

STATE OF MICHIGAN
COURT OF APPEALS

ANN MAREE FLOOK,

Plaintiff-Appellant,

v

GEORGE EARL FLOOK, SR.,

Defendant-Appellee.

UNPUBLISHED

December 20, 2011

No. 300521

Oakland Circuit Court

LC No. 2009-755567-DM

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order denying her motion for attorney fees. We affirm.

Plaintiff argues that the trial court abused its discretion by denying her motion for attorney fees because her need and defendant's misconduct clearly justified awarding the fees. We disagree.

When reviewing a decision regarding the grant or denial of attorney fees, this Court reviews findings of fact for clear error, and questions of law de novo. *In re Temple Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009). We review for an abuse of discretion a trial court's ultimate decision whether to award attorney fees. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*

Michigan follows the "American Rule," under which a prevailing party may not recover attorney fees from the losing party as a cost of litigation unless a statute or court rule expressly authorizes the award. *Smith v Smith*, 278 Mich App 198, 208; 748 NW2d 258 (2008). In domestic relations cases, both a statute, MCL 552.13, and court rule, MCR 3.206(C), authorize a trial court to award attorney fees. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). The common law also provides a basis for awarding attorney fees to a party when that party "has been forced to incur them as a result of the other party's unreasonable conduct in the course of litigation." *Id.* at 165, quoting *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992).

In a divorce action, attorney fees are not recoverable as of right. *Reed*, 265 Mich App at 164. The trial court may award attorney fees when a party needs financial assistance to prosecute or defend the suit. *Smith*, 278 Mich App at 207. In a divorce case, “a party should not be required to invade personal assets to satisfy attorney fees when the party is relying on the same assets for support.” *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010). However, the party requesting attorney fees must prove facts sufficient to show that the other party has the ability to pay. *Smith*, 278 Mich App at 207; see also MCR 3.206(C)(2)(a).

Plaintiff primarily relies on two cases to support her contention that the trial court abused its discretion by denying her motion. Plaintiff relies on the first case, *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007), to support her argument that because she produced evidence that she could not afford to pay her attorney fees (i.e., by showing the attorney fees amounted to more than her annual income), the court should have granted her motion. In *Stallworth*, however, this Court held that the trial court did not abuse its discretion by awarding attorney fees because the party seeking the fees not only demonstrated that she could not afford the fees, but also demonstrated the other party’s ability to pay. *Id.* at 288.

Plaintiff, in her motion for attorney fees and her brief on appeal, has not pointed to any evidence contradicting the trial court’s finding that defendant was unemployed and unable to pay plaintiff’s attorney fees. In contrast, and consistent with the trial court’s finding, defendant testified that he lost his job and was unable to pay his own attorney, much less plaintiff’s attorney. Although plaintiff contends in her brief on appeal that, “[i]n the lower [court], [plaintiff] proved that [d]efendant had consistently earned at least \$1,000.00 per week and had recently purchased a large tractor trailer for working cash jobs,” suggesting that defendant is collecting unreported income, plaintiff did not support this allegation with any evidence. The trial court’s finding that defendant did not have the ability to pay plaintiff’s attorney fees was, therefore, not clearly erroneous. In short, while the law required plaintiff to show that defendant had the ability to pay, plaintiff failed to make this showing. Thus, the trial court did not abuse its discretion by denying attorney fees for this reason.

Plaintiff also relies on *Reed*, 265 Mich App at 164, to support her argument that “the trial court’s flat refusal to listen to oral argument was an abuse of discretion” In *Reed*, the trial court awarded attorney fees to a party, based on the common-law misconduct exception, but this Court reversed because the trial court did not make specific findings of fact regarding the misconduct involved or the reasonableness of the fees awarded. *Id.* at 165-166. This Court held that the trial court should have held a hearing regarding the reasonableness of the fees incurred before requiring the other party to pay those fees. *Id.* Plaintiff’s reliance on *Reed* is misguided because it does not support her contention that the trial court abused its discretion by limiting the scope and duration of the hearing in this matter.

In this case, the trial court listened to plaintiff’s arguments and tried to explain to plaintiff’s counsel why the court believed that an award of attorney fees was inappropriate. Instead of addressing the court’s concern that defendant was unable to pay, plaintiff’s counsel continuously argued that the award was justified *solely* on the basis of defendant’s misconduct. Eventually, the trial court stopped plaintiff’s counsel and found him in contempt for his continued outbursts. In total, plaintiff’s counsel argued for attorney fees twice at hearings and

also in his brief in support of the motion. The trial court did not abuse its discretion by limiting counsel's arguments at the final hearing.

Finally, we reject plaintiff's argument that defendant's alleged failure to serve her with his response to her motion for attorney fees allowed defense counsel to "ambush" plaintiff's counsel. Defendant has not supported her position by citing applicable authority, and therefore, has abandoned this issue. See *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002). Second, even if defendant's failure to serve his response to the motion for attorney fees would have otherwise justified reversal, plaintiff has simply failed to establish that defendant failed to serve the response. Plaintiff's counsel did not, as he argues, "testify" that defendant's counsel failed to provide him with the response. His statement to the court, at the final hearing, was not given under oath, and plaintiff has failed to provide any other evidence in support of her argument. This argument, therefore, lacks both factual and legal support.

Affirmed. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy

/s/ Kathleen Jansen

/s/ Donald S. Owens