# STATE OF MICHIGAN

# COURT OF APPEALS

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| JAMES E. FRYE,<br><br>Plaintiff-Appellant,<br><br>v<br><br>CONSOLIDATED RAIL CORPORATION, a/k/a CONRAIL, and NORFOLK SOUTHERN RAILWAY CORPORATION,<br><br>Defendants-Appellees. | UNPUBLISHED<br>September 23, 2008<br><br>No. 276834<br>Wayne Circuit Court<br>LC No. 02-239279-NO |
| JAMES E. FRYE,<br><br>Plaintiff-Appellant,<br><br>v<br><br>CONSOLIDATED RAIL CORPORATION, a/k/a CONRAIL, and NORFOLK SOUTHERN RAILWAY CORPORATION,<br><br>Defendants-Appellees. | No. 279340<br>Wayne Circuit Court<br>LC No. 02-239279-NO |

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

PER CURIAM.

In this personal injury case, plaintiff James Frye appeals as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part and remand.

## I. Facts

Plaintiff worked at Chrysler's railroad dock and was responsible for opening railroad boxcar doors and preparing the dock to unload boxcars. On November 5, 1999, plaintiff opened a boxcar door and it fell on him causing injury. Before the accident, plaintiff visually inspected the boxcar and did not see anything unsafe, inappropriate, or unusual. He was able to get a good

look at the boxcar and was "real clear" and was able to "confirm the fact" that both bottom door rollers were attached to the door "from two different locations."

Plaintiff filed this cause of action in November 2002, alleging that defendants' negligence caused plaintiff's injuries. Defendants moved for summary disposition pursuant to MCR 2.116 (C)(10), arguing that because plaintiff admitted in his deposition that the boxcar was free from defects before the accident, there was no genuine issue of material fact. The trial court granted defendants' motion.

## II. Summary Disposition

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) based on the conclusion that plaintiff's own evidentiary admissions showed that the boxcar was free of any defect. Plaintiff further argues that the trial court misunderstood plaintiff's theory of the case and that defendant's theory of the case did not warrant a grant of summary disposition. We disagree.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

In his deposition, plaintiff was "real clear" and was able to "confirm the fact" that both bottom door rollers were attached to the door "from two different locations." When a party makes statements of fact in a 'clear, intelligent, unequivocal' manner, they should be considered as conclusively binding against him in the absence of any explanation or modification, or of a showing of mistake or improvidence. *Stefan v White*, 76 Mich App 654, 660; 257 NW2d 206 (1977) citing *Southern Rendering Co v Standard Rendering Co* (ED Ark 1953), 112 F Supp 103, 108. The *Stefan* Court explained the reason for this conclusion:

> If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact. *Gamet v Jenks*, 38 Mich App 719, 726, 197 NW2d 160, 164 (1972). [Id. at 659-660; citing *Perma Research and Development Co v (The) Singer Co* (CA2, 1969), 410 F2d 572, 578].

Here, plaintiff is attempting to create an issue of fact by relying on alternate theories that contradict his own version of events. Plaintiff's theories are premised on his contention that he must have been mistaken or misrepresented the facts about the state of the left bottom door roller assembly. However, plaintiff's deposition provides the only evidence concerning what the door looked like immediately before plaintiff opened it.

Plaintiff argues for the first time on appeal that his memory may have been imprecise because of the head injury that he incurred when the door fell on him. However, in his deposition and in the trial court plaintiff did not raise the issue of his possibly inaccurate memory, nor does he submit any medical evidence that his memory was affected by his injury.

In fact, in his deposition he stated that his view of the rollers was "real clear." While it is true that a trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition, *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005), the trial court here made a determination that plaintiff could not create an issue of fact where none existed merely by contradicting his own previous testimony.

Additionally, plaintiff was unable to produce the substantial evidence required to establish a reasonable basis for defendants' negligence. In *Skinner v Square D Company*, 445 Mich 153; 516 NW2d 475 (1994), our Supreme Court discussed the appropriateness of a grant of summary disposition under MCR 2.116(C)(10) in a products liability case. It applied this threshold evidentiary standard to a plaintiff's proof of factual causation in negligence cases:

> The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. [*Mulholland* at 416, n. 18, 443 NW2d 340, quoting Prosser & Keeton, Torts (5th ed.), § 41, p 269.]
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> The mere possibility that a defendant's negligence may have been the cause, either theoretical or conjectural, of an accident is not sufficient to establish a causal link between the two. [*Jordan v Whiting Corp.*, 396 Mich 145, 151, 240 NW2d 468 (1976).]
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> There must be substantial evidence which forms a reasonable basis for the inference of negligence. There must be more than a mere possibility that unreasonable conduct of the defendant caused the injury. We cannot permit the jury to guess.... [ *Daigneau v Young*, 349 Mich 632, 636, 85 NW2d 88 (1957) (citations omitted).] [*Id*. at 164-165].

Here, plaintiff's expert was only able to testify regarding purely hypothetical situations. Plaintiff's expert admitted that his first theory was based on the presumption that the door panel was missing the left bottom roller assembly and that the top hanger arms and the top door track were defective; he considered Frye's testimony that both rollers were present to be an opinion and erroneous. Alternatively, this expert claimed that even if both bottom door roller assemblies were present, the boxcar door could have fallen off the bottom door track as it moved along the track if the bottom door track was distorted or bent. However, he had no evidence indicating that the track was bent at the time of the accident. Therefore, we conclude that both of these theories of the case lack any supporting evidence and, in fact, testimony of the sole witness to the accident—plaintiff himself—refutes the first theory. Plaintiff failed to establish the requisite causal link between defendants' conduct and plaintiff's injury.

Furthermore, we reject plaintiff's contention that the trial court based its dismissal on a flawed understanding of plaintiff's case. The trial court rejected plaintiff's theories of the case and determined that "[s]omething more should be offered the jury than a situation which, by ingenious interpretation, suggests the mere possibility of defendant's negligence being the cause of the injury." The mere occurrence of the door falling on plaintiff is not enough to raise an

inference of negligence on the part of defendant. Only conjecture can make defendants' negligence the causal element to the exclusion of all others. Such speculation or conjecture is insufficient to raise a genuine issue of material fact. *Rohdy v James Decker Munson Hospital*, 17 Mich App 561, 563-64, 170 NW2d 67, 68 (1969).

We also reject plaintiff's argument that the trial court erred in its interpretation of plaintiff's theory of the accident. Plaintiff contends that defendants' theory of the case did not provide a basis for dismissal. The trial court based its decision to grant defendants' motion for summary disposition on the inadequacies it found in plaintiff's theory of the case. The trial court did not, and did not need to evaluate defendants' theory of the case for purposes of deciding this motion. Therefore, plaintiff's issue is without merit. The trial court did not err in granting defendants' motion for summary disposition.

III. Missing Evidence

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition because of the unavailability of the railcar door. We disagree.

During arguments on defendants' motion for summary disposition, plaintiff discussed the potential jury instruction under MRE 301 that provides for a negative inference where a party with control over evidence does not have a good reason for failing to produce it. The trial court did not specifically address this argument and proceeded to grant defendants' motion for summary disposition. Because this case was properly disposed of before trial, the trial court was not required to address the adverse inference jury instruction.

Nonetheless, an adverse inference instruction would not have been appropriate in this case. There is a general rule that if a party intentionally destroys evidence that was relevant to a case, a presumption arises that the evidence would have been adverse to that party's case. *Ward v Consolidated Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005); *Trupiano v Cully*, 349 Mich 568, 570; 84 NW2d 747 (1957). However, this presumption only applies " 'where there was intentional conduct indicating fraud and a desire to destroy and thereby suppress the truth." ' *Trupiano, supra* at 570, quoting 20 Am Jur, Evidence, § 185, p 191. In *Johnson v Secretary of State*, 406 Mich 420, 433; 280 NW2d 9 (1979), our Supreme Court held that where there is a deliberate destruction of or failure to produce evidence within a party's control, there is a presumption that the evidence would operate against the party.

In the present case, there is no indication that the destruction of the door was intentional conduct indicating fraud. Defendants have produced detailed maintenance and repair records of the railcar door stretching back to 1991. These records do not reflect any problems with the door for at least eight years before the incident. In addition, the railcar was inspected during the several days preceding its arrival at the Chrysler plant and no problems were noted at that time. Also, immediately after the incident the railcar and its door were inspected by representatives of Conrail who saw nothing wrong with the door except for a missing left roller assembly. After the accident, records indicate that over the course of the next three years, doors were replaced on the boxcar three different times. The first replacement door was installed two months after the accident because the door was deemed to be bent beyond repair.

Here, defendants had a reasonable excuse for failing to produce the door; the boxcar had returned to service and regular maintenance continued to be performed so as to make the boxcar usable. Further, there were detailed maintenance records reflecting its condition before and after the accident, as well as detailed inspection reports following the accident. Also, plaintiff himself stated that the door was free from defect when he attempted to open it, and several employees inspected the door after the accident and found it to be free from defect with the exception of the missing bottom left roller. Therefore, in addition to defendants' reasonable excuse for failing to produce the door, the evidence that would be provided by the actual door would have been cumulative.

## IV. Attorney Fees as Case Evaluation Sanctions

Plaintiff argues that the trial court erred in awarding defendants attorney fees as case evaluation sanctions. We disagree.

This Court reviews de novo a trial court's decision regarding a motion for case evaluation sanctions under MCR 2.403(O). *Ivezaj v Auto Club*, 275 Mich App 349, 356; 737 NW2d 807 (2007).

Plaintiff argues that because both plaintiff and defendants rejected the case evaluation award, it was unfair to impose sanctions against plaintiff and that MCR 2.403(O) does not authorize an award of "actual costs" as case evaluation sanctions. This Court has previously rejected these arguments. In *Zalut v Anderson & Associates, Inc*, 186 Mich App 229; 436 NW2d 236 (1990), this Court addressed these very topics. It stated:

> It is plaintiffs' contention that the drafters of the court rule, by omitting the word "actual" when describing the costs to be awarded when both litigants reject a mediation evaluation, intended that only normal costs be awarded, and not attorney fees.
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> * * *
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> We have found nothing in the commentary to the rule or in the case law which would support plaintiffs' reading of the court rule. It is our opinion that the omission of the word "actual" in the second sentence of MCR 2.403(O)(1) describing costs was inadvertent. We believe that to read the rule any other way would create a distinction where one is not warranted or intended. Indeed, one panel of this Court, while not addressing this precise issue, affirmed an award for "actual" costs where both parties had rejected the mediation evaluation. *Herrera v Levine*, 176 Mich App 350, 439 NW2d 378 (1989). *Id.* at 232-233.

The *Zalut* Court also concluded that the rejection of a case evaluation award by both parties does not impact the prevailing parties' entitlement to actual costs. *Id*. at 232. Therefore, in light of existing case law, plaintiff's arguments are unpersuasive and the trial court did not err in imposing sanctions against plaintiff.

## V. Hearing on Attorney Fees and Costs

Plaintiff argues that the trial court erred in failing to hold a hearing on the issue of attorney fees and costs. We agree.

We review the issue of whether the trial court should have held a hearing to determine attorney fees for an abuse of discretion. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007).

Here, the trial court awarded case evaluation sanctions in the form of attorney fees, expert witness fees, deposition and transcript fees, travel fees and photo and video fees. In general, a trial court should hold an evidentiary hearing when a party is challenging the reasonableness of the attorney fees claimed. *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 488-489; 652 NW2d 503 (2002). Certain criteria that a court should use for determining the reasonableness of attorney fees are set forth in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973):

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.

The *Crawley* court acknowledged that there is no "precise formula for computing the reasonableness of an attorney's fee" and that the facts that should be considered are not limited to the items mentioned above. *Id.* The Supreme Court agreed when it adopted the *Crawley* guidelines. *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982).

In *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), our Supreme Court elaborated on the method for calculating attorney fees as case-evaluation sanctions, stating:

> We conclude that our current multi-factor approach needs some fine tuning. We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood* ). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood* /MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors.

The *Smith* Court also stated:

> If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence. [*Smith, supra*].

Plaintiff requested an evidentiary hearing, but the court declined to grant a hearing. In light of *Smith,* we remand for a hearing regarding attorney fees and for a recalculation of those fees. We vacate the trial court's award of attorney fees and remand for the trial court to make specific findings, consistent with *Smith,* on the attorney fees plaintiff sought to recover in this case. *Id.* at 531. The trial court should hold an evidentiary hearing to allow it to make proper findings of fact.

In addition to attorney fees, the trial court awarded expert witness fees and other costs. Plaintiff asserts that some of the expert witnesses were incorrectly classified as such, and that the expert witness fees were unreasonable. It appears as though defendants submitted invoices for the work of employees who were not testifying expert witnesses. Defendants also submitted an invoice that included a charge for "interest," which appears to possibly have been incurred as a result of late payment of a bill. Although there are instances where the trial court does not need to hold an evidentiary hearing on matters involving attorney fees and costs, such as when the parties create a sufficient record to review the issue and the trial court fully explains the reasons for its decision, this is not the case here. See *Head v Phillips Camper Sales & Rental, Inc,* 234 Mich App 94, 113; 593 NW2d 595 (1999). Here, the trial court merely awarded all attorney fees and costs requested by defendants without explanation. Plaintiff is entitled to an evidentiary hearing to explore the attorney fees awarded as well as the appropriateness of other costs and of certain expert witness fees detailed in the bill of costs.

## VI. Interests of Justice Exception

The trial court did not err in rejecting plaintiff's argument that the "interests of justice" exception should preclude plaintiff from paying sanctions and fees.

We review for an abuse of discretion a trial court's decision whether to award costs in the "interest of justice" pursuant to MCR 2.403(O)(11). *Campbell v Sullins,* 257 Mich App 179, 205 n 9; 667 NW2d 887 (2003). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer,* 476 Mich 545, 557; 719 NW2d 842 (2006).

If a party has rejected a case evaluation award and the action proceeds to verdict, the rejecting party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. MCR 2.403(O)(1). This is a mandatory provision. But, in cases where a verdict is entered as a result of a ruling on a motion after rejection of the case evaluation, the trial court may refuse to award costs under MCR 2.403(O)(11), in the interest of justice. "[I]f the trial court finds on the basis of all the facts and circumstances of a particular case and viewed in light of the purposes of MCR 2.403(O) that unusual circumstances exist, it may invoke the 'interest of justice' exception found in MCR 2.403(O)(11)." See *Haliw v*

*Sterling Heights (On Remand)*, 266 Mich App 444, 449; 702 NW2d 637 (2005), quoting *Haliw v Sterling Heights*, 257 Mich App 689, 706-709; 669 NW2d 563 (2003), rev'd on other grounds 471 Mich 700 (2005). Interest of justice exceptions have been found, for example, in circumstances where: (1) it is a case of first impression, (2) a party has engaged in misconduct, or (3) the law is unsettled and substantial damages are at issue. *Haliw, supra,* 266 Mich App at 448-449, quoting *Luidens v 63rd Dist Court*, 219 Mich App 24, 35-36; 555 NW2d 709 (1996). In *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 466, 702 NW2d 671, 680 (2005) this Court reviewed the above mentioned factors and stated, "[t]hese factors are not exclusive. Other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception." The *Harbour* Court also noted that "a significant financial disparity between the parties" could be considered a sufficiently unusual circumstance so as to warrant the application of the "interest of justice" exception. *Id.* at 466.

Plaintiff argues that there is a significant financial disparity between the parties because plaintiff was disabled by the accident and relies on disability benefits from Chrysler, while defendants are corporations with substantial assets and can deduct the cost of litigation as a business expense. We find that the trial court did not abuse its discretion in rejecting plaintiff's request for an "interests of justice" exception. While it does appear that there is financial disparity between the parties, the trial court had the opportunity to review plaintiff's argument and determined that the financial disparity did not rise to the level of "unusual circumstances." Aside from merely stating that the parties are in financially different situations, plaintiff does not explain why this particular financial disparity should rise to the level of an "unusual circumstance." Case law allows, but does not require, the "interest of justice" exception to be applied to cases of financial disparity. Given that an abuse of discretion occurs only when a decision falls outside the principled range of outcomes, we decline to find that an abuse of discretion occurred.

## VII. Conclusion

We affirm the trial court's grant of summary disposition and vacate the trial court's award of attorney fees and costs and remand for the trial court to hold an evidentiary hearing and make specific findings, consistent with *Smith*, on the attorney fees plaintiff sought to recover in this case. During this hearing, the trial court should also make proper findings of fact regarding costs.

Affirmed in part and reversed in part and remanded for proceedings consistent with this proceeding. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Brian K. Zahra
/s/ Donald S. Owens