STATE OF MICHIGAN

COURT OF APPEALS

JAMIE L. SUMMERS, Plaintiff-Appellee,	UNPUBLISHED October 11, 2012
v	No. 309086 Oakland Circuit Court
SHANE E. SUMMERS, Defendant-Appellant.	LC No. 2009-757922-DM

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right from orders granting plaintiff's motion to modify the judgment of divorce regarding child support and parenting time and granting plaintiff's request for attorney fees. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The parties were divorced in March 2010. They have three small children, the oldest of whom is now in kindergarten. The parties enjoy joint legal and physical custody of the children. The original judgment of divorce provided for specific parenting time:

> IT IS ORDERED, until further order of the Court that the Defendant father shall have alternating weekend overnight parenting time (beginning Thursday after school until Monday morning at 9:00 a.m.) and every Wednesday after school to Thursday morning. Defendant shall pick [the oldest child] up and drop him off at school (if he attends school that day) and he shall pick up and drop off [the twins] from Plaintiff's home.
>
> Both parents shall be permitted to exercise two (2) non-consecutive weeks of summer parenting time with the children.

At the time of the original divorce judgment, defendant was unemployed and the schedule worked well for both parties. However, defendant began a new job in February 2011. Because of his work schedule, defendant now had to drop the children off at plaintiff's home by 6:00 a.m., requiring the children to wake up as early as 4:45 a.m. Plaintiff moved to modify the divorce judgment in order to seek payment of child support and to end overnight visitation on school nights.

The matter was submitted to the Friend of the Court (FOC) for a recommendation. On June 1, 2011, FOC counselor Jody LaPointe submitted her recommendation. Counselor LaPointe initially noted:

> The father appeared to be frustrated and focused on the past and oppositional throughout the interview, at one point advising me "you are a hypocrite" which prompted me to end the interview. The father was intent on rehashing the divorce proceedings in which I made a recommendation that he did not agree with, which he repeatedly reported was based on the mother's "lies." Despite these assertions, there was a trial on the matters of custody and parenting time at the time of the divorce.

LaPointe went on to explain the change in circumstances:

> The issue at this point is that the father has a full-time job which requires him to drop the children off at the mother's home by 6:15 a.m. so that he may get to work on time. The mother says sometimes this is as early as 5:45 a.m. The father admits that on those mornings the children must get up at 4:45 a.m. This is not reasonable or in the children's best interests.

As a result, LaPointe recommended that defendant's week day visits be altered and that that he have parenting time on alternating weekends from Friday at 6:00 p.m. until Sunday at 6:00 p.m. during the school year and then alternating weeks during summer vacation.

A. EVIDENTIARY HEARING ON MODIFICATION OF PARENTING TIME

Defendant objected to the recommendation and an evidentiary hearing was scheduled. Defendant did not appear at the scheduled August 16, 2011 hearing. The hearing was rescheduled for August 29, 2011 and both parties were represented by counsel. The trial court immediately noted that "[t]he only question is whether the number of overnights will change, and that's the parenting time issue." The hearing was contentious. Defense counsel accused plaintiff of a myriad of wrongs, including: feeding the children fast food, failing to work enough hours, attending school for a number of years, seeking to adjust parenting time in order to obtain child support, exposing the children to a number of different men, and failing to keep in contact with her former step-children (defendant's older children from a previous marriage). The trial court attempted to rein in the arguments, noting that it was only interested in "the relevant [best interest] factors as to parenting time. That isn't all of the factors at all. It is only the ones that are relevant to this case." Again, the trial court noted that "[i]n this instance, the only change in parenting time that is being requested is that it be shortened so the children do not have to get up at 5:45 [sic]." Shortly thereafter, defense counsel withdrew from representing defendant out of apparent frustration at "not helping my client at this stage."

The hearing was continued on October 4, 2011 and defendant represented himself. When defendant attempted to delve into matters previously litigated, the trial court reminded him:

> Once the judgment is entered and you are divorced and there is a statement concerning custody, parenting time, and support, we start from that point and we move forward. We don't go back and relive or re-litigate the divorce. We've done that. We're over with that.

> Right now we're talking about whether there's been a change of circumstances to warrant a modification of parenting time, whether there should be a modification of support. We don't go back and re-litigate before the judgment was entered.

Later, the trial court again interrupted defendant, "we look to see what has changed to determine whether or not any modification will be done. I'm not going back and reliving the litigation in the divorce. And I don't want to have to tell you that again." The following exchange took place between defendant and the court:

> THE COURT: Now, you want to change custody; is that what you want to do?
>
> SHANE SUMMERS: I don't want to change custody. I want to change parenting time.
>
> THE COURT: Well, what do you think the difference is?
>
> SHANE SUMMERS: There's – change of custody, I'm going to have to show with clear and convincing evidence that there should – or preponderance of evidence
>
> THE COURT: So what is the parenting time you want to change?
>
> SHANE SUMMERS: The parenting time is – I want to change the recommendation that Jody LaPointe put in.
>
> THE COURT: What is it you are asking for?
>
> SHANE SUMMERS: I am asking for the kids, Monday through Friday to go to my school district and that Jamie see the kids every other weekend.
>
> THE COURT: That's exactly the opposite of what's in the judgment, isn't it?
>
> SHANE SUMMERS: It is, Your Honor.
>
> THE COURT: Okay.
>
> SHANE SUMMERS: Can – the character –
>
> THE COURT: That would be –
>
> SHANE SUMMERS: -- of parents can't be –
>
> THE COURT: Excuse me, Mr. Summers. If I could just explain to you –
>
> SHANE SUMMERS: Yes, Your Honor.

> THE COURT: With the arrangement that currently exists as a result of the judgment of divorce, the child has – children have an established custodial environment with their mother. That's who they spend most of the time with.

The trial court then questioned defendant as to what the change of circumstances was that warranted revisiting the custody issue. Defendant stated that he was "an extremely concerned parent." Defendant had children in the Clarkston schools and would now also have children in Novi schools. "But me as a father, to be a father to these kids in Novi and a father to kids in Clarkston, it just doesn't work that way . . . those three kids that we're talking about are going to suffer for me not being there." Defendant continued:

> SHANE SUMMERS: And Your Honor, that's just – I don't see how it's – if someone's convicted of domestic violence, convicted of stealing, lies under oath, how is this best for the children?
>
> THE COURT: Get over it, Mr. Summers. That's not what I'm looking at today. Today I'm looking at what's convenient and best for these three children. That's it.
>
> ***
>
> That's why parents should not have children if they're planning to get divorced. But that's not the reality.
>
> SHANE SUMMERS: And that's where I wish that you would look at why we were divorced.
>
> THE COURT: No, I don't do that.

During closing argument, defendant reiterated his request for custody, noting, "I know that I'm the better parent."

For his part, plaintiff's counsel requested attorney fees, reminding the court that he appeared at the scheduled August 16th hearing but that defendant failed to attend. Plaintiff's counsel also noted that he spent several hours at an August 5, 2011 deposition of his client at defendant's request. Plaintiff's counsel requested $300 an hour for 14 hours of work.

The trial court took the matter under advisement and then issued a written opinion and order on November 8, 2011. The trial court treated plaintiff's motion as a request for modification of parenting time. It found that the proper standard was a preponderance of the evidence and that it was not required to analyze all of the best interest factors. The trial court found that factors (c) (the capacity and disposition of the parties to provide the child with food, clothing, medical care or other remedial care, and other material needs), (d) (the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity), (h) (the home, school, and community record of the child), and (j) (the willingness and ability of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent) were important. It found factor (c) favored neither party, factor (d) favored neither party, factor (h) favored plaintiff, and factor (j) favored neither party. The trial court found that modifying parenting time was in the best interests of the

minor children given the change in the work schedules of the parties and the distance between their homes. It ordered parenting time for defendant from Friday at 6:00 p.m. until Sunday at 6:00 p.m. for three consecutive weekends a month and then alternating weeks in the summer. The trial court ordered defendant to pick up the children from plaintiff's residence at 6:00 p.m. on Fridays and plaintiff to pick up the children from defendant's residence at 6:00 p.m. on Sundays.

On November 28, 2011, defendant filed a motion for reconsideration, claiming the trial court erred in using a preponderance of the evidence standard for determining whether a modification of parenting time was warranted when, in fact, plaintiff was seeking a change of physical custody, which required plaintiff to show by clear and convincing evidence that a change was in the children's best interests. Defendant also filed a motion for a new hearing, claiming plaintiff committed perjury regarding her employment history. The trial court denied defendant's motion for reconsideration on November 30, 2011, finding that defendant's motion was "improper and untimely" because no order was entered pursuant to the directive in the November 8, 2011, opinion and order.

Thereafter, on January 9, 2012, the trial court entered an order granting in part and denying in part plaintiff's motion to modify the judgment of divorce regarding custody and parenting time and granting plaintiff's requests for attorney fees. Plaintiff's motion was "denied in part" to the extent plaintiff sought retroactive child support.

On January 25, 2012, defendant once again filed a motion for reconsideration, in which he made the same arguments as in the previous motion for reconsideration. On January 26, 2012, defendant filed a motion for a new hearing, in which he made the same arguments as in the previous motion for a new hearing.

On February 15, 2012, a hearing was held regarding defendant's motion for a new hearing. The trial court found no legal basis for defendant's motion, for his allegation of perjury, or for his claim that plaintiff's motive was related to the outcome of the case. It awarded $900 in attorney fees against defendant for failing to make a sustainable legal argument, for engaging in harassing legal behavior, and because plaintiff was unable to pay her attorney's fees.

On February 21, 2012 the trial court entered an opinion and order denying defendant's motion for reconsideration. The trial court found that it "did not need to make findings on all of the best interest factors when considering a modification of parenting time." Also, "[b]ecause the modification of parenting time did not change the established custodial environment, the court applied the preponderance of the evidence standard."

B. EVIDENTIARY HEARING ON ATTORNEY FEES

In its November 8, 2011, order, the trial court found that the fees incurred by plaintiff were the result of defendant's failure to appear on August 16, 2011, additional time spent at a deposition, and additional time spent at the evidentiary hearing. The trial court granted plaintiff's request for attorney fees and required plaintiff to file a motion for a specific amount of attorney fees and set the matter for a hearing.

On January 26, 2012, an evidentiary hearing was held regarding plaintiff's motion for attorney fees. While plaintiff argued that the November 8, 2011, opinion and order awarded

plaintiff attorney fees, defendant argued that the opinion and order was limited to granting attorney fees for the three instances mentioned in the order—the missed hearing, additional time spent at a deposition, and additional time spent at an evidentiary hearing. The parties stipulated that plaintiff's attorney's hourly rate was $295, defendant's annual income was $51,000, and plaintiff's gross annual income was $6,500.

At the evidentiary hearing, plaintiff's attorney, Steven Malach, testified that defendant failed to appear for the August 16, 2011, evidentiary hearing and that plaintiff incurred $598 in attorney fees as a result. With regard to the August 5, 2011, deposition, Malach testified that he spent 2.7 hours preparing for and attending the deposition. The deposition itself was one hour and 45 minutes. The additional time was spent traveling, meeting with the client, and dictating after the deposition. Malach testified that defendant objected to even providing his income, which would have saved time. Malach also testified that at the deposition and the evidentiary hearing, many issues were rehashed. The 3.2 hours billed for August 29, 2011, also included dictation when Malach returned to his office. With regard to the October 4, 2011, hearing, Malach billed for 3.2 hours and did not dispute that the hearing itself was an hour and a half. Malach agreed that he was seeking over $11,300 in attorney fees from start to finish of the post judgment proceeding, not including that day at the hearing or the day before. Malach was also seeking attorney fees for the time spent having to seek attorney fees. Malach testified that he left several telephone messages and wrote several letters trying to resolve the matter, but did not receive a response from defendant's counsel until the day before the evidentiary hearing. In the meantime, Malach had already researched and contacted an expert to establish his hourly rate and also retained counsel to represent him at the hearing because he knew he would have to testify. Malach testified that his December bill, for activities in preparation for the evidentiary hearing, was $1,598.50. His January "pre-bill" was $914.50. The attorney representing plaintiff at the hearing, Michael Curhan, estimated an additional $1,500 for Malach and $1,500 for Curhan for the time spent preparing for the hearing, for a total of $5,413. In closing, plaintiff sought all fees from the beginning and, alternatively, sought fees for the three matters listed in the order, totaling $4,366. Plaintiff also sought fees for the time spent dealing with the attorney fee issue, totaling $5,413. Defendant argued that the attorney fees were limited to fees incurred by plaintiff as a result of defendant failing to appear at the August 16, 2011, evidentiary hearing, and for additional time spent at the deposition and evidentiary hearing.

For his part, defendant conceded he did not attend the August 16, 2011, hearing and had to pay sanctions. Beyond that, defendant argued that any further award of fees should be limited to additional time spent at the deposition and evidentiary hearing. He argued that attorney fees should not be awarded simply because plaintiff prevailed. Defendant argued that the focus should be on the portion of the deposition and evidentiary hearing that was unnecessary or irrelevant and that he should not be punished for his counsel's questions at the deposition or evidentiary hearing. He argued that the additional hearing was required because his attorney withdrew and it was his attorney's fault. With regard to the additional time spent on the attorney fee issue, defendant argued he should not be punished simply because he insisted that plaintiff prove her case. Therefore, defendant argued the attorney fees should be limited to $590 and, if the court awarded attorney fees for the other two items, then the bills should be cut in half.

On March 7, 2012, the trial court entered an opinion and order regarding plaintiff's request for attorney fees. The trial court found that it stated in the November 8, 2011, opinion and order that defendant should pay plaintiff's attorney fees associated with three categories.

The trial court found that the fees incurred, totaling $4,366, were fair and reasonable based on Malach's testimony and the billing statements. The trial court also found that "[n]eedless fees were incurred as a result of Defendant's counsel's last minute stipulations and failed correspondence." The trial court found that the fees incurred by Malach in hiring and consulting an expert, hiring counsel, and preparing to testify regarding his hourly rate, totaling $5,413, were fair and reasonable. Therefore, defendant was required to pay plaintiff's attorney fees in the amount of $9,799.

Defendant now appeals as of right, challenging the modification of parenting time, as well as the award of attorney fees.

II. MODIFICATION OF PARENTING TIME

Defendant contends that the trial court erred in utilizing the preponderance of the evidence standard where the trial court's modification of parenting time constituted a change of custody. "Although appellate review of parenting-time orders is de novo, this Court must affirm the trial court unless its findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger v Berger*, 277 Mich App 700, 716; 747 NW2d 336 (2008).

Pursuant to MCL 722.27a(1) of the Child Custody Act:

> Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.

The act provides for the modification of a parenting time order by the trial court, stating that the court may "[m]odify or amend its previous judgments or orders for proper cause shown or because of a change of circumstances," but only if such a modification is in the child's best interests. MCL 722.27(1)(c). "[I]f a requested modification in parenting time amounts to a change in the established custodial environment, it should not be granted unless the trial court is persuaded by clear and convincing evidence that the change would be in the best interest of the child." *Brown v Loveman*, 260 Mich App 576, 595; 680 NW2d 432 (2004). If, however, a parenting time modification does not change the child's established custodial environment, the parenting time modification must be supported by a preponderance of the evidence. *Pierron v Pierron*, 486 Mich 81, 93; 782 NW2d 480 (2010).

Defendant argues that because plaintiff was really seeking a change in the children's custodial environment, she had to show a proper cause or change of circumstance as set forth in *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003):

> As we have recognized in prior cases, the Legislature's directives that a court find "proper cause" (or a change of circumstances) before it determines the existence of a custodial environment and conducts a review of the statutory best interest factors are designed to be obstacles to revisiting custody orders. Providing a stable environment for children that is free of unwarranted custody changes (and

> hearings) is a paramount purpose of the Child Custody Act, and therefore allowing any "appropriate ground for legal action" to be sufficient to revisit custody orders would in no way further that purpose. Therefore, we conclude that in context, proper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken.. [*Id.* at 511 (citations and footnote omitted).]

As a result,

> a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. [*Id.* at 513-514.]

Moreover, "the change of circumstances must have occurred *after* entry of the last custody order." *Id.* at 514 (emphasis in original).

However, we note that *Vodvarka* clearly involved a change in *custody*. Here, plaintiff was not seeking a change in custody; instead, she sought a modification of *parenting time* to accommodate the children's schedule. "[A] more expansive definition of 'proper cause' or 'change of circumstances' is appropriate for determinations regarding parenting time when a modification in parenting time does not alter the established custodial environment." *Shade v Wright*, 291 Mich App 17, 28; 805 NW2d 1 (2010). "[T]he very normal life change factors that *Vodvarka* finds insufficient to justify a change in custodial environment are precisely the types of considerations that trial courts should take into account in making determinations regarding modification of parenting time." *Id.* at 30. Therefore, although *Vodvarka* cautions that a "movant . . . has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists *before* the trial court can consider whether an established custodial environment exists," *Vodvarka*, 259 Mich App at 509 (emphasis in original), in the situation before us, we must first determine whether and with whom the custodial environment existed in order to then determine whether the more stringent "proper cause" or "change of circumstances" in *Vodvarka* applies, or the more expansive definition in *Shade*.

MCL 722.27(1)(c) provides that a custodial environment is established if "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." Courts should also consider the child's age, environment, and the permanency of the relationship. MCL 722.27(1)(c). "An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child." *Berger*, 277 Mich App at 706. It is an environment that fosters a relationship between custodian and child that is "marked by security, stability, and permanence." *Id.* An established custodial environment may exist in more than one home and with more than one parent. *Id.* "Whether an

established custodial environment exists is a question of fact that we must affirm unless the trial court's finding is against the great weight of the evidence." *Id.* at 706.

Although the trial court did not specifically address custodial environment in its orders, the record clearly indicates that the trial court found that an established custodial environment existed with plaintiff.[1] As mentioned above, the trial court specifically told defendant, "[w]ith the arrangement that currently exists as a result of the judgment of divorce, the . . .children have an established custodial environment with their mother. That's who they spend most of the time with." We conclude the great weight of the evidence does not suggest that the trial court improperly concluded that the children had an established custodial relationship with plaintiff. Although time spent with a parent is not the single factor in determining whether an established custodial environment exists, the record supports the trial court's finding. These very young children spent a majority of their time with plaintiff.

Therefore, utilizing the more expansive view in *Shade* of "proper cause" or "change of circumstances," we conclude that the trial court properly revisited the issue of parenting time. Defendant, who was previously unemployed, had obtained a job that required him to return the children to plaintiff at or before 6:00 a.m., whereas the children were previously returned by 9:00 a.m. Given that the children now needed to wake up as early as 4:45 a.m. to accommodate defendant's work schedule, a determination as to their best interests was properly undertaken.

Because there was an adequate change of circumstances to revisit parenting time and because the children's established custodial environment was with plaintiff, plaintiff had to show that a change in parenting time was in the children's best interests by a preponderance of the evidence. *Shade*, 291 Mich App at 22-23. Additionally, because the modification of parenting time would not change the established custodial environment, "although the trial court must determine whether each of the best-interest factors [in MCL 722.23] applies, if a factor does not apply, the trial court need not address it any further." *Pierron v Pierron*, 486 Mich 81, 93; 782 NW2d 480 (2010). The trial court found that factors (c) (the capacity and disposition of the parties to provide the child with food, clothing, medical care or other remedial care, and other material needs), (d) (the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity), (h) (the home, school, and community record of the child), and (j) (the willingness and ability of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent) were important. It found factor (c) favored neither party, factor (d) favored neither party, factor (h) favored plaintiff, and factor (j) favored neither party. The trial court found that modifying parenting time was in the best interests of the minor children given the change in the work schedules of the parties and the distance between their homes. The modification was crafted to promote a strong relationship between the children and the defendant. Defendant would now enjoy three

[1] "Where a trial court fails to make a finding regarding the existence of a custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own determination of this issue by de novo review." *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). Again, we note that the trial court *did* make such a determination on the record, though not in its written opinion.

consecutive weekends a month of parenting time from Friday at 6:00 p.m. until Sunday at 6:00 p.m., as well as alternating weeks in the summer. Plaintiff was also ordered to help transport the children. We conclude that it was in the best interests of the children to modify parenting time and that the trial court properly set forth a schedule that would simultaneously accommodate the children while providing for parenting time similar to what defendant enjoyed prior to obtaining his job.

We also briefly address defendant's attempt to obtain a change of custody. Upon questioning by the trial court, defendant admitted that he hoped to turn the custody arrangement on its head such that *he* would have weekly custody of the children and *plaintiff* would have alternating weekend visitation. Defendant did not make a formal motion for change of custody in the trial court. Even if he had, defendant failed to show a change of circumstances warranting revisiting the custody arrangement. Again, the children's custodial environment was with plaintiff. As such, under *Vodvarka* defendant had to show that a material and significant change had taken place since the original divorce judgment was entered. He did not do so. While defendant's employment and its consequential disruption to the children's schedule formed a basis to revisit *parenting* time, it was not so significant as to warrant revisiting the *custody* order.

III. ATTORNEY FEES

Defendant contends the trial court improperly awarded attorney fees. We disagree. We review for an abuse of discretion a trial court's decision to grant or deny attorney fees. *Ewald v Ewald*, 292 Mich App 706, 724-725; 810 NW2d 396 (2011). We review for clear error the trial court's findings of fact upon which it based its decision. *Id.*

> Under the "American rule," attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract. In domestic relations cases, attorney fees are authorized by both statute, MCL 552.13, and court rule, MCR 3.206(C).
>
> Nevertheless, attorney fees are not recoverable as of right in divorce actions. Either by statute or court rule, attorney fees in a divorce action may be awarded only when a party needs financial assistance to prosecute or defend the suit. [*Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005) (citations omitted).]

Thus, "[a] party seeking attorney fees must establish both financial need and the ability of the other party to pay." *Ewald*, 292 Mich App at 724. There is also a "common-law exception to the American rule 'that an award of legal fees is authorized where the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation.'" *Reed*, 265 Mich App at 164-165 (internal quotations omitted). Under this exception, "the attorney fees awarded must have been incurred because of misconduct." *Id.* at 165. The party requesting attorney fees must also prove "the amount of the claimed fees and their reasonableness." *Ewald*, 292 Mich App at 725. A trial court must conduct a hearing or find facts regarding the reasonableness of the fees incurred. *Reed*, 265 Mich App at 165.

The trial court ordered defendant to pay three different amounts of attorney fees. First, at the hearing on defendant's motion for a new hearing, it ordered defendant to pay $900 in attorney fees for failing to make a sustainable legal argument, for harassing legal behavior, and because plaintiff was unable to pay. Second, the trial court ordered defendant to pay $4,366 for defendant's failure to appear at the August 16, 2011, evidentiary hearing and additional time spent at the deposition and evidentiary hearing, as specified in the November 8, 2011, opinion and order. Third, it ordered defendant to pay $5,413, for the time spent preparing for the hearing regarding attorney fees. On appeal, defendant focuses only on the attorney fees awarded for additional time spent at the deposition and evidentiary hearing, which amounts to $3,776.[2]

On appeal, defendant argues that the trial court failed to find any specific misconduct by defendant that caused plaintiff to incur attorney fees. *Reed*, 265 Mich App at 165. However, the order provided that [t]he fees incurred by Plaintiff were as a result of Defendant's failure to appear on August 16, 2011 for [the] first day of the evidentiary hearing and for the additional time spent at deposition and the evidentiary hearing in this matter." As set forth above, defendant caused the proceedings to become unnecessarily protracted. While it was plaintiff's motion for modification of support and visitation and she clearly had the burden, defendant made the case more difficult than it needed to be. On numerous occasions, defendant attempted to delve into matters that were completely irrelevant. He failed to cooperate with the FOC counselor and failed to tailor his evidence to matters pertinent to the hearing. Additionally, defendant filed numerous motions, seeking reconsideration of the trial court's rulings.

More importantly, the trial court did not award attorney fees simply because defendant had engaged in "misconduct." The trial court's order provided that "[t]he court may order one party to pay the other party's attorney fees under certain circumstances. Attorney fees are awardable in domestic relations cases on the basis of a party's financial need." The record establishes plaintiff's financial need as well as defendant's ability to pay. The parties stipulated that defendant's income exceeded $50,000 a year, while plaintiff's income was less than $7,000. Under the circumstances, the trial court did not abuse its discretion in awarding attorney fees.

Affirmed. As the prevailing party, plaintiff may tax costs. MCR 7.219.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Deborah A. Servitto

[2] The charge for defendant's failure to appear at the August 16, 2011, hearing was $590. Defendant concedes that he is responsible for those fees.