STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY WILLIAM KIDDER, Plaintiff-Appellant,	UNPUBLISHED March 21, 2013
v	No. 311352 Oakland Circuit Court
LAURA SUE POBURSKY-KIDDER, Defendant-Appellee.	LC No. 2010-776877-DM

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

In this child-custody case, plaintiff Jeffrey William Kidder appeals as of right an order denying his motion for sole physical custody and modification of parenting time, granting defendant Laura Sue Pobursky-Kidder's motion for a directed verdict, and granting defendant's motion for attorney fees, costs, and sanctions. For the reasons set forth below, we affirm in part, reverse in part, and remand.

I. BASIC FACTS AND PROCEDURAL HISTORY

The parties were married in September of 1999 and had three children together. On October 20, 2011, they entered into a consent judgment of divorce. With respect to child custody, the judgment stated that the parties would have "interim joint legal and physical custody." The judgment provided for a parenting schedule in which the children were with plaintiff for six nights and defendant for eight nights in a two-week period. The judgment also contained a provision requiring the parties to undergo psychological evaluations, whereafter the issues of custody and parenting time could be reviewed by the court upon the motion of either party. As ordered by the court, Patrick Ryan, Ph.D., conducted psychological evaluations of the parties and met briefly with each of the three children.

On February 10, 2012, plaintiff moved the trial court for sole physical custody, modification of parenting time, and modification of child support, claiming that defendant suffers from and needs treatment for "quite profound personality disorders that severely impact her ability to parent the children in a positive and appropriate manner." The trial court held an evidentiary hearing on April 26, 2012, and June 11, 2012. Plaintiff testified on his own behalf and presented the testimony of Dr. Ryan and psychiatrist Dr. Barbara Talbot. After plaintiff rested his case on June 13, 2012, the next scheduled date for the continued evidentiary hearing, defendant sought a directed verdict pursuant to MCR 2.516 and attorney fees, costs, and

sanctions pursuant to MCR 2.114(F). The trial court heard oral arguments and orally granted defendant's motion for a directed verdict. On June 28, 2012, the trial court issued its opinion and order granting defendant's motion for a directed verdict, denying plaintiff's motion for sole physical custody and modification of parenting time, and granting defendant's motion for attorney fees, costs and sanctions subject to defendant's submission of proof regarding hourly rates and billings incurred in responding to plaintiff's frivolous claim. Plaintiff filed this appeal of right.

II. ANALYSIS

Plaintiff contends that the trial court made several errors when ruling on the matters before it. We will address each of plaintiff's arguments in turn.

A. RELIANCE ON EVIDENCE OUTSIDE OF THE RECORD

Plaintiff first argues that the trial court improperly considered evidence that was not admitted into evidence. We agree in part and disagree in part.

This Court reviews a trial court's findings of fact for clear error and its conclusions of law de novo following a bench trial. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). "The clear error standard provides that factual findings are clearly erroneous where there is no evidentiary support for them . . . ." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). It is well-settled that an attorney's statements and arguments are not evidence. See *Guerrero v Smith*, 280 Mich App 647, 658; 761 NW2d 723 (2008); *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Dorsey (On Remand)*, 273 Mich App 26, 45; 730 NW2d 17 (2006); M Civ JI 3.04.

In her opening statement and motion for a directed verdict, defense counsel discussed at length the videotaped deposition testimony of Dr. Kathy Pietrofesa and Dr. Marvin Faust. At some points, defense counsel quoted directly from the doctors' deposition transcripts. Defendant moved for a directed verdict immediately after plaintiff rested and before presenting a defense. Neither Dr. Pietrofesa nor Dr. Faust testified at the evidentiary hearing, and their deposition testimony was not admitted into evidence. However, Dr. Ryan testified that he reviewed records and notes from Dr. Pietrofesa and Dr. Faust. He also said that he was aware that neither Dr. Pietrofesa nor Dr. Faust diagnosed defendant with a cluster B personality disorder.

In its opinion denying plaintiff's motion for sole physical and legal custody and granting defendant's motion for a directed verdict, the trial court stated:

> Additionally, Dr. Ryan acknowledged that Defendant's treating doctors (Dr. Petrofesa [sic] and Dr. Faust) did not find that Defendant had any Cluster B personality disorder.

Dr. Ryan did specifically acknowledge that neither Dr. Pietrofesa nor Dr. Faust diagnosed defendant with a cluster B personality disorder. Therefore, this evidence was in the record, and the trial court could consider it. In its opinion, the trial court also stated:

> Defendant's other treating physicians had all opined that they had no concerns regarding the children's health or welfare while with their mother.

This statement lacks evidentiary support; the only references to defendant's other treating physicians and their opinions regarding the children's safety while with defendant were from defense counsel's opening statement and motion for a directed verdict. An attorney's statements are not evidence. See *Guerrero*, 280 Mich App at 658; *Dorsey*, 273 Mich App at 45. Thus, this factual finding was clearly erroneous and should not have been relied on by the trial court in reaching its decision. See *Hill*, 276 Mich App at 308. However, other record evidence does support the trial court's ultimate conclusion regarding custody.

B. APPLICATION OF PROPER STANDARD FOR A DIRECTED VERDICT

Plaintiff contends that the trial court applied the wrong standard when evaluating defendant's motion for a directed verdict. We disagree.

This Court reviews de novo questions of law, including the proper interpretation of statutes and court rules. See *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009). Because a directed verdict "orders the jury to find no cause of action," *Auto Club Ins Ass'n v Gen Motors Corp*, 217 Mich App 594, 601; 552 NW2d 523 (1996), it is only technically proper in a jury trial, *Stanton v Dachille*, 186 Mich App 247, 261; 463 NW2d 479 (1990). Thus, when a defendant moves for a directed verdict in a bench trial, the motion is properly treated as a motion for an involuntary dismissal pursuant to MCR 2.504(B)(2). *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 235 n 2; 615 NW2d 241 (2000); *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). Involuntary dismissal is proper when "the trial court, . . . sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that 'on the facts and the law the plaintiff has shown no right to relief.'" *Begola*, 210 Mich App at 639, quoting MCR 2.504(B)(2). "Unlike [a] motion for directed verdict, a motion for involuntary dismissal calls upon the trial judge to exercise his function as trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences." *Marderosian v Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983) (internal citations omitted). Thus, the evidence is not viewed in the light most favorable to the nonmoving party. See *id*.

In its opinion, the trial court noted that a motion for a directed verdict in a bench trial is properly viewed as a motion for involuntary dismissal. The court then cited MCR 2.504(B)(2) and stated that a motion for involuntary dismissal should be granted "when the court is satisfied after the presentation of the plaintiff's evidence that 'on the facts and the law the plaintiff has no right to relief.'" The court acted as the trier of fact and weighed the evidence, including witness credibility, to arrive at its decision. Therefore, the trial court applied the correct standard to defendant's motion.

Plaintiff also contends that defendant should have served a copy of her written motion for a directed verdict on plaintiff and that the trial court's possession of a copy of the written motion indicates that defendant had an ex parte communication with the court. The transcript from the June 13, 2012, trial date indicates that defendant made oral motions for a directed verdict and sanctions after plaintiff rested his case. The court rules provide that a motion must be in writing, *unless* it is made during a hearing or trial. MCR 2.119(A)(1). Defendant's motion was made

during the bench trial. There were no objections from plaintiff or other indications in the record that defendant filed a written copy of its motion or gave a copy to the judge. There are no court rules prohibiting an attorney from referencing notes or other writings while making an oral motion. See MCR 2.001 *et seq*. Therefore, plaintiff's argument is unsupported.

C. ESTABLISHED CUSTODIAL ENVIRONMENT

Plaintiff claims that the trial court erred when determining the children's established custodial environment. We disagree.

When making a custody determination, the trial court must first determine if the child has an established custodial environment with one or both parents. See *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). An established custodial environment "is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). It is "marked by security, stability, and permanence." *Id*. MCL 722.27(1)(c) provides:

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

"A custodial environment can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order." *Berger*, 277 Mich App at 707, citing *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). A child can have an established custodial environment with both parents. *Id.* "Whether an established custodial environment exists is a question of fact." *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007).

The trial court found that the children have an established custodial environment with both plaintiff and defendant, stating:

> It is the factual finding of this Court that the parties have exercised a specific joint custody and parenting time arrangement pursuant to the October 2011 Judgment of Divorce and the February 22, 2012 Order regarding the instant Motion. Therefore, both parties have an established custodial environment.

The trial court's conclusion was supported by the evidence. Before the divorce judgment was entered, the parties lived together with the children. The divorce judgment provided for an interim schedule where plaintiff had the children for six nights in a two-week period and defendant had the children for the other eight nights. By following this schedule, the parties each acted as the primary parent of the children about 50 percent of the time. Furthermore, plaintiff testified that the children love defendant, have a close bond with her, and look to her for love and guidance. He also said that, before he moved out, he put the children to bed every night and got them dressed every morning. The evidence shows that both parties consistently cared for the

children, providing them with guidance, love, and parental comfort. See MCL 722.27(1)(c); *Berger*, 277 Mich App at 706.

Given its finding that the children have an established custodial environment with both parties, the trial court used the proper burden of proof when deciding plaintiff's motion. Plaintiff sought sole physical custody, which would have changed the children's established custodial environment with defendant. A parent seeking to change the established custodial environment of a child must show by clear and convincing evidence that such a change is in the child's best interest, considering the factors enumerated in MCL 722.23.[1] See MCL 722.27(1)(c).

D. TRIAL COURT'S ASSESSMENT OF PLAINTIFF'S EXPERT-WITNESS TESTIMONY

Plaintiff contends that the trial court erred by dismissing the testimony of his expert witnesses, Dr. Talbot and Dr. Ryan. We disagree.

As previously discussed, when a defendant moves for a directed verdict in a bench trial, the motion is properly treated as a motion for involuntary dismissal pursuant to MCR 2.504(B)(2). *Sands Appliance*, 463 Mich at 235 n 2; *Begola*, 210 Mich App at 639. We review a trial court's decision on a motion for involuntary dismissal for clear error. *Phillips v Deihm*, 213 Mich App 389, 397; 541 NW2d 566 (1995). "The trial court's decision will not be overturned unless the evidence manifestly preponderates against the decision." *Id*. Involuntary dismissal is proper when "the trial court, . . . sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that 'on the facts and the law the plaintiff has shown no right to relief.'" *Begola*, 210 Mich App at 639, quoting MCR 2.504(B)(2). "Unlike [a] the motion for directed verdict, a motion for involuntary dismissal calls upon the trial judge to exercise his function as trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences." *Marderosian*, 123 Mich App at 724 (internal citations omitted). Thus, the evidence is not viewed in the light most favorable to the nonmoving party, and "[p]laintiff is not given the advantage of the most favorable interpretation of the evidence." *Id*.

Here, the court properly evaluated the credibility of the witnesses, including Dr. Talbot and Dr. Ryan. See *id.* Furthermore, the evidence does not manifestly preponderate against the

[1] In his brief on appeal, plaintiff also contests the trial court's findings of fact with respect to best-interest factors (f), (g), and (j). However, the statement of questions presented in plaintiff's appellate brief specifically states that the trial court's finding on the children's established custodial environment is clearly erroneous; plaintiff does not identify the court's findings on the best-interest factors or custody in general as issues. An argument is not properly presented to this Court when it is not identified in the statement of questions presented. *Mich's Adventure, Inc v Dalton Twp*, 290 Mich App 328, 337 n 3; 802 NW2d 353 (2010); *Brausch v Brausch*, 283 Mich App 339, 351; 770 NW2d 77 (2009); see also MCR 7.212(C)(5). A party who fails to identify an issue in his statement of questions presented has waived the issue for appellate review. *Mich's Adventure*, 290 Mich App at 337 n 3; *Brausch*, 283 Mich App at 351; see also MCR 7.212(C)(5).

court's credibility determinations of these experts. As the court noted, Dr. Talbot did not conduct any parent/child observations or evaluate the best-interest factors. She did not make a recommendation regarding custody and spoke only hypothetically about the problems that someone with narcissistic personality disorder would have with parenting. Dr. Talbot testified that, in her opinion, the children were not in any danger of physical injury when they were with defendant. Furthermore, Dr. Ryan testified that defendant does not have narcissistic personality disorder. Dr. Ryan was unable to provide a basis for his recommendation that plaintiff should have sole physical custody, other than that such an arrangement would give defendant the time to seek treatment. He did not go through the best-interest factors before making his recommendation. Therefore, the trial court's decision to disregard Dr. Talbot's and Dr. Ryan's expert testimony was not clearly erroneous.

E. AWARD OF SANCTIONS

Plaintiff argues that the trial court erred by awarding defendant sanctions on the basis that his motion for sole physical custody was frivolous. We agree.

This Court reviews for an abuse of discretion a trial court's ruling on a request for attorney fees and costs as sanctions. See *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010). A trial court abuses its discretion when it reaches a decision that falls outside of the range of principled outcomes. *Id.* We review for clear error a trial court's finding that a motion is frivolous. *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.

When the trial court finds that a civil action is frivolous, it must award to the prevailing party "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(1); see also MCR 2.114(F); MCR 2.625(A)(1). The amount awarded "shall include all reasonable costs actually incurred by the prevailing party . . . including court costs and reasonable attorney fees." MCL 600.2591(2). Under MCL 600.2591(3)(a), an action is frivolous if any of the following conditions are 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.

In this case, the trial court concluded that plaintiff's motion was frivolous under MCL 600.2591(3)(a)(ii) and (iii). When determining if an action was frivolous, the trial court's decision must be on the basis of the circumstances as they existed when the action was filed. *Robert A Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 486; 760 NW2d 526 (2008).

With respect to the factual basis for plaintiff's motion, the court stated:

> First, Plaintiff had no reasonable basis upon which to believe the underlying claim regarding Defendant's mental fitness to parent her children was true. Indeed, Plaintiff's claim was questionable from the start: although Defendant had treated with three mental health professionals (Petrofesa [sic], Faust, Talbot), there was no definitive diagnosis and there was no recommendation that Defendant's exposure to her children be limited/modified. As noted, Plaintiff terminated Defendant's employment and, as such, Defendant was able to spend more time with the children. Plaintiff *chose* to pursue the motion for change of custody.

Several of the court's factual findings, upon which it relied in reaching this conclusion, are clearly erroneous. Defendant was definitively diagnosed; Dr. Talbot diagnosed her with narcissistic personality disorder. The only evidence in the record regarding Dr. Pietrofesa's and Dr. Faust's evaluations or diagnoses of defendant is Dr. Ryan's acknowledgment that these doctors did not diagnose defendant with any Cluster B personality disorder. Although defense counsel referenced the doctors' videotaped depositions in her opening statement and motion for a directed verdict, these doctors never testified at trial, nor were their deposition transcripts filed with the court.

Plaintiff had a reasonable basis to believe that the factual allegations in his motion for sole physical custody were true. While there was no evidence that defendant's contact with her children should be limited, Dr. Ryan and Dr. Talbot both testified about the general problems that an individual with a Cluster B personality disorder and narcissistic personality disorder, respectively, would have with parenting. Whether plaintiff's motion was frivolous depends on the circumstances as they existed when the motion was filed. See *id.* Plaintiff could not have known when he filed his motion that the trial court would find Dr. Talbot's testimony and diagnosis incredible. In fact, he could not have known this until the court issued its written opinion on June 28, 2012.

Defendant cites to Dr. Ryan's deposition testimony in support of her argument that plaintiff knew that his motion was frivolous. First, the deposition testimony is not part of the evidentiary record, so it cannot be considered by this Court. Second, plaintiff still had Dr. Talbot's and his own testimony to rely on in support of his motion. The court found significant plaintiff's termination of defendant from her position with his company, which gave her more time with the children. It appears that the court used this fact to conclude that plaintiff was not terribly concerned about his children's welfare. We are not sure such a conclusion necessarily follows. The children presumably were in school, so it is not clear how much more time they actually spent with defendant because of her termination. In addition, it is odd to argue that plaintiff should have continued to employ defendant in order to keep her out of the house and away from the children. In filing for divorce and then moving for sole physical custody, plaintiff clearly showed his desire to limit defendant's interaction with the children. Because plaintiff had a reasonable basis to believe that the facts underlying his motion for sole physical custody were true, his motion was not frivolous under MCL 600.2591(3)(a)(ii).

With respect to the legal merit of plaintiff's motion for sole physical custody, the trial court said the following:

> Second, Plaintiff's position was devoid of arguable legal merit: even after Dr. Ryan observed that his recommendation was on "shaky ground," and even after cross-examination when Dr. Ryan's position was rendered to be without merit, Plaintiff *chose* to continue the evidentiary hearing and the present the testimony of Dr. Talbot; Dr. Talbot's position was likewise rendered to be without merit. [Emphasis in original.]

The reasons delineated by the trial court all relate to the factual basis of plaintiff's claim, not the legal basis. The court discussed Dr. Ryan's and Dr. Talbot's testimony and credibility. In addition, the consent judgment of divorce clearly provided that either party could file a custody motion after Dr. Ryan's psychological evaluations of both parties. Plaintiff's motion was not devoid of arguable legal merit. See MCL 600.2591(3)(a)(iii).

Accordingly, the trial court abused its discretion by awarding defendant sanctions.

We reverse the trial court's order granting defendant's motion for sanctions, affirm the court's order denying plaintiff's motion for sole physical custody, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering