STATE OF MICHIGAN

COURT OF APPEALS

HALE COMPANY OF MICHIGAN, INC.,

Plaintiff/Counterdefendant-Appellee,

v

GITCHE GUMEE OIL COMPANY, GYGI HEATING COMPANY, INC., GYGI HEATING, INC., GYGI-GITCHE GUMEE OIL COMPANY, and FRED GYGI,

Defendants/Counterplaintiffs-Appellants.

UNPUBLISHED
March 22, 2002

No. 222897
Baraga Circuit Court
LC No. 97-004453-CK

HALE COMPANY OF MICHIGAN, INC.,

Plaintiff-Appellee,

v

GITCHE GUMEE OIL COMPANY, GYGI HEATING COMPANY, GYGI-GITCHE GUMEE OIL COMPANY, and FRED GYGI,

Defendants-Appellants.

No. 225172
Baraga Circuit Court
LC No. 97-004453-CK

Before: Griffin, P.J., and Markey and Meter, JJ.

PER CURIAM.

In Docket No. 222897, defendants, Fred Gygi and several business entities under his control, appeal as of right from a jury-trial-based judgment requiring defendants to pay plaintiff $106,768.07 in damages, interest, costs, and attorney fees. In Docket No. 225172, defendants appeal by leave granted from a posttrial order requiring defendants to pay an additional $2,000 in costs and attorney fees. We affirm in part, reverse in part, and remand for further proceedings.

This case arises from contracts between the parties for the construction of a Mobil Mart gasoline station and convenience store on land owned by defendant Fred Gygi in Baraga,

Michigan. The parties did business from September 1996 until February 1997, at which time relations between them deteriorated. Plaintiff, defendant's contractor, filed suit in December 1997, claiming that defendants still owed approximately $50,000 on their contacts. Defendants counterclaimed, alleging that plaintiff failed to fulfill its own contractual obligations. At trial, plaintiff claimed approximately $75,000 on theories of breach of contract and unjust enrichment, and defendants sought $29,000 for the cost of making repairs to work that plaintiff allegedly had done improperly.

The jury found defendants liable under plaintiff's theories, rejected defendants' counterclaim, and awarded plaintiff $70,000. The trial court entered judgment on that verdict, adding interest, attorney fees, and costs. Defendants filed a timely claim of appeal, after which plaintiff persuaded the trial court to award an additional $2,000 in costs and attorney fees.

Defendants first argue that the trial court should have granted their motion for a judgment notwithstanding the verdict (JNOV). However, defendants predicate their argument on the assertion that the verdict was against the great weight of the evidence. Such an assertion is not proper grounds for a JNOV. "[T]hat the verdict was contrary to the great weight of the evidence . . . [is] grounds for a new trial but *not a proper consideration for a judgment notwithstanding the verdict*." *Scott v Saupe*, 32 Mich App 503, 506-507; 189 NW2d 159 (1971) (emphasis added).

Next, defendants argue that the trial court should have granted their motion for a new trial based on numerous grounds. MCR 2.611(A)(1) authorizes a court to grant a new trial on various grounds, including irregularity in the proceedings, an abuse of discretion that denied the moving party a fair trial, misconduct by the jury or the prevailing party, excessive damages, a verdict against the great weight of the evidence, and errors of law. A trial court's decision whether to grant a motion for a new trial is reviewed for an abuse of discretion.[1] See *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 411; 516 NW2d 502 (1994). A court's evidentiary rulings, conduct of discovery, and general conduct of trial are likewise reviewed for an abuse of discretion. See *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993) (evidentiary rulings); *In re King*, 186 Mich App 458, 466; 465 NW2d 1 (1990) (conduct of trial); and *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000) (discovery). Claims of attorney misconduct are subject to harmless-error review. *Reetz v Kinsman Marine Transit*, 416 Mich 97, 102-103; 330 NW2d 638 (1982). Unpreserved claims of error are reviewed for a clear or obvious error that affected substantial rights (i.e., that likely affected the outcome of the proceedings). *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

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[1] "[A]n abuse of discretion will be found when the decision is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). Put another way, an abuse of discretion occurs "where an unprejudiced person, considering the facts under which the trial court acted, would say that there was no justification or excuse for the court's ruling." *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 167; 561 NW2d 445 (1997).

Defendants contend that a new trial is necessary because liability should not have been joint and several among the various defendants. Defendants argue that each defendant is a distinct entity and that the case involved various discrete contracts with these entities. However, when defendants' substitute counsel presented this issue at the hearing on the motion for a new trial, the trial court and plaintiff's attorney agreed that they and original defense counsel had agreed that if plaintiff proved any part of its case, the resulting liability against defendants would be joint and several. Accordingly, there is no indication that defendants preserved the current issue for appeal by raising it in a timely fashion. See generally *Providence Hospital v National Labor Union Health & Welfare Fund*, 162 Mich App 191, 194; 412 NW2d 690 (1987) (this Court generally will not review issues that were not raised before, and decided by, the trial court). Moreover, it is apparent from a review of the transcripts and other documents of record that defendant Fred Gygi and his various business entities tended to operate collectively or interchangeably, to the point where there was occasionally some confusion below as to the specific identities of Gygi's businesses. Because all indications are that defendants consist of Fred Gygi and business entities fully under his control and that plaintiff and Gygi tended to treat Gygi and his businesses collectively, the imposition of joint and several liability on all defendants did not constitute plain error affecting substantial rights. See *Kern, supra* at 336 (setting forth the standard of review for unpreserved issues).

Further, defendants' own proposed verdict form spoke of defendants collectively only. Thus, not only does the record lack evidence that defendants objected before the verdict to joint and several liability, but there are also indications that defendants affirmatively agreed to it. "Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997).

Defendants contend that the verdict was against the great weight of the evidence and a new trial is warranted because plaintiff failed to fulfill its own contractual obligations to defendants. However, "'Michigan follows the substantial performance of contract rule.'" *Gibson v Group Ins Co*, 142 Mich App 271, 275; 369 NW2d 484 (1985), quoting 6A Michigan Law & Practice, Contracts, § 314, pp 315-316. Accordingly, where there is substantial performance, minor deficiencies in performance do not cause the substantial performer to forfeit rights under the contract. *Gibson, supra* at 276. In this case, plaintiff's president and vice president both testified that plaintiff substantially fulfilled its contractual obligations to defendants, while admitting to minor matters left undone. The jury was free to believe that the outstanding matters to which plaintiff's officers admitted, as well as any defects described by Gygi and his witnesses, were minor deficiencies of the sort that left the contract substantially performed. The jury was also free to believe plaintiff's mitigating explanations concerning why certain details were delayed or suspended. "An appellate court recognizes the jury's and the judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony." *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). Because there was a reasonable evidentiary basis for concluding that plaintiff had substantially fulfilled its contractual obligations to defendants, a new trial is unwarranted. See *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999) (a motion for a new trial should not be granted on the ground that the jury's verdict was against the great weight of the evidence if there was competent evidence to support the verdict).

Defendants contend that a new trial is warranted because the jury, not the trial court, should have determined the amount of the construction lien at issue. However, the jury was never asked to decide that question, as the instructions and the verdict form indicate, neither having drawn an objection from the defense. Defendants' own proposed verdict form is also silent on the question of the amount of the construction lien. It is thus apparent from the record that defendants, purposefully or inadvertently, acquiesced in letting the court, not the jury, decide the amount of the lien. See *Phinney, supra* at 537. Additionally, defendants fail to show or even allege how they suffered any prejudice with regard to the amount of the lien. For these reasons, we reject this claim of error.

Defendants contend that a new trial is warranted because the court improperly allowed hearsay testimony at trial. Defendants first complain that plaintiff was allowed to prove through hearsay testimony that the Department of Environment Quality had inspected and approved the project. There was no objection to the testimony, and we therefore review this issue for clear error. *Kern, supra* at 336. We discern no clear error, because there was no testimony regarding what another asserted, offered to prove the truth of the matter asserted. See MRE 801. Defendants additionally contend that hearsay testimony was admitted when plaintiff's president's stated that the project "would never have been passed by the DEQ . . . if there was anything about it that . . . didn't meet the requirements." A hearsay objection followed, and the trial court asked, "Was the project ultimately approved by the – I mean there's testimony it was approved by the DEQ?" Upon receiving an affirmative reply from plaintiff's attorney, the court overruled defendant's objection.[2] Once again, this interchange did not contain hearsay, because there was no testimony regarding what anyone said.

Defendants additionally assert a hearsay problem in plaintiff's president's testimony when he spoke of concerns in getting the required bank funding and noted, "as we got more and more involved, we were getting negative feedback from my banker and from – . . . ." This brought a hearsay objection, which the court sustained. Plaintiff's officer continued, "I guess the feedback from other vendors in the industry, so forth. I don't know what I can do here without upsetting everybody," then, with the encouragement of counsel, added, "I was getting feedback, just being warned by the people in the industry that the relationship may go sour, that there was a reputation here." When the defense renewed the hearsay objection, plaintiff's attorney agreed to move on and did so. On appeal, defendants argue that they suffered prejudice in the matter, despite having their hearsay objections sustained. However, to whatever extent implied assertions from persons not in court or under oath concerning defendants' questionable business reputation got to the jury's attention, the effect was de minimis. Had any real harm been done, defendants were free to request a curative instruction. That defense counsel did not suggests that counsel at trial shared our sense from the record that no significant damage occurred. Reversal is unwarranted. See generally *Hilgendorf v St John Hospital & Medical Center Corp*, 245 Mich App 670, 693; 630 NW2d 356 (2001) (erroneous evidentiary ruling subject to harmless-error analysis).

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[2] Defendants also argue that the trial court improperly credited the evidence that the DEQ had approved the project, where the matter should have been left for the jury to decide. However, the trial court obviously spotted that hazard and immediately corrected itself, establishing not that the DEQ had approved the project, but that there was "testimony it was approved."

Finally, defendants put forward as improper hearsay the trial court's decision to receive into evidence two letters written to Fred Gygi by plaintiff's president and vice president, respectively, describing problems developing with the project and proposing ways of dealing with them. The objection to the letter from the vice president was not based on hearsay, but on the best evidence rule. However, on appeal, only hearsay is argued. To preserve an evidentiary issue for appellate review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. *People v Welch*, 226 Mich App 461, 464; 574 NW2d 682 (1997). Because the hearsay issue was not preserved at trial and is merely asserted without development on appeal, we deem the issue forfeited and abandoned. *In re Hamlet (After Remand)*, 225 Mich App 505, 521; 571 NW2d 750 (1997), overruled in part on other grounds by *In re Trejo*, 462 Mich 341 (2000) ("A party may not merely announce a position and leave it to us to discover and rationalize the basis for the claim."). With regard to the letter from the president, defendants fail to identify any assertions in the letter that were offered to prove the truth of the things asserted and have therefore once again forfeited the issue.[3] *Id*.

Next, defendants summarily argue that a new trial is warranted because testimony of compromise negotiations was admitted in violation of MRE 408. We find no clear error with regard to this unpreserved issue, because the testimony did not concern negotiations envisioned as an alternative to litigation but instead the usual business haggling in hopes of getting accounts in order.

Next, defendants argue that a new trial is warranted because the trial court improperly excluded defendants' recent photographs and videotape of the work site. Defendants cite only an unpublished case in support of its position. Accordingly, defendants have effectively waived the issue for purposes of appeal. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Nonetheless, we discern no error. Indeed, the court excluded the photographs and videotape because they had not been disclosed to plaintiff in a timely manner. The exclusion of evidence not properly disclosed is within the trial court's discretion. *Farrell v Auto Club of Michigan*, 155 Mich App 378, 388; 399 NW2d 531 (1986), remanded on other grounds 433 Mich 913 (1989). Here, because exclusion of the evidence did not cause defendants' whole case to fall, as was the situation in *Dean v Tucker*, 182 Mich App 27, 31-35; 451 NW2d 751 (1990), the court cannot be said to have abused its discretion in excluding that undisclosed evidence.[4]

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[3] Defendants also summarily assert that plaintiff's attorney engaged in improper argument while submitting the letters into evidence. Defendants cite no authority and develop no argument with regard to this assertion, thus waiving it for purposes of appeal. *Hamlet, supra* at 521.

[4] Defendants further argue that, because the trial court had disallowed the recent photographic evidence, it should have granted a mistrial in response to plaintiff having emphasized in closing arguments that defendants were relying on photographs of nebulous origin instead of recent ones. Defendants cite no authority and development no argument in support of their assertion and have therefore abandoned the issue for purposes of appeal. *Wilson, supra* at 243. At any rate, we do not agree that the court erred in denying the motion for a mistrial, nor do we believe that the attorney's comments and the judge's failure to give a curative instruction affected the outcome of the proceedings.

Next, defendants contend that a new trial is warranted because the trial court prohibited a defense witness from testifying as an expert on the installation of gasoline dispensing equipment. The trial court prohibited the witness from testifying as an expert because he had not been disclosed as an expert in discovery. Once again, defendants cite no authority in support of their argument and have therefore waived this issue for appeal. *Wilson, supra* at 243. Nevertheless, we discern no error. Indeed, defendants disclosed in discovery that a corporate entity would provide expert testimony on the installation of gasoline dispensing equipment but listed the individual agent of that entity by name only as one among several names listed as general witnesses. We agree with the trial court that the discovery rules "don't apply to companies, they apply to individuals." Under the circumstances, defendants effectively disguised the witness' identity as an expert, leaving plaintiff either to investigate where it should not have had to or to contend with a surprise expert.

Defendants additionally contend that the trial court improperly limited the testimony of another witness to non-expert testimony. Once again, defendants have waived this issue by failing to develop the argument or cite relevant authority. *Id.* Nevertheless, we discern no error, because defendants themselves offered the witness only for non-expert purposes. See generally *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000) (acquiescence to a particular course of conduct at trial extinguishes any potential errors).

Defendants also complain that the trial court allowed plaintiff to present some evidence that had not been disclosed in perfect accord with the discovery orders, but they cite no authority for the proposition that a court must respond to every discovery violation by every party in precisely the same way. The argument is waived. *Wilson, supra* at 243.

Next, defendants argue that a new trial is warranted because the trial court improperly commented about one of defendants' witnesses and failed to properly present defendants' counterclaim. Yet again, defendants cite no authority in support of these arguments, which are unpreserved. Accordingly, defendants have waived the arguments for appeal. *Id*. Nevertheless, we have reviewed the alleged claims of error and find them to be without merit.

Next, defendants argue that a new trial is warranted because plaintiff's witnesses improperly mentioned during the trial another job site in Marquette that was not at issue in the case. Defendants have again waived this issue for appeal by failing to cite any authority in support of their position. *Id*. Nevertheless, we discern no error. Indeed, the parties had contracted for work at Marquette and Baraga simultaneously, their main agreement stating, "The projects will be done under separate contracts but have been combined under a singular payment program to increase purchasing efficiencies." Because the jury would be obliged to separate the Baraga project from evidence that necessarily brought both the Baraga and Marquette projects to the fore, some mention of the Marquette job was necessary. Moreover, we note that plaintiff consistently reiterated that nothing in the Marquette job was at issue for present purposes, and the court likewise so instructed the jury. Although evidence that plaintiff had filed liens on both properties tended to suggest that defendants were in arrears concerning the Marquette property, because the jury was instructed that Marquette did not bear on the instant case, any prejudice was minimal. Defendants also argue that they should have been allowed to explain why they had delayed or ceased making payments on the Marquette job, but it is precisely because the Marquette job was not at issue that the trial court properly limited the presentation of evidence concerning it.

Next, defendants argue that a new trial is warranted because the trial court did not take appropriate measures in the face of the risk that some of the jurors might visit the job site in question. We disagree. The court's speculation when speaking to the parties, outside the presence of the jury, that perhaps half of the jurors would visit the site despite the court's instructions falls short of a factual finding concerning such juror misconduct. The court instructed the jury to consider only the evidence presented in court, specifically admonishing them, "You must not consider any other information which will come to you or might come to you outside of the courtroom. You are not to make any investigations on your own, nor are you to conduct any experiments of any kind." The instructions actually given thus well covered the duty to confine consideration to the evidence presented in court, and defendants asked for no further instructions. No error resulted when the court did not take the initiative to repeat or intensify its admonishments.

Next, defendants argue that a new trial is warranted because of plaintiff's attorney's misconduct. We disagree.

On direct examination, plaintiff's attorney asked plaintiff's president if plaintiff had ever had to commence an action against any other customer. This drew an objection as to relevance, which the court sustained. Nonetheless, plaintiff's attorney explained, before the jury, that he wished to elicit that this was the first time plaintiff felt obliged to sue a customer. While this comment might have been improper, there was no request for a curative instruction, which could have avoided any unfair prejudice defendants suffered in the matter. See *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 466; 624 NW2d 427 (2000). Moreover, the comment was harmless in light of the entire context of the trial.[5] *Reetz, supra* at 102-103.

Defendants contend that plaintiff's counsel argued facts not in evidence by stating, "The fact of the matter is, if we waited till the spring, the store would have never been open. It's against EPA regulations. The store can't open unless it has the concrete to put the pumps on." While this statement does appear to be improper, an objection and request for a curative instruction would have provided ample opportunity to clarify the matter for the jury. *Stitt, supra* at 466. At any rate, this minor impropriety did not constitute an outcome-determinative plain error affecting substantial rights. *Reetz, supra* at 102-103; *Kern, supra* at 336.

Defendants additionally allege error from a myriad of other comments by plaintiff's counsel, which drew no objections or requests for special instructions. We have carefully reviewed the comments and find nothing so inflammatory or improper so as to warrant a new trial. We note that that an attorney may argue credibility when the jury is obliged to resolve a credibility contest. See generally *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). Moreover, an attorney does not have to confine arguments to the blandest of terms. See *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), remanded on other grounds sub nom *People v Thomas*, 439 Mich 896; 478 NW2d 445 (1991).

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[5] Also harmless was the attorney's comment discussed in footnote 4, *supra*.

Finally, defendants characterize the verdict as inconsistent because the jury concluded that plaintiff had not breached its obligations to defendant yet declined to award all the damages for which plaintiff asked. Defendants suggest that to be consistent the verdict would have had to have been for either all or none of the damages that plaintiff requested. This argument is meritless. Plaintiff's president testified that the total amount owing under its contract and unjust enrichment theories was $75,982.09 but that plaintiff had left incomplete some minor contractual obligations for which $1,000 should be deducted from the amount owed. The jury's eventual award of $70,000 obviously indicates that it regarded plaintiff's outstanding obligations under the contract as demanding a downward adjustment of approximately $5,000, perhaps recognizing plaintiff's incentive to downplay the value of the outstanding items, or perhaps crediting some of Gygi's testimony in this regard. Either way, "If there is an interpretation of the evidence that provides a logical explanation for the findings of the jury, the verdict is not inconsistent." *Lagalo v Allied Corp*, 457 Mich 278, 282; 577 NW2d 462 (1998); *Granger v Fruehauf Corp*, 429 Mich 1, 7; 412 NW2d 199 (1987). The verdict in this case was not inconsistent.

We have considered and rejected defendants' many allegations of error advanced in support of their argument that the trial court should have granted the motion for new trial.[6]

Next, defendants argue that the trial court abused its discretion in denying their post-verdict motion to depose the principals of plaintiff's concrete subcontractor. Yet again, defendants failed to cite any authority in support of its argument, thereby waiving the issue for appeal. *Wilson, supra* at 243. Nevertheless, we discern no error. At the time of the motion, defendants expressed the wish to gather evidence for use in potential posttrial proceedings. Defendants did not specify any proceeding envisioned. Because the verdict was in, and no specific posttrial proceeding was presently contemplated, the trial court did not abuse its discretion in concluding that defendants had failed to show cause to depose the principals of the concrete subcontractor at that time. Further, even on appeal, defendants do not indicate what they hoped to learn from the deposition of those persons and fail to explain why additional discovery should have been ordered after the verdict had been returned. For these reasons, we reject this claim of error.

Next, defendants argue that the trial court erred in its award of attorney fees and costs. This Court reviews a trial court's award of attorney fees for an abuse of discretion. See generally *In re Condemnation of Private Property for Highway Purposes*, 221 Mich App 136, 139-140; 561 NW2d 459 (1997).

"'Where the opposing party challenges the reasonableness of the fee requested, the trial court should inquire into the services actually rendered prior to approving the bills of costs. . . . Although a full-blown trial is not necessary, an evidentiary hearing regarding the reasonableness of the fee request is.'" *B & B Investment Group v Gitler*, 229 Mich App 1, 15-16; 581 NW2d 17

[6] We note that certain of defendants' allegations (e.g., an allegation that the Court "improperly allowed a hearsay letter in," without identifying the content of the letter or the context of its admission) were set forth so summarily, and without supporting authority, in their appellate brief that we deemed them unworthy of discussion in this opinion. As noted in *Wilson, supra* at 243, an appellant may not simply assert a position and leave it up to this court to discover and rationalize the basis for his claims.

(1998), quoting *Wilson v General Motors Corp*, 183 Mich App 21, 42-43; 454 NW2d 405 (1990). A court choosing to award attorney fees is obliged to determine the reasonable amount of the fees in accordance with the nonexclusive list of criteria set forth in *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982). *B & B Investment, supra* at 16. The court must state its factual findings concerning the matter, but it need not detail its findings on each specific factor. *Id*. If a party changes attorneys for valid reasons the new attorney should be afforded reasonable time to take the reins. See generally *People v Williams*, 386 Mich 565, 574-575; 194 NW2d 337 (1972).

In this case, at the hearing on plaintiff's motion for costs and fees, defendants' recently substituted attorney asked for a continuance on the ground that he was not yet in a position to argue the matter but stated generally that defendants challenged the reasonableness of the attorney fees requested and asked that the court conduct an evidentiary hearing and issue findings of fact. Defendants' original lawyer, who the trial court had insisted remain with the case for the issue of costs and fees, made clear that Gygi had fired him and directed that he take no action in this regard. Substitute counsel protested that he was never afforded adequate time to defend the motion for costs and fees.

The trial court stated for the record that "nothing has ever been filed in response to this motion," and, accordingly, ruled that it would accept plaintiff's representations without an evidentiary hearing. The court decided to award $12,952.07 in costs and prejudgment interest and attorney fees from the time of mediation forward in the amount of $23,816, for a total of $36,768.07. The question, then, is whether the trial court abused its discretion in regarding defendants as having, by inaction, waived or forfeited the right to oppose plaintiff's representations concerning legal fees. We conclude that it did.

Plaintiff's motion for costs and attorney fees was filed May 14, 1999. Substitute counsel filed a motion for a continuance on May 20, 1999, and defendants' written motion for substitution of attorneys was filed on May 26, 1999. The hearing on the motions for costs and fees and for substitution of counsel began on May 25, 1999, but was rescheduled for two days later, when the issues were decided. Thus, on its face, the motion for a continuance filed six days after the motion for costs and fees appears reasonable, in light of the breakdown of the relationship between defendant Gygi and the attorney of record. Finally, the motion for costs and fees was decided thirteen days after it was filed, but just seven days after substitute counsel's entry into the case with the motion for continuance.

The trial court gave no indication that it doubted that defendant Gygi discharged his first lawyer and engaged substitute counsel for anything but legitimate reasons, nor did the court state that substitute counsel had sufficient time to advocate defendants' interests in this matter. Without factual findings indicating that original counsel was discharged only to create procedural obstacles, or that substitute counsel had actual reasonable time to defend the motion, the trial court's decision to award costs and fees without an evidentiary hearing was precipitate. For these reasons, despite the stringency of the test for an abuse of discretion, we conclude that the trial court abused its discretion in forcing defendants to accept plaintiff's representations without the benefit of an evidentiary hearing.

We also must agree with defendants that the court acted without jurisdiction when it subsequently awarded $2,000 in additional costs and fees while a claim of appeal was pending.

"After a claim of appeal is filed . . . , the trial court . . . may not set aside or amend the judgment or order appealed from except by order of the Court of Appeals, by stipulation of the parties, or as otherwise provided by law." MCR 7.208(A). The language of the rule does not restrict its limitation to changes in, as opposed to additions to, the substance of the order appealed from. Although this rule was amended in 1999, effective February 1, 2000, to permit a trial court to "rule on requests for costs or attorney fees," MCR 7.208(I), the order here at issue was issued on November 9, 1999, and thus preceded that amendment.

In this case, the court ruled as follows:

> I think that the most interesting part of all of this is the question that's raised by [MCR] 7.208. I am going to take the position, because the motion was filed before the appeal was taken and because it simply seems to me to make sense that the Court would still have jurisdiction on the issue of attorney fees and costs, that I do have that jurisdiction. I would hope, however, that somehow this gets tied into the package that's already going to be raised before the Court of Appeals so that we all have a definitive answer to that question. I'm going to award attorney fees and costs in the amount of two thousand dollars.

"This Court has applied [MCR 7.208(A)] to prohibit a trial court from granting a party attorney fees or costs after the claim of appeal is filed, unless the order or judgment expressed an intention to grant such costs." *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 314; 486 NW2d 351 (1992). Thus, where the final judgment grants costs to a party in general terms, it may determine the amount of costs after a claim of appeal is filed. *Id.* at 314; *Lincoln v Gupta*, 142 Mich App 615, 531; 370 NW2d 312 (1985). Plaintiff argues that because the judgment of June 1999 included an award of costs, it thus left the door open to additional awards of costs and attorney fees despite the pendency of the claim of appeal. However, awards of costs and fees after the filing of a claim of appeal are proper only where the orders appealed from provided for the awards while leaving for later "the ministerial task of documenting the costs and fees." *Lincoln, supra* at 631. This is as opposed to the instant case, where the June 1999 order included such awards in precise amounts, giving no indication that any later determination was envisioned. By all appearances, that order finally resolved the entire question of costs and fees; the court's November 9, 1999, order had the effect of amending an award that had been put forward in final form, not finishing a matter that the final order left for later calculation.

It is apparent that the court rules were amended effective February 1, 2000, to put into effect what the court below empirically sensed that a trial court should be able to do – award posttrial costs and fees while an appeal is pending. However, before that amendment that prerogative did not exist. The trial court in this case acted without the benefit of MCR 7.208(I), and thus without jurisdiction. The award of posttrial costs and fees must be vacated for that reason.

Thus, we remand for full evidentiary development of the issue of costs and fees, covering all proceedings. We affirm the judgment below in all other regards.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Jane E. Markey
/s/ Patrick M. Meter