

STATE OF MICHIGAN
COURT OF APPEALS

WENDY SUE MOSSNER,

Plaintiff-Appellee,

v

DAVID DONALD MOSSNER,

Defendant-Appellant.

UNPUBLISHED

July 1, 1997

No. 192848

Saginaw Circuit Court

LC No. 94-000712 DM

Before: Cavanagh, P.J., and Doctoroff and D.A. Teeple*, JJ.

MEMORANDUM.

Defendant appeals by right from a judgment of divorce. This case is being decided without oral argument pursuant to MCR 7.214(E).

When the property settlement was placed on the record, it was defense counsel who informed the court on May 25, 1995, that there were three contingencies, regarding a pickup truck, a savings account, and an automobile. It was defendant's burden to produce receipts or other documentary evidence to reduce the cash portion of plaintiff's property settlement award; defendant failed to do so, and the trial court properly awarded plaintiff a cash component which took those items into account. Any claim by defendant that the trial court's action amended the settlement agreement is directly contradicted by the factual record.

A fourth reserved issue concerned attorney fees. At the May 25, 1995, hearing, defense counsel noted that the burden would be on plaintiff to petition for attorney fees on the basis of wrongful litigation tactics by defendant which increased those fees. The lower court record contains no motion by plaintiff nor any itemization of attorney fees purportedly attributable to defendant's improper litigation tactics. See *Thames v Thames*, 191 Mich App 299, 310; 477 NW2d 496 (1991). The trial court awarded plaintiff \$70 per hour for every hour her attorney had billed, without regard to whether those hours were incurred because of any improper actions by defendant. Defense counsel seasonably objected, and the trial court erred in failing to conduct an evidentiary hearing to determine which, if any,

* Circuit judge, sitting on the Court of Appeals by assignment.

of the attorney fees billed were the result of such improprieties. *Miller v Meijer, Inc*, 219 Mich App 476, 479-480; ___ NW2d ___ (1996).

Affirmed in part; vacated and remanded in part for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Martin M. Doctoroff

/s/ Donald A. Teeple