

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JODI K. MORGAN,

Plaintiff/Counter-Defendant  
Appellant,

v

ROBERT L. HIGGINSON,

Defendant/Counter-Plaintiff  
Appellee.

UNPUBLISHED

January 4, 2007

No. 261236

Oakland Circuit Court

LC No. 02-668349-DC

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Before: Zahra, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from a January, 2005, order, denying her attorney fees incurred from filing a response to post-judgment motions brought by defendant and the trustee of a trust established for the parties' minor child. We affirm.

I. Basic Facts and Procedure

Plaintiff and defendant are the parents of a minor child. In December, 2002, the parties entered into a consent order for child support and other relief, which confirmed defendant's paternity and established child support in the amount of \$7,000 a month. Because defendant was a professional baseball player and the parties contemplated that his career would have a finite duration, the parties also established a "Good Fortune Trust" for payment of future child support. Defendant was required to pay an additional \$10,000 a month into the trust beginning October 1, 2002, and continuing through March 2006, when his contract with the Detroit Tigers was to expire. Defendant would continue to pay into the trust if he continued to play baseball. If he did not, his monthly support payments would be recalculated and the trust would make up the difference to the \$7,000 a month initial support amount. The trustees were also permitted to pay additional discretionary amounts pursuant to the terms of the trust by a majority vote of the three

trustees – plaintiff, defendant, and Citicorp Trust Bank (a/k/a Citigroup).<sup>1</sup> The consent order also directed defendant to pay plaintiff \$45,000 in attorney fees.<sup>2</sup>

In 2004, plaintiff made a request for a discretionary distribution of \$500 a month to send the child to a Montessori school. Defendant alleges that he requested that plaintiff provide more information to determine whether the preschool expenses could be paid out of the \$7,000 monthly child support. Citing defendant's response letter, plaintiff maintains that defendant improperly stated that he had veto power and that she had to provide financial information before he would decide whether to grant her request.

Citicorp subsequently sought a determination whether the distribution could be made and requested clarification of the terms of the trust. Defendant then filed a motion to reform and clarify the trust provisions, allegedly to avoid such disputes in the future. Defendant maintains that he sent plaintiff a "modest and reasonable" five-question set of interrogatories about her financial status. Plaintiff refused to respond to most of these interrogatories. Instead, on October 6, 2004, she moved for attorney fees. She requested that defendant pay \$50,000 toward her attorney fees in defending the two motions. Shortly before the hearing, plaintiff presented an affidavit in which she maintained that she was not working, had no source of income, and had no savings with which to pay attorney fees.

After a hearing in November, 2004, the trial court denied defendant's request to reform the trust, and denied Citicorp's request for a determination whether a distribution should be made. The trial court also denied plaintiff's motion for attorney fees. The court subsequently denied plaintiff's motion for reconsideration.

Plaintiff filed a claim of appeal. Defendant moved to dismiss plaintiff's appeal on the ground that this Court lacked jurisdiction over the appeal because the order appealed from was not a final order and, therefore, not subject to appeal by right. This Court denied defendant's motion, "without prejudice to the parties raising the jurisdictional issues in their briefs on appeal."

## II. Analysis

Plaintiff argues on appeal that the trial court abused its discretion in not awarding attorney fees pursuant to MCR 3.206(C), where she was unable to pay her fees and is also entitled to appellate attorney fees. Defendant argues that plaintiff cannot appeal the trial court's order and, therefore, this Court lacks jurisdiction to hear her appeal. We disagree with both litigants.

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<sup>1</sup> Plaintiff maintains that she was entitled to a greater amount under the child support guidelines, but agreed to a reduction in consideration of formation of the trust.

<sup>2</sup> As a result of a subsequent parenting time dispute, during which defendant voluntarily paid \$5,000 of plaintiff's attorney fees, defendant was ordered to pay plaintiff an additional \$10,000 for her attorney fees.

## 1. Plaintiff Is Allowed An Appeal By Right

Defendant argues this Court lacks jurisdiction<sup>3</sup> over plaintiff's appeal because the trial court's post-judgment order denying attorney fees is not a final order and, therefore, not subject to appeal by right.

This Court reviews issues involving the interpretation of court rules de novo. *CAM Constr v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002). In that case, our Supreme Court held:

When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998). Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. See *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). Similarly, common words must be understood to have their everyday, plain meaning. See MCL 8.3a; see also *Perez v Keeler Brass Co*, 461 Mich 602, 609; 608 NW2d 45 (2000). *CAM Constr*, *supra*, at 554.

At issue in this case is the effect of MCR 7.202(6)(a)(iii) and (iv), rule provisions that define final judgments. The rule reads, in pertinent part:

(6) "final judgment" or "final order" means:

(a) In a civil case,

(i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order,

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(iii) in a domestic relations action, a postjudgment order affecting the custody of a minor,

(iv) a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule. [Emphasis added.]

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<sup>3</sup> MCR 7.203(A), provides, in pertinent part: The court has jurisdiction of an appeal of right filed by an aggrieved party from the following: (1) A *final judgment* or *final order* of the circuit court, or court of claims, as defined in MCR 7.202(6) . . . .[Emphasis added.]

MCR 3.206(C)<sup>4</sup> is an “other . . . court rule.” Moreover, it specifically provides for attorney fee awards in separate post-judgment proceedings for post-judgment litigation. MCR 3.206(C)(1). Therefore, we conclude that the Supreme Court did not intend to foreclose an avenue of review to the parties involved in this type of litigation.

## 2. Plaintiff Did Not Make A Sufficient Showing

This Court reviews a trial court’s decision to award attorney fees for an abuse of discretion. *Featherston v Steinhoff*, 226 Mich App 584, 593; 575 NW2d 6 (1997). A party in a domestic relations matter who is unable to bear the expense of attorney fees may recover reasonable attorney fees if the other party is able to pay. MCR 3.206(C)(2); *Featherston, supra*, 226 Mich App at 593. Under MCR 3.206(C)(2), however, the party requesting the fees must allege facts sufficient to show that the party is unable to bear the expense of the action. Moreover, the party requesting attorney fees bears the burden of proving that they were incurred, and that they are reasonable. *Reed v Reed*, 265 Mich App 131, 165-166; 693 NW2d 825 (2005).

This Court cannot conclude that the trial court abused its discretion here because it chose a reasonable outcome. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Plaintiff’s argument rests almost entirely on a claim that defendant is wealthy. But plaintiff has not alleged sufficient facts to show that she is unable to bear the expense of this litigation. In support of her motion for fees before the trial court, plaintiff presented only her own affidavit. She maintained that she was unemployed at the time she filed her petition, that she remained unemployed, and that she had no other source of income to pay legal fees. She also stated that she had no savings, was currently in debt, and was unable to borrow funds. She did not, however, explain why she was not working or why she could not work. She provided no supporting documentation about her other assertions. She also failed to present any evidence showing that she actually incurred \$50,000 in legal fees, or that such a fee was reasonable. *Reed, supra*, 265 Mich App at 165-166. Nor did she request an evidentiary hearing where such evidence could be presented. In her motion for reconsideration, plaintiff again failed to provide any supporting evidence of her claims of inability to bear the burden of the litigation or of what that burden actually entailed. Therefore, plaintiff failed to establish that the trial court abused its discretion.

Likewise, while a party may be entitled to payment of appellate attorney fees under MCR 3.206(C)(2), plaintiff has not shown that she is entitled to appellate attorney fees in connection with this appeal. She again provides no evidence of an actual inability to pay, any pertinent

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<sup>4</sup> MCR 3.206(C) provides: (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.

financial information, or evidence of fees incurred in pursuing this appeal. Therefore, plaintiff failed to meet her burden with respect to her request for attorney fees on appeal.

Affirmed.

/s/ Brian K. Zahra  
/s/ Mark J. Cavanagh  
/s/ Bill Schuette