STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH C. DEKROUB, Plaintiff-Appellant,	UNPUBLISHED August 19, 2010
v	No. 291548 Livingston Circuit Court
SUSAN L. DEKROUB, a/k/a SUSAN L. HERCEG, Defendant-Appellee.	LC No. 93-020686-DO

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order requiring that he pay defendant, his former wife, $1,500 in attorney fees incurred defending a motion for reconsideration. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

The parties divorced in 1994. Among the marital assets was an interest in a property development. The parties' property settlement, which was merged into the divorce judgment, included the following provision:

> 9. [Plaintiff] shall pay to [defendant] one-half (½) of his profit distributions from Lake Wallaby Limited Partnership (excluding the repayment of loans made by Plaintiff to Lake Wallaby), with a minimum of Two Hundred Thousand and No/100 ($200,000.00) Dollars; and that, if the total of distributions is less than $200,000.00 upon completion of development, [plaintiff] will then pay the difference at $2,000.00 per month, at zero (0%) interest, until such time as [defendant] receives a total of $200,000.00.

The judgment separately reserves spousal support (also referred to as alimony) for defendant, including the following provision:

> B. That, in the event the property settlement provision is not fully performed, the Plaintiff shall pay to Defendant, as alimony, an amount equivalent to the amount Defendant would have received had the property settlement provision been fully performed; and that the terms thereof shall be identical to the

terms of the property settlement; and that the Plaintiff shall assume and pay any tax liability thereon to the Defendant . . . .

After years went by with no proceeds from the project paid to her, defendant sought enforcement of the above provisions.

On November 17, 2008,[1] the trial court issued an order enforcing the divorce judgment and for paying alimony. The order stated that, "the minimum sum of $200,000.00, less demonstrated payments already made by Plaintiff in partial satisfaction thereof, is now due to Defendant," and provided that, "Plaintiff shall pay to Defendant alimony in the sum of $2,000.00 per month . . . and said alimony shall continue until all net profits to which Plaintiff may be entitled by virtue of the LAKE WALLABY LIMITED PARTNERSHIP have been determined by proper and full accounting . . . ." [Parenthetical omitted.]

A different attorney for plaintiff filed what he entitled as a motion for a new trial or reconsideration. At a hearing on the motion, on February 5, 2009, plaintiff's attorney spoke of his "motion for a new trial and/or reconsideration . . . ." A different judge was presiding apparently because the original judge was not available. After hearing some argument, that judge expressed a reluctance to become involved in the case, and rescheduled the hearing in hopes that the original judge would be able to hear it.

Proceedings resumed before the original judge on February 20, 2009. Plaintiff's attorney spoke of the desire to bring witnesses. Defendant's attorney stated that, given that there was no trial in the first instance, but that the divorce judgment was 14 or 15 years old, a motion for a new trial was neither appropriate nor timely. The latter suggested that a motion for reconsideration was the only procedure available to plaintiff. Plaintiff's attorney agreed that the instant motion could also be considered one for reconsideration, but characterized the hearing that resulted in the spousal support enforcement order as a trial, on the grounds that the court "redrafted the judgment of divorce and interpreted the judgment of divorce such in effect and ordered alimony and said it will continue . . . in perpetuity depending on need . . . ." The trial court requested briefs on this procedural question, and set the hearing to continue on March 19, 2009.

When proceedings resumed, the parties and court understood that the procedure at hand was a motion for reconsideration. After entertaining some argument, the court held that no palpable error had been brought to light, denied the motion for reconsideration, and ordered plaintiff to pay sanctions as requested by defense counsel.

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[1] Defendant filed a motion the judgment of divorce in 2007. The court referee scheduled hearings. During that proceeding, plaintiff's counsel arrived late for a hearing, and defendant requested costs. However, the court referee noted that the lack of proper notice to plaintiff's counsel was due to a change in court practice. Ultimately, defendant dismissed her motion to enforce the judgment in 2007. When the motion was filed in 2008, the referee determined that he could not resolve the motion and scheduled it for hearing before a visiting judge.

II. Attorney Fees

"Awards of costs and attorney fees are recoverable only where specifically authorized by a statute, a court rule, or a recognized exception." *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). Both Court rule and statute embody the principle that a party may be assessed the opposition's attorney fees where the party put forward a frivolous claim or defense.

MCR 2.114(E) includes reasonable attorney fees among the sanctions available for violations of certain pleading rules, and MCR 2.114(F) in turn indicates that those sanctions may come to bear in response to a party who pleads a frivolous claim or defense.

MCL 600.2591(1) provides as follows:

> Upon motion of any party, 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 by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

A claim is frivolous if "(1) the party's primary purpose was to harass, embarrass, or injure the prevailing party, or (2) the party had no reasonable basis upon which to believe the underlying facts were true, or (3) the party's position was devoid of arguable legal merit." *Cvengros v Farm Bureau Ins Co*, 216 Mich App 261, 266-267; 548 NW2d 698 (1996), citing MCL 600.2591(3)(a). The fact that a party does not prevail does not itself indicate that the position maintained was frivolous. See *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). "A trial court's finding that an action is frivolous is reviewed for clear error. *Id.* at 661. "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* at 661-662.

In this case, the trial court did not conclude that plaintiff's motion for reconsideration was wholly without some reasonable basis in fact or law. That the motion was decided only after briefing and considerable argument confirms that the award of sanctions was not based on those concerns. Instead, the trial court apparently regarded the motion as gratuitously delaying the final resolution of the issues at hand. The court stated, "I do think that this is very dilatory what has been brought to this Court," and further recited that what was originally styled as a motion for new trial would be treated as a motion for reconsideration, and added, "then the Court rules went from 14 days to 21 days and this was filed on the 21st day." These minimal explanations suggest that the court awarded the requested attorney fees upon concluding that the motion for reconsideration was designed to cause delay in performance of the spousal support order.

The merits of the trial court's substantive decision on the motion for reconsideration are not at issue in this claim of appeal.[2] But our reading of the oral arguments plaintiff presented

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[2] This Court denied plaintiff's application for leave to appeal the substantive aspects of the (continued…)

suggests that the primary purpose of the motion was indeed to try to persuade the court either to modify its order, or even to proceed to taking evidence to establish certain facts. Defendant may have felt aggrieved at having to defend the motion, and endure the delay attendant to it, but, despite any weakness in plaintiff's position, the record does not support the conclusion that plaintiff's "*primary* purpose" for bringing the motion "was to harass, embarrass, or injure" defendant. MCL 600.2591(3)(a)(i); *Cvengros*, 216 Mich App at 266 (emphasis added).

Further, although the motion for reconsideration resulted in three separate proceedings, this was not by any design on plaintiff's part that is apparent on the record. The first proceeding was truncated and continued because a substitute judge thought the matter should be decided by the original one. The second was continued because the original judge in turn wanted briefing.

In light of plaintiff's vigorous advocacy in the matter, and the lack of such obvious delay tactics such as endeavoring to push back dates for proceedings, or himself moving for continuances, any conclusion below that the motion was brought and maintained primarily for purposes of delay leaves us with "a definite and firm conviction that a mistake has been made." *Kitchen*, 465 Mich at 661-662. For these reasons, we hereby reverse the award of attorney fees.

Attorney fees reversed. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens

(…continued)

alimony order "for lack of merit in the grounds presented" in an unpublished order issued July 22, 2009 (Docket No. 291529).