STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL MUSGRAVE,

Defendant/Counter-Defendant-Appellant,

v

ENTERPRISE LEASING COMPANY,

Counter-Plaintiff-Appellee.

UNPUBLISHED
September 21, 2004

No. 246962
Macomb Circuit Court
LC No. 2001-004112-NI

MICHAEL MUSGRAVE,

Defendant/Counter-Defendant-Appellee,

v

ENTERPRISE LEASING COMPANY OF DETROIT,

Counter-Plaintiff-Appellant.

No. 247507
Macomb Circuit Court
LC No. 2001-004112-NI

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

These consolidated appeals arise out of an indemnity claim filed by a rental car company against a customer and that customer's insurer to recover money paid to settle an automobile negligence claim. Defendant/cross-plaintiff Enterprise Leasing Company of Detroit (Enterprise) filed a cross-complaint against co-defendant Michael Musgrave, insured and defended by Allstate, to recover money Enterprise paid to plaintiff Maribeth Buday, who was injured while she was a passenger in a car driven by Musgrave. The court below denied Musgrave's motion for summary disposition, instead granting summary disposition to Enterprise and requiring Musgrave to pay Enterprise $20,000 for the settlement it made with Buday and $11,200 in attorney fees, costs, and prejudgment interest. We affirm both decisions.

I

In November 1999, while "highly intoxicated," Musgrave had an accident in an Enterprise rental car he was driving. Buday was a passenger in the back seat of Musgrave's car. In October 2001, Buday sued Musgrave and Enterprise. During the intervening two years, Allstate disputed the validity of the indemnity clause in the rental car contract, which obligated the renter of any Enterprise vehicle to indemnify Enterprise fully for any costs arising from the rental.

Soon after Buday filed suit, Enterprise made an offer of judgment to her for $20,000, which she accepted, thereby settling her claim against Enterprise. When it offered the settlement to Buday, Enterprise also filed a cross complaint for indemnity against Musgrave for "whatever amount Enterprise [] may be found liable for to the principal Plaintiff, plus costs and attorney fees incurred in having to defend the principal Complaint." Six months later, after a brief hearing, the court summarily dismissed Buday's claim against Musgrave, finding that "Plaintiff did not sustain a serious impairment of bodily function or a serious permanent disfigurement, thereby disqualifying her from pursuing non-economic loss damages against Defendant."

Enterprise's indemnity cross-claim was evaluated under MCR 2.403 at $10,000, which Enterprise accepted and Musgrave rejected. Musgrave moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Enterprise then filed a motion under MCR 2.116(I)(2), asking the court to grant summary disposition in its favor, which it did and awarded Enterprise $31,200 for indemnity costs, legal expenses, and interest.

II

On appeal, Allstate[1] argues that this award was in error because the settlement Enterprise reached was not reasonable in light of the potential for liability that it faced; therefore, Enterprise should not be able to recover the settlement amount and its derivative costs. We disagree. "This Court reviews de novo decisions regarding motions for summary disposition to determine if the moving party was entitled to judgment as a matter of law." *Dep't of Transportation v Christensen*, 229 Mich App 417, 419; 581 NW2d 807 (1998) (quotation and citation omitted).

This Court considered indemnity agreements involving rented vehicles in *Joe Panian Chevrolet, Inc v Young*, 239 Mich App 227; 608 NW2d 89 (2000), a case with very similar facts. In *Joe Panian Chevrolet*, this Court noted that "no legal rule in Michigan prohibit[s] a person in the business of renting or leasing vehicles from contracting for indemnification from the vehicles' users." *Id*. at 235. Thus, the only issue is whether Allstate was required to indemnify Enterprise for the $20,000 settlement with Buday where her actual noneconomic damages at the time of settlement may be presumed to have been below the legal threshold for an actionable claim at the time she accepted Enterprise's settlement offer. Stated another way, we must decide

[1] Because the parties mainly refer to Allstate rather than Musgrave in discussing the indemnity appeal, so do we. Allstate, Musgrave's insurer, defended Musgrave on the cross-complaint now on appeal.

whether Allstate is required to indemnify Enterprise for the amount of a settlement agreement made with Buday at a time when Enterprise had incurred no actual liability.

We are guided in our decision by this Court's resolution of the same issue in *Grand Trunk Western RR, Inc v Auto Warehousing Co*, 262 Mich App 345; ___ NW2d ___ (2004). "This case presents an issue of recovery under an express contract for indemnity when an indemnitee has settled a claim before a determination of liability has been made." *Id*. at 350-351.

> Two general principles of law, applicable to contractual indemnity in this context, are well-established. First, if an indemnitee settles a claim against it before seeking the approval of, or tendering the defense to, the indemnitor, then the indemnitee must prove its *actual* liability to the claimant to recover from the indemnitor. However, the indemnitee who has settled a claim need show only *potential* liability if the indemnitor has notice of the claim and refuses to defend. 41 Am Jur 2d, Indemnity § 46; *Consolidated Rail* [*Corp v Ford Motor Corp*, 751 F Supp 674,] 676 [(ED Mich, 1990)].
>
> These principles, and the policy underlying their formulation, were directly addressed in *Ford v Clark Equip Co*, 87 Mich App 270, 276-278; 274 NW2d 33 (1978). If (1) an enforceable contract of indemnity exists, (2) a seasonable tender of defense is made with notice that a settlement will be entered, and (3) the tender of the defense is refused, an indemnitee need show only potential liability to recover on a contract of indemnity. To require a showing of actual liability in these circumstances places too heavy a burden on a defendant who settles after a tender of the defense to the contractual indemnitor and would undermine this state's policy of encouraging the settlement of lawsuits. *Id.* at 277. "The settlement of a suit benefits both parties and the public." *Id.*
>
> In *Ford*, this Court explained the analysis and proof required for potential liability, i.e., in a case such as this one, in which a seasonable tender of defense was made with notice that a settlement will be entered and the tender of defense was refused.
>
> > "To recover under these circumstances the indemnitee must show that the fact situation of the original claim is covered by the contract of indemnity and that the settlement is reasonable.
> >
> > Potential liability actually means nothing more than that the indemnitee acted reasonably in settling the underlying suit. The reasonableness of the settlement consists of two components, which are interrelated. The fact finder must look at the amount paid in settlement of the claim in light of the risk of exposure. The risk of exposure is the probable amount of a judgment if the original plaintiff were to prevail at trial, balanced against the possibility that the original defendant would have prevailed. If the amount of the settlement is reasonable in light of the fact finder's analysis of these factors, the indemnitee will have cleared this

> hurdle." *Ford*, *supra* at 277-278 (citations omitted). [*Grand Trunk*, *supra* at 354-356; emphasis in original.]

At the summary disposition hearing in this case, Enterprise proffered photographs of Buday taken shortly after the accident that showed a "very visible injury with scarring in the area of her right eye," as the court characterized it. Allstate failed to provide photographic evidence to show that there was no disfigurement or to dispute Enterprise's potential liability. Instead, Allstate relied entirely on the fact that, some months after Enterprise settled with Buday, the court dismissed Buday's claim against Musgrave because her injuries were below the threshold necessary to sustain a claim for noneconomic damages under the no-fault act. See MCL 500.3135.[2] MCL 500.3135(1) provides:

> A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

When Enterprise settled Buday's claim, the investigation reports and especially the photos Enterprise and Allstate had in hand suggested that she would have no problem in meeting the serious disfigurement test of the no-fault threshold. Allstate argues on appeal, however, that Enterprise had a duty to mitigate by investigating further before settling with Buday, because Enterprise would have discovered that Buday had undergone surgery to correct the scarring shown in the post-accident photos. We believe that the evaluation of whether Enterprise acted reasonably should not be considered with the benefit of 20/20 hindsight. Rather, the focus should be on the reasonableness of the action at the time it was taken. In November 2001, neither Allstate nor Enterprise had contacted Buday in some time, and neither knew that she had undergone plastic surgery.

Given the circumstances that existed at the time, we conclude that Enterprise acted reasonably in settling the claim with Buday quickly and immediately turning to Allstate for indemnity. All that Allstate needed to do to ensure that damages were mitigated to its liking was to notify Enterprise that it was assuming the defense of the action as soon as Buday filed suit. Allstate could then have instructed Enterprise not to offer or accept any settlement without approval from Allstate. Had Allstate done so, Enterprise would have borne the risk of any unwise settlement with Buday.

---

[2] The court found that whether Buday's injuries exceeded the threshold of the no-fault act was not relevant because Enterprise's liability arose from its ownership of the rental vehicle. In reaching this conclusion, the court relied on MCL 257.401, the owner's liability statute. In this case, rather than being a source of liability for Enterprise, MCL 257.401 served only to cap its liability under the no-fault act. However, while the court erred in relying on MCL 257.401, the error does not affect the final outcome of this appeal.

Allstate also argues on appeal that Enterprise failed to seasonably tender the defense of Buday's claim. "This claim was not raised before and addressed by the trial court; therefore, it is not preserved for appellate review." *Persinger v Holst*, 248 Mich App 499, 510; 639 NW2d 594 (2001). In any event, Allstate admits that it disputed the responsibility for the claim in the period between the accident and the resulting lawsuit. It is reasonable to conclude from this that Enterprise attempted to tender the defense of the action. The existence of a dispute presumes such an attempt. Therefore, for the above reasons, we find that the trial court did not err in granting Enterprise summary disposition and awarding it indemnification and related costs.

II

In its appeal, Enterprise appeals the denial of its motion for an additional $1875 in case evaluation sanctions. Enterprise argues that the court abused its discretion by failing to determine its reasonable attorney fees and by failing to use those fees, rather than its actual attorney fees, when awarding case evaluation sanctions to Enterprise. We disagree. Although a court's award of fees or costs is reviewed for an abuse of discretion, where, as here, resolution of the issue involves a question of law, namely the interpretation MCR 2.403(O) regarding permissible recoverable costs, our review is de novo. *46th Circuit Trial Court v Crawford Co*, 261 Mich App 477, 486; 682 NW2d 519 (2004).

In *Cleary v The Turning Point*, 203 Mich App 208, 211; 512 NW2d 9 (1994), this Court considered an appeal where "Plaintiffs argue[d] that the trial court abused its discretion in awarding defendant attorney fees that were based upon an hourly rate that exceeded the actual hourly rate charged by defense counsel." The *Cleary* Court observed:

> We cannot agree with plaintiffs. 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 [case] evaluation. Actual costs are defined by MCR 2.403(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."
>
> Nothing in the language of MCR 2.403(O) requires a trial court to find that reasonable attorney fees are equivalent to actual fees. [*Id*. at 211-212.]

And our Supreme Court has made clear that sanctions are exceptions to the American rule that each side pays its own costs, and that case evaluation sanctions exist only to compensate a party for actual losses, not to inflict punishment on the losing party.

> In explaining our conclusion in *McAuley* [*v General Motors Corp*, 457 Mich 513; 578 NW2d 282 (1998),] that the plaintiff was not entitled to recover duplicative attorney fees under the mediation rule because he already had been fully reimbursed for his reasonable attorney fees under the HCRA [Handicappers'

> Civil Rights Act], we stressed that attorney fees generally are not recoverable in this jurisdiction in the absence of a statute or a court rule that expressly authorizes such an award. *Id.*, 519. We further observed that only compensatory damages generally are available in Michigan, and that punitive sanctions may not be imposed. Because the purpose of compensatory damages is to make an injured party whole for losses actually suffered, the amount of recovery for such damages is thus limited by the amount of the loss. The fact that litigants who represent themselves may not recover attorney fees as an element of costs or damages underscores that a party may not make a profit or obtain more than one recovery. *Id.*, 519-520.
>
> We said in *McAuley* that in order for a party to recover attorney fees under the mediation court rule, he must show that he has incurred such fees. But he cannot make such a showing if he already has been fully reimbursed for reasonable attorney fees through operation of a statutory provision, i.e., there are no "actual costs" remaining to be reimbursed. An additional award may be appropriate only if the applicable statute limits the recovery of attorney fees to something less than a reasonable attorney fee. [*Rafferty v Markovitz*, 461 Mich 265, 270-271; 602 NW2d 367 (1999) (footnote omitted).]

Thus, where the prevailing party's actual attorney fees were already recovered under another mechanism – such as an indemnity clause, as in this case – the party seeking evaluation sanctions must show that there is still something to recover, which requires a showing that the actual attorney fees already recovered are less than reasonable attorney fees.

Yet Enterprise argues that, "[t]he traditional manner of determining what is a reasonable hourly rate is to analyze the fair market value for the work of the prevailing party's attorney." Here, there is hard evidence of the precise fair market value of the services at issue. Specifically, Enterprise and its counsel, neither of whom were forced to deal with each other, agreed that the fair market value, and thus the reasonable value, for counsel's legal services was $125 per hour. That value was fixed by their agreement, and it does not change by virtue of third-party payment. Accordingly, we find that the trial court did not err in refusing to award Enterprise attorney fees in an amount greater than the actual fees incurred.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens