STATE OF MICHIGAN

COURT OF APPEALS

SUSAN L. FORMICOLA,

Plaintiff-Appellant,

v

ROBERT FORMICOLA,

Defendant-Appellee.

UNPUBLISHED
November 23, 2010

No. 294307
Macomb Circuit Court
LC No. 2005-003833-DM

Before: STEPHENS, P.J., and MARKEY and WILDER, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's denial of her motion for attorney fees and costs in connection with defendant's unsuccessful motion to modify child support. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The parties were divorced on February 2, 2006, pursuant to a consent judgment. The parties have two minor children. The initial child support order directed defendant to pay plaintiff base support in the amount of $1,117 per month and ordinary medical expenses in the amount of $43, for a total of $1,160 per month. Subsequently, on August 7, 2009, defendant moved to modify child support. In his motion, defendant maintained that he had recently changed employment after being unemployed for a time and stated that he currently earned an average weekly gross income of $1,228, but that this figure included overtime, which he might not be able to work in the future. Defendant also maintained that plaintiff, who was unemployed, should have income imputed to her in the amount of at least $7.40 an hour for 40 hours per week. In response to plaintiff's subsequent argument that defendant's calculations were incorrect and that defendant could not meet the minimum threshold for a change in a child support order under 2008 MSCF 4.04, as well as plaintiff's concurrent motion for sanctions for filing a frivolous motion, defendant eventually recalculated his current wages without the included overtime at $1,002.40 a week. Using this new figure, and still imputing income to plaintiff, he argued that the new child support obligation should be $211.85 a week, or $921.56 a month, an amount lower than the threshold $1,044 a month necessary to move for a change in his support obligation.

On September 8, 2009, the trial court held a hearing on the parties' motions. Ultimately, the court concluded that it was not appropriate to impute income to plaintiff. The court noted that plaintiff was not working at the time of the divorce and that there was no change in

circumstances to justify the court's revisiting the issue. When defendant requested that the court consider the 11 factors listed in the child support guidelines concerning imputation of income, the trial court stated that it did not think that those factors necessitated imputation of income while the children, then ages six and seven, still needed more parenting than they might when they were older. The trial court denied plaintiff's motion for sanctions, however, after finding that the request for imputation of income was not frivolous.

We review a trial court's determination whether an action is frivolous for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "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.

Under MCR 2.114(D)(2), when a party or an attorney signs a motion, among other documents, the signature constitutes an certification that, "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, 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(E) provides:

> (E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

Pursuant to MCR 2.114(F):

> (F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

MCR.2.625(A)(2) in turn provides:

> (2) Frivolous Claims and Defenses. In an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591.

MCL 600.2591(1) provides:

> (1) 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.

MCL 600.2591(3) defines "frivolous" as follows:

> (a) "Frivolous" means that at least 1 of the following conditions is met:

(i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit.

These provisions impose a duty on the attorney to conduct an objectively reasonable inquiry into the factual and legal viability of a pleading before it is signed. *LaRose Market, Inc v Sylvan Center, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). The determination of whether a claim is frivolous under MCR 2.114(E) and (F) and under MCL 600.2591 depends on the facts of the case. *Kitchen*, 465 Mich at 662.

Plaintiff appears to argue that defendant's motion to modify his child support was frivolous under the statute and court rule because defendant should have known that his request for modification of child support would be denied because it did not meet the "minimum threshold for modification" of a change of ten percent of the currently ordered support, or $50, whichever is greater. 2008 MCSF 4.04.[1] But the main dispute over whether defendant's calculated reduction met the minimum threshold was whether the trial court should impute income to plaintiff, who was not working. Defendant correctly points out that the MCSF manual does allow for imputation of income after analyzing the eleven factors. 2008 MCSF 2.01(G). Defendant argued, and continues to argue, that imputation was proper under the guideline factors. The trial court found it was not, because plaintiff was not working at the time of the divorce and that there had been no change of circumstances. The court also appeared to base its decision on the age of the children and plaintiff's desire to continue as a full-time parent.

We need not decide the underlying question of whether a court can properly modify a child support order based on imputation of income to someone who was not working at the time of the judgment of divorce. Instead, we note that plaintiff has not presented this court with any authority to suggest that this question is so settled that defendant's attempt to impute income under these circumstances was so outrageous as to be frivolous. A party may not simply assert an error and then leave it to this Court to search for authority to support or reject the argument. *In re Reisman Estate*, 266 Mich App 522, 533; 702 NW2d 658 (2005). The trial court intimated that were the children older, it might have reached a different decision. And, arguably, even if the fact that the children were getting older was not by itself enough to warrant revisiting the issue of imputing income to plaintiff, defendant's new job and reduced income could have formed the basis for maintaining that there was such a change in circumstances. We do not decide whether defendant's position is the correct one or whether imputation was appropriate

[1] While plaintiff does not provide a citation to authority to show that defendant had to actually establish this minimum threshold in order to seek modification of his child support, we note that the state Friend of the Court Bureau is required to "establish a minimum threshold for modification of a child support amount." MCL 552.519(3)(a)(vi).

here. But defendant's position had sufficient merit that we find no clear error in the trial court's decision that defendant's motion for change in support was not frivolous.

We affirm. Defendant being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Cynthia Diane Stephens
/s/ Jane E. Markey
/s/ Kurtis T. Wilder