

STATE OF MICHIGAN
COURT OF APPEALS

REBECCA JOHNSON, also known as
REBECCA DEVRIES,

Plaintiff-Appellant,

v

MICHAEL DEVRIES,

Defendant-Appellee.

UNPUBLISHED
October 16, 2018

No. 342135
Allegan Circuit Court
LC No. 11-48104-DM

Before: BOONSTRA, P.J., and O'CONNELL and TUKEL, JJ.

PER CURIAM.

Plaintiff appeals by right the order of the trial court finding her in contempt and imposing monetary sanctions for her denial of parenting time to defendant. We vacate the order and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The parties married in 1994 and divorced in 2011. They are the parents of two children born during the marriage, a daughter, ED, (born in 1998) and a son, PD, (born in 2003). The consent judgment of divorce entered in 2011 granted the parties joint legal custody of the children, with plaintiff having sole physical custody and defendant having substantial parenting time. The judgment of divorce also contained a "right of first refusal" clause, stating that "[e]ach parent shall have the right of first refusal to care for the minor children in the event the non-custodial parent is not available to the children during their parenting time for a period of three hours or more." In September 2015, the trial court entered an order modifying parenting time and permitting ED to "opt out" of 3 parenting time visits in any 60-day period with either parent, provided that she gave adequate notice to both parents. The order stated that ED "may not select more than two opt out periods from either parent without first selecting an opt out date from the other parent." The order provided for "make up" parenting time to be provided to the parent subject to such an opt-out.

In June 2016, defendant filed a motion with the trial court requesting that it order plaintiff to show cause why she should not be held in contempt for denying parenting time regarding ED (who was seventeen years old at the time and soon to turn 18) and seeking sole or joint physical custody of PD (then fourteen). Relevant to this appeal, the motion requested that plaintiff be

held in contempt for several alleged denials of defendant's parenting time with ED and for allegedly denying defendant the right to exercise his right of first refusal. Defendant's brief in support of his motion sought to have plaintiff held in contempt under the general contempt statute, MCL 600.1701, and MCR 3.606.¹ On August 25, 2016, the Friend of the Court (FOC) filed two motions with the trial court requesting that it order both plaintiff and defendant to show cause why they should not be held in contempt for violating the parenting time order. Each FOC motion was premised on complaints made by the other parent. The motions contained notice that if a parent was found to have violated the parenting time order without good cause, he or she could receive a sanction of up to \$100, or, if the court found after a show-cause hearing that a parent had acted in bad faith, could receive escalating sanctions of up to \$250 for "the first time the party is found to have acted in bad faith," \$500 for the second time, and \$1,000 for the third and all subsequent times, as well as ordered to pay the other parent's costs. The motion cited (and mirrored the language of) MCL 552.644, which authorizes the trial court to impose such sanctions if the party to a parenting time dispute is found in civil contempt and if a finding of bad faith is made.

The referee held a hearing on defendant's motion and the FOC motions, as well as on another pending matter of unpaid medical expenses. The hearing began on December 13, 2016, was continued on January 6, 2017, and concluded on January 9, 2017. At the hearing, the parties testified to the following incidents involving a denial of defendant's parenting time:

- 1) On April 8, 2016, defendant was scheduled to have parenting time with the children for the weekend ending April 10. Defendant, who was living in Indiana at the time, arrived on Friday to take the children to Indiana for the weekend, where he had planned for them to attend numerous events, including a hockey game and a party. Defendant and plaintiff had previously discussed the fact that ED was concerned about having a lot of homework, and defendant had requested that plaintiff ensure that ED was caught up on her homework by Friday. Nonetheless, on April 8, ED informed defendant that she did not wish to go with him and wanted to opt out due to her homework; however, ED had already opted out of two parenting times with defendant and, under the opt-out order, could not opt out of a third before opting out of a parenting time with plaintiff.² Defendant testified that ED was defiant and refused to go with him, and that plaintiff stated that she would not "force" ED to attend parenting time. Defendant contacted the police, who arrived and attempted to mediate the situation. Defendant ultimately agreed to allow ED to stay home and took PD to Indiana for parenting time.
- 2) On April 29, 2016, plaintiff asked defendant if he would like to use his right of first refusal to have parenting time with the children for the weekend ending May 1, 2016,

¹ MCL 600.1701(g) permits the trial court to "punish by fine or imprisonment" persons who disobey "any lawful order, decree, or process of the court." MCR 3.606 permits the trial court to find a party in contempt after a show-cause hearing for acts committed outside of the immediate presence of the court.

² It is unclear what form an "opt-out" would take with plaintiff. ED never exercised this option.

because she was going on a business trip. Defendant agreed, and plaintiff testified that she encouraged ED to attend. Yet ED refused. Defendant had parenting time with PD, but not with ED.

- 3) Both parties testified that parenting time on the following dates followed a similar pattern, i.e., ED would refuse to attend parenting time with defendant despite plaintiff's encouragement: May 2 through May 6, 2016; May 13 through May 15, 2016; May 27 through May 29, 2016; June 10 through June 12, 2016; June 12 through June 17, 2016; June 23 through June 26, 2016; July 3 through July 10, 2016; July 17 through July 25, 2016; August 4 through August 7, 2016; and August 18 through August 21, 2016.³
- 4) Plaintiff testified that she communicated with defendant on June 14, 2016 through the computer program Our Family Wizard, asking him if he would like to exercise his right of first refusal to take the children for parenting time on June 20, 2016 through June 22, 2016, due to her last-minute business trip. Defendant was on vacation at the time of plaintiff's message. On June 16, 2016, plaintiff informed defendant that he had not responded in a timely manner and that she had made plans for the children to stay with her parents. Defendant testified that he did wish to exercise his right of first refusal, and even attempted to pick the children up from their grandparents' home, but was ultimately unable to exercise his parenting time.
- 5) Plaintiff testified that she sent defendant a message on July 1, asking if he would like to exercise his right of first refusal and have parenting time from July 25 through July 29, 2016, due to plaintiff's work schedule. Defendant responded immediately that he would have to check his work schedule. On July 13, plaintiff, having not heard anything from defendant, informed him that she had made other arrangements for the children.

On March 8, 2017, the referee issued a written recommendation. The referee found plaintiff in contempt for denying defendant's parenting time with ED on the following dates in 2016: (1) April 8-10, (2) April 29-May 1, (3) May 2-6, (4) May 13-15, (5) May 27-29, (6) June 10-12, (7) June 12-17, (8) June 23-26, (9) July 3-July 10, (10) July 17-July 24, (11) August 4-7, (12) August 18-21. With respect to all of these dates, the referee found that defendant had exercised his parenting time with PD but had been denied it with ED. The referee recommended that plaintiff be fined \$100 for each of these denials (considering each period of denied parenting time as one denial, e.g., the denial of a weekend of parenting time was one denial despite defendant being denied multiple consecutive days of parenting time). Although the referee's recommendation listed 12 incidents for which the referee recommended a sanction of \$100 each, the recommendation stated that the total sanctions were \$1,100. The referee did not indicate specifically that she recommended these sanctions under MCL 552.644, but did state that "there

³ The 3 and 4 day periods are "weekends"—the judgment of divorce provided that defendant's parenting time weekends during the children's summer break from school would begin on Thursday evenings. The longer periods appear to be vacations, as also provided for in the judgment of divorce.

is no evidence that Plaintiff acted in bad faith, therefore the higher mandatory fines are not imposed.” The referee recommended that plaintiff not be held in contempt for the denial of defendant’s right of first refusal for parenting time with both children on June 20-22, finding plaintiff’s actions in securing other accommodations for the children after not hearing from defendant to be reasonable. The referee did recommend that plaintiff be held in contempt for the denial of defendant’s right of first refusal on July 25-29, finding plaintiff’s actions not reasonable in light the fact that she made other arrangements for the children when there was still nearly two weeks until the scheduled trip and refused to alter those plans. The referee found that the record indicated that this contempt recommendation only related to the denial of parenting time with PD and did not relate to the denial of parenting time with ED.⁴ The referee did not recommend a monetary sanction, but only an award of makeup parenting time, with respect to ED.⁵

Defendant filed objections to the referee’s recommendation and requested a de novo hearing under MCR 3.215(E) and (F). Relative to the referee having found plaintiff in contempt, defendant argued that the monetary amount of 10 of the 11 sanctions awards was insufficient, because the referee should have found plaintiff to have acted in bad faith. Defendant alleged that “Plaintiff took no actions to ensure the child [ED] participated in parenting time and Defendant was denied any parenting time on at least 10 occasions until child turned 18.” Defendant argued that 10 of the 11 denials should have received higher sanctions for bad faith under MCL 552.644(2), arguing that plaintiff should have been fined \$250 for the first denial, \$500 for the second denial, and \$1000 for the remaining 7 denials.⁶ Defendant did not specify which 10 of the 11 monetary sanctions recommended by the referee should be increased in such a manner. Defendant did not argue that the referee improperly failed to find plaintiff in contempt or recommended inappropriate sanctions for any denials of parenting time with PD or for any denials of his right of first refusal.

The trial court held a hearing on defendant’s objections. At the hearing, counsel for defendant stated that defendant objected to “a minimum of 11” contempt findings that “the referee determined that it was \$100 per violation.” Defendant’s counsel also stated that defendant was not objecting to the referee’s order of four makeup parenting-time days with PD for plaintiff’s denial of his right to first refusal on July 25-29. Both parties agreed that they were not challenging the referee’s findings of contempt, and plaintiff did not challenge the amount of

⁴ It is not clear from the record whether defendant voluntarily declined his parenting with ED on this date; defendant normally sought to exercise his parenting time with both children at the same time. As stated below, defendant did not object to the referee’s recommendations regarding these dates, and did not object to the referee’s finding that these dates only concerned PD.

⁵ The referee also declined to change custody of PD, and declined to find defendant in contempt for allegedly violating the parenting time order in an incident in which he picked PD up from a different location than the parents had agreed upon. These issues are not the subject of this appeal.

⁶ Defendant also treated the denial of each multiple-day parenting-time period as one denial.

sanctions the referee had recommended; the only issue was defendant's challenge to the amount of sanctions ordered for those instances of contempt found by the referee.

Following the hearing, the trial court issued a decision and order concerning defendant's objections. Despite the referee's recommendation of sanctions for denials of parenting time regarding ED, the decision stated that "[t]here is no dispute over the Referee's underlying conclusion that Plaintiff is in contempt for denying parenting time with [PD] on eleven days of alleged parenting time." The decision further stated that "[p]ursuant to MCL 552.644(2), Referee Kamps sanctioned Plaintiff mother \$100 for each complete or partial day of eleven (11) total days of contemptuously denied parenting time, for a grand total of \$1,100.00" noting that the referee had found that plaintiff had not acted in bad faith.

The trial court addressed the incident that occurred on April 8, 2016, in which defendant was denied his parenting time with ED, which was one of the incidents for which the referee had recommended that plaintiff be sanctioned \$100. The trial court found that plaintiff *had* acted in bad faith regarding this event. The trial court made further reference to a denial of defendant's parenting time with ED on April 29-May 1, and again found bad faith on the part of plaintiff; however, the trial court stated that "since [PD] did attend parenting time, this incident has no direct bearing on the calculations of sanctions awarded in this decision" although the referee had recommended a sanction of \$100 for this violation.

The trial court addressed the denial of defendant's right of first refusal for the period of June 20 through June 22, for which the referee had found plaintiff had good cause and had not found her in contempt. The trial court disagreed with the referee, finding that plaintiff lacked good cause to violate the parenting time order and had acted in bad faith. The trial court stated that "[t]he court believes these three days are already included in the total of eleven separate days for which Defendant [sic] should be sanctioned," despite noting that the referee had not found plaintiff in contempt or sanctioned her in this respect.

The trial court also addressed the denial of defendant's right of first refusal for the period of July 25 through July 29, despite his counsel's statement at the hearing that he did not object to the referee's imposition of the sanction of makeup parenting-time for this period. The trial court again found that "Plaintiff's conduct should be treated as behavior committed in bad faith, in violation of MCL 552.644(6) and (8) as to these five days of parenting time."

The trial court made no further reference to specific denials of parenting time, but concluded as follows:

For the first three of eleven days of parenting time denied by Plaintiff without good cause and in bad faith, she is sanctioned and ordered to pay to the FOC \$200 for the first day, \$400 for the second day and \$600 for the third day.

For the second period of parenting time denied by Plaintiff without good cause and in bad faith (3 days from June 20-June 22, 2016), Plaintiff is sanctioned and ordered to pay to the FOC \$250 for the first day, \$500 for the second day and \$750 for the third day.

For the third period of parenting time denied by Plaintiff without good cause and in bad faith (five days from July 25-July 29, 2016), Plaintiff is sanctioned and ordered to pay to the FOC \$250 for the first day, \$500 for the second day, \$1,000 for the third day, \$1,000 for the fourth day and \$1,000 for the fifth day.

The trial court also ordered the payment of defendant's reasonable costs and attorney's fees "attributable to the effort and expense of raising the violations and seeking to enforce his parenting time."

This appeal followed.

II. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's issuance of a contempt order. *Porter v Porter*, 285 Mich App 450, 454; 776 NW2d 377. "The abuse of discretion standard recognizes that there will be circumstances where there is no single correct outcome and which require us to defer to the trial court's judgment; reversal is warranted only when the trial court's decision is outside the range of principled outcomes." *Id.* at 455. We review for clear error a trial court's factual findings. *Id.*

III. TRIAL COURT'S REVIEW OF THE REFEREE'S RECOMMENDATION

Plaintiff argues that the trial court erred by identifying the issue before it as being that of the denial of defendant's parenting time for PD, and that this error perpetuated numerous clear factual errors that rendered the trial court's decision an abuse of discretion. We agree.

As stated, defendant only objected to the *amount* of sanctions recommended by the referee related to finding plaintiff in contempt. All of the referee's contempt findings for which monetary sanctions were imposed were related to the denial of defendant's parenting time with ED, not PD. The referee made one contempt finding related to parenting time with PD, for which she recommended makeup parenting time; defendant not only did not challenge this sanction in his pleadings but affirmatively expressed his approval of that sanction at oral argument. Additionally, defendant did not challenge the referee's failure to find plaintiff in contempt regarding any other parenting time dates, and his counsel agreed at the motion hearing that the only issue was the "inadequacy of sanctions." At the motion hearing, the parties discussed plaintiff's denial of defendant's parenting time related to ED, and the trial court made statements and asked questions that seemed to indicate that it understood the issue to be related to parenting time with ED. For example, it asked whether "any of those 11 citations fall at a time when the child had complied with the opt-out provisions," ED being the only child subject to the order concerning opt-outs.

Nonetheless, the trial court stated in its decision that the referee had recommended sanctioning plaintiff for 11 "complete or partial" days of denied parenting time with PD, which was clearly erroneous not only in mis-identifying the involved child, but in light of the fact that the referee had sanctioned plaintiff for 11 (or 12) separate *instances* of denying defendant parenting time over multiple days. *Porter*, 285 Mich App at 455. Further, despite defendant's

clear repeated statements that he only objected to the lack of a finding of bad faith and the resulting inadequacy of the sanctions that the referee recommended, the trial court reviewed the referee's failure to find plaintiff in contempt for the period of June 20 through June 22. And, having disagreed with the referee and having determined that plaintiff should be held in contempt for those days, the trial court inexplicably reached the conclusion that the three days of this time period were included within the 11 days for which it believed the referee had recommended that plaintiff be sanctioned. This was also clear error. *Id.*

The trial court also reviewed and imposed sanctions for the denial of parenting time with PD from July 25 through July 29, despite defendant affirmatively expressing his approval of the existing sanctions. This was an abuse of discretion in light of defendant's clear waiver of any review of this issue. See *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999) (defining waiver as "the intentional relinquishment or abandonment of a known right.").

The trial court also did not review the majority of the actual dates for which the referee recommended sanctions; in fact, it made the statement, when reviewing the April 29 to May 1 period, that an instance in which defendant received parenting time with PD, but not ED, had "no direct bearing" on the sanctions it was imposing, despite that instance being precisely one of those for which the referee had recommended sanctions.

Nor is the error of the trial court limited, as defendant argues, to the mere transposition of the children's names. At least 8 of the 11 days for which the trial court imposed sanctions were unequivocally related to the denial of parenting time with PD, despite defendant's objections being limited to those sanctions imposed by the referee for the denial of parenting time with ED. It is also unclear to this Court what exactly the trial court meant by the "the first three of eleven days of parenting time denied by Plaintiff without good cause and in bad faith." If the trial court was referring to the denial of defendant's parenting time with ED on April 8-10, this denial was among those for which the referee recommended sanctions and to which defendant objected; however, this three-day period was only one of the sanctioned periods, not three.

In sum, we conclude that the trial court clearly erred in its review and resolution of the referee's recommendation and defendant's objections. *Porter*, 285 Mich App at 455. We therefore vacate its order and remand for further proceedings. On remand, the trial court should review de novo at an evidentiary hearing the referee's recommendation in light of defendant's objections. In light of our disposition of this matter, we do not consider the balance of the issues raised on appeal.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Peter D. O'Connell
/s/ Jonathan Tukel