

STATE OF MICHIGAN
COURT OF APPEALS

DAVID S. BROWN,

Plaintiff/Counter-Defendant-
Appellant,

v

SANDI G. BROWN,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

June 24, 2003

No. 236441

St. Clair Circuit Court

LC No. 99-002247-DO

Before: Talbot, P.J. and Neff and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's judgment of divorce. Plaintiff and defendant were married for three months before they separated. Defendant counterclaimed for fraud, intentional infliction of emotional distress, and slander. We affirm.

I. Property Division

Plaintiff first claims that the property division was inequitable. However, because plaintiff fails to identify how the division was unfair, this issue is waived. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998). In any event, there is no indication that the property was not divided as equally as possible with the exception of the two awards discussed below.

A. \$10,000

Plaintiff claims that the trial court erred by awarding defendant \$10,000, fashioned as a property award, for fraudulent inducement to marry and intentional infliction of emotional distress. We disagree.

Although damage claims for torts that relate to the very existence of the marital relationship cannot be maintained as separate actions in a divorce proceeding, *Gubin v Lodisev*, 197 Mich App 84, 88, 89; 494 NW2d 782 (1992), the trial court may take into account those same costs and losses in fashioning an award of alimony or property. *Sparks v Sparks*, 440 Mich 141; 485 NW2d 893 (1992); *Thames v Thames*, 191 Mich App 299; 477 NW2d 496 (1991). Here, the trial court correctly refused to entertain separate tort claims, instead stating it would

consider any claimed damages when dividing the property. The court then found that plaintiff had defrauded defendant and “approached his wedding vows with reckless indifference” and that he “did not share a commitment to have a successful marriage” with defendant.

As a result, the court awarded defendant \$10,000 as part of the property settlement. The court indicated that it had considered “the substantial wedding expenses paid directly by [defendant].” Thus, the court’s award was in line with the guidelines of *Gubin, supra* at 89, because the trial court, sitting in equity, “righted the wrong” and attempted to put defendant in the same position she would have been in had plaintiff not deceived her. *Id.*

B. Attorney Fees

Plaintiff next argues that the trial court erroneously ordered plaintiff to pay \$5,000 of the \$55,000 defendant accrued in attorney fees. Attorney fees may be awarded when a party shows that a lack of resources would inhibit or prevent the party from defending or prosecuting the action. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). Attorney fees are also awardable where 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 the litigation. *Id.*; *Thames, supra* at 310.

Here, the trial court determined that plaintiff concealed the fact and extent of his pre-marriage and post-marriage relationship with another woman, that he made allegations that defendant destroyed his property, and that defendant’s attorney fees were to some extent expended on disproving the allegations. The trial court also found that plaintiff earned \$50,000 a year and that defendant had previously earned between \$25,000 and \$40,000 a year. The court further found that plaintiff’s fraud and intentional infliction of emotional distress on defendant caused her physical and emotional distress that was exacerbated by the “extent of the deception practiced upon her” The court’s latter finding was presumably based on defendant’s testimony regarding her inability to function in the months following the marital breakdown.

Because the trial court has discretion to award reasonable and necessary attorney fees, the court’s determination in this regard will not be reversed on appeal absent an abuse of that discretion. *Stackhouse, supra* at 445; *Thames, supra* at 310. Based on the record, the court’s findings were not erroneous and supported the award of \$5,000 (1/11th of the total) in attorney fees. The trial court did not abuse its discretion.

II. Therapist’s Testimony

Plaintiff also argues that the trial court violated his privilege by allowing the couple’s marriage therapist to testify. However, this issue is not preserved for appellate review because plaintiff did not object to admission of the therapist’s testimony. See *Etefia v Credit Technologies*, 245 Mich App 466, 471-472; 628 NW2d 577 (2001). We review this unpreserved issue for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

There was nothing in the therapist’s testimony that was harmful to plaintiff. The majority of the therapist’s testimony regarded defendant’s, not plaintiff’s, counseling sessions. Regarding the only session the couple attended together, the therapist testified that he elicited a dating history from the couple and learned there were “red flags” before the marriage relating to the lack of time the couple spent together during the engagement. He also reported that plaintiff

stated he had reservations about getting married, but when he verbalized them, defendant became upset. The therapist recommended the couple continue therapy sessions, but plaintiff was averse to further therapy while defendant desired more. Plaintiff himself readily acknowledged that he had reservations about marrying defendant. He also readily acknowledged that he had no desire to save the marriage or return to counseling after he decided on divorce. Therefore, plaintiff has failed to demonstrate that admission of the therapist's testimony was plain error.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Kirsten Frank Kelly