

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES WRIGHT,

Plaintiff-Appellant,

v

MONICA MARIE WRIGHT,

Defendant-Appellee.

UNPUBLISHED
December 1, 2009

No. 282926
Washtenaw Circuit Court
LC No. 06-000800-DM

Before: Talbot, P.J., and Wilder and M.J. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's December 13, 2007 order awarding defendant appellate attorney fees and denying admission of evidence to support his motion for sanctions against defendant. We reverse in part and affirm in part.

This appeal arises from a divorce proceeding that began in 2006. Following a trial, but before the trial court entered its judgment of divorce, plaintiff alleged that defendant committed misconduct and perpetuated fraud on the court, and moved the trial court to impose sanctions against defendant based on these allegations. Plaintiff failed to cite any court rule or statute in support of his motion. Attached to the motion was DVD evidence in the form of "interviews" he had conducted of one of the parties' minor children in May and July of 2007. Plaintiff claimed in his motion that the interviews showed that defendant lied during her trial testimony. Before the trial court held a hearing to address plaintiff's motion, it issued its judgment of divorce. Plaintiff appealed that judgment on November 13, 2007.¹ Defendant then filed a motion in the trial court seeking to exclude the DVD evidence from the lower court record, and requesting appellate attorneys fees to defend against plaintiff's appeal of the divorce judgment. Following a hearing on both parties' motions, the trial court awarded defendant \$3,000 for appellate attorney's fees, ruled that the DVD evidence was inadmissible and removed it from the lower court file before the record was sent to this Court in connection with the appeal from the underlying judgment. The trial court also did not impose sanctions on defendant as requested by plaintiff.

¹ This Court ultimately affirmed the trial court's judgment of divorce in *Wright v Wright*, 279 Mich App 291; 761 NW2d 443 (2008).

Plaintiff first argues that the trial court erred in awarding defendant appellate attorney fees. We agree. We review a trial court's decision to award attorney fees for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 165-166; 693 NW2d 825 (2005). "An abuse of discretion occurs when the [trial court's] decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). Findings of fact in support of the award are reviewed for clear error, while questions of law are reviewed de novo. *Reed, supra*.

In a divorce action, all "[n]ecessary and reasonable attorney fees may be awarded to a party to carry on or defend" the action. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007). A trial court may award appellate attorney fees pursuant to MCR 3.206(C), which provides in relevant part:

(1) 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.

(2) *A party who requests attorney fees and expenses must allege facts sufficient to show that*

(a) the party is unable to bear the expense of the action, and that the other party is able to pay... [Emphasis added.]

Here, the trial court abused its discretion in awarding defendant appellate attorney fees because defendant's assertion in her motion that she was unable to bear the expense of the appellate action was not supported by specific evidence demonstrating her inability to pay. MCR 3.206(C)(2). Defendant also failed to articulate specific facts during the motion hearing showing she was unable to pay attorney fees for the forthcoming appeal, and she did not demonstrate on what she based her claim that \$3,000 in appellate fees was necessary. The trial court also failed to make specific findings of fact in support of its conclusion that defendant was unable to pay the fees. Despite acknowledging that it had not been presented evidence of defendant's income at the time of the hearing, nevertheless, the trial court relied on a generalized finding that there was a disparity of income between the plaintiff and defendant to justify the attorney fee award. Finally, the trial court failed to make any reasonableness findings to support its award of \$3,000 in appellate fees. *Stallworth, supra* at 288. In sum, the trial court abused its discretion because defendant failed to show the fees were necessary and reasonable, or that she was unable to pay the fees while plaintiff was. MCR 3.206(C). We reverse that portion of the December 13, 2007 order.

Plaintiff next argues that the trial court erred in ruling that the DVD evidence was inadmissible, and in directing its removal from the lower court record before the record was sent to this Court for plaintiff's appeal of the judgment of divorce. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Whether an evidentiary rule precludes admission of evidence involves a question of law that this Court reviews de novo. *Id.*

Plaintiff contends that the DVD evidence was admissible under MRE 804(b)(7), which permits the admission of hearsay evidence "not specifically covered by any of the foregoing

[hearsay] exceptions but having equivalent circumstantial guarantees of trustworthiness...” may be admitted. However, the circumstances here, prearranged recorded interviews of the minor child conducted by the plaintiff and not a neutral third-party, lack sufficient “guarantees of trustworthiness” to warrant admission under MRE 804(b)(7). As such, the trial court did not abuse its discretion in declining to consider the evidence and in refusing to allow the DVD evidence to remain in the lower court record.

Affirmed in part, reversed in part. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Kurtis T. Wilder

/s/ Michael J. Kelly