STATE OF MICHIGAN

COURT OF APPEALS

RONDA LYNN MCDOWELL, a/k/a RONDA LYNN SCHABES, Plaintiff-Appellant,	UNPUBLISHED May 22, 2008
v	No. 273807 Kalamazoo Circuit Court
DARRELL LYNN MCDOWELL, Defendant-Appellee.	LC No. 02-007446-DM

Before: O'Connell, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Plaintiff Ronda McDowell appeals by delayed leave granted from a post-judgment order denying her request to increase child support. We affirm.

The parties married in 1991 and had two children, Alexis, d/o/b 10/11/95, and Savannah, d/o/b 8/11/99. The parties separated in October 2002, and plaintiff filed her complaint for divorce on November 27, 2002.

On July 30, 2003, a settlement agreement was placed on the record regarding all the terms of the divorce, including that support be based on incomes of $40,000 for defendant and $27,000 for plaintiff. The divorce judgment was not entered until about eight months later, however. On March 4, 2004, shortly before the judgment was entered, the circuit court entered an order for temporary payment of child support, which stated that the children had been in plaintiff's exclusive care since July 30, 2003 (7 months), and that defendant had paid only $1,150 in child support since then "due to lack of an appropriate order." Defendant was ordered to pay support of $652.50 per month, commencing immediately.

The divorce judgment, entered March 15, 2004, awarded plaintiff sole physical custody and the parties joint legal custody, defendant reasonable parenting time, and set child support at $652.50, calculated according to the annual incomes agreed on in the settlement agreement ($40,000 for defendant, $27,000 for plaintiff).

Both parties have since re-married. Less than two months after entry of the divorce judgment, around the time when plaintiff pursued the significant arrears defendant owed, defendant filed a motion to reduce child support. A referee heard the motion. Defendant filed

objections to the referee's findings, and the trial court agreed to schedule a hearing on defendant's motion, recast as a motion for relief from judgment.

Plaintiff petitioned to increase child support, childcare and medical expenses. Defendant then filed a motion to modify the divorce judgment by decreasing child support or, in the alternative, to set aside the judgment based on mutual mistake regarding defendant's income. Defendant's motion argued that when the parties placed the settlement agreement on the record in July 2003, it was acknowledged that defendant was starting a new business (trucking) and did not know what his income would be, and that the parties were later to provide W2s by February 1st of each year so that the amount could be modified if needed.

Following a 5-day evidentiary hearing regarding child support (from April 2005 through February 2006), the court denied both parties' motions, and set defendant's child support obligation at $652.50 per month (excluding child care) for the year from August 15, 2003 to August 15, 2004 (based on defendant earning $40,000 and plaintiff $27,000). The court ordered the Friend of the Court (FOC) to recalculate defendant's support obligation for August 15, 2004 to December 31, 2005, imputing income of $30,000 to defendant for that period. The FOC determined defendant's child support obligation to be $222 per month. This appeal ensued.

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The trial court's opinion sets forth many pertinent facts:

> Sometime in early 2003, Defendant and his then, girlfriend, Tamara [sic Tamera] [VanOstran] decided to enter into a trucking business together, and this was before Mr. McDowell's divorce was final. Tamara [sic] left her job at the Heart Center and, even though she had never been in the trucking business, and had no business plan, she went into the trucking business with someone not yet her husband. A $50,000 truck was bought, but for some reason Mrs. McDowell [VanOstran] could not remember how much the down payment was.
>
> Mr. McDowell had worked as a truck driver from 1991 until 1998. Later, he was working as a truck driver before they [he and VanOstran] began their business as Chrome Carriers in March 2004. Once Mrs. McDowell received her [DOT interstate trucking] authority papers, she began as owner of the business and Mr. McDowell and his brother became drivers for the business. At this time, Mr. McDowell had two credit union accounts, one personal and one business. The business account was assigned to Tamara [sic] . . . .
>
> Prior to driving for Chrome Carriers, Mr. McDowell had been driving for Hybels, and after Chrome Carriers was started, Hybels wrote the some paychecks to Mr. McDowell by mistake. . . .
>
> Tamara [sic] claimed to have about $179,000 in expenses for the business, but little documentation of these expenses was provided to Plaintiff or to the Court. The driver would make 30% of what her truck made per run. The drivers pay their own expenses. Sometimes, drivers or Chrome Carrier [sic] received cash advances from Hybels.

* * *

> There was testimony that Tamara [sic] lived with Darrell on the road so that she could learn the business of truck driving. Tamara [sic] made the payments on the truck, and Darrell drove it. From June 1 to December 2003, Darrell received all of the profits. After that, it went to Tamara [sic]. When Darrell received a 1099 from Hybels, it was for everything and included the cash advances, and expenses, etc.
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> Tamara [sic] claimed to have purchased the Harley Davidson motorcycle while at the same time claimed that she only received a $2,000 net income from the business. A lot of the evidence simply didn't add up to what either party was claiming was the true income for Mr. McDowell. Darrell didn't keep track of his expenses.
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> During this time in 2003 and 2004, several trucks were run under Tammy's authority and allegedly the 1099's received from Hybels included payments for the other drivers. This made it very convenient for Mr. McDowell to claim that he was making much less than anyone alleged and to argue that this is an explanation for why Darrell may have advised a referee at a hearing in 2004 that he earned $75,000, but it was not all money for him.

Additional evidence presented at the evidentiary hearing includes Roger Mills' testimony that he prepared defendant and VanOstran's tax returns for 2003 and 2004 and that the 2004 amended 1099 from Hybels, Inc., raised defendant's earnings from $33,141 to $44,974. He testified that he accepted as true all the documentation defendant and his wife provided.

Defendant's 2003 tax return [filed in his name alone] stated an adjusted gross income of $14,690, and a net business profit of $15,497. Defendant's and Tamera's jointly filed amended 2004 tax return (amended to show the corrected 1099s from Bert Hybels, Inc.) stated an adjusted gross income of $36,780, taxable income of $14,690, and a net profit of $13,074 to defendant from the business.

VanOstran (now McDowell) testified that she divorced in June 2003, has two children, ages 9 and 11, and left employment as a records technician at the Heart Center "probably the end of August or September of 2004." When asked what made her decide to get into the trucking business, she responded, "Darrell [defendant] and I discussed it. He had the knowledge of how to operate the truck, and I felt that I could do the paperwork." She testified that she wanted to be able to work at home because of her children. Exhibits introduced at trial showed that the 1999 Peterbilt tractor truck was sold to defendant and Tamera in May 2003 for $50,000, the down payment was $3,000, and financing was over 49 months with payments of $1,159.02 monthly.

Plaintiff testified that she had been an office manager at Jay's Foods for four years, handling payroll, accounts payable and receivable, and bank deposits, among other things. She testified that since August 2003 (the month after the settlement agreement was placed on the record) defendant had paid child support 13 of 28 months, and that many of those payments were way below the amount due.

Plaintiff testified that defendant was in the trucking business for seven or eight years of their marriage. She introduced at trial a contract defendant and Tamera signed on May 25, 2003 (while the parties were still married and Tamera was still married to her prior spouse), stating:

> On this 25 day of May, 2003, I Tamera Van Ostran and Darrell McDowell Agree to the following provisions, as pertaining to my intended company of Chrome Carriers.
>
> 1. I, Tamera Van Ostran, am the sole Proprietor of said company.
>
> 2. I have complete control of all matters pertaining to finance as agreed to in this contract.
>
> 3. The 1999 Peterbilt is the property of Tamera Van Ostran.
>
> 4. It is however noted that Darrell McDowell is named as co-borrower.
>
> 5. This was due to my having no experience of driving a commercial vehicle, his experience was requirement [sic] to obtain said loan.
>
> 6. He does not maintain any right or permission to sell or borrow against said property.
>
> 7. He will be responsible for the payments from June 1, 2003 until December 31, 2003.
>
> 8. He shall also be responsible for all repairs during this time.
>
> 9. Darrell shall also be responsible for all license and permits during this time.
>
> 10. Darrell McDowell shall receive all income related to these specifications.
>
> 11. From June 1, 2003 Until December 31, 2003 all profit to Darrell.
>
> 12. From January 1, 2004 until Chrome Carriers Authority is granted, Tamera shall receive 90% of checks cut to Darrell McDowell, the this [sic] portion is to be for driver payroll and obtaining Tamera Van Ostran/Chrome Carriers interstate authority with the remainder for her sole use.
>
> 13. Darrell McDowell will file 1099s to the sum of what is paid by him to Tamera Van Ostran for this period.
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> 14. Upon granting of interstate authority, all checks received shall come as Chrome Carriers/Tamera Van Ostran.
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> 15. From this day, Chrome Carriers shall be owned by Tamera Van Ostran, even if in matrimony to Darrell McDowell. It shall remain hers even through any separation of matrimony.

16. Once the authority is used, Darrell McDowell shall receive as his salary for services in starting customer relations, obtaining authority and continuing to dispatch trucks for Chrome Carriers a sum of $300.00/wk. This is a residual income for as long as Chrome Carriers remain in business.

Tamera testified that some of these provisions were not in effect, including that defendant receive $300 weekly in salary, because the business did not make enough money to pay him that.

Plaintiff testified that she reviewed 2004 bank records subpoenaed from Chrome Carriers (which were introduced into evidence) and found checks and withdrawals from the business accounts for personal expenses. She testified that for the Credit Union bank account there were deposits of $209,000 for the year 2004 and $41,906.17 in personal expenses withdrawn, which figure did not include $9,672.82 in cash withdrawals and $8,890.55 in ATM withdrawals. The $41,906.17 in personal expenses withdrawn included $4,313.34 for a Harley Davidson motorcycle and $3,057.31 for defendant and Tamera's Las Vegas wedding.

Defendant testified that he and Tamera co-owned the semi-truck and that Chrome Carriers also leased a truck. He testified that diesel trucks get five miles per gallon. Defendant introduced his social security statement dated May 26, 2004, which set forth his taxed social security earnings going back to 1985, including:

1997 7,582

1998 20,582

1999 28,812

2000 6,746

2001 6,697

2002 7,160

2003 14,600

Defendant testified regarding 2004, that he worked as a truck driver until mid-August, grossing $41,525, and then worked as a dispatcher for Bert Hybels, Inc., from October through the end of the year, grossing between $6,000 and $7,000, i.e., grossing approximately $47,000 in 2004. Defendant testified that he was an independent contractor for Chrome Carriers from January 2005 until around July 4, 2005, when he lost Bert Hybels, Inc.'s work because he dropped loads (declined to carry truck loads) so that he could pick up his children according to the visitation schedule and because of the pending felony charge against him (apparently referring to the Attorney General pursuing defendant because of child support arrears).

The U.S. Department of Transportation issued Tamera's interstate authority permit in May 2004. Defendant testified that Tamera lost interstate authority in April 2005 because she was unable to pay the insurance owners/operators must pay, which had increased from about $8,000 to $20,000 per year on the truck Chrome Carriers leased, because it was involved in an

accident. Defendant testified that as of November 2005, he was again a subcontractor for Chrome Carriers.

Trucking industry expert Mark Alexander testified that truckers earn $.87 a mile as owner/operators with about three years experience, and that they average 2000 miles per week. Drivers for companies earn about $.28 a mile but, unlike owner/operators, they are reimbursed for their expenses. Another expert, Christopher Edwards, testified that a driver could average $700 to $800 weekly with everything paid for.

Plaintiff first argues that the circuit court erred in failing to impute income to defendant[1] based on his earning capacity as an owner/operator of Chrome Carriers trucking business, and in allowing him to pay support based on his claimed earnings of less than minimum wage.

In determining the contributions to support that divorced parents must make, the trial court must generally follow the formula developed by the Friend of the Court Bureau. MCL 552.605(2); *Berger v Berger*, 277 Mich App 700, 724; ___ NW2d ___ (2008). A court may deviate from the support formula only if application of the formula would be unjust or inappropriate. MCL 552.605(2); *Ghidotti v Barber*, 459 Mich 189, 196; 568 NW2d 883 (1998). When assessing a parent's ability to pay support, the trial court is not limited to consideration of a parent's actual income, *Reed v Reed*, 265 Mich App 131, 163; 693 NW2d 825 (2005), rather, it may consider the parent's voluntarily unexercised ability to earn. *Ghidotti*, *supra* at 198. When evaluating whether there is an unexercised ability to earn, the following factors must be considered:

> 1) Prior employment experience; 2) education level; 3) physical and mental disabilities; 4) the presence of children of the marriage in the party's home and its impact on the earnings of the parties; 5) availability of employment in the local geographical area; 6) the prevailing wage rates in the local geographical area; 7) special skills and training; or 8) whether there is any evidence that the party in question is able to earn the imputed income. [*Ghidotti v Barber*, 459 Mich 189, 199; 586 NW2d 883 (1998), quoting Michigan Child Support Formula Manual, Tenth Rev, p 8.]

A trial court's factual findings are reviewed for clear error. *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007). A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake was made. *Id.* The party appealing the support order bears the burden of showing that a mistake was made. *Id.* However, we review de novo the trial court's ultimate disposition. *Edwards v Edwards*, 192 Mich App 559, 562; 481 NW2d 769 (1992).

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[1] Plaintiff's appellate brief does not make clear whether she is challenging the court's determination for the year August 2003 to August 2004, and the determination regarding August 15, 2004 to December 31, 2005, or only the latter. We will assume plaintiff's challenge is to both determinations.

Regarding whether to impute income to defendant, the trial court ruled:

What the Court must consider is whether to impute income to Defendant for a period of time, since he voluntarily left his employment, and then wants to complain to the Court that he can't afford to pay any child support. And, it appears that in an attempt to prove his point, he has either neglected or refused to consistently pay child support throughout these proceedings.

As a side issue, Defendant complains that the agenda of the Plaintiff is to limit contact with their minor children, and he supports his position by the proposition that Plaintiff contacted the Michigan Attorney General for criminal prosecution against him. Defendant also argued throughout the hearings in this matter that Plaintiff had a personal vendetta against him, possibly because he began his relationship with his current wife during the separation and married this woman shortly after the divorce was finalized.

Although this Court agrees that Plaintiff may have urged the Michigan Attorney General's to [sic] office became [sic] involved in the prosecution of child support arrears in this case, the Court does not agree that the entire motivation was to limit Defendant's parenting time. A review of the file and proofs presented, clearly indicates an apparent disregard for obligations of child support by Mr. McDowell.

Although there have been problems with parenting time, the complete abandonment of any financial obligations to his children would merit criminal prosecution under most circumstances. Mr. McDowell has greatly benefited by the length of time it has taken to come up with a resolution in this case. Although the Attorney General's office was initially so aggressive they refused to consider that the issue of the appropriate support amount was pending, it must be recognized by Mr. McDowell that he took no good faith steps to make consistent and regular payments. It makes it harder to find fault with the action of either Plaintiff or the AG's office under those circumstances.

On the other hand, Plaintiff argued that Defendant lives an affluent lifestyle and this is due to income from his trucking business, which he is hiding from the Court. However, no such affluent lifestyle was proven to this Court. The fact that Defendant may have spent a few thousand dollars on a wedding does not rise to the level of living a lavish lifestyle. There was nothing to indicate that there is or was anything lavish about the Defendant's lifestyle, but the Court was not impressed with the fact that money was spent towards a Harley Davidson . . . motorcycle [that] was obviously a purchase for pleasure, and obviously one that came before any obligation of child support. Mr. McDowell's testimony regarding the owner and purchaser of the motorcycle as being his wife, instead of himself, was questionable.

However, the Court found Defendant's testimony credible regarding some of his expenses as those that he needed while on the road as a truck driver. He appears to work long, hard hours and his need for food and other convenience

items was reasonable. The only concern this Court had about the evidence in this regard is the position that Defendant and his present wife took regarding their alleged lack of good business practices. This stretched their credibility a little on that point. Their failure to keep accurate and detailed records and to promptly provide those to counsel for Plaintiff was an issue that is difficult to reconcile for this Court.

Counsel for Defendant asked, "Should the Defendant be required to work more than a 40 hour week when he has not done that ever in his entire life?" The answer to Defendant's question is, "Perhaps . . . if he is not earning enough to adequately support his minor children, and especially if he has not been able to support them because he entered into a questionable business arrangement with his new wife."

The Defendant entered into an agreement in 2004 [sic 2003] that he apparently was comfortable with for at least eight months until it appeared that he was going to be seriously pursued for child support arrears. There is nothing in the record to indicate or support the fact that he was mistaken about his income at the time that he entered into the agreement that resolved all issues in this divorce case. That does not mean, however, that the $40,000.00 income to which he agreed should be applied forever in this case, but it does mean that it should apply for a reasonable period of time.

What is a reasonable period of time in this case?

What this Court never heard from the Defendant was any recognition that he has a serious obligation of child support in this case, and what the Defendant never recognized is that a $40,000.00 income in today's economy is not an unreasonable amount to expect from him or from any parent responsible for supporting two children. Not once, did Defendant ever acknowledge to this Court that he has an obligation to support his children and that his failure to do so was seriously wrong. Although this Court did not find that the evidence supported the larger income that was claimed by Plaintiff, the evidence did support the concept that Mr. McDowell was not doing whatever he could to meet his child support obligation.

The entire scenario of Mr. McDowell (Darrell) and the new Mrs. McDowell (Tamara) [sic] and their trucking business is a little difficult to accept *in toto*. Sometime in early 2003, Defendant and his then, girlfriend, Tamara [sic] decided to enter into a trucking business together, and this was before Mr. McDowell's divorce was final. Tamara [sic] left her job at the Heart Center and, even though she had never been in the trucking business, and had no business plan, she went into the trucking business with someone not yet her husband. A $50,000 truck was brought, but for some reason Mrs. McDowell could not remember how much the down payment was.

Mr. McDowell had worked as a truck driver from 1991 until 1998. Later, he was working as a truck driver before they began their business as Chrome

Carriers in March 2004. Once Mrs. McDowell received her authority papers, she began as owner of the business and Mr. McDowell and his brother became drivers for the business. At this time, Mr. McDowell had two credit union accounts, one personal and one business. The business account was assigned to Tamara [sic]. All of this information makes it convenient for Mr. McDowell to simply say that he is not responsible for what happened in the business.

Prior to driving for Chrome Carriers, Mr. McDowell had been driving for Hybels and after Chrome Carriers was started, Hybels wrote the some paychecks to Mr. McDowell by mistake. This added to the confusion of presentation of evidence.

Tamara [sic] claimed to have about $179,000 in expenses for the business, but little documentation of these expenses was provided to Plaintiff or to the Court. The driver would make 30% of what her truck made per run. The drivers pay their own expenses. Sometimes, drivers or Chrome Carrier [sic] received cash advances from Hybels.

In one 5-week period, Darrell made $34,451 gross. The information about the expenses and the cash advances was confusing. Was it intentionally so? Some payments to Chrome Carriers were only partial payments, and some contained cash advances. It is not easy to pin down what the truck driver is making as net income. Is this intentionally so?

There was testimony that Tamara [sic] lived with Darrell on the road so that she could learn the business of truck driving. Tamara [sic] made the payments on the truck, and Darrell drove it. From June 1 to December 2003, Darrell received all of the profits. After that, it went to Tamara [sic]. When Darrell received a 1099 from Hybels, it was for everything and included the cash advances, and expenses, etc.

Tamara [sic] claimed to have purchased the Harley Davidson motorcycle while at the same time claimed that she only received a $2,000 net income from the business. A lot of the evidence simply didn't add up to what either party was claiming was the true income for Mr. McDowell. Darrell didn't keep track of his expenses.

During this time in 2003 and 2004, several trucks were run under Tammy's authority and allegedly the 1099's received from Hybels included payments for the other drivers. This made it very convenient for Mr. McDowell to claim that he was making much less than anyone alleged and to argue that this is an explanation for why Darrell may have advised a referee at a hearing in 2004 that he earned $75,000, but it was not all money for him.

Mark Alexander was called as an expert on the income of truck drivers. He testified that they earn $.87 a mile as owner/operators with about 3 years experience. The industry averages 2000 miles per week. This would leave an average gross of $1,740 per week, or most likely, between 40 and 60 thousand a

year. On the other hand, drivers for companies earn about $.28 a mile, but they are reimbursed for their expenses. This would result in a gross of about $560 per week or about $30,000 a year without the expenses that the owner/driver experiences.

Another expert, Christopher Edwards was also called to testify. His opinion was that a driver could earn on an average $700 to $800 per week with everything paid for. Of course, this witness agreed that it was important that the driver keep his truck full and be a good record keeper.

The problem with the position of Mr. McDowell and his current wife is that they either are terrible business people who keep poor records, or they are very clever business people who purposely answered vaguely when it seemed to fulfill their obvious purposes. It is not clear to this Court which is the most correct interpretation in this case. Mr. McDowell appeared genuine on the witness stand, as did his wife.

Someone might have a dream of owning his own truck or his own business. But, when it becomes obvious to that person that he is not making enough money to meet his financial obligations, and child support should be at the top of those obligations, then the refusal to seek work outside the trucking business becomes a stubborn response that is not appropriate and not acceptable.

If the Court accepts the latter interpretation and finds that the Defendant and his current wife are just poor business folks, then, the Court must also say to Defendant, that if he chose to enter into his own trucking business, that was his prerogative. But, this Court will not support his dream in lieu of his child support obligation. Once it became clear to him that he was not making a sufficient income to support his children, he had an obligation to obtain other employment, including going back to laying floors, or driving for Hybels, or whatever it takes.

Therefore, this Court finds that from August 15, 2003 until August 15, 2004, the appropriate income for Defendant is *$40,000.00, and child support is $652.50 per month*. After that, it is appropriate to reduce the income used for Defendant for child support to an amount imputed to him of *$30,000* and to use the Child Support Guidelines and accurate parenting time for that period, until December 31, 2005.

The Court is basing the imputed amount on the combination of testimony heard over the past year and a half about the gross income received by Defendant, and what is considered average income for other truck drivers, and the testimony of Ronda McDowell about past practices of Mr. McDowell as a truck driver, and what this court believes is unexercised ability to earn a satisfactory amount to support his children. [Emphasis added.]

The court denied plaintiff's motion to modify defendant's child support obligation based on an increase in defendant's income, explaining:

3. Should the original amount of child support, reached by negotiation, be modified to reflect an increase in the income of the Defendant?

> It was difficult in this case to arrive at an income for the calculation of child support, and the reason for said difficulty was not that Plaintiff was unreasonably fishing for income as was argued by Defendant. Mr. McDowell and his wife gave every appearance of not being forthcoming with information, and being totally uncooperative with Plaintiff and her attorney when it came to discovery. Notwithstanding the difficulties, Plaintiff tried valiantly to persuade this Court of hidden income. That persuasion, unfortunately for Plaintiff, did not happen, but the Court was very impressed with the visual aids showing the lack of child support payments over a significant period of time. Although this Court has a strong suspicion that everything was not as it was made to seem by Defendant, there was not enough reliable information for this Court to assess a higher amount of income to Mr. McDowell than what he had so willingly agreed to in this first place. The Court was convinced, however, that he either showed gross negligence or gross obstinacy in his failure to pay child support, and that is not acceptable. The former Mrs. McDowell was forced to incur horrendous attorney fees due to his failure to cooperate and his attempt to avoid his support obligations.
>
> THEREFORE, IT IS ORDERED THAT Plaintiff's motion to increase child support is denied, but her Motion for Attorney Fees is granted in the amount of $6,500.00, which is to be paid at the rate of $500 per month directly to Mr. Thomas Powers until paid in full, effective June 1, 2006. If at any time, Mr. McDowell fails to honor this portion of the decision of the Court, counsel for Plaintiff may apply for enforcement of the total amount of attorney fees by money Judgment with statutory interest.

We note that plaintiff's argument under this issue contains only two cites to the record. From our review of the evidentiary hearing transcripts, there was no evidence presented regarding four of the seven elements courts look to in determining whether to impute income, see *Ghidotti*, *supra* at 199, defendant's educational level, whether he had any physical and mental disabilities, the presence of the children in defendant's home and its impact on the parties' earnings, and availability of employment in defendant's area.

The record evidence of defendant's prior employment experience was as a trucker and a floor installer. Defendant's social security statement set forth taxable social security earnings from 1985 through 2003 and indicated that the highest annual incomes he earned were $20,582 in 1998 and $28,812 in 1999 (during his marriage to plaintiff).

Plaintiff maintains that defendant earned $75,000 in the first 18 weeks of 2004, and that he so admitted at the May 17, 2004 hearing before Referee Johnson. The record does not support that argument.

Both parties appeared at the hearing, defendant in propria persona. Defendant testified that his income for 2004 would not be $40,000, as agreed to in July 2003, but rather, would

likely be $17,000 or $18,000. Plaintiff's counsel agreed the $40,000 income was not correct, but because it was actually much higher. Plaintiff's counsel then questioned defendant:

> *Q.* Now you claim that you only make seventeen thousand a year, this year, is that correct? What is your year-to-date income form [sic] Bert Hybels through May?
>
> *A.* My year-to-date income, payroll checks out, which is a gross income *before any expenses are deducted before anybody gets a percentages [sic] is due them, is approximately seventy-five thousand.* Gross income before expenses, fuel, truck payments, tolls . . .
>
> *Q.* Just during the year 2004?
>
> *A.* That's correct.
>
> *Q.* Okay. You're [sic] truck payment is $1200?
>
> *A.* Thirteen eighty eight.
>
> *Q.* And fuel about $3500?
>
> *A.* Yeah, probably about $3500.
>
> *Q.* Do you pay a driver?
>
> *A.* Yes, there's a driver wage but I don't actually pay the driver. I pay a percentage to the person that the business was actually set up for.
>
> *Q.* So, that $75,000, you have to part with some of that money for the driver.
>
> *A.* I part with 90% of the money. Ninety percent after expenses.
>
> *Q.* I'm talking about what does a driver earn?
>
> *A.* The driver makes 20% of gross.
>
> *Q.* So if the gross is $75,000, the driver makes $15,000?
>
> *A.* Okay, roughly. [Emphasis added.]

Plaintiff asserts that defendant's expenses during this time period were $30,327.83, and a printout plaintiff supplied supports that figure.[2] However, the printout details the expenses, and

[2] It appears from the record that this document was never admitted into evidence, but there was testimony regarding information contained within it.

it is clear that payments to drivers are *not included* (the printout lists plates, fuel, tolls, repairs, and washes). Plaintiff then argues, using the $75,000 figure, that defendant's net income would project to $214,801. This figure, too, is erroneous because it does not take into account all of defendant's expenses.

Plaintiff also asserts that the amended 1099s from Bert Hybels show that defendant and Tamera pocketed approximately $90,000 of "under the table" funds, and that all those funds should be imputed to defendant, because the business arrangement he has with Tamera is that she allocates whatever portion of the business she wants to defendant—a very small one.

Plaintiff is correct that Bert Hybels, Inc., issued amended 1099s to defendant and Tamera for 2004. The amended 1099s increased defendant's non-employee compensation from $33,141.71 to $46,974.84, and Tamera's non-employee compensation from $134,152.69 to $224,583.06, i.e., by approximately $90,000. Hybels, Inc., sent a letter dated April 29, 2005, addressed to contracted drivers, stating that it had come to their attention "that the manner in which we were presenting information to our accounting firm caused last year's 1099's to be inaccurate" and that a corrected 1099 is attached.

Plaintiff provides no cite to the record to support that defendant hid or lied about the $90,000, and our review of the record found no support therefore. Rather, as Hybels, Inc., stated in its letter, it discovered it had made an error and corrected it. Defendant and Tamera filed amended 2004 tax returns, taking into account the amended 1099s from Hybels. Defendant's and Tamera's jointly filed amended 2004 tax return stated an adjusted gross income of $36,780, taxable income of $14,690, and a net profit of $13,074 to defendant from the business.

That defendant does not have his children's best interests as a priority is evident from the written agreement he and VanOstran entered into regarding Chrome Carriers and allocation of the earnings from the business primarily to her. VanOstran testified she entered into the business so that she could work out of the home and care for her children. In contrast, defendant did not testify that he was concerned about earning enough to provide adequate support for his own children. Nonetheless, defendant's 2003 and 2004 tax returns show net income levels (around $15,000) that are in line with his social security taxable earnings as shown on the social security statement. Further, the trial court noted that for the original FOC custody and parenting time evaluation, defendant "reported that he earned between $30,000.00 and $40,000.00 as a floor installer since 1999." The incomes the trial court imputed to defendant, $40,000 and $30,000, are in line with those figures.

We agree with the trial court that plaintiff did not establish that defendant was hiding large amounts of income. Granted, that may have been an impossible feat given defendant and VanOstran's abysmal record-keeping, but the record is what it is.

We conclude that plaintiff has not shown that the circuit court erred in declining to impute income to defendant greater than $40,000 for the year of August 15, 2003 to August 15, 2004, and $30,000 for the following period, ending December 31, 2005.

Plaintiff also asserts that the circuit court erred in concluding that earnings of $1,740 per week result in a gross income of between 40 and 60 thousand dollars a year.

The court's findings were based on the expert testimony of Mark Alexander. The court's opinion noted Alexander's testimony that owner/operators earn about $.87 a mile and average 2,000 miles per week. Two thousand miles per week times 52 weeks equals 104,000 miles per year. 104,000 miles times $.87 per mile equals $90,480 per year. $90,480 divided by 52 (weeks) equals $1,740 per week, as the circuit court found.

Plaintiff's appellate brief's factual scenarios and income and gross revenue calculations, however, assume truck drivers drive *3,000* miles per week.[3] Additionally, plaintiff argues that defendant's earnings rate was $1.27 per mile,[4] but does not cite to the record. A search through the trial exhibits yielded records produced by Hybels, Inc., which showed that in calendar year 2003, plaintiff earned either $1.30 per mile or $1.17, and earned primarily the $1.17 rate in the first months of 2004. However, those per mile rates were paid to defendant when he operated as an independent contractor, and not as an owner/operator. In any event, plaintiff's argument that defendant's gross revenue was properly $3,810.00 per week or $156,000.00 per year, is based on 3,000 miles per week—a figure supported only by records covering the first 14 weeks of 2004, and not 2003, and a per mile earnings rate that does not take into account the periods when defendant's pay was as an owner/operator, which works out to a much lower per mile rate than an independent contractor.

If plaintiff's challenge is to the court's determination that an annual gross salary of $90,480 results in a net income of $40,000 to $60,000, we reject it. The testimony at trial was that owner/operators must pay all their expenses (fuel, tolls, repairs, food, plus insurance). Thus,

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[3] Plaintiff asserts that records she subpoenaed from Bert Hybels show that defendant drove approximately 3,000 miles per week, but does not cite to an exhibit or the record.

Our review of the record found Hybels' records introduced as trial exhibits from calendar year 2003 and part of 2004. Some of the records provided mileage figures and others did not.

The 2003 records do not support plaintiff's figure of 3,000 miles per week. The 2004 records do support the 3,000 per week figure, but are only for the first three months of the year.

Defendant's mileage for 2003 was 54,075 (slightly over 1,000 miles weekly), but this number is low because when driving as an owner/operator defendant was not paid by the mile and odometer readings were not provided. Just how low we cannot discern, as plaintiff provides no guidance in how to ascertain mileage from these documents. Mileage figures are not stated on the documents showing defendant's pay as an owner/operator, as that pay is computed on a percentage of the gross load and not per mile.

For 2004 through April 6 (14 weeks), defendant's mileage was 43,080 (or 3,077 miles per week). As noted above, that is not an accurate number because defendant was at times paid a percentage of the load, and not per mile.

[4] Hybels' records introduced into evidence show that in calendar year 2003 Hybels often paid defendant $1.30 per mile, but later in the year often paid $1.17 per mile. Hybels' records of 2004 (through early April), also show defendant was paid $1.17 per mile the majority of the time when his pay was computed based on mileage. Exhibit 7 shows that much of defendant's pay in the first four months of 2004 was computed as an owner/operator, i.e., not per mile, but as a percentage of the gross of the load carried.

that a gross income of $90,480 would net between $40,000 and $60,000 after taxes and expenses does not appear to be a clearly erroneous factual finding.

We conclude that plaintiff has not shown that the circuit court's factual finding that earnings of $1,740 per week result in a gross income of between $40,000 and $60,000 thousand a year was clearly erroneous, *Stallworth, supra*.[5]

Affirmed.

/s/ Peter D. O'Connell
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski

[5] Plaintiff's statement of questions presented includes that the verdict was against the great weight of the evidence. However the issue is not briefed and is thus abandoned. *Woods v SLB Property Mgt, LLC*, 277 Mich App 622, 626-627; ___ NW2d ___ (2008).