# STATE OF MICHIGAN

# COURT OF APPEALS

ROBERT PATTERSON,

Plaintiff-Appellee,

v

JEANNA A. LYONS and EXPEDITE INTERNATIONAL, L.L.C.,

Defendants,

and

SAMIR BERRI,

Defendant-Appellant.

UNPUBLISHED
December 2, 2010

No. 294269
Wayne Circuit Court
LC No. 08-115053-CH

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

PER CURIAM.

Defendant Samir Berri ("defendant") appeals as of right, challenging the circuit court's rulings that declined to find plaintiff in contempt and denied defendant's request for sanctions that included fees for legal services provided by an attorney who never formally filed an appearance in this action. We affirm the trial court's decision to award sanctions, but vacate the amount of sanctions awarded and remand for reconsideration of defendant's request for a finding of contempt and for redetermination of an "appropriate sanction" under MCR 2.114(E).

Defendant requested that plaintiff's counsel be held in contempt because she signed and verified the complaint knowing that it contained inaccurate information. Whether such conduct can support a finding of contempt involves the interpretation and application of court rules and statutes, and thus, presents a question of law, which we review de novo. *Cardinal Mooney High Sch v Mich High Sch Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

The trial court determined that plaintiff's complaint was signed in violation of MCR 2.114(B)(2)(b), but rejected defendant's request that plaintiff's counsel be found in contempt because "[t]here hasn't been a violation of a court order." We agree with defendant that the trial court's denial of defendant's request for a finding of contempt was based on the court's erroneous belief that a contempt finding could only be based on a violation of a court order. MCR 2.114(B)(2) provides that "[i]n addition to the sanctions provided by subrule (E), a person

who knowingly makes a false declaration under subrule (B)(2)(b) may be found in contempt of court."

A trial court's decision to hold a party in contempt is discretionary. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 714; 624 NW2d 443 (2000). Because the record indicates that the trial court erroneously believed that it did not have discretion to find plaintiff's counsel in contempt, we remand for reconsideration of defendant's request for a finding of contempt.

We also conclude that the trial court's denial of defendant's request for sanctions in the form of reimbursement of expenses incurred by defendant for consultation with an attorney, Hattem Beydoun, was premised on the court's mistaken belief that the law precluded such an award. MCR 2.114(E) sets forth the sanctions that are available for a violation of MCR 2.114 as follows:

> If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

When defendant sought compensation for the expenses of Beydoun, plaintiff and the trial court mistakenly focused on whether the expenses could be deemed "attorney fees" where defendant had represented himself. Unlike MCR 2.114(F), which, by reference to MCR 2.625(A)(2), incorporates MCL 600.2591, MCR 2.114(E) "does not restrict the sanctions to expenses or costs incurred"; rather it "grants the trial court the discretion to fashion an 'appropriate sanction,' which may include, but is not limited to, an order to pay the opposing party the reasonable expenses incurred" by that party as a result of the filing of the offending document, including, but not limited to, attorney fees. *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 726; 591 NW2d 676 (1998); MCR 2.114(E). In *FMB-First Mich Bank*, 232 Mich App at 726-728, this Court explained that although a pro se litigant does not incur "attorney fees" for representing himself or herself, MCR 2.114(E) does not restrict sanctions to the recovery of attorney fees and costs incurred. Regardless of whether the expenses for Beydoun's services are "attorney fees," MCR 2.114(E) does not preclude a court from considering those expenses when determining the amount of an "appropriate sanction." The trial court's statements indicate that the court believed that defendant should be compensated for the expense of Beydoun's services, but erroneously concluded that it could not make such an award unless Beydoun's expenses qualified as "attorney fees." Because the court's ruling was based on a mistaken belief about the limitations of "an appropriate sanction," we vacate the amount of sanctions awarded and remand for redetermination of "an appropriate sanction" under MCR 2.114(E).

Moreover, we also disagree with the trial court that the expense of Beydoun's services to defendant may not be characterized as "attorney fees." In *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423, 428, 432; 733 NW2d 380 (2007), the Court explained that there were no "actual attorney fees" to recover under MCL 15.271(4) for a pro se litigant who is also an attorney.

> The meaning of these three words is central to the resolution of this case. The word "actual" means "'existing in act, fact, or reality; real.'" "Attorney" is defined as a "lawyer" or an "attorney-at-law." The definition of "lawyer" is "a person whose profession is *to represent clients* in a court of law or *to advise or act for them* in other legal matters." And the definition of "attorney-at-law" is "an officer of the court authorized to appear before it as a *representative of a party* to a legal controversy." Clearly, the word "attorney" connotes an agency relationship between two people. "Fee" is relevantly defined as "a sum charged or paid, as for professional services or for a privilege."
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> In sum, by its plain terms, the phrase "actual attorney fees" requires an agency relationship between an attorney and the client whom he or she represents. Therefore, there must be separate identities between the attorney and the client, and *a person who represents himself or herself cannot recover actual attorney fees even if the pro se individual is a licensed attorney*. [Citations omitted; emphasis added.]

We recognize that there are statements in *Omdahl* and *FMB-First Mich Bank* that suggest that pro se litigants cannot recover attorney fees. However, those cases are limited to situations in which attorney's fees were sought for the party's own time and work in representing himself – cases in which no attorney fees were actually charged to the litigant by an attorney. Neither *Omdahl* nor *FMB-First Mich Bank* involved a pro se litigant who used, and incurred attorney fees for, the services of *another* attorney, as defendant did here. Thus, those cases cannot be understood as establishing a blanket prohibition on the recovery of "attorney fees" actually incurred by a pro se litigant, charged to the litigant by an attorney for professional services rendered to the litigant in the course of the litigant's self-representation.

The rationale and definitions adopted in *Omdahl*, support the conclusion that Beydoun's fees were "attorney fees." Beydoun is an "attorney," i.e., "a person whose profession it is to represent clients in a court of law or to advise or act for them in other legal matters," or "officer of the court authorized to appear before it as a representative of a party to a legal controversy." *Omdahl*, 478 Mich at 428. The record indicates that an agency relationship existed between defendant and Beydoun. In addition to the bill of services, defendant noted that Beydoun had been in contact with plaintiff on defendant's behalf in regard to the litigation. Plainly, there are "separate identities between the attorney and client." *Omdahl*, 478 Mich at 432.

The trial court noted that Beydoun had not filed an appearance. The court seemed to believe that, absent an appearance, Beydoun was not representing defendant and thus was not his "attorney." However, our Supreme Court's decisions indicate that a lawyer who advises a litigant is his "attorney"; they do not indicate that whether the attorney has filed an appearance is dispositive. The definition of "attorney" adopted in *Omdahl*, 478 Mich at 428, does not support the trial court's understanding that the absence of an appearance is conclusive. The definition of attorney includes a "lawyer," which is defined as a person "whose profession is to represent clients in a court of law *or to advise or act for them* in other legal matters." *Omdahl*, 478 Mich at 428 (emphasis changed). This definition indicates that a lawyer who counsels a party is an

"attorney" without regard to the entry of an appearance. In *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 10-11; 564 NW2d 457 (1997), the Court considered whether an express payment agreement was a prerequisite to the recovery of "costs," which for purposes of the Headlee Amendment include attorney fees. In rejecting that argument, the Court explained that "[t]he rendering of legal advice and legal services by the attorney and the client's reliance on that advice or those services is the benchmark of an attorney-client relationship." *Id*. at 11. The Court further stated:

> We agree with the authorities cited in 7 Am Jur 2d, Attorneys at Law, § 118, pp 187-188, that
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> "the relation of attorney and client is not dependent on the payment of a fee, nor is a formal contract necessary to create this relationship. The contract may be implied from conduct of the parties. The employment is sufficiently established when it is shown that the advice and assistance of the attorney are sought and received in matters pertinent to his profession." [*Id.* at 11 (citations omitted).]

In light of these authorities, we disagree with the trial court that the determination whether the fees charged by Beydoun qualify as "attorney fees" depends on whether he entered an appearance on behalf of defendant.

For these reasons, although we affirm the trial court's decision to award sanctions, we vacate the amount of sanctions awarded and remand for redetermination of an "appropriate sanction" under MCR 2.114(E), which may include consideration of the expense of Beydoun's services.

We affirm in part, vacate in part, and remand for reconsideration of defendant's request for a finding of contempt and redetermination of "an appropriate sanction" under MCR 2.114(E) consistent with this opinion. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Christopher M. Murray