STATE OF MICHIGAN

COURT OF APPEALS

EARLIN FAYE WEBSTER, Plaintiff-Appellee,	UNPUBLISHED December 1, 2009
v CURTIS L. WEBSTER, Defendant-Appellant.	No. 285848 Genesee Circuit Court LC No. 07-273592-DM

Before: Borrello, P.J., and Whitbeck and K.F. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. For the reasons set forth in this opinion, we affirm.

The parties married in 1988 and plaintiff gave birth to the parties' only child on October 15, 1991. Plaintiff filed her complaint for divorce on March 14, 2007, and then filed an affidavit and default on June 11, 2007, as a result of defendant's failure to answer the complaint or appear in the action. A default was entered on that date. On February 21, 2008, plaintiff filed a motion to enter a default judgment, and on March 3, 2008, the trial court held a hearing on plaintiff's motion. Defendant appeared at the hearing without counsel, and when questioned by the trial court as to why he had not hired an attorney, the following exchange occurred:

> *THE COURT:* Why – why did you not get a lawyer?
>
> *MR. WEBSTER:* Because I wanted it to be done right.
>
> *THE COURT:* Why did you not file something in here – any – on your own.
>
> *MR. WEBSTER:* I'm not trying to fight with them, sir. I want things done the right way. I'm not trying to fight with my wife. I'm not trying to fight with Ms. attorney Fish [plaintiff's counsel]. I was told by an attorney that they wouldn't defend me because of Ms. Fish in your office – in your court – that Ms. Fish has an unfair advantage in your court. I've been told by an attorney.
>
> *THE COURT:* Why does she have an unfair advan-

MR. WEBSTER: I don't know. I'm trying to find that out. And I want to get to the bottom of it and give me a chance to get an attorney so we can find all this out.

THE COURT: I'll adjourn it one week and I'll allow you to set the Default aside upon payment of $1,000 in costs.

MR. WEBSTER: On whose part?

THE COURT: You'll have to pay $1,000 to have the Default set aside.

MS. FISH: Is that to be paid to my office, your Honor?

THE COURT: Yes.

MS. FISH: Thank you.

MR. WEBSTER: Okay. It sounds about right, attorney.

THE COURT: And I'll adjourn it one week.

MS. FISH: Thank you, your Honor.

THE COURT: You can have a lawyer and have it set aside. I don't have to do that.

MR. WEBSTER: Well –

THE COURT: You're – you're getting' unfair advantage [sic].

MS. FISH: Thank you.

One week later, on Monday March 10, 2008, attorney David Megdell filed his appearance as defendant's counsel and the parties again appeared before the trial court. Plaintiff's counsel stated that defendant never paid $1,000 to set aside the default. Defendant's counsel stated that he had just spoken to defendant over the weekend and requested a two-week adjournment to file a motion for reconsideration regarding the $1,000 sum. The trial court expressed reluctance to waive the payment requirement, stating that if defendant wanted to set aside the default, he would have to pay for costs because "he sat on this thing for over a year." The following colloquy then ensued:

MR. MEGDELL: It's my understanding, Judge, that he's at – that he's tried to speak to with [sic] Ms. Fish about this case. He doesn't want the divorce. But be as it may –

THE COURT: That's beside the point. A Default was filed and he took no action. I'm giving him an opportunity to get back in the case but it's not going on

forever and he needs to – there's certain conditions for him to set it aside. If not, I will proceed.

MR. MEGDELL: Well can you adjourn this two weeks for him to uh- try to raise the money – the $1,000 – so we can uh-proceed with a defense in this case? Can you adjourn this for two weeks?

THE COURT: Yes, I'll do that but that's it. I mean, this lady's waited and he's done nothing. That's not fair. He's had opportunities, had notice. He could have hired you months ago. If he thought it was going to go away by doing nothing, that's unreasonable. That's not fair to her.

* * *

THE COURT: And it's not going go on – it's not going to go on. It's going to be set for trial immediately.

MR. MEGDELL: Okay.

THE COURT: I mean, I'm not – the court, nor should the uh-Plaintiff in this matter, be held hostage to his inaction.

On April 23, 2008, the parties filed a stipulation to set aside the default and the trial court entered an order setting aside the default. Also on the same day, the parties reached a partial settlement that was placed on the record. The trial court directed the parties to appear at 9:00 a.m. the following morning to resolve the remaining four or five issues. Immediately after the proceeding began the next morning, the following exchange occurred:

MR. MEGDELL: I'd like to – I would like to make a motion at this time. I met this morning for a few minutes with my client, Mr. Webster, and um-and he informed me that he does not want me to represent him and he wants to get a new lawyer, so I'm asking that I be recused from this case.

THE COURT: Mr. Webster, is that true?

MR. WEBSTER: That's true, sir.

THE COURT: Well I'm not going to give you time to get another lawyer.

MR. WEBSTER: I'm waiting-I'm waitin' on a call right now.

THE COURT: Wait a minute. Wait a minute. I'm talking right now. I'm not giving you time. We're going to trial this morning. You're making a serious mistake by discharging your attorney and I'm not going to let you get another lawyer because you were in default in this case. I did you a favor by allowing the default to be set aside. This matter is going to trial this morning and if – you're going up against a very experienced lawyer, and if you want to do that on your own, I will allow you to do that, but I will not allow you time to get

another lawyer. Now you got your choice to go to trial with Mr. Megdell this morning or go to trial representing yourself.

MR. WEBSTER: I'm going with your wishes, sir.

THE COURT: Huh?

MR. WEBSTER: I'm going with your wishes. This is your court, sir.

THE COURT: I don't – my wishes are it's going to trial. I don't care how it goes. I'm just telling you that's the choice you've got to make. We were here all day yesterday.

MR. WEBSTER: I tried, sir.

THE COURT: We are [sic] here all day yesterday and it's going to trial this morning. Now you decide if you want to try it yourself or you want to try it with Mr. Megdell. I – I get – I strongly recommended yesterday that this matter get settled. I kept you here all day yesterday. If I had let this thing go to default, this wouldn't have been going on. You'd a got none of this. You'd had no opportunity to discuss it.

MR. MEGDELL: Judge, based upon Mr. Webster's intentions in this matter or how he wants me to proceed or what I haven't done, there's no way I can represent him because he refuses to follow my advice and he has a – and I just do not feel comfortable representing him because I would just be a uh-the word is uh-

THE COURT: I will allow Mr. Megdell to withdraw. We'll proceed –

MR. MEGDELL: Thank you, your Honor.

THE COURT: We'll proceed to trial. You represent yourself.

Following trial, the trial court signed a judgment of divorce (JOD), which was signed by the court on May 14, 2008, but not entered by the court clerk until May 16, 2008. This appeal ensued.

Defendant first argues that he was denied his constitutional right to counsel when the trial court permitted his attorney to withdraw on the day of trial and refused to adjourn the trial to enable him to secure new counsel. We review constitutional issues de novo. *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

Const 1963, art 1, § 13 provides that "[a] suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney." "An attorney who has entered an appearance may withdraw from the action or be substituted for only with the consent of the client or by leave of the court." *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999).

Defendant argues that he was denied his constitutional right to counsel when the trial court permitted his attorney to withdraw on the morning of trial despite defendant's indication that he wished to proceed with the attorney's representation. Defendant relies on *Bye v Ferguson*, 138 Mich App 196, 200; 360 NW2d 175 (1984), in which the trial court permitted defense counsel to withdraw on the morning of trial notwithstanding that the defendant failed to appear at trial and had no notice of his attorney's withdrawal. This Court held that, regardless of whether the attorney's withdrawal because of the defendant's nonpayment of attorney fees was justified, the defendant was entitled to notice of the withdrawal. *Id.* at 206. This Court stated that although an attorney's withdrawal does not give a litigant an absolute right to a continuance, the defendant should have been afforded notice of the withdrawal and an opportunity to obtain new counsel. *Id.* at 206-207. Similar to *Bye*, in *Pascoe v Sova*, 209 Mich App 297, 300-301; 530 NW2d 781 (1995), this Court reversed the trial court's denial of the defendant's motion to set aside a default judgment based on the defendant's lack of notice of his attorney's withdrawal at the beginning of trial.

In contrast to *Bye* and *Pascoe*, the record here shows defendant had notice of his attorney's intent to withdraw, and it was defendant's desire that his counsel be removed from the case. These factors alone negate defendant's reliance on *Bye* and *Pascoe* as a means for this Court granting relief. Additionally, the trial court informed defendant that it was not going to further delay the matter and then gave defendant the option of either proceeding with attorney Megdell or representing himself. Although defendant contends that he voiced his decision to proceed with counsel, the record demonstrates that defendant avoided directly answering the trial court's question as to whether he wished to proceed with or without counsel by stating" "I'm going to go with your wishes."

In *Wykoff v Winisky*, 9 Mich App 662, 664; 158 NW2d 55 (1968), the defendants' previous attorney withdrew because of indifferences that resulted in the defendants filing a grievance against the attorney. The defendants retained new counsel approximately one week before trial, and, after some discussion of whether the defendants wanted the new attorney to continue to represent them, the trial court granted a one-day adjournment of trial on the condition that there would be no further requests for adjournment. *Id.* at 665-666. At the beginning of trial the following day, defense counsel moved to withdraw and the defendants requested a continuance to hire a new attorney. The trial court permitted defense counsel to withdraw and denied the defendants' request for a continuance, essentially requiring that they represent themselves during trial. *Id.* at 666. This Court affirmed, reasoning that had the defendants acted with reasonable diligence, they had ample time to obtain counsel in whom they had confidence. *Id.* at 668-669. This Court also noted that at a pretrial conference held approximately four months before trial, one of the defendants indicated an intent to represent himself throughout the proceedings. *Id.* at 667-668.

In this case, the record evidences defendant's dilatory tactics and unwillingness to defend the action. Defendant initially failed to answer plaintiff's complaint or take any action after a default was entered. He waited until plaintiff sought to enter a default judgment, approximately 11 months after she had filed her complaint, to participate in the action. Defendant appeared at a March 3, 2008, hearing without counsel and claimed that he did not have enough time to hire an attorney. When asked why he had not hired a lawyer, defendant merely replied, "Because I

wanted it to be done right." The trial court granted a one-week adjournment and allowed defendant to set aside the default by paying $1,000 in costs to plaintiff's counsel.

One week later, defendant still had not paid plaintiff's counsel $1,000. The trial court granted a request for a two-week adjournment, noting that such an adjournment was unfair to plaintiff, who had pursued the action while defendant had "done nothing." The court indicated that it would grant no further adjournments. The court stated that the case would proceed to trial immediately and that neither plaintiff nor the court would "be held hostage to [defendant's] inaction." The parties appeared on April 23, 2008, and spent the entire day negotiating a partial settlement that was placed on the record. Before trial on the remaining issues the following morning, however, defendant indicated that he wanted to hire a new attorney and rescind the agreement that was reached the previous day. We note that during defense counsel's first appearance before the trial court he indicated that his client did not want the divorce action to proceed. When reviewing the record as a whole we are left with the firm conviction that contrary to defendant being denied his constitutional right to counsel, he engaged in gamesmanship with the trial court in an effort to forestall the proceedings, including discharging his counsel on the date and time set for trial. As stated in *Wykoff*, *supra* at 670, "when the record establishes a substantial basis for challenging a litigant's good faith in preparing for trial, all need not come to a dead halt until that litigant decides that he is ready to permit the trial to proceed." Because the record shows that defendant not only had notice of his attorney's intent to withdraw but that defendant sought to dismiss his attorney, defendant was not denied his constitutional right to counsel. Further, because the record evidences defendant's dilatory tactics and gamesmanship, the trial court did not abuse its discretion by proceeding with trial in Megdell's absence and denying a continuance. See *Bye*, *supra* at 207.

Defendant also contends that the trial court abused its discretion by allowing his attorney to withdraw on the day of trial. The trial court's decision was not outside the range of reasonable and principled outcomes. See *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). As previously discussed, the record establishes that defendant's desire to dismiss Megdell was yet another attempt to delay the proceedings.

Defendant next argues that the trial court's failure to make findings of fact and conclusions of law regarding child support and spousal support requires reversal. Defendant contends that the trial court erred by failing to make explicit or implicit findings regarding his baseline income and, as a result, it is unclear whether the court accepted plaintiff's or defendant's assertion regarding his salary. Hence, defendant does not appeal the amounts awarded by the trial court but rather the method employed by the trial court to calculate the amounts.

Defendant argues that the trial court failed to make explicit or implicit findings in regard to his income. MCR 2.517(A) provides, in relevant part:

> (1) In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.

> (2) Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.
>
> (3) The court may state the findings and conclusions on the record *or include them in a written opinion*. [Emphasis added.]

Although the trial court did not articulate its findings regarding defendant's income on the record following trial, it did so in the judgment of divorce, which states, "[Child] Support is based on Plaintiff's average net monthly income of $1,520.67 and Defendant's average net monthly unemployment and strike pay of $2,557.02 and then, his ability to earn an average net monthly income of $4,640.45." Pursuant to MCR 2.517(A)(3), the trial court was permitted to state its findings of fact in a written opinion.

Further, regarding spousal support, the trial court recognized in its findings of fact on the record that the parties' disparity in income was extreme and that the marriage had lasted 20 years. The court further stated that plaintiff was in good health and should be afforded an opportunity to further her education and seek new employment. These findings are sufficient to satisfy MCR 2.517(A)(2) with respect to spousal support.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly