

IN THE COURT OF APPEALS OF IOWA

No. 7-552 / 06-1920
Filed September 6, 2007

Upon the Petition of
MICHELE L. FRAMPTON,
Petitioner-Appellee,

And Concerning
GEORGE A. FRAMPTON,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson,
Judge.

George Frampton appeals from the district court's decision finding he committed domestic abuse assault under Iowa Code chapter 236 (2005), and the district court's award of attorney fees. **AFFIRMED IN PART AND REVERSED IN PART.**

Bernard Spaeth of Whitfield & Eddy, P.L.C., Des Moines, for appellant.

Alexander Rhoads, Des Moines, and Jolie Juckette of Nelissen & Juckette, P.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

ZIMMER, J.

George Frampton appeals from the district court's entry of a domestic abuse protective order following a hearing on a petition for relief from domestic abuse filed by his wife, Michele Frampton. He contends the evidence was insufficient to prove he committed civil domestic abuse in violation of Iowa Code chapter 236 (2005). He also contends the district court erred in awarding his wife attorney fees. We affirm in part and reverse in part.

I. Background Facts and Proceedings.

On May 23, 2006, George and Michele Frampton engaged in a heated argument at their home in Polk County.¹ The following day the parties filed separate petitions for relief from domestic abuse. A judge entered a temporary protective order against George in Polk County Case No. 13072. A different judge entered a temporary protective order against Michele in Polk County Case No. 13073. In each case a hearing was scheduled to determine whether a final protective order should be issued.

Following an evidentiary hearing on June 7, 2006, the district court granted both petitions. The court entered a final domestic abuse protective order against George in No. 13072, and a final domestic abuse protective order against Michele in No. 13073. On June 16, 2006, George filed a motion to enlarge or amend the protective order entered against him. He contended there was no evidence he assaulted Michele and asked the court to specify the basis for its conclusion that abuse occurred. Michele resisted the motion and sought an award of attorney fees.

¹ George called the police, and Michele was arrested. She spent the night in jail and was released the following morning. No protective order was entered in the criminal matter before Michele was released from custody.

The court held a hearing on George's motion to enlarge on October 13, 2006. At the hearing, George reasserted his claim that he had not assaulted his wife. Michele did not contest the court's decision to enter a protective order against her; however, her counsel argued that the protective order entered against George was proper and contended George's request to amend the order was "oppressive and vindictive." Michele's counsel requested that Michele be awarded attorney fees in the amount of \$950 for defending against the motion.

A few days after the hearing, the district court entered a written ruling that denied George's motion to amend the protective order against him. The court also awarded Michele attorney fees in the amount of \$300 under a common law theory. George has appealed.

II. Scope and Standards of Review.

Because this domestic abuse case was heard in equity, our review is de novo. *Knight v. Knight*, 525 N.W.2d 841, 843 (Iowa 1994). The party alleging domestic abuse bears the burden of proving the abuse by a preponderance of the evidence. Iowa Code § 236.4(1). We give weight to the fact findings of the district court when considering the credibility of witnesses, but we are not bound by those findings. Iowa R. App. P. 6.14(6)(g).

III. Discussion.

George first contends his acts on May 23, 2006, did not constitute domestic abuse.² Under Iowa Code section 236.2, George committed domestic abuse if he committed assault against Michele as the term is defined by section 708.1. That section provides in relevant part:

² Appellee did not file a brief; however, we are still obligated to determine if the arguments advanced by the appellant have merit.

A person commits an assault when, without justification, the person does any of the following:

(1) Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.

(2) Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.

Iowa Code § 708.1(1), (2).

At the hearing held June 7, George denied assaulting Michele on May 23 and testified that Michele struck him twice in the back of the head. During her testimony, Michele admitted that she tried to slap Goerge two times during their argument. Michele testified that during the argument she was “really afraid he was going to smack me.” She testified George had been “very physical” with her before, and that although he had never hit her, he had “grabbed” her. She also testified George was screaming at her from a distance of about three feet. According to Michele, George threw her across the room soon after she attempted to hit him. After considering this and other evidence, the district court concluded both Michele and George committed an assault under Iowa Code chapter 236.³

Upon our de novo review of the record, we conclude a preponderance of the evidence supports the district court’s conclusion that the incident that occurred May 23 was sufficient to constitute an act of domestic abuse. In reaching this conclusion, we acknowledge the district court, as trier of fact, has a better opportunity to evaluate the credibility of witnesses than we do. *Tim O’Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996). Michele’s version

³ It is apparent from the record that the court found each party’s testimony regarding the other party’s assaultive conduct credible.

of events, if believed by the trial court, is sufficient to constitute domestic abuse assault. Accordingly, we affirm the district court's determination that domestic abuse occurred and its entry of a permanent protective order.

George next contends Michele should not have been awarded attorney fees in this case. Upon review of the record, we agree with George. There is no statutory basis for an award of attorney fees under Iowa Code chapter 236. The district court relied on *Hockenburg Equipment Co. v. Hockenburg's Equipment and Supply Co. of Des Moines*, 510 N.W.2d 153 (Iowa 1993), in determining that attorney fees should be awarded despite the absence of any statutory authority.⁴ *Hockenburg* held generally a party has no claim for attorney fees in the absence of a statute or contract. 510 N.W.2d at 158. However, the court noted, “[a]t common law in rare instances a prevailing party had such a claim [for attorney fees as damages] where the losing party had acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Id.* In order for the prevailing party to receive attorney fees, the opposing party's conduct “must rise to the level of oppression or connivance to harass or injure another.” *Id.* at 159-60. The level of culpability required by the opposing party's conduct must exceed the punitive-damage standard, which requires “willful and wanton disregard for the rights of another.” *Id.* at 159; see also *Fennelly v. A-1 Mach. & Tool Co.*, 728 N.W.2d 163, 181 (Iowa 2006).

In this case, the district court's written order indicates the defendant's motion to enlarge or amend the protective order was “vexatious.” However, during the hearing on the motion, the court stated it was “not making any finding

⁴ *Hockenburg* did not concern a domestic abuse claim under chapter 236; rather, it involved a dispute that arose out of a settlement contract between two competing restaurant equipment suppliers. 510 N.W.2d at 154.

of any bad faith with regard to the defendant.” We do not think the record in this case comes close to reaching the heightened standard of oppression or connivance required under the *Hockenberg* test. See *Fennelly*, 728 N.W.2d at 181 (concluding an award for attorney fees in a tax-collection case was “far removed from the rare exception to the general rule against an award for attorney fees”); *Wolf v. Wolf*, 690 N.W.2d 887, 896 (Iowa 2005) (finding the defendant’s conduct, which was “clearly willful and demonstrated a wanton disregard for [her ex-husband’s custody] rights,” did not meet the heightened standard required in *Hockenberg* for an award of common-law attorney fees). Accordingly, we reverse the district court’s award of attorney fees.

IV. Conclusion.

We affirm the district court’s determination that domestic abuse occurred and its entry of a protective order. We reverse the court’s order assessing attorney fees to George. Costs are assessed one-half to each party.

AFFIRMED IN PART AND REVERSED IN PART.