STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH LYNNE OSTERMANN,

Plaintiff-Appellee,

v

ERNEST THEODORE OSTERMANN,

Defendant-Appellant.

UNPUBLISHED
January 13, 2009

No. 278786
Muskegon Circuit Court
LC No. 01-014571-DM

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

PER CURIAM.

In *Ostermann v Ostermann*, unpublished opinion per curiam of the Court of Appeals, issued September 22, 2005 (Docket No. 261271), this Court affirmed the parties' judgment of divorce, except as to the property division. This Court remanded, stating:

> The trial court did not place on the record what values it placed on the disputed property items or what percentage proportion of the final estate was to be awarded to the parties. The court appears to have adopted plaintiff's proposed division of the marital assets but did not explicitly say so. The court also did not rule on what property was or was not included in the marital estate. Finally, the court did not determine the dollar value of the assets not agreed upon by the parties. [*Ostermann*, slip op at 7.]

Defendant appeals as of right from the amended judgment entered on remand. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

First, defendant submits that the trial court erred in its valuation of Canadian property by using an improper exchange rate. Review of the record reveals that the trial court instructed the parties to submit the valuation of the property in U.S. dollars in light of defendant's acquisition of Canadian property. During trial, the judge noted that the parties continued to transpose the figures back and forth to such an extent that he stated, "You guys are killing me." The trial judge then advised the parties that he expected them to remedy the interchange in dollar figures in their post-trial briefs. However, during testimony, defendant asserted that several Canadian properties were purchased when he had filed for divorce earlier, a case that was dismissed due to lack of progress, and therefore, should not be considered as marital property. The trial court ruled that the parties were still married at the time of purchase and concluded that it was part of

the marital estate. The trial court then advised that the "end of these proofs" would be the date for determining the exchange rate. When defense counsel inquired whether that ruling was agreeable, the judge stated that it was not subject to agreement, but rather was "my ruling." Ultimately, the trial court advised the parties to submit their proposed exchange rates in their post-trial briefs, but did not adopt either exchange rate.

After the proceedings on remand and after the amended judgment ruling, defendant advised that the trial court may have mistakenly utilized the wrong exchange rate. However, defendant did not ask the court to correct any error, but raised the issue in the context of a motion for disqualification as evidence of bias. A party may not harbor error as an appellate parachute by consenting to action at trial and objecting on appeal. *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005). Moreover, in light of the failure to file the appropriate documentation evidencing income generated and loan information regarding the Canadian properties, it cannot be concluded that the exchange rate utilized by the trial court caused an inequitable division. *Stoudemire v Stoudemire*, 248 Mich App 325, 339; 639 NW2d 274 (2001). Accordingly, this claim of error does not warrant appellate relief.

Defendant next argues that the trial court failed to exercise discretion regarding consideration of property acquired after the parties separated and during the pendency of divorce proceedings. The *Ostermann* Court addressed this issue, and rejected this argument. This Court may not reach a determination that is not consistent with its prior ruling. See *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000).

Defendant next argues that the trial court erred in valuing the pay loader, the carpentry tools, the boat, and the lumber at $71,500, claiming that plaintiff sought to add $10,000 for the lumber only during the appeal. However, plaintiff claimed the lumber was worth $10,000 in her trial brief, and reiterated the value in her post-trial brief. Defendant further asserts that the trial court erred in accepting plaintiff's valuation of these assets based on defendant's failure to account for some of his earned income; he maintains he accounted for all income. Preliminarily, defendant miscalculates his gross income in his brief on appeal after remand. He claims his income was $943,000 ($460,000 x 2.5 years, the time period between the separation and the divorce). But $460,000 x 2.5 years equals $1,150,000. Moreover, this aspect of his income was linked only to his employment as a radiologist. Defendant acknowledges other income of $25,000 from a rental property, but fails to mention income from surface rights relative to oil drilling on the Canadian properties and income from grain sales generated from the Canadian property. He had not filed Canadian tax returns relative to the Canadian income; he indicated he would be filing in 2003, and that the filings would date back to 1998. Given this evidence, we find no clear error in the valuation of the pay loader, the carpentry tools, the boat, and the lumber. See *Welling v Welling*, 233 Mich App 708, 709; 592 NW2d 822 (1999).

Defendant next argues that the unaccounted for earned income should not have been a factor in awarding plaintiff 60 percent of the marital assets and defendant 40 percent of the assets. After making findings of fact consistent with *Berger v Berger*, 277 Mich App 700, 716-718; 747 NW2d 336 (2008), the trial court determined that the equities favored this distribution given the failure to account for the disbursement of significant income, gifts to a girlfriend in excess of $200,000, and defendant's retention of income producing property and his ability to continue full employment as a radiologist, as compared to the income of plaintiff coupled with

her role in caring for the parties' five children. Although the trial court could have considered additional factors defendant finds significant, the factors articulated by the trial court were not in error and cannot be discounted. There is no showing based on the findings of fact that trial court's dispositional ruling was unfair or inequitable in light of these facts and thus, we affirm. *Id.*

Finally, defendant challenges the valuation of Muskegon Radiology. However, during trial, both parties represented that this asset was worth $200,000.

Plaintiff has requested that defendant be ordered to pay her attorney fees on appeal. MCR 3.206(C)(2)(a) would allow for fees if plaintiff were unable to bear the expense of the action and defendant was able to pay. We note that plaintiff was awarded over $1,000,000 in cash as part of the property distribution. Accordingly, she cannot establish an inability to pay and is not entitled to attorney fees on appeal.

Affirmed.

/s/ Deborah A. Servitto
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood