STATE OF MICHIGAN

COURT OF APPEALS

JO EDGE a/k/a JO DARLINGTON, Plaintiff-Appellee,	FOR PUBLICATION December 27, 2012 9:00 a.m.
v	No. 308633 Washtenaw Circuit Court
JOEL D. EDGE, Defendant-Appellant.	LC No. 07-000993-DM

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

BECKERING, J.

In this hotly contested child-custody case, we must determine whether the circuit court erred when it awarded plaintiff, Jo Edge, appellate costs and attorney fees incurred as a result of defendant, Joel D. Edge's, decision to appeal the circuit court's custody determination. After the circuit court awarded plaintiff sole legal and physical custody of the parties' minor child and reduced defendant's parenting time, defendant appealed. We affirmed and awarded plaintiff taxable costs under MCL 7.219 for having fully prevailed on appeal. Plaintiff did not move this Court for damages for a vexatious appeal under MCR 7.211(C)(8), MCR 7.216(C), and MCL 600.2445. Rather, plaintiff moved the circuit court for attorney fees and costs incurred in the appeal, citing MCR 2.114(D)(1) and (E), MCR 7.208(I), and MCR 3.206(C). Plaintiff argued that defendant's unsuccessful appeal was frivolous and suggested that only defendant was able to bear the expense. The circuit court granted plaintiff's motion and awarded her $14,398.27 in appellate attorney fees and costs as sanctions on the basis that defendant's appeal to this Court was frivolous. Because neither court rule nor statute authorized the circuit court to grant appellate attorney fees and costs on the basis of a frivolous appeal to this Court, we hold that the circuit court abused its discretion by doing so. We also hold that, contrary to plaintiff's contention, the circuit court did not grant plaintiff appellate attorney fees and costs under MCR 3.206(C). Accordingly, we reverse.

I. FACTUAL BACKGROUND

Plaintiff and defendant entered into a consent judgment of divorce in June 2008. Under the consent judgment, plaintiff and defendant were to have joint legal custody of their minor child. After holding an evidentiary hearing, the circuit court in September 2010 entered an order that awarded plaintiff sole legal and physical custody of the minor child and reduced defendant's

parenting time. Defendant appealed to this Court. We affirmed the circuit court's order and awarded plaintiff taxable costs under MCL 7.219 for having fully prevailed on appeal.[1]

Four months later, plaintiff filed a verified motion in the circuit court for attorney fees and costs pursuant to MCR 2.114(D)(1) and (E), MCR 7.208(I), and MCR 3.206(C). Plaintiff requested that the court award her $14,858.27 in appellate attorney fees and costs for defendant's unsuccessful appeal. Plaintiff generally asserted that defendant had "demonstrated an ongoing pattern of unnecessary and unreasonable litigation without regard to the facts or law which . . . caused [her] to needlessly incur superfluous attorney fees and costs." Plaintiff argued that her resources were "limited" and that the "frivolous actions . . . caused a severe drain on those resources." Plaintiff insisted that an "award of appellate attorney fees is generally left to the trial court to decide because the trial court is in a better position to evaluate the need and/or ability for the payment of said fees by the parties." Plaintiff also insisted that a "trial court may order appellate attorney fees under MCR 3.206." Plaintiff noted that her annual salary was $21,600 and that defendant's annual salary was $62,675.08.

Without holding a hearing, the circuit court issued an opinion and order granting plaintiff's motion for attorney fees and costs. At the outset of its opinion, the court noted that it was granting plaintiff attorney fees and costs "as sanctions." In its legal analysis, the court first explained that this Court determined that the circuit court did not err with respect to any of the issues raised by defendant in his appeal. The circuit court next explained the following:

> In matters involving domestic relations, attorney fees are at times awarded, within the discretion of the trial court, when necessary to enable a party to carry on or defend a suit. In enforcement proceedings the court may also award attorney fees if one party is unable to bear all or a portion of those fees. . . . Further, the court may award a party attorney fees necessitated by the other party's failure to comply with the divorce judgment.

The circuit court then discussed the factors to consider when determining the reasonableness of an hourly fee and concluded that plaintiff's counsel's hourly rate was "not excessive" and that the services charged were "not unwarranted." The circuit court then opined as follows:

> Overwhelming evidence was presented during the evidentiary hearing to support this Court's findings, and was noted by the Court of Appeals in its ruling that Plaintiff had fully prevailed. The Court finds that Defendant's claims, as presented to the Court of Appeals, were completely without merit.
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> The Court will acknowledge that merely because a party is unsuccessful on appeal does not automatically mean that he is responsible to reimburse the other party for the costs of the litigation. However, a party that signs a pleading certifies by that signature that the pleading is not interposed for any improper purpose, such as to

[1] *Edge v Edge*, unpublished opinion per curiam of the Court of Appeals, issued August 23, 2011 (Docket Nos. 300668, 300713).

> harass or to cause unnecessary delay or needless increase in the cost of litigation. In this case, Defendant's signature, or his attorney's signature on his behalf, created meritless arguments litigation for which no credible evidence existed to support his claims and arguments.
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> As a result, the Court finds that Defendant's claims on appeal were clearly frivolous pursuant to MCR 2.114(D)(1) and (E), MCR 7.208(1) [sic], and MCR 3.206(C), MCR 2.625(A)(2), and MCL 600.2591.

On this basis, the trial court awarded plaintiff $153.27 in costs and $14,245 in attorney fees, totaling $14,398.27. Defendant moved the circuit court for reconsideration, which the court denied.

II. ANALYSIS

Defendant argues that the circuit court did not have the authority to award appellate attorney fees and costs under MCR 2.114, MCR 2.625(A)(2), MCR 3.206(C), MCR 7.208(I), or MCL 600.2591. Defendant also argues that, even if the circuit court had such authority, his appeal to this court was not frivolous to justify an award of attorney fees and costs under MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591; the court did not actually award plaintiff fees and costs under MCR 3.206(C); and, even if the court did award plaintiff fees and costs under MCR 3.206(C), it abused its discretion because the factual allegations in plaintiff's motion were insufficient to show that plaintiff was entitled to attorney fees and costs under MCR 3.206(C).

We review for an abuse of discretion a trial court's ruling on a request for attorney fees. *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Id.* "The findings of fact on which the trial court bases its decision are reviewed for clear error." *Woodington v Shokoohi*, 288 Mich App 352, 369; 792 NW2d 63 (2010). Furthermore, we review de novo issues of statutory interpretation and the interpretation of court rules. *Bint v Doe*, 274 Mich App 232, 234; 732 NW2d 156 (2007).

A. MCR 2.114, MCR 2.625(A)(2), AND MCL 600.2591

Generally, '"[a]wards of costs and attorney fees are recoverable only where specifically authorized by a statute, a court rule, or a recognized exception.'"[2] *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010), quoting *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). Both the Michigan court rules and statute provide a method for *this Court* to

[2] Trial courts also "possess the inherent authority to sanction litigants and their attorneys. 'This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Keinz*, 290 Mich App at 142 n 1, quoting *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006).

award attorney fees and costs for litigation before this Court. See MCR 2.114; MCR 7.216(C); MCR 7.219; MCL 600.2445.

This Court may sanction a party under MCR 2.114(E) for a document signed in violation of MCR 2.114. See *BJ's & Sons Constr Co v Van Sickle*, 266 Mich App 400, 413; 700 NW2d 432 (2005) (finding a violation of MCR 2.114(D) and (E) in furtherance of a vexatious appeal). MCR 2.114(E) states that, if a party signs a document in violation of MCR 2.114, "the court, on motion of a party or on its own initiative, shall impose upon the [party] . . . an appropriate sanction, which may include an order to pay the other party . . . the amount of reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." Under MCR 2.114(C)(1), "[e]very document of a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney must sign the document." When a party signs a document, the party certifies, to the best of "his or her knowledge, information, and belief formed after reasonable inquiry, [that] 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." MCR 2.114(D)(2). The party also certifies that "the document is not interposed 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)(3).

MCR 7.219 addresses taxation of costs and fees on appeal. MCR 7.219(A) states that, "[e]xcept as the Court of Appeals otherwise directs, the prevailing party in a civil case is entitled to costs."[3] Furthermore, MCR 7.219(I) provides that this Court "may impose costs on a party or an attorney when in its discretion they should be assessed for violation of these rules." Significantly, this Court has consistently held that a trial court does not have jurisdiction to tax costs incurred on appeal to this Court. See, e.g., *Reeves v Cincinnati, Inc*, 208 Mich App 556, 562; 528 NW2d 787 (1995) ("[T]he trial court was without jurisdiction to tax costs incurred by plaintiffs in the prior appeal."); *Bloemsma v Auto Club Ins Ass'n*, 190 Mich App 686, 692-693; 476 NW2d 487 (1991) ("The trial court was without jurisdiction to tax costs incurred on appeal."); *Lopez-Flores v Hamburg Twp*, 185 Mich App 49, 53; 460 NW2d 268 (1990) ("Accordingly, a circuit court judge may not tax costs incurred on appeal.").

MCR 7.216(C) addresses awards of damages and other disciplinary action for vexatious appellate proceedings:

> (1) The Court of Appeals may, on its own initiative or on the motion of any party filed under MCR 7.211(C)(8),[4] assess actual and punitive damages or take other

[3] A prevailing party must file a certified or verified bill of costs with the clerk and serve a copy on all parties within 28 days after the dispositive order, opinion, or order denying reconsideration is mailed. MCR 7.219(B). The clerk will then promptly verify the bills and tax those costs allowable. MCR 7.219(D). "The action by the clerk will be reviewed by the Court of Appeals on motion of either party filed within 7 days from the date of taxation . . . ." MCR 7.219(E).

[4] MCR 7.211(C)(8) states that a party's request for damages or other disciplinary action under MCR 7.216(C) must be made in a motion. "A party may file [the] motion . . . at any time within

> disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because
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> (a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or
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> (b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.
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> (2) Damages may not exceed actual damages and expenses incurred by the opposing party because of the vexatious appeal or proceeding, including reasonable attorney fees, and punitive damages in an added amount not exceeding the actual damages. The court may remand the case to the trial court or tribunal for a determination of actual damages.

Finally, MCL 600.2445(1) states that costs on appeal to this Court "shall be awarded in the discretion of the court." "The appellant may be awarded the costs on appeal if he improves his position on appeal." MCL 600.2445(2). And, "[t]he appellee may be awarded damages for the delay and vexation caused by the appeal, to be assessed in the discretion of the court, in addition to costs on appeal, if the appellant does not improve his position on appeal." MCL 600.2445(3).

In this case, the trial court did not rely on MCR 7.219, MCR 7.216, or MCL 600.2445 as a basis for its award of appellate attorney fees and costs. Rather, the court opined that it was awarding attorney fees and costs to plaintiff as a sanction against defendant because defendant's claims on appeal were frivolous, citing the following legal authority: MCR 2.114, MCR 3.206(C), MCR 2.625(A)(2), MCR 7.208(I), and MCL 600.2591.

As previously discussed, MCR 2.114(E) grants "the court" the discretion to fashion an appropriate sanction for a violation of MCR 2.114; this includes trial courts. *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 726; 591 NW2d 676 (1998) ("MCR 2.114(E) grants the trial court discretion to fashion an 'appropriate sanction.'"). In addition to sanctions under MCR 2.114(E), MCR 2.114(F) provides that "a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)." Under MCR 2.625(A)(2), "if the court finds on motion of a party that an action . . . was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591 states that "if a court finds that 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." MCL 600.2591(1).

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21 days after the date of the order or opinion that disposes of the matter that is asserted to have been vexatious." MCR 7.211(C)(8).

In *DeWald v Isola (After Remand)*, 188 Mich App 697, 703; 470 NW2d 505 (1991), this Court concluded that MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591 were not an appropriate basis for a circuit court to award attorney fees incurred on appeal. In *DeWald*, the circuit court dismissed the plaintiff's claim but denied the defendants' request for sanctions pursuant to MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591. Defendants appealed the circuit court's denial of sanctions. *DeWald*, 188 Mich App at 698. This Court reversed, finding that the plaintiff's claim in the circuit court was frivolous, and remanded the case to the circuit court for an assessment and imposition of sanctions. *Id.* On remand, the circuit court awarded the defendants costs and reasonable attorney fees incurred as a result of the frivolous action pursued in the circuit court; however, the court denied a request by the defendants for costs and attorney fees incurred as a result of their appeal to this Court. *Id.* So, defendants appealed again. *Id.* This Court held that the circuit court properly denied the defendants' request for appellate attorney fees and costs. *Id.* at 698, 703-704. The *DeWald* Court first distinguished MCR 2.625(A)(2), MCR 2.114, and MCL 600.2591 from the court rules and statute that address costs and attorney fees in the context of appeals: MCR 7.219, MCR 7.216(C), and MCL 600.2445. *Id.* at 699-700. The Court then favorably quoted the Supreme Court of the United States's decision in *Cooter & Gell v Hartmarx Corp*, 496 US 384; 110 S Ct 2447; 110 L Ed 2d 359 (1990), wherein the Court distinguished Federal Rule of Civil Procedure 11 from Federal Rule of Appellate Procedure 38; the Supreme Court explained that Rule 11 is "understood as permitting an award only of those expenses directly caused by the filing, logically, those *at the trial level*" and that Rule 38 "places a 'natural limit' on the scope of FR Civ P 11 by providing the Court of Appeals with the authority to award sanctions if it determines that an appeal is frivolous." *Id.* at 701-702 (emphasis added and citation omitted). The *DeWald* Court then opined as follows:

> The costs, including reasonable attorney fees, incurred by defendants at the trial level were the direct result of plaintiff's pursuit of a frivolous cause of action and were clearly within the scope of the sanctions allowable under MCR 2.114, 2.625(A)(2), and MCL 600.2591[.] However, the expenses incurred by defendants on appeal and remand, after the trial court's refusal to impose sanctions under the statute and court rules, were directly caused by the trial court's erroneous decision and defendants' consequent decision to appeal, *not by plaintiff's initial filing of a frivolous complaint in the circuit court.* This Court determined, in defendants' first appeal, that plaintiff's cause of action was frivolous, *but did not expressly authorize an award of appellate attorney fees. We conclude that it is inappropriate to expand the scope of MCR 2.114, 2.625(A)(2), and MCL 600.2591 . . . to cover costs, including attorney fees, incurred on appeal and remand of a frivolous action.* [*Id.* at 703 (emphasis added).]

Under *DeWald*, the circuit court in the present case did not have the authority to grant plaintiff appellate attorney fees and costs under MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591. See *id.* Neither court rule nor statute authorizes a circuit court to grant appellate attorney fees and costs on the basis of a frivolous appeal to this Court. Moreover, under *Reeves*, the circuit court did not have jurisdiction to award appellate costs. See *Reeves*, 208 Mich App at 562.

Plaintiff attempts to distinguish *DeWald* from the present case by arguing that defendant's first appeal in this case was frivolous but that the first appeal in *DeWald* was not.

Defendant essentially tries to limit *DeWald's* application by arguing that the only reason appellate attorney fees were not awarded in *DeWald* was because the appeal was not found to be frivolous. Defendant's argument fails. *DeWald* is much broader than plaintiff asserts. The issue in *DeWald* was not whether the appeal was frivolous; rather, it was whether "the trial court erred when it ruled that the postjudgment costs and attorney fees incurred by defendants in their original appeal and on remand [were] outside the scope of the statute and court rule providing for an award of costs and reasonable attorney fees to the party who prevails over a frivolous claim or defense," i.e., the application of MCR 2.625(A)(2), MCR 2.114, and MCL 600.2591. *DeWald*, 188 Mich App at 699. The fact that this Court distinguished MCR 2.625(A)(2), MCR 2.114, and MCL 600.2591 from MCR 7.219, MCR 7.216(C), and MCL 600.2445 and favorably cited *Cooter* illustrates this point. Indeed, the *DeWald* Court explained that MCR 2.625(A)(2), MCR 2.114, and MCL 600.2591 were not an appropriate basis for the circuit court to award appellate attorney fees because the defendant's appellate expenses were not incurred by the plaintiff's *initial filing of a frivolous complaint in the circuit court. Id.* at 703. Furthermore, the *DeWald* Court emphasized that, while it determined in the first appeal that the plaintiff's complaint was frivolous, it "did not expressly authorize an award of appellate attorney fees." *Id.* Although the present case is factually distinguishable from *DeWald* because the circuit court here determined that defendant's appeal was frivolous and, thus, awarded appellate fees and expenses, *DeWald* nevertheless applies because both this case and *DeWald* concern whether a circuit court can award appellate attorney fees and costs under MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591; the *Dewald* Court expressly considered the issue and held that a circuit court cannot.

Moreover, we emphasize that the plain language of MCL 600.2591 demonstrates that the circuit court could not award appellate attorney fees and costs in this case. MCL 600.2591 states that "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 . . . ." MCL 600.2591(1) (emphasis added). In this case, the circuit court was not the court that conducted the appeal; therefore, it could not award sanctions under MCL 600.2591 for a frivolous appeal.

In addition, the definition of a frivolous claim under MCL 600.2591(3)(a) is different from the definition of a vexatious appellate proceeding under MCR 7.216(C)(1). MCL 600.2591(3)(a) states that a claim is frivolous if one of three conditions is met: (1) where a "party's legal position was devoid of arguable legal merit"; (2) the "party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true"; or (3) the "party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party." MCL 600.2591(3)(a)(i)-(iii). In contrast, MCR 7.216(C)(1) provides that an appeal is vexatious in either of the following circumstances: (1) "the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal" or (2) "a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court." MCR 7.216(C)(1)(a)-(b). As can be gleaned from the definitions above, the definition of a vexatious appeal is much broader than the definition of a frivolous claim or defense. The difference in the definitions further supports the conclusion that sanctions for vexatious appeals must be considered by this Court under MCR 7.216 and not by a trial court under MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591.

Accordingly, we conclude that the circuit court abused its discretion by awarding plaintiff appellate attorney fees and costs under MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591.[5]

B. MCR 3.206(C) AND MCR 7.208(I)

As previously discussed, the circuit court also cited MCR 3.206(C) and MCR 7.208(I) as a basis for sanctioning defendant for pursuing a frivolous appeal in this Court. Plaintiff insists that the circuit court properly awarded her appellate attorney fees and costs under these court rules. We disagree.

MCR 3.206(C)(1) provides that, in a domestic-relations action, "[a] party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding." A party who requests attorney fees and expenses under MCR 3.206(C) must allege facts sufficient to show that either (1) he or she is unable to bear the expense of the action and that the other party is able to pay or (2) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order despite having the ability to comply. MCR 3.206(2)(a)-(b).

In this case, however, the circuit court did not grant plaintiff attorney fees and costs under MCR 3.206(C).[6] The court in its opinion and order made two references to MCR 3.206(C): (1) it stated that plaintiff moved the court for attorney fees and costs under MCR 3.206(C) and (2) it cited MCR 3.206(C) immediately after stating that defendant's claims on appeal were "clearly frivolous." The trial court did not make any factual findings about—or even discuss—the parties' ability to pay the expense of defendant's appeal or a refusal by defendant to comply with a previous court order despite an ability to do so. Moreover, the trial court explicitly stated that it was granting plaintiff attorney fees and costs "as sanctions."

Finally, MCR 7.208(I) did not provide the circuit court with a basis to award plaintiff appellate attorney fees and costs. MCR 7.208(I) states the following: "The trial court may rule on requests for costs or attorney fees under MCR 2.403, 2.405, 2.625 or other law or court rule, unless the Court of Appeals orders otherwise." This Court has explained that MCR 7.208(I) provides that a trial court has jurisdiction to award sanctions despite the filing of a claim to appeal, unless the Court of Appeals orders otherwise. *Tingley v 900 Monroe, LLC*, 266 Mich App 233, 255; 731 NW2d 427 (2005), vacated on other grounds 474 Mich 1104 (2006). Moreover, the staff comment to the 1999 amendment that added subsection (I) to MCR 7.208 states the following:

[5] In light of this conclusion, we need not address defendant's alternative claim on appeal that the circuit court clearly erred by finding that his appeal to this Court was frivolous.

[6] In light of this conclusion, we need not address whether a circuit court has the authority to grant appellate attorney fees and costs under MCR 3.206(C). Therefore, we express no opinion on this issue.

> The amendment to MCR 7.208 deals with the issue regarding the relationship of appeals and orders awarding or denying attorney fees and costs. The amendment concerns the authority of the trial court to rule on requests for sanctions when an appeal has been taken. See Co-Jo, Inc v Strand, 226 Mich App 108; 572 NW2d 251 (1997). New MCR 7.208(I) provides that the trial court has the authority to rule on such requests despite the pendency of an appeal.

Although MCR 7.208(I) authorizes a trial court to grant a request for sanctions despite the pendency of an appeal, it does not authorize a trial court to grant a request for sanctions made under a court rule or statute that is not a proper basis for the court to grant sanctions. As previously discussed, the circuit court could not award plaintiff appellate attorney fees and costs under the court rules and statute that it cited.

Accordingly, we hold that the circuit court abused its discretion by awarding plaintiff $14,398.27 in appellate attorney fees and costs.

Reversed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald