

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD M. GOODMAN,

Plaintiff-Appellant,

v

ALBERT AMMORI,

Defendant-Appellee.

UNPUBLISHED

August 9, 1996

No. 183120

LC No. 94-416393 CZ

Before: Wahls, P.J., and Murphy and C.D. Corwin,* JJ.

PER CURIAM.

Plaintiff appeals as of right the order awarding defendant \$7,030.62 in costs and attorney fees imposed as a condition to the voluntary dismissal, pursuant to MCR 2.504(A)(2), of plaintiff's state court action to enjoin construction of a building so that plaintiff could file a cause of action in federal court. We reverse and remand.

Under MCR 2.504(A)(2), a trial court has the discretion to condition a grant of voluntary dismissal upon the payment of costs and attorney fees. *McKelvie v Mount Clemens*, 193 Mich App 81, 84; 483 NW2d 442 (1992). In a case such as this where the same action is being brought in another forum, the plaintiff is not required to pay the defendant's costs and attorney fees to the extent that the work product from the action to be dismissed is usable in the subsequent action. *McKelvie*, *supra* at 85.

In this case, defendant submitted a request for \$10,185.62 in attorney fees. At the hearing on defendant's motion for fees, plaintiff took issue with three types of fees sought by defendant. First, plaintiff argued that much of the background research done on the state case was usable in the federal action and is therefore not recoverable. Plaintiff alleged that these fees amounted to \$3,380. Second, plaintiff argued that plaintiff should not be required to compensate defense counsel for meetings defense counsel had with the judge in the federal action. Plaintiff alleges that these fees amounted to \$1,200. Last, plaintiff argued that defense counsel should not recover fees relating to preparation for the voluntary dismissal motion because such motions are nearly always granted. Plaintiff alleges that these

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

fees amounted to \$1,450. The trial court agreed with plaintiff's first argument, and ruled that plaintiff should not be held accountable for \$3,380 of the requested fee,¹ but disagreed with plaintiff's other two arguments and declined to strike those fees from the request. An order was entered awarding defendant \$7030.62 in costs and attorney fees.

Based on the record, we are unable to determine how the trial court arrived at its award amount. The trial court's order does not correspond to its statements at the hearing. The trial court stated that it would subtract \$3,380 from the request, and also stated that \$200 would be subtracted due to a mathematical error. Based on these statements, the award should have been \$6,605.62 (\$10,185.62-\$200.00-\$3,380.00).

The trial court correctly stated that it would not consider fees contrary to the rule of *McKelvie*. However, because the evidence presented and the trial court's findings on the record are insufficient, we are unable to determine if the trial court actually did comply with *McKelvie*.

Therefore, we remand this case to the trial court for a full hearing to determine which of the fees incurred correspond to work product that was usable solely in the dismissed state action, and which of the fees incurred correspond to work product usable in the subsequent federal action, as well as specific factfinding in reference to *McKelvie*.

We note that under *McKelvie*, the fee awarded should not include fees related to meetings with the federal judge if those meetings were necessary solely for purposes related to the pending federal litigation.² Also, *McKelvie* requires that at the conclusion of the evidentiary hearing, if costs and attorney fees are to be imposed as a condition of the voluntary dismissal, the plaintiff must be given the opportunity either to accept the condition or to decline the dismissal and proceed with the action. *McKelvie, supra* at 85. In this case, the record does not reflect that plaintiff was given such an opportunity.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ William B. Murphy
/s/ Charles D. Corwin

¹ In regards to the \$3,380 figure, the trial court stated "I haven't done the arithmetic, but assuming that that's the figure for those items then I'm going to say that Mr. Goodman shouldn't be charged with that."

² The trial court stated that the meetings at issue were "related to unraveling" the federal and state actions. However, because of the incompleteness of the record we are unable to determine if this was a proper ruling.