2015 IL App (2d) 130999-U
No. 2-13-0999
Order filed February 6, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF BRENDA MacNEIL, Petitioner-Appellee, and DAVID MacNEIL, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 07-D-0780 Honorable Robert A. Miller, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Denial of respondent's section 2-615 motion to dismiss petition for attorney fees was proper because the petition alleged sufficient facts to establish as a matter of law a legally recognized cause of action under section 508(a) of the Act (750 ILCS 5/508(a)(West 2010)); denial of respondent's section 2-619 motion to dismiss respondent's petition was proper because respondent did not raise an affirmative defense; the trial court did not abuse its discretion in ordering respondent to contribute 25% of petitioner's attorney fees.

¶ 2 Respondent, David MacNeil, appeals from the trial court's May 8, 2013, denial of his motion to dismiss petitioner's, Brenda MacNeil's, motion for attorney fees. David also appeals

from the trial court's August 29, 2013, order requiring him to pay 25% of Brenda's attorney fees. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties were married in Scotland in 1989 and had three children. On April 10, 2007, Brenda filed a petition for dissolution of marriage. On June 20, 2007, the trial court entered a judgment dissolving the marriage. Incorporated into the judgment was a marital settlement agreement (MSA) entered into by the parties that provided for custody, child support and maintenance.

¶ 5 On January 14, 2011, Brenda filed a petition to modify child support pursuant to section 510(a)(1) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/510(a)(1) (West 2010)), retaining an attorney to represent her. On October 18, 2012, the trial court entered an order modifying the amount of child support Brenda was obligated to pay David. On the same day, Brenda, relying on section 508(a) of the Act (750 ILCS 5/508(a)(West 2010)), filed a "Petition for Contribution to Attorney Fees" requesting that David contribute 100% of the attorney fees and costs incurred up to that date in connection with the litigation of her petition.

¶ 6 Brenda's petition, with affidavit attached, alleged that section 508 of the Act authorized the trial court to order "any party to pay a reasonable amount for his own or the other party's costs and attorney's fees" in connection with the enforcement or modification of any order or judgment under the Act. Brenda alleged that she was unable to pay her attorney's fees and costs, whereas David was well-able to pay his own attorney's fees and costs. Brenda listed her net monthly income as $14,038.12 and her monthly living expenses as $15,824.48, which included monthly child support payments she made to David of $3,391.00.[1] David had a yearly gross

[1] On October 18, 2012, the trial court modified the amount of Brenda's child support,

income of over $2 million; his monthly net income was $90,333.00, and his monthly expenses were $32,200.00. Brenda further alleged that requiring her to pay her attorney fees would "strip [her] of her means of support and undermine her financial stability."

¶ 7 On February 8, 2013, David filed a "Motion to Strike and Dismiss Brenda's Fee Petition" requesting dismissal pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 5/2-619 (West 2012)). On May 8, the trial court denied David's motion, finding that there were sufficient facts to state a claim in that Brenda pleaded that she had a monthly financial deficit and that David had the ability to pay, and that David had not presented an affirmative defense sufficient to defeat Brenda's petition.

¶ 8 On August 29, the trial court conducted a hearing on Brenda's fee petition at which Brenda testified. The parties agreed that the facts were not in dispute. David conceded that he had the means to pay the attorney fees (approximately $90,000 monthly income) but argued that Brenda was required to prove she was unable to pay fees and costs. The trial court found that a total of $75,000 of attorney fees was generated, including costs. Brenda had paid $52,500, leaving $22,500 outstanding. The trial court noted that the criterion for deciding the issue of attorney fees was not to simply order the "deeper pocket" to pay. The trial court also noted that Brenda had "an affirmative duty to become self-supporting" and that she was receiving

---

retroactive to the date she filed her petition to modify, with the net result being an arrearage of $15,961.88 owing to David. Commencing May 1, 2012, and going forward, the trial court ordered Brenda to pay David $3,456 per month for child support. Both David and Brenda appealed portions of the trial court's orders. We affirmed the trial court in an unpublished Rule 23 Order, *In re Marriage of MacNeil*, 2014 IL App (2d) 130999-U.

maintenance that she was using to set up a business in order to increase her income. The court then ruled that there was a disparity between the two parties' incomes, and that Brenda was in a position of being unable to pay her attorney fees "without stripping her of the means to further advance her business interest where she has a duty to do [so]." The trial court ordered Brenda responsible for 75%, and David responsible for 25%, of Brenda's accrued fees and costs.

¶ 9 David timely appealed.

¶ 10 II. ANALYSIS

¶ 11 As a preliminary matter, Brenda asserts in her brief that David's statement of facts contains irrelevant information, argument, and repetition. Brenda requests this court to strike David's statement of facts as improper argument. Brenda cites no authority to support her position.

¶ 12 It is within this court's discretion to strike or disregard those portions of a party's brief containing improper argument, conclusions, or inappropriate record citations. *Hubert v. Consolidated Medical Laboratories*, 306 Ill. App. 3d 1118, 1120 (1999). If, however, the " 'violations of supreme court rules are not so flagrant as to hinder or preclude review, the striking of a brief in whole or in part may be unwarranted.' " *Id*. at 1120 (quoting *Merrifield v. Illinois State Police Merit Board*, 294 Ill. App. 3d 520, 527 (1998)). As a general rule, this court is reluctant to grant motions to strike, preferring to simply disregard the improper material. *Haubner v. Abercrombie & Kent International, Inc.*, 351 Ill. App. 3d 112, 117 (2004). Here, we do not find David's violations to be so "flagrant as to hinder or preclude review," nor do we find that his statement of facts is so misleading as to hinder our analysis. Therefore, we elect to simply disregard the offending portions.

¶ 13 We now turn to the merits of the appeal.

¶ 14 A. Section 2-615 Motion

¶ 15 David first argues that the trial court erred when it denied his section 2-615 motion to dismiss. It is well-settled that Illinois is a fact-pleading jurisdiction and, while the plaintiff is not required to set forth evidence in the complaint, the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429-30 (2006). A section 2-615 motion to dismiss challenges only the legal sufficiency of a complaint and alleges only defects on the face of the complaint. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 54. A section 2-615 motion to dismiss should only be granted if there are no sets of facts that can be proved which would entitle the plaintiff to recover. *Iseberg v. Gross*, 227 Ill. 2d 78, 86 (2007). Simply alleging legal conclusions is insufficient to defeat a motion to dismiss. *Marshall*, 222 Ill. 2d at 430. We review *de novo* a trial court's decision on a motion to dismiss pursuant to section 2-615 or 2-619 of the Code. *Diotallevi v. Diotallevi*, 2013 IL App (2d) 111297, ¶ 26.

¶ 16 In this case, Brenda alleged that her attorney fees were incurred as a result of litigating her modification of child support petition and that, with her current income, she was financially unable to pay her attorney fees while David had the financial ability to pay. She alleged that requiring her to pay her attorney fees would "strip [her] of her means of support and undermine her financial stability." She supported these allegations with specific facts and figures regarding her income and expenses, as well as David's income and expenses. In our opinion, her petition contained sufficient facts to establish as a matter of law a legally recognized cause of action under section 508(a) of the Act. (750 ILCS 5/508(a)(West 2010). We hold that the trial court was correct when it denied David's section 2-615 motion to dismiss Brenda's petition.

¶ 17 B. Section 2-619 Motion

¶ 18 David next argues that the trial court erred when it denied his section 2-619 motion because, he alleges, he presented "affirmative matter" that was sufficient to defeat Brenda's petition.

¶ 19 "A motion to dismiss under section 2-619(a) admits the legal sufficiency of the plaintiff's claim but asserts certain defects or defenses outside the pleadings which defeat the claim. [Citation.] When ruling on the motion, the court should construe the pleadings and supporting documents in the light most favorable to the nonmoving party. [Citation.] The court must accept as true all well-pleaded facts in plaintiff's complaint and all inferences that may reasonably be drawn in plaintiff's favor. [Citation.] The question on appeal is 'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' [Citation.]" *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55.

Again, our review is *de novo*. *Diotallevi*, 2013 IL App (2d) 111297, ¶ 26.

¶ 20 David's purported "affirmative matter" consisted of his assertions that the allegations in Brenda's petition were "patently false," and an assertion that the information in Brenda's comprehensive financial statement constituted judicial admissions which should bar the relief requested. This novel argument does not assert any defects or defenses outside the pleadings which would defeat the claim. See *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 42 ("Section 2-619(a)(9) is not a proper vehicle to contest factual allegations; nor does it authorize a fact-based 'mini-trial' on whether plaintiff can support his allegations."). David's assertions are not affirmative matters; rather, this is merely contrary evidence and David is arguing the evidence to both the trial court and this court. We agree with Brenda that disputing facts does not warrant dismissal pursuant to section 2-619 of the Code. Therefore,

David's argument fails. The trial court did not err when it ruled that Brenda's petition was legally sufficient and denied David's section 2-619 motion.

¶ 21 C. Attorney Fees

¶ 22 The parties dispute the standard of review. David asserts the issue must be reviewed *de novo*, as it presents a question of statutory construction, while Brenda maintains that the proper standard of review is abuse of discretion. It is well-settled that this court will not disturb a trial court's award of attorney fees under section 508(a) absent an abuse of discretion. *In re Marriage of Bussey*, 108 Ill. 2d 286, 299 (1985); *In re Marriage of Lonvick*, 2013 IL App (2d) 120865, ¶ 58. A court abuses its discretion when no reasonable person would take the view adopted by the trial court. *In re Marriage of Arjmand*, 2013 IL App (2d) 120639, ¶ 32.

¶ 23 Generally, attorney fees are the primary responsibility of the party who incurred the fees. *In re Marriage of Streur*, 2011 IL App (1st) 082326, ¶ 36; *In re Marriage of Schinelli*, 406 Ill. App. 3d 991, 995 (2011). However, a trial court, "after considering the financial resources of the parties," may order a party "to pay a reasonable amount" of the other party's attorney fees. 750 ILCS 5/508(a) (West 2012). When determining an award of attorney fees, the allocation of assets and liabilities, maintenance, and the relative earning ability of each party should be considered. *Streur*, 2011 IL App (1st) 082326, ¶ 36 (citing *In re Marriage of Suriano*, 324 Ill. App. 3d 839, 852 (2001)).

¶ 24 Regarding attorney fees, section 508 of the Marriage Act states:

> "(a) The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own or the other party's costs and attorney's fees. *** At the conclusion of any pre-judgment dissolution proceeding under this subsection, contribution to

> attorney's fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503 *and in any other proceeding under this subsection*. ***. Fees and costs may be awarded *in any proceeding* to counsel from a former client in accordance with subsection (c) of this Section. Awards may be made in connection with the following:
>
> ***
>
> (2) The enforcement or modification of any order or judgment under this Act." (Emphases added). 750 ILCS 5/508(a) (West 2012).

The language italicized in this excerpt was added effective January 1, 2010. "Any other proceeding" includes post-judgment proceedings. See *Blum v. Koster*, 235 Ill. 2d 21, 46-47 (2009) ("Section 508 governs attorney fees generally, including petitions for contribution of attorney fees and costs incurred in postdecree proceedings and initial dissolution proceedings."); *In re Marriage of Streur*, 2011 IL App (1st) 082326, ¶ 38 (An award for proceedings that were "postdecree and occurred several years after the judgment for dissolution of marriage was entered" was proper, "as such an award is contemplated by the Act.") .

¶ 25 Section 503(j)(2) of the Act states:

> "[a]ny award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504." (750 ILCS 5/503(j)(2) (West 2012)).

¶ 26 The criteria for division of marital property include the contribution of each party to the acquisition of marital property, including, but not limited to, the contribution of a spouse as a homemaker; the value of the property assigned to each spouse; the marriage's duration; each

spouse's economic circumstances; the age, health, occupation, sources of income, and employability of each party; the custodial provisions for the children; and the reasonable opportunity of each spouse for future acquisition of capital assets and income. 750 ILCS 5/503(d) (West 2012). The criteria for maintenance include many overlapping criteria, as well as, *inter alia*, impairment of present and future earning capacity due to devoting time to domestic duties or having forgone education or career opportunities due to marriage; the standard of living established during the marriage; and contributions and services to the education or career of the other spouse. 750 ILCS 5/504(a) (West 2012). "Together, sections 504(a) and 503(d) provide the framework to determine whether the relative financial situations of the parties warrant a contribution to the attorney fees of one party." *In re Marriage of Sobieski*, 2013 IL App (2d) 111146, ¶ 41.

¶ 27 David argues at length that section 503(j) does not apply to post-decree litigation, citing *Blum*, 235 Ill. 2d at 47. However, *Blum* addressed the issue of whether a petition for attorney fees must be heard and decided before the final judgment is entered. The court in *Blum* held that the statutory provision setting the time period for filing of petitions for contribution of attorney fees and costs did not apply to postdecree proceedings. Thus, section 503(j) governs the *procedural requirements* applicable to fee petitions. *Blum* did not establish a rule expressed by David that a court should take into consideration the fact that a petition is postdecree in deciding *whether and to what extent* attorney fees should be awarded.

¶ 28 The Act does not explicitly require that a party seeking contribution under section 508(a) prove that she is unable to pay her own attorney fees. The Act merely states that the court shall consider "all relevant factors." 750 ILCS 5/503(d) (West 2010). However, in *Schneider*, 214 Ill. 2d 152 (2005), the supreme court stated:

> "Section 508 of the Dissolution Act allows for an award of attorney fees where one party lacks the financial resources and the other party has the ability to pay. [Citation.] The party seeking an award of attorney fees must establish her inability to pay and the other spouse's ability to do so. [Citation.] Financial inability exists where requiring payment of fees would strip that party of her means of support or undermine her financial stability." *Id.* at 174. See also *In re Marriage of Patel and Sines-Patel*, 2013 IL App (1st) 112571, ¶ 113; *Streur*, 2011 IL App (1st) 082326, ¶ 36; *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 667 (2008); *In re Marriage of Nesbitt*, 377 Ill. App. 3d 649, 657 (2007).

Because our supreme court has stated that a party seeking an award of fees under section 508(a) must show an inability to pay, we are bound by that decision, as this court does not have the authority to abandon supreme court precedent. See *Orr v. Edgar*, 298 Ill. App. 3d 432, 442 (1998). Thus, whether a party is able to pay his or her own fees is viewed in the larger framework of the statutory factors. *Sobieski*, 2013 IL App (2d) 111146 ¶ 49; see also *In re Marriage of Carr*, 221 Ill. App. 3d 609, 612 (1991) (" 'Inability to pay' must be determined relative to the party's standard of living, employment abilities, allocated capital assets, existing indebtedness, and income available from investments and maintenance."). "Financial inability to pay does not require a showing of destitution nor does it require the fee-seeking spouse to divest himself or herself of capital assets." *In re Marriage of Kennedy*, 214 Ill. App. 3d 849, 861-62 (1991). Rather, financial inability exists when requiring the requesting party to pay attorney fees would strip that party of his or her means of support or would undermine that party's financial stability. *Id.* at 862. See also *Pond*, 379 Ill.App.3d 982, 987 (2008) (Petitioner clearly

demonstrated that she was "unable to pay her attorney fees without invading her capital assets or undermining her financial stability.").

¶ 29 David asserts that *In re Marriage of Haken*, 394 Ill. App. 3d 155 (2009), *In re Marriage of Sobieski*, 2013 IL App (2d) 111146, and *In re Marriage of Price*, 2013 IL App (4th) 120155 are factually inapposite because all of those cases involved attorney fees incurred in pre-decree matters. Conversely, in his argument regarding whether the award of fees was an abuse of discretion, David relies on *Schneider*, 214 Ill. 2d 152; *Pond*, 379 Ill.App.3d 982; *In re Marriage of Mantei*, 222 Ill. App. 3d 933 (1991), and *In re Marriage of Krivi*, 283 Ill. App. 3d 772 (1996), all prejudgment cases. David repeatedly makes factual distinctions in an attempt to disallow the predecree cases cited by Brenda, while ignoring that cases that he relies on are predecree as well. We find David's attempts to distinguish these cases disingenuous.

¶ 30 In this case, David's ability to pay the attorney fees was undisputed. The trial court considered the disparity between David's income and Brenda's income, and her monthly deficit. Regarding Brenda's ability to secure employment, the trial court noted that Brenda had a duty to increase her income in order to become self-supporting. It considered her efforts to start and build a business, using maintenance funds to do so. We find, therefore, that the court's ruling that there was a disparity between the two parties' incomes, and that Brenda was in a position of being unable to pay her attorney fees "without stripping her of the means to further advance her business interest where she has a duty to do [so]" was not against the manifest weight of the evidence. Moreover, the trial court ordered David to pay 25% of Brenda's fees, not 100% as she requested. This was not an abuse of discretion.

¶ 31 We emphasize that today's ruling does not compel, in David's words, an "absurd result that a party who has ample assets and income to pay his or her own attorneys' fees can, under

this ruling, nevertheless obtain contribution from the other party simply upon showing that the other party has the ability to pay such fees." Our ruling does not establish such a rule. An award for contribution of attorney fees is not made solely on the basis of one party's inability to pay, nor is inability to pay a condition precedent to considering the other party's financial resources and ability to pay. Therefore, we reject David's argument that the trial court erred in awarding attorney fees to Brenda.

¶ 32 D. David's Comprehensive Financial Statement

¶ 33 As a final matter, we disagree with David that Brenda has forfeited the argument raised in her reply brief that the trial court erred in barring the admission of David's comprehensive financial statement. It is true that appellees may not argue alleged errors unless they timely file a cross-appeal. *Martis v. Grinnell Mutual Reinsurance Co.*, 388 Ill. App. 3d 1017, 1024 (2009). In the absence of a cross-appeal, an appellee will not be permitted to challenge or ask the reviewing court to modify a portion of the trial court's order. *Id.* "When an appellee does not file a cross-appeal, the reviewing court is confined to the issues presented by the appellant. [Citation]." *Id.* However, in this case, Brenda is not seeking anything but an affirmance of the trial court's order. Therefore, we find that her argument is properly before this court. See *Wm. Aupperle & Sons, Inc. v. American National Bank & Trust Co. of Chicago*, 62 Ill. App. 3d 842, 846 (1978) (appellate court had jurisdiction over issues raised by the appellee bank where it was not attempting to attack the trial court's judgment).

¶ 34 Brenda's argument that the trial court's refusal to admit David's financial statement was erroneous is moot. Excluding the financial statement, the record demonstrated David's financial position; indeed, the facts were undisputed. Further, Brenda's position is that the trial court did not abuse its discretion in awarding the fees, so this point is moot as she could not obtain relief

different from what we could otherwise grant her. Assuming, *arguendo*, we were to agree that the exhibit was previously admitted and thus had a proper foundation, Brenda is asking for a relief that could only result in affirmance. Since we determine that the trial court did not abuse it discretion in the apportionment of fees this alleged error is moot.

¶ 35 In conclusion, we determine that the trial court did not abuse its discretion when it ordered Brenda to pay 75% and David to pay 25% of her attorney fees and costs.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm.

¶ 38 Affirmed.