STATE OF MICHIGAN

COURT OF APPEALS

LISA M. BOWERS,

Plaintiff-Appellee,

v

CHARLES E. BOWERS,

Defendant-Appellant.

UNPUBLISHED
September 20, 2011

No. 298268
Oakland Circuit Court
LC No. 06-725162-DM

Before: M.J. KELLY, P.J., and OWENS and BORRELLO, JJ.

PER CURIAM.

In this divorce case, defendant appeals as of right from the trial court's grant of plaintiff's motion for attorney fees in the amount of $24,857.00. The trial court granted the motion based upon its finding that defendant engaged in unreasonable conduct in bringing an unsuccessful motion for a change of custody of the parties' daughters. We affirm as to the grant of attorney fees, but remand for a hearing on the amount of those fees.

I. FACTS

In 2008, the parties were divorced by consent judgment after a 25 year marriage. The parties have three daughters together, two of whom are still minors. The judgment awarded the parties joint legal custody and set forth a specific parenting time schedule. In the summer of 2009, the parties had a disagreement about when the older of the two daughters, S.M., should take driver's education classes. Plaintiff believed that the parties had agreed that 16-year-old S.M. would take the classes during the fall session and scheduled a vacation to begin on August 10, 2009. Defendant believed that the parties had agreed that S.M. could take driver's education in the summer, beginning on July 27, 2009. The disagreement resulted in defendant attempting to help S.M. sneak out of plaintiff's house. Plaintiff caught S.M. and defendant attempting to drive away, and a confrontation ensued.

Defendant then filed an emergency motion to modify custody. In his motion, defendant contended that there had been a change in circumstances that warranted a custody change. In support of his motion he claimed that plaintiff burdened the children with her financial problems, and attempted to poison the children against him. He alleged that plaintiff had become neglectful of the children, often leaving them home alone for extended periods. He contended that plaintiff failed to keep sufficient or suitable food in the home for the children, causing them to be hungry, that he had personally observed spoiled food and empty cupboards at plaintiff's

home, and that plaintiff self-medicated her depression, drank alcohol on a daily basis and was often intoxicated in front of the children. Defendant further alleged that plaintiff was inattentive to the children and had been physically, verbally, and emotionally abusive to S.M. According to the trial court, "[e]ssentially, Defendant's Motion read like a petition in a child protective proceeding in an attempt to convince this Court that the children were in immediate danger."

Following an emergency hearing on this motion, the trial court referred the matter to the Friend of the Court (FOC) for a review of both parenting time and custody. The FOC counselor found that there had been no change in circumstances and that a change in custody was not warranted. Plaintiff moved to adopt this recommendation and defendant filed an objection.

The trial court scheduled a *Vodvarka*[1] hearing On December 21, 2009 to 1) determine whether defendant could establish a proper cause or change of circumstances in support of his request to change custody and 2) hear plaintiff's request for attorney fees. At the *Vodvarka* hearing, defendant testified as to generalized events that allegedly occurred in plaintiff's home that gave rise to his motion. The trial court was impatient with defendant's inability to be more specific in his testimony and stated, "either there's specifics or there aren't . . . and if you can't give me specifics, then don't give me anything else sir." At the end of the hearing, at the behest of plaintiff's attorney, the trial court directed counsel to file briefs on the issue of plaintiff's attorney fees in lieu of hearing oral arguments on the matter. The trial court instructed the attorneys to submit their briefs "before the end of the year." Defendant's attorney reluctantly agreed.

Plaintiff's attorney submitted a brief on the attorney fee issue on December 30, 2009. Attached to the brief was a copy of plaintiff's "bill" and her attorney's hourly rate of $335. Defendant's attorney submitted his brief on January 4, 2010 and submitted it to Judge Lisa Gorcyca, rather than to Judge Anderson. Judge Anderson declined to accept defendant's brief because it was not filed "before the end of the year," and because it had been filed with the wrong judge[2].

On February 24, 2010 the trial court (Judge Anderson) issued its written opinion and order denying defendant's motion for a change of custody and granting plaintiff attorney fees. The trial court wrote that it "did not find Defendant's testimony to be credible." The trial court also found that "the situation that gave rise to the instant conflicts in this case was nothing more

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[1] *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 87 (2003). An evidentiary hearing to determine whether there has been a change of circumstances warranting a review of the order of custody.

[2] Since Judge Anderson would no longer be sitting in the family division after December 31, 2009 and since she informed the parties that, "I'm not taking this case with me"; it was unreasonable for her not to accept defendant's brief for having been erroneously, but understandably, filed with the judge who took over Judge Anderson's family court docket. This is particularly so because defendant claims that when went to file his brief, the clerk of the family court would only file it with Judge Anderson's successor.

than a teenage daughter rebelling from her mother's rules in the home and Defendant enabling her conduct by facilitating these exaggerated and fabricated allegations in support of a change of custody." Furthermore, during his testimony defendant confirmed that he had allowed S.M. to attend a birthday party in northern Michigan in contravention of the parties' parenting time schedule. The trial court noted that as a result, plaintiff incurred more attorney fees for having to file an additional motion. Defendant filed a motion for reconsideration. The trial court denied that motion.

II. STANDARD OF REVIEW

A trial court's decision to award attorney fees is reviewed for an abuse of discretion. *Stoudemire v Stoudemire,* 248 Mich App 325, 344; 639 NW2d 274 (2001). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Radeljak v DaimlerChrysler Corp,* 475 Mich 598, 603, 719 NW2d 40 (2006). Its factual findings are reviewed for clear error. *Reed v Reed,* 265 Mich App 131, 164; 693 NW2d 825 (2005).

III. ATTORNEY FEES

Before addressing defendant's substantive arguments, we address the procedural issue of whether defendant's brief on the issue of attorney fees was timely submitted. Here, the trial court stated on the record that briefs were to be submitted before the end of the year. That would mean by Thursday, December 31, 2009. Defendant states in his brief that the Oakland Circuit Court is always closed on December 31, 2009. Defendant's brief was filed the next day the court was open following the filing of plaintiff's brief. To the extent that defendant's brief addressed plaintiff's eligibility to be awarded attorney fees, defendant's brief was untimely. However, to the extent the brief dealt with the reasonableness of the amount of plaintiff's claimed attorney fees, defendant's brief was timely. After plaintiff filed her fee affidavit and brief, defendant had only 39 minutes within which to reply to her calculations before the court closed until January 4, 2010.

Next, we turn to the issue of the trial court's award of attorney fees. In domestic relations cases, attorney fees are authorized by both statute, MCL 552.13, and court rule, MCR 3.206(C)." *Reed v Reed,* 265 Mich App 131, 164; 693 NW2d 825 (2005). MCR 3.206(C) provides:

> (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.
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> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
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> > (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
> >
> > (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

MCL 552.13(1), authorizes as follows the imposition of fees and costs in divorce actions:

> In every action brought, either for a divorce or for a separation, the court may require either party to pay alimony for the suitable maintenance of the adverse party, to pay such sums as shall be deemed proper and necessary to conserve any real or personal property owned by the parties or either of them, and to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency. It may award costs against either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver.

In addition, this Court has held that attorney fees are "authorized when the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of litigation." *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992); *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2d 394 (1992). "[T]he attorney fees awarded must have been incurred because of misconduct." *Reed*, 265 Mich App at 165. Here, the trial court made a finding that plaintiff was forced to incur these attorney fees because of defendant's misconduct. The trial court specifically stated that defendant's motion was based on "exaggerated and fabricated allegations." The trial court also found that defendant's testimony was not credible. Therefore, all of defendant's arguments regarding plaintiff's ability to pay the fees herself are irrelevant. It was defendant's misconduct, rather than plaintiff's inability to pay the attorney fees which was the basis for the trial court's decision.

A trial court can award fees if the following criteria are met: 1) where a party engages in unreasonable conduct 2) the conduct caused the other party to incur the legal fees and 3) the fees are reasonable. *Reed*, 265 Mich App 131. In *Reed*, this Court stated:

> Moreover, the trial court further erred by not conducting a hearing or finding facts regarding the reasonableness of the fees incurred. *Miller v Meijer, Inc*, 219 Mich App 476, 479-480; 556 NW2d 890 (1996); *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 33; 335 NW2d 710 (1983).
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> When requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services. *Miller, supra* 219 Mich App at 479-480; 556 NW2d 890; *Petterman, supra* at 33. [Id. at 165-166].

Here the trial court reviewed the affidavit submitted by plaintiff's attorney, and concluded that the amount of attorney fees requested was reasonable. Under MCR 3.206(C)(1), plaintiff bears the burden of showing facts sufficient to justify the award of attorney fees. Defendant argues that the invoice upon which the trial court relied in granting the attorney fees was not detailed enough. We agree. The affidavit in support of plaintiff's motion for attorney fees appears as follows:

> July, 2009: $335 fees and $20 costs
> August, 2009: $8,274.50

September, 2009: $3,450.50
October, 2009: $4,924.50
November, 2009: $2,010 and $65 costs
December, 2009: $5,862.50 and $40 costs for a total of $24,857 in fees and $115 costs.

Defendant also contends that the award of $24,972, or $335/hour for 74.5 hours was unreasonable and that the trial court may not award attorney fees solely on the basis of what it perceives to be fair or on equitable principles. *Reed*, 265 Mich App 131. The trial court noted that it took into consideration plaintiff's attorney's level of experience and determined that $335/hour was a reasonable rate. Nonetheless, this cursory review of plaintiff's attorney fees does not appear to comport with the in depth review of such fees that this Court has required in other cases.

Although there is no Michigan case law directly on point about the calculation of attorney fees in the context of misconduct in a divorce case, our Supreme Court has given detailed instructions on the calculation of attorney fees related to case evaluation rejection under MCR 2.403(O)(6). We conclude that a more in depth analysis than was conducted by the trial court was in order. Our Supreme Court's analysis in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008) demonstrates how a court should determine the reasonableness of requested attorney fees.

The *Smith* Court first noted that the party requesting fees bears "the burden of proving the reasonableness of the requested fees." *Smith*, 481 Mich at 528–529. The trial court should "consider the totality of special circumstances," applying as appropriate the six factors listed in *Wood v Detroit Auto Inter–Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982), and the eight factors listed in Michigan Rules of Professional Conduct (MRPC) Rule 1.5(a). The factors overlap and include "the professional standing and experience of the attorney," "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly," and "the expenses incurred." *Id.* at 529–530, quoting *Wood*, 413 Mich at 588, MRPC 1.5(a).

The *Smith* Court held that, in determining whether requested attorney fees are reasonable, the trial court should

> begin its analysis by determining the fee customarily charged in the locality for similar legal services.... In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case.... The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee.... [*Id.* at 530–531.]

The Court "emphasize[d]" that "'the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.'" *Id.* at 531, quoting *Blum v Stenson*, 465 US 886, 895 n 11; 104 S Ct 1541; 79 L Ed2d 891 (1984). This "satisfactory evidence" of customary fees "can be

established by testimony or empirical data found in surveys and other reliable reports." *Id.* at 531–532. Mere "anecdotal statements" are not sufficient. *Id.* at 532.

To determine "the reasonable number of hours expended in the case," the attorney requesting fees "must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness." *Id.* The burden of establishing the reasonableness of the hours reported lies with the attorney requesting fees. If the other party raises a factual dispute regarding the reasonableness of the hourly rates or the hours billed, "the party opposing the fee request is entitled to an evidentiary hearing to challenge" the evidence submitted by the attorney requesting fees and to present contrary evidence. *Id.* Only after the trial court has determined a reasonable fee by multiplying the reasonable hourly rate by a reasonable number of hours billed, should the court "consider the other factors and determine whether they support an increase or decrease in the base number." *Id.* at 533. To facilitate appellate review, the trial court "should briefly address on the record its view of each of the factors." *Id.* at 529 n 14.

In light of the in-depth analysis in the calculation of attorney fees that our Supreme Court has required, we conclude that the trial court's reliance on the perfunctory affidavit of plaintiff's counsel was an insufficient analysis. Therefore, we remand this case for a hearing on the amount of attorney fees and for a recalculation of those fees based upon the type of analysis outlined in *Smith*, 481 Mich 519. Because there were sufficient facts from which the trial court could determine that defendant had engaged in misconduct, we affirm that plaintiff is entitled to an award of some amount of attorney fees.

Defendant also argues that the trial court erred in denying *his* motion for attorney fees. This issue is without merit. The trial court concluded that defendant was not credible and that he was the one who committed misconduct in this case. The court further found that plaintiff's attorney fees would not have been incurred but for this misconduct. It would logically follow that defendant's attorney fees were also incurred as a result of his actions and that an award of attorney fees to him would be totally incongruous with the trial court's finding and would be inappropriate. Therefore, we find that the trial court did not clearly err in making this finding. Furthermore, there was no evidence that plaintiff committed any misconduct of her own that would support an award of attorney fees to defendant.

Lastly, plaintiff urges this Court to award her sanctions under MCR 7.216(C)(1)(b). This Court may, upon motion of a party or its own initiative, impose sanctions on a party who pursued a vexatious appeal or a vexatious proceeding in an appeal. MCR 7.216(C)(1), *DeWald v Isola (After Remand)*, 188 Mich App 697, 700; 470 NW2d 505 (1991). An appeal is vexatious when it is taken for purposes of hindrance or delay or without any reasonable basis for belief that there is a meritorious issue to be determined on appeal. MCR 7.216(C)(1)(a), *Richardson v DAIIE*, 180 Mich App 704, 709; 447 NW2d 791 (1989). A proceeding is vexatious when a pleading, motion, argument, brief, document or record filed or any testimony presented is grossly lacking in the requirements of propriety, violates court rules, or grossly disregards the requirements of a fair presentation of the issues to the court. MCR 7.216(C)(1)(b). Plaintiff asserts that defendant's attempt to expand the record on appeal by adding a copy of a letter written by S.M. to his brief where it was not a part of the trial court record constitutes a violation of court rule that should

result in sanctions. Given the extensive testimony about the contents of the letter contained in the trial court record, we decline to impose sanctions.

Affirmed as to the grant of attorney fees, but remanded for proceedings consistent with this opinion. We do not retain jurisdiction. No costs are awarded under MCR 7.219, neither party having prevailed in full.

/s/ Michael J. Kelly
/s/ Donald S. Owens
/s/ Stephen L. Borrello