

STATE OF MICHIGAN
COURT OF APPEALS

TRACY L HAYLEY f/k/a TRACY L. MARTIN,
Plaintiff-Appellant,

UNPUBLISHED
February 11, 2016

v

DANIEL B. MARTIN,

Defendant-Appellee.

No. 324689
Wayne Circuit Court
LC No. 07-705347-DM

Before: CAVANAGH, P.J., and RIORDAN and GADOLA, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order, entered after this Court's remand, denying her request for attorney fees related to the filing of her motion to modify the custody and parenting time provisions of a consent judgment of divorce. We affirm.

This is an acrimonious divorce action. The parties had been married in 2000, had a son in 2004, and a consent judgment of divorce was entered in 2007. The parties had joint physical and joint legal custody of their son. On June 16, 2010, plaintiff filed a motion seeking sole physical and legal custody, arguing that "at the time of the entry of the Judgment of Divorce the parties orally agreed that when the minor child was enrolled in school, 2009/2010 school year, that the minor child would reside with the Plaintiff/Mother overnight on school nights and would also be awarded alternate weekends." But, plaintiff argued, defendant "declines/refuses to adhere to his commitment to amend the custody/parenting time order at the time the minor child enrolled in school (September, 2009)." Plaintiff also referenced personal protection orders that had been issued against defendant and argued that there was a "total breakdown in the ability of the parties to communicate in the best interest of the minor child with the result that effective communication as to issues involving the minor child are no longer a realistic goal." Plaintiff also requested attorney fees. After extensive lower court proceedings, including a five-day evidentiary hearing, the court granted plaintiff's motion, in part, and awarded her sole physical custody of the parties' son, but denied her request for sole legal custody. The court also denied plaintiff's request for attorney fees, holding: "Both parties work and are responsible for there [sic] own attorney fees."

Plaintiff appealed the order, challenging both the trial court's decision to continue joint legal custody, as well as the court's denial of her request for attorney fees related to her motion to modify the custody and parenting time provisions of the consent judgment of divorce. This

Court concluded, in relevant part, that the trial court failed to address plaintiff's request for attorney fees. *Hayley v Martin*, unpublished opinion of the Court of Appeals, issued July 23, 2013 (Docket No. 310504); slip op at 3. Accordingly, this Court directed that an evidentiary hearing be conducted "to determine the amount of fees claimed and their reasonableness, and defendant's ability to pay," as set forth under MCR 3.206(C)(2)(a). *Id.*; slip op at 4-5. This Court further noted that plaintiff "may have also stated a valid request for attorney fees based on defendant's 'refus[al] to comply with a previous court order,' " as set forth under MCR 3.206(C)(2)(b), and directed that "the trial court should consider this question on remand as an alternative to the need-based award." *Id.* However, this Court noted: "Whether MCR 3.206(C)(2)(b) authorizes holding defendant responsible for plaintiff's attorney fees for the totality of the five-day evidentiary hearing on her motion, facially unrelated to defendant's noncompliance with court orders, is doubtful." *Id.*

On remand, the trial court issued an order indicating that an evidentiary hearing would be scheduled at which time plaintiff was to present evidence in support of her request for attorney fees. Thereafter, a four-day evidentiary hearing was conducted. Plaintiff sought attorney fees in the amount of \$44,851.17 for legal services rendered from June 16, 2010, the date the motion was filed, through February 20, 2014, at an hourly rate of \$275. The trial court eventually concluded that plaintiff had improperly sought appeal costs and post-appeal costs amounting to \$16,192.37; thus, the amount of claimed attorney fees at issue in this remand was \$28,658.80. The trial court also concluded that the billable rate and number of hours plaintiff claimed were reasonable.

Plaintiff testified at the evidentiary hearing that she earned about \$62,000 a year and that her living expenses exceeded her income. She had almost exhausted her 401k account because of this divorce, had taken on a loan, and had to file for bankruptcy. She was paying her attorney \$150 per month. And, as noted by the trial court, according to the record evidence plaintiff had paid her attorney over \$71,000 between February 1, 2010 and December 20, 2013 for post-judgment matters and an appeal.

Plaintiff also presented witness testimony attempting to establish that defendant owned a hair salon and that his single-member LLC, Magnum Tools, was flourishing and not floundering as defendant claimed. Toward these ends, plaintiff presented the testimony of witnesses who were involved in a lawsuit between a hair salon and one of its terminated hair stylists, but the testimony did not conclusively establish defendant's ownership interest in the hair salon. Plaintiff also presented the testimony from defendant's girlfriend who testified that she started a hair salon, defendant's company had invested in it, and defendant was the resident agent, but the salon had lost \$23,000 in 2013, was losing money in 2014, and owed the landlord over \$17,000.

Plaintiff also presented witnesses from Monroe Bank & Trust which had loaned money to Magnum Tools. The bank's vice president and deputy general counsel was the primary witness and, while she could read to the court the information that was on the financial records provided to the bank by Magnum Tools, she could not determine the financial health of Magnum Tools based on her review of those records. Defendant testified that his accountant had provided the financial information to the bank, some of which was inaccurate, but plaintiff did not present any testimony or evidence from defendant's accountant.

Defendant testified that Magnum Tools owed Monroe Bank & Trust \$145,000; owed the U.S. government \$119,000; owed the State of Michigan \$15,221.19; owed Bank of America about \$50,000; owed \$13,000 on an automobile loan; paid rent in the amount of about \$4,000 a month for the building it leased, plus utilities; and paid rent of \$1,200 a year for a boat slip. Defendant's mother also testified that she had loaned defendant about \$20,000 and had not been paid back any of the money. As for assets, either owned by Magnum Tools or defendant, defendant testified that the parties' home in Westland was being rented out because it had negative equity and the rent was used to pay for the mortgage and the water bill. He drove a 1997 Audi with 130,000 miles on it that was worth about \$2,500 and the boat he used and slept on was a 1984 model worth about \$16,500, but \$14,000 or \$15,000 was owed on it. Defendant's mother and his girlfriend both testified that defendant stays on the boat or at either of their houses, but he does not pay them to do so. And defendant admitted that, while his income tax returns through the several years indicated that he earned between \$7,500 and \$15,000 a year, the Friend of the Court had imputed income to him amounting to \$34,000 a year and he was ordered to pay \$581 a month in child support. Plaintiff did not present any evidence to refute the testimony provided by defendant, his mother, or his girlfriend regarding defendant's business or personal assets and liabilities.

After the evidentiary hearing the trial court concluded that plaintiff failed to prove that she could not pay her attorney fees incurred by the filing of her motion, and that defendant was able to pay her attorney fees as required under MCR 3.206(C)(2)(a). Because neither of the requirements of MCR 3.206(C)(2)(a) were met, attorney fees requested under this court rule were denied. Further, the court held that plaintiff failed to show that the claimed attorney fees of \$28,658.80 were incurred because defendant violated a previous court order. Accordingly, plaintiff was also not entitled to attorney fees under MCR 2.306(C)(2)(b). In summary, the trial court concluded, its prior decision that both parties were responsible for their own attorney fees was reaffirmed. This appeal followed.

Plaintiff argues that the trial court applied an incorrect legal standard in considering whether she could pay her attorney fees under MCR 3.206(C)(2)(a) and abused its discretion in concluding that she was not entitled to attorney fees. We disagree.

We review a trial court's decision to grant or deny attorney fees for an abuse of discretion. *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012). The court's findings of fact are reviewed for clear error, while issues of law are reviewed de novo. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007).

MCR 3.206(C) provides:

- (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
- (2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, and that the other party is able to pay, or

(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

As required under MCR 3.206(C)(2)(a), in considering plaintiff's request for attorney fees related to the filing of her motion to modify the consent judgment of divorce, the trial court considered plaintiff's ability to pay. The court noted plaintiff's evidentiary hearing testimony that her income in 2013 was about \$62,000, as well as the Referee Recommendation and Order of January 14, 2014, which determined plaintiff's income to be \$62,176.72 for child support purposes. The trial court noted that, in *Myland v Myland*, 290 Mich App 691, 702; 804 NW2d 124 (2010), this Court held that "a party sufficiently demonstrates an inability to pay attorney fees when the party's yearly income is less than the amount owed in attorney fees." And here, plaintiff's annual income of \$62,176.72 was clearly more than her attorney fees of \$28,658; thus, the court concluded, "the *Myland* test" was not met. Moreover, the trial court held, the records provided by plaintiff's counsel showed that between February 1, 2010 and December 20, 2013, plaintiff had paid over \$71,000 in attorney fees for post-judgment matters and an appeal. That is, plaintiff had been paying her own attorney fees. Thus, the trial court concluded that plaintiff failed to meet her burden of showing she could not pay her attorney fees related to the filing of her motion as required under MCR 3.206(C)(2)(a).

On appeal, plaintiff argues that the trial court "improperly applied a bright-line threshold test" to conclude that, because the amount of attorney fees she owed was less than her annual income, she could not demonstrate the requisite financial need. But, contrary to plaintiff's claim, the factor discussed in the *Myland* case was only one consideration supporting the trial court's ultimate conclusion. Plaintiff was required to demonstrate that the requested financial assistance was necessary. But the record evidence submitted by plaintiff in this case showed that she had been able to pay \$71,000 in attorney fees. Further, plaintiff earned about \$62,000 a year and testified that she was paying her attorney \$150 a month. Thus, the trial court's factual findings were supported by the record evidence; plaintiff did not prove that she was *unable* to pay her attorney fees incurred by the filing of her motion to modify the consent judgment of divorce.

Next, plaintiff argues that the trial court applied an incorrect legal standard in considering whether defendant had the ability to pay her attorney fees under MCR 3.206(C)(2)(a) and abused its discretion in concluding that she was not entitled to attorney fees. We disagree.

As required under MCR 3.206(C)(2)(a), the trial court considered whether plaintiff proved that defendant had the ability to pay her attorney fees. Citing to *Stallworth*, 275 Mich App at 288-289, the court noted that, if a party's income was more than double the opposing party's yearly income, that party had the ability to pay the other party's attorney fees. After summarizing the record evidence pertaining to defendant's business and income, the court concluded that, contrary to plaintiff's claims, she failed to show that defendant was living an extravagant lifestyle and earning \$200,000 to \$400,000 a year. That is, plaintiff's claim was "mere speculation without evidentiary support." The court also noted that the "income of a

corporation cannot be imputed to an individual, only the personal expenses the corporation is paying.” And in this case, it appeared defendant’s corporation was paying for some of his personal expenses, like the boat. The trial court agreed with the referee’s imputation of income in the amount of about \$34,000 and attributed that amount of income to defendant for the purpose of these proceedings. The court held that there was no evidence to impute more income to defendant, and his lifestyle did not reflect a higher income. He rented out his home to pay the mortgage, lived on his boat or with his mother or girlfriend, drove an older vehicle, and had business that was in debt. The court noted that defendant also had attorney fees to pay. Accordingly, the court concluded that plaintiff did not meet her burden of proving that defendant was able to pay her attorney fees. Thus, neither requirement of MCR 3.206(C)(2)(a) was met and attorney fees requested under this court rule were denied.

Plaintiff argues that the trial court improperly imposed a “relative or comparative approach” set forth in *Stallworth* in considering this issue. But, contrary to plaintiff’s claim, and as discussed above, that was not the primary factor supporting the trial court’s ultimate conclusion. Simply stated, plaintiff did not prove that defendant had the ability to pay her attorney fees. The trial court’s factual findings were amply supported by the record evidence. While plaintiff continues to argue on appeal that defendant owns three companies, “had the ability to hide income,” and lived an extravagant lifestyle, she has failed to establish that defendant had the financial ability to pay her attorney fees. Accordingly, the trial court did not abuse its discretion when it concluded that plaintiff was not entitled to attorney fees under MCR 3.206(C)(2)(a).

Next, plaintiff argues that the trial court committed legal error and abused its discretion in denying her any attorney fees under MCR 3.206(C)(2)(b). We disagree.

MCR 3.206(C)(2)(b) allows a trial court to award attorney fees that were incurred by one party as a result of the other party’s refusal to comply with a prior court order although having the ability to do so. In her motion to modify the consent judgment of divorce, plaintiff argued that two alleged oral agreements related to custody and parenting time during the school year were not honored by defendant. Plaintiff also referenced the fact that personal protection orders had been issued against defendant. On remand, the trial court reviewed the evidentiary hearing proceedings related to plaintiff’s motion and concluded that plaintiff “did not show that the attorney fees requested for the custody motion were incurred because of a violation of court order by Defendant. Nor did Plaintiff show that Defendant’s behavior during the proceedings delayed or caused additional attorney fees to be incurred.” The trial court further noted that any violation of court orders were addressed in separate proceedings and the court ruled on requests for attorney fees in those specific matters.

On appeal, plaintiff argues that defendant’s “behavior and violation of court order(s) were the bases for [her] 2010 motion to modify custody” However, as discussed above, the primary reason stated by plaintiff for her motion to modify the consent judgment of divorce was defendant’s alleged refusal to honor two oral agreements he purportedly made with plaintiff regarding custody and parenting time during the school year. Plaintiff did not allege that defendant “refused to comply with a previous court order, despite having the ability to comply.” See MCR 3.206(C)(2)(b). The party seeking attorney fees must allege facts sufficient to justify the award. *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010). We have

also reviewed the remand proceedings pertaining to plaintiff's request for attorney fees and plaintiff failed to present any evidence establishing that her motion to modify the consent judgment of divorce was necessary because of defendant's refusal to comply with a specific court order. In her appeal brief, plaintiff generally states that "[d]efendant's actions, including violations of court orders, were an integral part of the custody hearing," but she does not refer us to any record evidence that supports her claim that the motion at issue was necessary because defendant refused to comply with a previous court order. A party may not leave it to this Court to search for the factual basis to support her position, but must support factual statements with specific citations to the record. MCR 7.212(C)(7); *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Accordingly, the trial court did not abuse its discretion when it concluded that plaintiff was not entitled to attorney fees under MCR 2.306(C)(2)(b).

In summary, the trial court did not abuse its discretion in denying plaintiff's request for attorney fees related to the filing of her motion to modify the custody and parenting time provisions of the consent judgment of divorce. In light of our conclusion, we need not consider plaintiff's argument that she was also entitled to post-remand attorney fees because it is moot.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Riordan
/s/ Michael F. Gadola