

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER L. LANXNER, f/k/a JENNIFER L.
GORDON,

Plaintiff-Appellant,

v

JASON S. GORDON,

Defendant-Appellee.

UNPUBLISHED
March 7, 2013

No. 305980
Oakland Circuit Court
Family Division
LC No. 2007-730585-DM

Before: RIORDAN, P.J., and HOEKSTRA and O'CONNELL, JJ.

HOEKSTRA, J. (*dissenting*).

Because I disagree with the majority's holding that the trial court did not err by finding that plaintiff's objections were frivolous, and consequently, that the trial court did not abuse its discretion by assessing attorney fees, I respectfully dissent.

"The general American rule is that attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008) (quotation marks and citation omitted). Here, the trial court assessed attorney fees against plaintiff pursuant to MCR 3.215(F)(3), which permits such a sanction when a party raises a frivolous objection to the decision of a referee. 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).

Here, the trial court did not specifically identify why plaintiff's objection was frivolous, and in granting defendant's motion for sanctions, stated only:

The Court finds that based on the arguments presented in Plaintiff's objections and her brief in support of her request for this court to deviate, as well as her failure to prove that [the referee's] recommendation was not support [sic] by the evidence presented at the time of the referee hearing, plaintiff shall pay the

amount of the reasonable expenses incurred by defendant as a result of plaintiff's objections pursuant to MCR 2.114(E) and MCR 3.215(F)(3).

Thus, based on this brief statement it appears that the trial court did not find plaintiff's objections frivolous because of any purpose was to harass, embarrass, or injure defendant. Hence, the trial court must have concluded plaintiff either had no reasonable basis upon which to believe the underlying facts were true, or that plaintiff's objections were devoid of arguable legal merit. The majority finds no clear error "in the circuit court's apparent finding that plaintiff's legal arguments lacked merit," and concludes that plaintiff's objections to the referee's findings were based on "aspersions" rather than valid legal arguments.¹ From my review of the record, I find no basis to conclude that plaintiff's objections were based on aspersions; rather, plaintiff generally argued that income should be imputed to defendant because he failed to take any steps to increase his income despite the fact that it has been decreasing ever since their divorce was finalized. This argument does not constitute "slander" or "a damaging or derogatory remark or criticism."

With regard to the circuit court's finding that plaintiff failed to provide an adequate factual basis for her objection, plaintiff pointed to the following facts in the record to support her argument that defendant should have had imputed income: (1) Defendant owns his own legal practice, Dean Legal Services; (2) defendant has been a licensed attorney for 15 years; (3) defendant is the president of three companies owned by his father; (4) defendant claims that he receives no income for his legal services; (5) defendant has use of multiple company-owned vehicles, and his father's company pays all, or at least a portion of, his health insurance, dental insurance, vision insurance, life insurance, and disability insurance; and (6) defendant has substantial assets, including a 401(k) and stock dividends. Plaintiff also noted the fact that defendant owns two homes and travels frequently. Defendant admitted to these allegations during the hearing. Further, plaintiff had a reasonable basis upon which to believe defendant was intentionally earning less money because at the time of the parties' divorce defendant held the same employment, but earned substantially more money. The record supports plaintiff's argument that while defendant owns a law practice, he has made no effort to expand that practice despite the substantial reduction in his wages. Thus, plaintiff's argument that defendant's income should have been adjusted upward was supported by facts of record and did not rely merely on aspersions. Because plaintiff's allegations were all supported by the record, plaintiff had a reasonable basis upon which to believe the underlying facts were true.

In regard to the circuit court's apparent finding that plaintiff's legal arguments lacked merit, the Michigan Child Support Formula (MCSF), which provides guidance to trial courts regarding the imputation of income, provides that when "a parent is voluntarily unemployed or underemployed, or has an unexercised ability to earn, income includes the potential income that parent could earn, subject to that parent's actual ability." 2008 MCSF 2.01(G). Arguably, based on the facts, defendant has an unexercised ability to earn. Further, the MCSF provides that

¹ An "aspersion" is "a damaging or derogatory remark or criticism; slander." *Random House Webster's College Dictionary* (1992).

income includes “the value of gifts or gratuities such as money, food, shelter, transportation, or other goods or services that a parent receives from relatives, friends, or others, to the extent that it” is either “significant and regularly reduces personal expenses” or “[r]eplaces or supplements employment income.” 2008 MCSF 2.05(B). Thus, the perks that defendant enjoys as a result of his employment, and the fact that he still has discretionary income to travel and engage in leisure activities suggests that defendant is receiving gifts or gratuities that would constitute income. Accordingly, while plaintiff may not have presented enough evidence to establish that income must be imputed to defendant, her objections to the referee’s findings were not frivolous.

For these reasons, I would conclude that the trial court erred by granting defendant’s request for attorney fee sanctions.

/s/ Joel P. Hoekstra