Affirmed and Opinion Filed June 27, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01330-CV

IN THE INTEREST OF J.A.H. AND J.A.H.

On Appeal from the 254th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 05-13133-R

MEMORANDUM OPINION

Before Justices Myers, Stoddart, and Whitehill
Opinion by Justice Whitehill

Appellant Aimee Hardin filed a petition to modify parent–child relationship. She later nonsuited that petition. Her ex-husband, appellee Jeffrey Hardin, then filed an amended summary judgment motion that, among other things, expanded on his prior summary judgment motion seeking attorneys' fees. The trial court granted the amended motion, awarding Jeffrey over $14,000 in fees.

Aimee raises ten issues on appeal. We affirm the judgment.

I. PROCEDURAL HISTORY

Aimee and Jeffrey divorced in 2005. They had two children, both with the initials J.A.H. The divorce decree made Aimee and Jeffrey the children's joint managing conservators and gave Aimee the exclusive right to designate the children's primary residence.

In 2008, Aimee filed a petition to modify parent–child relationship. In 2010, the trial court signed a modification order continuing Aimee and Jeffrey as joint managing conservators but giving Jeffrey the exclusive right to designate the children's primary residence within the Richardson School District as long as Aimee lived within that school district.

Aimee filed a new petition in modify parent–child relationship in July 2011. The appellate record contains no order disposing of this petition, and the trial court's docket sheet does not indicate that it was disposed of by a new modification order.

In February 2012, Aimee filed another petition to modify parent–child relationship, following which the trial court in January 2013 signed a modification order that maintained Aimee and Jeffrey as the children's joint managing conservators. It also gave Jeffrey the exclusive right to designate the children's primary residence, subject to the requirement that Jeffrey live in Texas, a state contiguous to Texas, or New York state (where he had moved for work). The order specified Aimee's possession rights, which differed depending on whether she lived more or less than 100 miles away from the children's primary residence.

Thirty-four days after the preceding order, in February 2013, Aimee filed another new petition to modify parent–child relationship. She alleged that Jeffrey and the children had since moved back to Texas from New York, and she sought a "50/50 possession schedule, or that which the Court deems is in the best interest of the children."

Jeffrey's answer included a general denial and a request for attorney's fees.

In September 2013, Jeffrey's attorney withdrew from representation, and new attorneys appeared on Jeffrey's behalf. That same month, Aimee's attorney moved to withdraw as her counsel. In November 2013, the trial court granted Aimee's attorney's motion to withdraw.

The docket sheet indicates that a new lawyer appeared for Aimee on April 3, 2014.

Four days later, Jeffrey filed a summary judgment motion, which also requested attorneys' fees without specifying an amount or citing an applicable code section. The record does not contain special exceptions asking the trial court to order Jeffrey to specify the statutory basis underlying his fee request. Nor is it apparent whether Aimee sought that information through discovery.

On May 1, 2014, Aimee's new lawyer filed a motion to withdraw.

Six days later, Aimee (still acting through counsel) filed a notice of nonsuit of her entire case.

The next day, Jeffrey filed a first amended answer.

On May 9, the trial court granted Aimee's lawyer's motion to withdraw.

Jeffrey then filed an amended summary judgment motion that among other relief, requested $23,924.96 in attorneys' fees and costs. Jeffrey supported his fee request with an affidavit from his then current lawyer, Kip Allison.

Aimee, acting through new counsel, filed a combined response, objections, and counter-motion for sanctions.

The trial court signed an order granting in part Jeffrey's amended summary judgment motion and denying Aimee's motion for sanctions. The order awarded Jeffrey attorney's fees and costs of $14,425.50. The order, however, did not state the legal basis for the award and did not say that Aimee was to pay the fees directly to Jeffrey's lawyer. But that order did have sufficient language to make it a final judgment.

Aimee timely appealed.

II. ANALYSIS

A. Issues Presented.

Aimee asserts ten issues on appeal:

1. Did the trial court abuse its discretion by overruling Aimee's objections to Jeffrey's evidence?

2. Did the trial court abuse its discretion by sustaining Jeffrey's objections to Aimee's evidence?

3–6. Did the trial court err by granting Jeffrey's summary judgment motion?

7, 10. Did the trial court err by denying, and by sustaining Jeffrey's objections to, Aimee's sanctions motion?

8, 9. Did the trial court err by denying Aimee's request that any fee award be assessed against Aimee's lawyer who filed the February 2013 petition to modify parent–child relationship?

B. Issue One: Did the trial court abuse its discretion by overruling Aimee's objections to Jeffrey's evidence?

Aimee made hearsay objections to 14 of Jeffrey's 15 summary judgment exhibits. She also objected to the remaining exhibit, the affidavit of Jeffrey's attorney Kip Allison, on several bases. The trial court sustained in part Aimee's objections to Allison's affidavit and overruled the rest of her objections.

On appeal, Aimee complains about 11 of the 14 exhibits that she objected to as hearsay. But she does not argue that those exhibits were hearsay; she argues instead that they were not sworn or certified, they were not properly authenticated, and some of them were pleadings, motions, and orders that are not proper summary judgment evidence. "Complaints and arguments on appeal must correspond with the complaint made at the trial court level." *Blackstone Med., Inc. v. Phoenix Surgicals, L.L.C.*, 470 S.W.3d 636, 651 (Tex. App.—Dallas 2015, no pet.). Accordingly, we conclude that Aimee did not preserve her appellate complaints about these exhibits. Moreover, even had she preserved her complaints, Aimee has not explained how the trial court's rulings on her objections to these exhibits harmed her. This is equally fatal to her argument. *See Mira Mar Dev. Corp. v. City of Coppell, Tex.*, 421 S.W.3d 74, 84 (Tex. App.—Dallas 2013, no pet.) (rejecting attack on evidentiary rulings because appellant did not show harm).

Aimee also argues that the Allison affidavit is defective because Allison failed to show that he had personal knowledge of some of the facts stated therein. But again Aimee does not explain how the error, if any, was harmful. Accordingly, her argument fails. *See id*.

We overrule Aimee's first issue.

B. Issue Two: Did the trial court abuse its discretion by sustaining Jeffrey's objections to Aimee's evidence?

Aimee filed two affidavits with her summary judgment response and counter-motion for sanctions: (i) her own affidavit explaining why she filed her February 2013 petition to modify parent–child relationship, and (ii) her attorney's affidavit proving up his fees. Jeffrey objected to both affidavits in their entirety on various grounds. The trial court sustained Jeffrey's objections.

Aimee argues that the trial court erred by sustaining Jeffrey's objections to her affidavits. Assuming without deciding that the trial court so erred, we conclude that any error was harmless because, as shown below, the trial court's judgment must be affirmed regardless of Aimee's evidence. *See generally* TEX. R. APP. P. 44.1 (reversible error in civil cases). We thus overrule Aimee's second issue.

C. Issues Three Through Six: Did the trial court err by granting summary judgment for Jeffrey?

In her next four issues, Aimee raises various arguments that the trial court erred by granting Jeffrey's amended summary judgment motion. We overrule her issues for the following reasons:

1. Issue Three: Did Aimee's nonsuit preclude Jeffrey from seeking and obtaining the attorneys' fees he owed to his successor counsel?

Aimee's third issue argues that her nonsuit made it improper to award Jeffrey the fees he incurred and owed to his successor counsel, Kip Allison and his firm.

a. Additional Facts.

The following additional facts concern this issue:

Jeffrey's original answer to Aimee's February 2013 petition included a request for attorney's fees. His request identified his attorney by name and asked the court to award the fees directly to his attorney:

> ***Attorneys Fees***
>
> It was necessary for Respondent to secure the services of Lisa R. Hernandez, a licensed attorney, to prepare and prosecute this suit. For services rendered in connection with conservatorship and support of the children, judgment for attorney's fees, expenses, and costs through trial and appeal should be granted against Petitioner and in favor of Respondent for the use and benefit of Respondent's attorney and be ordered paid directly to Respondent's attorney, who may enforce the judgment in the attorney's own name. Respondent requests postjudgment interest as allowed by law.
>
> ***Prayer***
>
> Respondent prays that Petitioner take nothing and that Respondent be granted all relief requested in this Original Answer.
>
> Respondent also prays for attorney's fees, expenses, costs, and interest as requested above.
>
> Respondent prays for general relief.

Although Jeffrey's answer did not identify by code reference a specific statute supporting his fee request, by asking that Aimee be ordered to pay the fees directly to Jeffrey's lawyer, the request implicated at least family code § 106.002, which says that a judgment for attorneys' fees may be enforced in the attorney's name. TEX. FAM. CODE § 106.002(a).

In September 2013, Jeffrey's original attorney withdrew, and that same month his new attorneys, Kip Allison and Karen Kennedy, appeared.

In April 2014, Jeffrey filed his original summary judgment motion, which requested an award of fees but did not cite a legal basis for a fee award or attempt to prove the fees up—but it did track the counterclaim by asking the trial court to order Aimee to pay Jeffrey's counsel directly.

On May 7, 2014, Aimee nonsuited all of her claims.

The next day, Jeffrey filed his first amended answer, which (i) broadened the request for attorneys' fees to cover all of Jeffrey's attorneys in the case and (ii) specifically identified both

family code §§ 106.002 and 156.005 as supporting his fee recovery. About three weeks later, Jeffrey filed his amended summary judgment motion, which sought an award of all his attorneys' fees incurred in the case, again based on §§ 106.002 and 156.005. The trial court's final judgment awarded Jeffrey the fees charged by Allison's firm but not those charged by Jeffrey's former lawyer, Lisa Hernandez.

b. Application of the Law to the Facts.

Aimee asserts that Jeffrey did not file a counterclaim in this case. We disagree.

We look to a pleading's substance to determine its nature. *Hodges v. Rajpal*, 459 S.W.3d 237, 244 (Tex. App.—Dallas 2015, no pet.). A counterclaim is simply a claim for relief against an opposing party in a pending action. *See* TEX. R. CIV. P. 97(a), (b) (describing compulsory and permissive counterclaims); *Calstar Props., L.L.C. v. City of Fort Worth*, 139 S.W.3d 433, 441 (Tex. App.—Fort Worth 2004, no pet.) ("A counterclaim is a claim against an opposing party") (emphasis omitted). Thus, Jeffrey's original answer's fee request was a counterclaim even though he did not label it "counterclaim." *See Tull v. Tull*, 159 S.W.3d 758, 762 (Tex. App.—Dallas 2005, no pet.) ("A general request for attorney's fees in the prayer of the pleading is itself sufficient to authorize the award of attorney's fees."); *see also Nolte v. Flournoy*, 348 S.W.3d 262, 266–67 (Tex. App.—Texarkana 2011, pet. denied) (treating similar pleading as a counterclaim).

Aimee's reply brief argues that Jeffrey never paid the filing fee for a counterclaim. She is not permitted to raise this new argument in her reply brief. *See Sanchez v. Martin*, 378 S.W.3d 581, 590 (Tex. App.—Dallas 2012, no pet.). Nonetheless, we reject her argument because a trial court has the discretion to consider a counterclaim even if the filing fee is not paid, *Nolte*, 348 S.W.3d at 267–68, and Aimee has not shown that the trial court abused its discretion in this case.

Aimee also argues that her nonsuit precluded Jeffrey from either (i) expanding his fee request beyond Lisa Hernandez's fees, or (ii) asserting new legal bases for a fee recovery. She cites only Texas Rule of Civil Procedure 162 as support. We disagree with Aimee's argument for several reasons.

One, Rule 162 provides that a nonsuit "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief." TEX. R. CIV. P. 162. Thus, "a plaintiff's nonsuit cannot extinguish a defendant's counterclaim for costs and attorney's fees." *Villafani v. Trejo*, 251 S.W.3d 466, 469 (Tex. 2008).

Two, nothing in Rule 162 supports Aimee's premise that a defendant's counterclaim for affirmative relief is somehow "frozen" if the plaintiff nonsuits her case. Nor has she cited to us any case authority supporting her premise.

Three, there is case authority indicating that Aimee's position is wrong. *See Blank v. Robertson*, 78 S.W. 564, 564 (Tex. Civ. App.—Fort Worth 1904, no writ) (trial court erred by, after plaintiff's nonsuit, denying defendant leave to amend its pleading seeking affirmative relief); *see also State v. Roberson*, 409 S.W.2d 872, 875–76 (Tex. Civ. App.—Tyler 1966, no writ) (intervenors' claims for relief survived plaintiff's nonsuit, so defendant could later amend its pleadings to assert new "cross action" against plaintiff).

Four, Aimee could have sought but did not seek clarification of the statutory grounds underlying Jeffrey's fee request via special exceptions or discovery.

Finally, we disagree with Aimee's premise that Jeffrey's original answer failed to identify a statutory basis for his fee claim. The original answer requested that the judgment be directly enforced by Jeffrey's counsel, thereby implicating § 106.002. Additionally, because the judgment awarded fees under both §§ 106.002 and 156.005, the record does not support Aimee's

argument that the trial court necessarily based its award on a statutory basis raised for the first time after Aimee's nonsuit.

We therefore overrule Aimee's third issue.

2. Issue Four: Did Aimee's nonsuit preclude Jeffrey from recovering attorneys' fees under family code § 106.002 because he was not a "prevailing party"?

Aimee contends that Jeffrey could not recover attorneys' fees under family code § 106.002 because her nonsuit prevented him from being a "prevailing party." We reject her argument, because § 106.002 does not contain a prevailing party requirement.

Section 106.002(a) provides, "In a suit under this title,[1] the court may render judgment for reasonable attorney's fees and expenses and order the judgment and postjudgment interest to be paid directly to an attorney." FAM. § 106.002(a). The statute does not contain a prevailing party requirement, and we may not add requirements the legislature did not see fit to adopt. *See Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam) ("We presume . . . that words not included [in a statute] were purposefully omitted.").

Additionally the Austin Court of Appeals recently examined the text and history of § 106.002 and concluded that the statute contains no prevailing party requirement. *Coburn v. Moreland*, 433 S.W.3d 809, 838–41 & n.30 (Tex. App.—Austin 2014, no pet.); *see also In re R.E.S.*, 482 S.W.3d 584, 586–87 (Tex. App.—San Antonio 2015, no pet.) (following *Coburn* and concluding that prevailing party status is relevant but not decisive or conclusive). We agree.

Aimee, however, argues that we held that § 106.002 contains a prevailing party requirement in *In re M.A.N.H.*, 231 S.W.3d 562 (Tex. App.—Dallas 2007, no pet.), and *In re A.M.W.*, 313 S.W.3d 887 (Tex. App.—Dallas 2010, no pet.). We disagree.

[1] Section 106.002 appears in family code Title 5, which is entitled "The Parent–Child Relationship and the Suit Affecting the Parent–Child Relationship."

In *In re M.A.N.M.*, the appellant father argued that the trial court erred in awarding § 106.002 attorneys' fees to the mother as the non-prevailing party in a suit affecting parent–child relationship modification case without showing good cause. In affirming that award, we implicitly assumed—without actually deciding—that § 106.002 imposed a prevailing party requirement and held that, after comparing the relief the parties requested with the relief they received, the trial court did not abuse its broad discretion in awarding fees to the mother based on the facts of that case. *Id.* at 566–67. Thus, although we considered the extent to which the parties prevailed in the trial court, we did not say that prevailing party status is essential to a fee recovery. Because prevailing party status is but one factor relevant to the trial court's exercise of discretion, *In re R.E.S.*, 482 S.W.3d at 586–87, we properly considered the parties' degrees of success. We further conclude, however, that *In re M.A.N.H.* does not hold that only prevailing parties may recover fees under § 106.002.

In re A.M.W. also did not hold that only prevailing parties can recover § 106.002 fees. *See* 313 S.W.3d at 892. In that case, the father appealed a modification order and argued that the fee award was erroneous because the modification order was erroneous on the merits. *Id.* After we rejected the father's attack on the modification order's merits, we summarily rejected his related attack on the fee award: "Mother prevailed on her motion to modify, and we have concluded that Father's challenge to that ruling is without merit. It was within the trial court's discretion to award Mother, as the prevailing party, her attorney's fees." *Id.* The case did not present the question of whether § 106.002 permits fee awards only to prevailing parties, and we did not purport to decide that question. *See id.*

Aimee's fourth issue depends on the premise that § 106.002 incorporates a prevailing party requirement. Because we disagree with that premise, we overrule Aimee's fourth issue.

3. Issues Five and Six: Did Aimee conclusively prove, or raise a genuine fact issue, that her petition was not frivolous or designed to harass?

Issues five and six argue that summary judgment was improper because Aimee conclusively proved that, or at least raised a genuine fact issue regarding whether, her petition to modify was not frivolous or designed to harass. If Aimee is correct, the trial court erred by granting Jeffrey summary judgment on his request for fees under family code § 156.005. *See* FAM. § 156.005 ("If the court finds that a suit for modification is filed frivolously or is designed to harass a party, the courts shall tax attorney's fees as costs against the offending party.").

We need not address issues five and six, however, because the fee award is supported equally and independently by both § 106.002 and § 156.005. Because we uphold the award under § 106.002, issues five and six are unnecessary to our disposition. *See* TEX. R. APP. P. 47.1. Accordingly, we do not decide them.

D. Issues Eight and Nine: Did the trial court err by assessing Jeffrey's attorneys' fees against Aimee instead of against Aimee's attorney who filed the petition to modify?

Aimee's eighth and ninth issues argue that the trial court erred by assessing Jeffrey's attorneys' fees against her instead of the attorney who represented her when she filed the petition to modify. Aimee argues that civil practice and remedies code Chapter 10 expressly prohibits the sanctioning of a represented party for filing a frivolous pleading. *See* TEX. CIV. PRAC. & REM. CODE § 10.004(d). Although she is correct about Chapter 10, we overrule her issues.

Section 10.004(d) provides, "The court may not award monetary sanctions against a represented party *for a violation of Section 10.001(2).*" *Id.* (emphasis added). But Jeffrey's motion did not invoke Chapter 10 to support the fee award. Accordingly, § 10.004(d) does not apply here.

Accordingly, we overrule Aimee's eighth and ninth issues.

E. Issues Seven and Ten: Did the trial court err by denying Aimee's motion for sanctions?

Aimee's summary judgment response included a civil practice and remedies code Chapter 10 sanctions motion. Jeffrey's summary judgment reply brief objected to Aimee's sanctions motion, arguing that Aimee could not nonsuit all of her claims and then request sanctions in a summary judgment response. The trial court's summary judgment order sustained Jeffrey's objection and denied Aimee's sanctions motion.

Aimee's seventh issue argues that the trial court erred by denying her sanctions motion on the merits. Her tenth issue argues that the trial court erred by sustaining Jeffrey's objection to the sanctions motion. We are not persuaded by her issue seven argument. Consequently, we overrule it and need not and do not reach issue 10.

Regarding Aimee's seventh issue, our standard of review is abuse of discretion. *See Ollie v. Plano Indep. Sch. Dist.*, 383 S.W.3d 783, 793 (Tex. App.—Dallas 2012, pet. denied) ("We review the trial court's award of sanctions for an abuse of discretion."). We reverse only if the trial court's decision was arbitrary or unreasonable. *Id*.

Aimee's sanctions motion argued that Jeffrey's amended summary judgment motion (i) violated § 10.001(1) because it was brought for an improper purpose and (ii) violated § 10.001(2) because it was warranted neither by existing law nor by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Under § 10.001(1), Aimee had to show that the amended summary judgment motion was presented for an improper purpose, including to harass, to cause needless delay, or to cause needless increase in the cost of litigation. *See* CIV. PRAC. & REM. § 10.001(1); *see also Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009) (per curiam) (party seeking sanctions bears the burden of overcoming presumption that papers are filed in good faith). Aimee argues that Jeffrey filed the amended summary judgment motion (i) to punish her financially, (ii) to

restrict her access to the trial court for seeking future modifications, and (iii) to intimidate her from seeking future modifications.

We see nothing in Jeffrey's motion indicating that he filed it to punish or intimidate Aimee as she contends. For the most part, the motion simply seeks an attorneys' fee award—which the family code authorizes—without the expense and delay of a trial. Nor do the affidavits attached to Aimee's sanctions motion show that Jeffrey acted with an improper purpose. The trial court could reasonably conclude that Aimee failed to show that Jeffrey's request for fees was motivated by an improper purpose.

Nonetheless, as evidence of improper purpose, Aimee relies on the part of Jeffrey's motion requesting an injunction that would have barred her from filing another suit about conservatorship of their children unless she first presented the pleading to an associate judge, who would review its sufficiency before allowing it to proceed. Although Jeffrey did not prevail on this request, that fact alone does not show that Jeffrey presented the request for an improper purpose. *Cf. Gomer v. Davis*, 419 S.W.3d 470, 481 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (fact that a claim fails does not compel conclusion that it was factually frivolous under § 10.001(3)). Aimee does not identify any other evidence purportedly supporting her claim that Jeffrey acted with an improper purpose when he requested the injunction. The trial court thus could have reasonably concluded that Aimee failed to show that Jeffrey's injunction request was motivated by an improper purpose.

Under § 10.001(2), Aimee argues only that the amended summary judgment motion was legally frivolous because she had nonsuited her claims three weeks earlier. We have already concluded that her nonsuit was no impediment to Jeffrey's pressing his counterclaim for affirmative relief. Accordingly, the trial court reasonably rejected Aimee's request for § 10.001(2) sanctions.

We overrule Aimee's seventh issue.

Aimee's tenth issue challenges the trial court's ruling sustaining Jeffrey's objection to her sanctions motion. Because we have upheld the trial court's denial of sanctions on the merits, any error in the trial court's sustaining of Jeffrey's objection to Aimee's sanction motion is harmless. *See generally* TEX. R. APP. P. 44.1 (reversible error in civil cases). Accordingly, we overrule Aimee's tenth issue.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

141330F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF J.A.H. AND J.A.H.	On Appeal from the 254th Judicial District Court, Dallas County, Texas
No. 05-14-01330-CV	Trial Court Cause No. 05-13133-R. Opinion delivered by Justice Whitehill. Justices Myers and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Jeffrey Hardin recover his costs of this appeal from appellant Aimee Hardin.

Judgment entered June 27, 2016.