So. 2d 697 (Fla.

1997). As the Second District articulated in *Tutt v. Hudson*, 299 So. 3d 568 (Fla. 2d DCA 2020):

> In a dissolution case, "the trial court must look to each spouse's need for suit money versus each spouse's respective ability to pay." *Arena v. Arena*, 103 So. 3d 1044, 1046 (Fla. 2d DCA 2013) (quoting *Rosen v. Rosen*, 696 So. 2d 697, 699 (Fla. 1997)). "A trial court may also consider 'any factor necessary to provide justice and ensure equity between the parties.'" *Id.* (quoting *Rosen*, 696 So. 2d at 700). Such factors include "the scope and history of the litigation; the duration of the litigation; the merits of the respective positions; whether the litigation is brought or maintained primarily to harass (or whether a defense is raised mainly to frustrate or stall); and the existence and course of prior or pending litigation." *Rosen*, 696 So. 2d at 700. "After considering all applicable factors, *the trial court must then make specific findings of fact*—either at the hearing or in the written judgment—supporting its determination of entitlement to an award of attorney's fees and the factors that justify the specific amount awarded." *Arena*, 103 So. 3d at 1046.

Id. at 572 (emphasis added); *accord Rawson v. Rawson*, 264 So. 3d 325, 333 (Fla. 1st DCA 2019) ("Inherent in weighing these equitable factors is the necessity for the trial court to make express findings.") (citing *Nassirou v. Borba*, 236 So. 3d 1180, 1181-82 (Fla. 1st DCA 2018)).

Former Husband suggests that one of the reasons the trial court ordered Former Wife to pay her own fees was as a sanction for her "litigiousness" and her "spurious" and "frivolous" motions brought primarily to harass. Quoting the Fourth District's observation in *Von Baillou v. Von Baillou*, 959 So. 2d 821 (Fla. 4th DCA 2007), Former Husband asserts that "[w]here a party is required to bear her own attorney's fees, that person is more likely to be a 'responsible, conservative consumer of legal services.'" *Id.* at 825 (some quotation marks omitted). But even if the trial court had been so inclined to punish Former Wife, "[w]here a trial court intends the fee award to be a sanction for a party's actions, the fee order must contain sufficient findings to support the trial court's

decision." *Tutt*, 299 So. 3d at 572 (citing *Arena*, 103 So. 3d at 1047). "[T]he court must make findings that support the reduction or enhancement factors set out in *Rosen* and must explain what portion of the fees incurred was 'occasioned by [the party's] misconduct.'" *Id.* (alterations in original) (some quotation marks omitted) (quoting *Perez v. Perez*, 100 So. 3d 769, 773 (Fla. 2d DCA 2012)).

A similar sanction may be imposed based on the "inequitable conduct doctrine." In *Greene v. Greene*, 242 So. 3d 526 (Fla. 1st DCA 2018), we acknowledged that a trial court "has authority to award attorney's fees under the inequitable conduct doctrine when a party has acted with egregious conduct or in bad faith." *Id.* at 527 (citing *Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla. 1998)). We also stressed that "[s]uch an award is 'reserved for those extreme cases where a party acts in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Id.* (some quotation marks omitted) (quoting *Bitterman*, 714 So. 2d at 365). In *Myrick v. Myrick*, 214 So. 3d 769 (Fla. 2d DCA 2017), the Second District cautioned that "'[s]uch awards are *rarely applicable* and should be reserved for extreme cases in which a party litigates vexatiously and in bad faith.'" *Id.* at 772 (emphasis added) (quoting *Hallac v. Hallac*, 88 So. 3d 253, 259 (Fla. 4th DCA 2012)); *see also Henry v. Henry*, 191 So. 3d 995, 999 (Fla. 4th DCA 2016) (citation omitted) (holding "[s]uch awards are rarely applicable and should be reserved for extreme cases.") But even in these rare instances, "the trial court must make express findings of bad faith conduct, 'supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees'" based on a "'high degree of specificity.'" *Greene*, 242 So. 3d at 527-28 (quoting *Moakley v. Smallwood*, 826 So. 2d 221, 227 (Fla. 2002)); *accord Myrick*, 214 So. 3d at 772 (citation omitted) ("'When a court uses its inherent authority to assess attorney's fees, the court must make an express finding of bad faith and include facts justifying the imposition of the award.'").

In our view, however, the instant case does not present itself as one of those rare cases. In fact, despite noting that "everybody is asking for attorney fees because of litigious litigation," the trial court went on to state for the record that it could not "fault" Former Wife for objecting to Former Husband's supplemental petition or

for filing her motion to dismiss the petition and her motions for summary judgment. The court expressly found that she had a "good faith basis" to argue those motions. Consequently, as there was absolutely no finding by the trial court of bad faith on the Former Wife's part, there was no basis on which the court could have denied Former Wife's motion for attorney's fees on the basis of the inequitable conduct doctrine. *Greene*, 242 So. 3d at 527-28; *cf. Quigley v. Culbertson*, 279 So. 3d 1260, 1261 (Fla. 3d DCA 2019) (footnote omitted) ("The fact that one or more of the former wife's claims were termed 'frivolous' or 'vexatious' in the final order does not transform it into an order awarding statutory or common law sanctions").

III.

Nevertheless, for whatever reason the trial court chose to order Former Wife to pay her own fees, it failed to make the requisite findings justifying its decision. We review a trial court's decision concerning attorney's fees for an abuse of discretion. *Myrick*, 214 So. 3d at 771. Since the trial court neglected to make any findings on which to base its order that Former Wife pay her own attorney's fees, we have no choice but to conclude that the trial court abused its discretion. *Rawson*, 264 So. 3d at 332 (footnote omitted) ("Without making any findings as to the former wife's need for fees and the former husband's ability to pay them, the trial court ruled only that both parties were responsible for their own attorney's fees. In simply denying fees without further explanation, the trial court erred."). Accordingly, we reverse and remand for the trial court to reconsider Former Wife's motion "under the guidance of *Rosen*, and to make appropriate findings before making its ruling." *Id.* at 333.

REVERSED and REMANDED with instructions.

M.K. THOMAS and NORDBY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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Virginia C. Ralls and James L. Chase, Pensacola, for Appellee.