

STATE OF MICHIGAN
COURT OF APPEALS

LINDEN INVESTMENT COMPANY,

Plaintiff-Appellee,

v

JOHN R. FRENS and THELMA A. FRENS,

Defendants-Appellants,

and

FRANK MINCA, ERNESTINE MINCA, JOSEPH
A. KEPHART, RICHARD F. KINKLE, Estate of
LOUISE NETTLOW, KARL MICHAEL, JR., and
ROSEMARY MICHAEL,

Defendants.

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendants, John R. Frens and Thelma A. Frens, appeal as of right from an order imposing case evaluation sanctions against them in the amount of \$11,393.94. We affirm.

The Frens first argue that the trial court erred by failing to follow *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517; 664 NW2d 263 (2003), and apportion the attorney fees assessed as case evaluation sanctions¹ amongst all defendants. Whether *Ayre* requires case evaluation sanctions to be apportioned amongst all defendants is a question of law that we review de novo. *Ghaffari v Turner Construction Co*, 473 Mich 16, 19; 699 NW2d 687 (2005). In addition, we review for an abuse of discretion the amount of case evaluation sanctions awarded. *Ayre, supra* at 520.

¹ Although the Frens refer to “mediation” sanctions, MCR 2.403 was amended in 2000 to refer to “case evaluation” sanctions rather than “mediation” sanctions. *Ayar v Foodland Distributors*, 472 Mich 713, 714 n 1; 698 NW2d 875 (2005).

MCR 2.403(O)(1) provides:

If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

The term "verdict" in the above provision includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." MCR 2.403(O)(2)(c). With respect to multiple parties, MCR 2.403(O)(4)(a) states:

Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.

Contrary to the Frens' argument, *Ayre* is not directly on point. It does, however, shed some light on whether the trial court should have apportioned the case evaluation sanctions amongst all defendants. In *Ayre*, *supra* at 519, the plaintiff's decedent, along with three others, died in a boating accident. All the plaintiffs filed suit against "Outlaw," the manufacturer of the boat, and "Attwood," the manufacturer of a fuel system component of the boat. At case evaluation, unanimous awards were rendered in favor of each plaintiff, with 70 percent of the liability assessed against Outlaw and 30 percent assessed against Attwood. The remaining plaintiffs accepted the awards conditioned on the defendants' acceptance. The plaintiff at issue in *Ayre* rejected the award, as did Outlaw and Attwood. *Id.*

Before trial, Outlaw settled with all the plaintiffs, and a trial involving Attwood only culminated in a verdict of no cause of action in favor of Attwood. *Id.* at 519. Thereafter, the trial court granted Attwood's motion for case evaluation sanctions in the amount of \$232,794 against the plaintiff only because she was the only plaintiff who rejected the case evaluation award. *Id.* at 520. The plaintiff appealed, arguing that the trial court erred by assessing against her all of Attwood's attorney fees incurred following case evaluation. The plaintiff argued that the trial would have occurred even if she had accepted the award because Attwood rejected the awards with respect to all the plaintiffs. *Id.* at 521. The *Ayre* Court recognized that the purpose of the case evaluation rule is to require a party who insists on trial by rejecting a case evaluation award to assume the burden of litigation expenses. *Id.* at 522. The Court recognized, however, that a rejecting plaintiff may not be liable for all of a defendant's attorney fees in multiple-plaintiff cases. Rather, this Court stated that "[t]he rejecting plaintiff is only liable for those attorney fees that accrued as a consequence of that plaintiff's rejection, which is determined by examining the rejecting plaintiff's theories of liability and damage claims." *Ayre*, *supra* at 522.

Regarding a plaintiff's theories of liability, this Court stated:

The rejecting plaintiff is only liable for attorney fees associated with the defense against that plaintiff's theories of liability. If coplaintiffs asserted

different theories of liability than the rejecting plaintiff, only the attorney fees associated with the defense against the rejecting plaintiff's theories of liability are taxable. On the other hand, if all the plaintiffs asserted the same theory of liability, the rejecting plaintiff is liable for the attorney fees associated with the defense against that theory of liability. [*Id.* at 522-523.]

This Court held that because all the plaintiffs asserted the same theory of liability against Attwood, attorney fees incurred defending against that theory were recoverable against the sole rejecting plaintiff. *Id.* at 523. This Court stated that the plaintiff assumed that risk by rejecting the award. *Id.*

Regarding the plaintiffs' damage claims, however, this Court determined that a rejecting plaintiff is liable for only those attorney fees incurred in defending against the damages component of that particular plaintiff's case. *Id.* at 523. This Court reasoned that, especially in personal injury and wrongful death cases, damage claims are unique to each plaintiff. This Court thus held that the plaintiff was not liable for the attorney fees incurred defending against her coplaintiffs' damage claims. *Id.* This Court recognized that the "net result" of its analysis is that the plaintiff is liable for attorney fees "as if the plaintiff and the defendant were the only litigants in the cause of action." *Ayre, supra* at 524. Further, this Court recognized that MCR 2.403(O)(6) provides for the reimbursement of actual costs, including reasonable attorney fees "for services necessitated by the rejection of the case evaluation." *Id.* at 525. The Court opined that this subrule thus requires a causal nexus between services performed and a party's rejection of an award. *Id.* at 526. This Court further stated that a rejecting plaintiff who is liable for attorney fees incurred as a result of having to defend against that particular plaintiff's case is thus liable "for services necessitated by the rejection of the case evaluation." *Id.*

Although *Ayre* is not directly on point, its reasoning is applicable to the instant case and indicates that the trial court properly held the Frens liable for the entire amount of plaintiff's attorney fees. Plaintiff's theories of liability were identical against all defendants. Thus, defendant is liable for the attorney fees associated with the prosecution of those theories of liability. *Ayre, supra* at 522-523. Because plaintiff did not assert separate damage claims against the individual defendants, the trial court's ruling did not require the Frens to pay for plaintiff's damage claims against other defendants. Rather, the trial court's order properly held the Frens liable for attorney fees as if plaintiff and the Frens were the only litigants in the cause of action. *Id.* at 524.

The fact that the remaining defendants in the instant case settled rather than accepted the case evaluation award, as was the situation in *Ayre*, is not significant. *Ayre's* reasoning is persuasive. This Court in *Ayre* recognized that MCR 2.403(O)(6) requires a causal nexus between services performed and a party's rejection of an award. *Ayre, supra* at 526. The services performed by plaintiff's attorney were causally related to the Frens' rejection of the case evaluation award. Thus, the Frens were held liable "for services necessitated by the rejection of the case evaluation" under MCR 2.403(O)(6).

The fact that the other defendants also rejected the award but subsequently settled does not change the analysis. In *Ayre*, Attwood rejected the case evaluation and proceeded to trial against the four plaintiffs, only one of whom rejected the award. This Court stated that the rejecting plaintiff did not cause Attwood to incur attorney fees defending against the three

coplaintiffs' claims, but rather, Attwood's rejection of the case evaluation award caused those expenses to accrue. *Id.* This Court further stated:

[I]t is irrelevant that plaintiff's three coplaintiffs were asserting the same theory of liability. If plaintiff's coplaintiffs were asserting different theories of liability, plaintiff would not be liable for attorney fees defendant incurred defending against those theories of liability, just as plaintiff is not responsible for those fees resulting from defendant's defense of her three coplaintiffs' damages claims. [*Id.*]

Likewise, it is irrelevant that plaintiff's claims in the instant case were identical against all defendants. As in *Ayre*, the Frens assumed the risk that they would be responsible for all of plaintiff's attorney fees incurred in pursuing its identical claims against all defendants when the Frens rejected the case evaluation award. *Id.* at 523. If plaintiff had asserted different theories of liability against defendants, the Frens would not be responsible for fees incurred in the pursuit of claims not asserted against them. Because plaintiff's claims were identical against all defendants, however, the Frens were properly held liable "for services necessitated by the rejection of the case evaluation" under MCR 2.403(O)(6). Accordingly, *Ayre* did not require the trial court to apportion the fees amongst all defendants and the trial court's order was not erroneous.

The Frens also contend that they cannot be held liable for any portion of the attorney fees because the release of a joint or joint and several obligor releases the remaining obligors from liability. The Frens' argument appears to stem from the erroneous belief that the trial court determined that all defendants were jointly and severally liable for attorney fees. Rather, the trial court stated that plaintiff's quiet title action was a joint and several action against all defendants. Thus, the Frens' argument is based on a misinterpretation of the trial court's ruling. In any event, as previously discussed, the trial court's order holding the Frens responsible for all of plaintiff's attorney fees comports with the plain language of MCR 2.403(O)(6).

The Frens next contend that the trial court erred by allowing recovery of attorney fees associated with a motion for reconsideration and evidentiary hearing, fees for work performed by non-attorneys, and attorney fees associated with a related district court action. Whether plaintiff is entitled to collect attorney fees associated with post-trial proceedings and the evidentiary hearing is a question of law that we review de novo. *Ghaffari, supra* at 19. We review for an abuse of discretion the amount of case evaluation sanctions awarded. *Ayre, supra* at 520.

The Frens argue that under *Haliw v City of Sterling Hts*, 471 Mich 700; 691 NW2d 753 (2005), case evaluation sanctions for post-trial matters are not recoverable. We disagree. In *Haliw*, the Court addressed whether appellate attorney fees and costs are recoverable under MCR 2.403(O) and decided that such fees are not recoverable as case evaluation sanctions. *Id.* at 702, 706. The Court reasoned in part that the lack of any reference to appellate attorney fees and costs in MCR 2.403(O) is understandable because they are covered under a different section of the court rules. *Id.* at 706.

The Frens contend that while *Haliw* focused on appellate attorney fees, its rationale applies to all attorney fees incurred after a judgment. The Frens' argument is contrary to *Troyanowski v Village of Kent City*, 175 Mich App 217; 437 NW2d 266 (1988). In that case,

this Court held that the trial court did not err by allowing recovery of attorney fees as case evaluation sanctions for services associated with post-trial motions and a post-trial evidentiary hearing. *Id.* at 226-227. This Court stated that MCR 2.403 does not limit an award to fees for services pertaining to the trial itself. *Id.* Accordingly, the trial court in the instant case did not err by allowing recovery for fees associated with the motion for reconsideration and evidentiary hearing.

The Frens also contend that the trial court awarded fees for time spent by non-attorneys. The trial court awarded 49.2 hours of attorney fees at the rate of \$150 an hour and 12.5 hours of attorney fees at the rate of \$225 an hour and specified that these rates were attorney rates. The court stated that given the experience of plaintiff's counsel between case evaluation and judgment, \$150 an hour was a reasonable rate for services performed during that time. Further, the court found that counsel was entitled to an increased rate of \$225 an hour for services associated with the evidentiary hearing, and that the new rate was a result of the passage of time and the advancement of counsel's expertise. Thus, the record does not reflect that the trial court allowed recovery of fees for work performed by non-attorneys.

Further, the Frens argue that the trial court erred by allowing recovery of fees incurred in the district court action. The Frens cite *Duthler v Duthler*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2004 (Docket No. 242317), for the proposition that attorney fees incurred in one case cannot be assessed in a different case. Although *Duthler* implies that fees incurred in one case cannot be assessed as case evaluation sanctions in another case, *Duthler* did not establish a rule of law. Rather, the *Duthler* Court merely stated that services related to a 1998 case were not recoverable in a 1995 case. *Id.*, slip op at 7. The Court did not cite any authority for this proposition and did not address the issue whether attorney fees associated with one case may be assessed as sanctions in another case. In any event, *Duthler* was not published and, therefore, is not binding under MCR 7.215(C)(1). Under the plain language of MCR 2.403(O)(6) attorney fees are recoverable "for services necessitated by the rejection of the case evaluation." Thus, the question is whether the attorney fees incurred in the district court action were necessitated by the rejection of the case evaluation.

In 1995, plaintiff filed a forfeiture action in district court, and that court ruled that defendants had no interest in the subject property. A review of the record discloses that the effect of the district court order was a subject of argument between the parties in the instant action in nearly every pleading. During the pendency of the instant action, the Frens filed in the district court a motion to vacate or modify the district court's order. Plaintiff incurred attorney fees with respect to the district court action in response to the Frens' motion.

The trial court did not abuse its discretion by including fees associated with the district court action in the sanctions award. It appears from the record that the effect and validity of the district court judgment was a hotly contested issue in the context of this case. If the Frens had accepted the case evaluation award, plaintiff would not have been obligated to defend the district court judgment and incur further attorney fees in that case. The Frens' rejection of the award and subsequent district court motion to vacate the district court's order caused plaintiff to incur attorney fees necessitated by the rejection of the case evaluation. Accordingly, the trial court did not abuse its discretion by including these fees as case evaluation sanctions.

The Frens also argue that the trial court erred by failing to rule on their outstanding motion to set aside a previous order imposing case evaluation sanctions, then known as mediation sanctions. Whether the trial court erred by failing to rule on the Frens' outstanding motion is a question of law that this Court reviews de novo. *Ghaffari, supra* at 19.

The trial court declined to rule on the outstanding motion, seven years after it had been filed, in part because the court opined that the motion had been rendered moot by the previous appeal to this Court. See *Linden Investment Co v Minca*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 1999 (Docket No. 202059). The trial court's decision was not erroneous. In the previous appeal, this Court addressed the issue of case evaluation sanctions and concluded that the trial court did not err by awarding sanctions. *Id.*, slip op at 6. This Court remanded this case only for purposes of an evidentiary hearing to determine the proper amount of case evaluation sanctions. *Id.* slip op at 6-7. Thus, the trial court correctly determined that the outstanding motion had been rendered moot.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood