

STATE OF MICHIGAN
COURT OF APPEALS

PAUL ANTHONY CARTHEW,

Plaintiff-Appellant,

UNPUBLISHED
March 4, 2010

v

SUSAN HARVEY CARTHEW, a/k/a/ SUSAN
HARVEY,

No. 289365
Oakland Circuit Court
LC No. 2005-712255-DM

Defendant-Appellee.

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order awarding defendant \$750 in attorney fees relative to a petition to show cause. We vacate the award and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed a motion for modification of child support and related provisions in the parties' judgment of divorce. While the motion was pending, plaintiff fell into arrears on the payments. Defendant then filed a petition to show cause. At a hearing, the trial court ordered an interim reduction in support and related expenses. The evening before the hearing, plaintiff paid the arrearages to defendant. The trial court found that plaintiff was in compliance with the court's orders and was not in contempt of court. However, the trial court granted defendant's request for attorney fees. Plaintiff argues that there was no legal basis for the award.

MCL 600.1721 provides:

If the alleged [contemptuous] misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant. . . .

In *Local 214 v Genesee Cty Bd of Commr's*, 401 Mich 408, 409-410; 258 NW2d 55 (1977), the union sued the Board of Commissioners relative to the suspension of two sheriff's deputies. The Board obtained summary disposition in this suit, and three days later, the Board suspended a third deputy. *Id.* at 409. The trial court signed a show cause order and ordered that suspensions cease; thereafter, the trial court ordered that the third deputy be reinstated. *Id.* The trial court did

not find the sheriff or the Board in contempt, but nevertheless awarded the union \$2,000 in reasonable attorneys' fees. *Id.* Our Supreme Court stated:

As for the award of attorneys' fees, this Court notes that such awards are not the general rule in Michigan. The Court of Appeals cited MCLA 600.1721; MSA 27A.1721 in connection with this award, but the possible effect of that statute in this case is nullified by the trial court's explicit finding that neither the Sheriff nor the board were in contempt. [*Id.* at 410-411.]

Local 214 indicates that possible misconduct, by itself and in the absence of a finding of contempt, will not suffice to justify an award of attorney fees under MCL 600.1721. Accordingly, MCL 600.1721 provided no basis for the award of fees in this case.

Defendant contends that MCR 3.206(C)(2) justified the award of attorney fees. MCR 3.206(C) states:

(1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, and that the other party is able to pay, or

(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

This rule arguably did provide a basis for the award. However, the trial court did not cite this rule or provide any other rationale for its award of fees. We thus vacate the award of fees and remand this case to the trial court for a reevaluation of the attorney-fee issue; if the court on remand again awards attorney fees, it shall articulate the legal basis for the award.

Vacated and remanded. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray