

STATE OF MICHIGAN
COURT OF APPEALS

KENT PATTENAUDE,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 187873

Monroe County
LC No. 93-001601

HAROLD LANE,

Defendant-Appellee.

Before: Hoekstra, P.J., and Sawyer and T.P. Pickard,* JJ.

PICKARD, J. (concurring).

I concur in the majority opinion finding that although this Court has previously concluded that nothing in the language of MCR 2.403(O) requires a trial court to equate reasonable fees with actual fees, *Cleary v The Turning Point*, 203 Mich App 208; 512 NW2d 9 (1994), that on the facts of this case the trial court abused its discretion when it awarded attorney fees at a higher rate than actually charged by the defendant's attorney.

MCR 2.403(O)(1) states that if a party has rejected an evaluation and the action proceeds to trial, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation violation. Actual costs are defined by MCR 2.401(O)(6) as:

- (a) those costs taxable in any civil action, and
- (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation.

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

This Court previously concluded that nothing in the language of MCR 2.403(O) requires a court to equate reasonable fees with actual fees. *Cleary*, supra at 212. I agree. However, nothing in the language of MCR 2.403(O) prevents a trial judge from doing so.

The *Cleary* Court correctly stated the rule, but failed to instruct trial judges how to apply it. MCR 2.403(O)(6)(b) requires that the trial judge determines a reasonable attorney fee for services necessitated by the rejection of the mediation evaluation. In *Cleary*, the Court awarded a reasonable fee in excess of the actual fee charged. However, the Court failed to explain how that reasonable fee was determined or what process trial judges should use to determine reasonable fees in such situations.

As evidenced by this present case, the trial judge appears to believe that *Cleary* set forth a blanket rule for determining the reasonableness of attorney fees after a mediation evaluation has been rejected. The rule in *Cleary* implies that any reasonable fee may be awarded without consideration of the actual attorney fees charged. Such a rule is unfair and invites abuse. It provides the opportunity for the prevailing plaintiff or defendant to inflate attorney fees. It also provides an opportunity for punitive sanctions.

This Court should take this opportunity to explain how a reasonable attorney fee should be determined under MCR 2.403(O)(6). This judge would suggest the following approach: (1) First, the trial judge should determine if the actual attorney fee charged to the client was reasonable. If that fee is reasonable, that amount should be awarded. (2) Second, if the actual fee charged to the client is unreasonably high or unreasonably low for the services necessitated by the rejection of mediation, then MCR 2.403(O)(6) allows the trial judge to determine a fee which would be reasonable under the circumstances.¹ This process would insure that reasonable fees are taxed to the appropriate party without punishing that party.

/s/ Timothy P. Pickard

¹ This rule should apply uniformly to plaintiffs and defendants. For example, in this case, the defendant was charged \$85 an hour for 118.45 hours by his attorney, totaling \$10,068.25. The court should determine if the \$85 per hour rate was reasonable under the circumstances. If it is, the \$10,068.25 should be awarded the defense. If that rate is unreasonably high or low, then the trial judge should determine a reasonable hourly rate.

If, in this case, the plaintiff had agreed to a \$20,000 mediation evaluation and the defendant had rejected it, and \$20,000 was awarded to plaintiff at trial, the defendant would have to pay the plaintiff's attorney fees pursuant to MCR 2.403(O). If, in this example, the plaintiff's attorney had a one-third contingency agreement, his attorney fees would be \$6,600, or \$55.72 per hour, using the same 118.45 hours billed by defense counsel in this case. The trial judge would need to determine if the \$55.72 per hour rate was reasonable under the circumstances. If it is reasonable, the \$6,600 would be awarded to

the plaintiff as attorney fees. However, if that rate is unreasonable, the judge would set a reasonable hourly rate.