

STATE OF MICHIGAN
COURT OF APPEALS

FURNESS GOLF CONSTRUCTION, INC., f/k/a
CASTLE ROCK COMMUNICATIONS, INC.,

UNPUBLISHED
June 11, 2009

Plaintiff,

and

TRANSCONTINENTAL INSURANCE
COMPANY,

Intervening Plaintiff-Appellee,

v

RVP DEVELOPMENT CORPORATION,

Defendant-Appellant.

No. 279398
Manistee Circuit Court
LC No. 00-009766-CH

RVP DEVELOPMENT CORPORATION,

Plaintiff-Appellant,

v

FURNESS GOLF CONSTRUCTION, INC., f/k/a
CASTLE ROCK COMMUNICATIONS, INC.,

Defendant,

and

TRANSCONTINENTAL INSURANCE
COMPANY,

Intervening Defendant-Appellee.

No. 279399
Manistee Circuit Court
LC No. 00-09791-CK

Before: Judges Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

FITZGERALD, J. (*concurring in part and dissenting in part*).

I respectfully disagree with the majority's conclusion that case evaluation sanctions in this case are contractually limited to the amount of actual attorney fees paid by CNA on behalf of Furness.

Following a combined trial in 2001, a jury agreed with Furness that an "act of God" occurred, and the trial court entered a judgment of no cause of action in RVP's negligence/breach of contract case. The jury also found in Furness' favor in Furness' construction lien case, awarding \$527,464.34, plus interest. Further, because RVP rejected the case evaluation, the trial court awarded Furness case evaluation sanctions in the combined cases in the amount of \$330,188.00, plus costs and interest, pursuant to MCR 2.403(O)(6)(b).

RVP claimed an appeal as of right in this Court. This Court affirmed the judgment of no cause of action. However, this Court found that the evidence presented did not support a finding that \$385 was a reasonable hourly billing rate for Furness' counsel and reversed the award of case evaluation sanctions and remanded "to the trial court to determine reasonable attorneys' fees under MCR 2.403 . . ."¹

On remand, the trial court held an evidentiary hearing regarding attorney fees on May 9, 2007. Before presenting testimony, the attorney for RVP asserted that this Court's previous decision limited attorney fees to an hourly rate of \$259 and, therefore, it would be improper for CNA to present testimony that a reasonable hourly attorney fee in this case is somewhere between \$294 and \$443. RVP asserted that "CNA is bound by the Court of Appeals' decision, and they're collaterally estopped from raising additional evidence to try to attack the Court of Appeals' decision since they didn't appeal it." CNA disagreed, asserting that:

the Court of Appeals then went on to say at page 9, quote, there is no evidence to support this Court's conclusion that \$385 is a reasonable hourly billing rate in this case, unquote, because that hourly rate, quote, is higher than any hourly rate listed in the 2000 *Economics of Law Practice and Michigan Survey*. And quote, an attorney billing in the top five percentile with the same office location, experience, and type of practice as Attorney Verwys would charge an hourly rate of \$259, unquote.

That, I believe, is what we are here to do today. And that is to take testimony on what a reasonable hourly rate was for the time period in question, July and August of 2001, and whether in fact \$259 is the top amount that a top five percentile lawyer would charge.

And that is why Dr. Stiffman is here today.

¹ Unpublished per curiam opinion of the Court of Appeals, entered 8/3/2004 (Docket Nos. 241125 and 241126). The Supreme Court denied RVP's application for leave to appeal. *Furness Golf Construction, Inc. v RVP Development Corp*, 472 Mich 894; 695 NW2d 76 (2005).

The trial court overruled the objection to Dr. Stiffman's testimony, opining that because the Court of Appeals concluded that the record did not support the court's original award of attorney fees, CNA was entitled to make a record and the trial court was ordered to "determine reasonable attorney's fees under MCR 2.403, and the time and labor for the legal assistant under MCR 2.626 consistent with this opinion." The trial court concluded, "I think I clearly got it back remanded to determine reasonable attorney's fees, and he's calling a witness that we're going to see if he's an expert."

Dr. Lawrence Stiffman, the owner of Applied Statistics Laboratory, Inc., was qualified as an expert witness with respect to the question of what attorneys who fit certain fee profiles charged as hourly rates in Michigan in the year 2000. The trial court noted after voir dire of the witness that

... he's here to tell us that he has sampled what attorneys actually charge and bill through the State of Michigan, and indeed nationally. And he's here to tell us that there are variables apparently based on locality, apparently based on the size of the law firm, for example, which is not one of the factors enumerated by the Court of Appeals. But I think he's here to tell us that, in terms of the reality, there's a factor. That's a variable that's important. And others are important that he mentioned. So he's here to say someone who fits a fee profile.

Dr. Stiffman presented detailed testimony in support of his opinion that a reasonable hourly billing rate for the year 2000 for a shareholder or partner in practice for more than 25 years with a specialization and experience in complex civil litigation as inflated for the rate of inflation lies between \$304 and \$459, and the trial court presented a detailed analysis of its holding. The trial court concluded that:

the \$385 per hour figure is a proper figure. And the Court of Appeals didn't have a sufficient record for that figure. And I certainly have no criticism. And I accept that decision of the Court of Appeals and am respectful of it. But I think we do now have the data and the basis in the record. And so I think that the record supports that figure.

A trial court's grant of case evaluation sanctions is subject to de novo review on appeal. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000). However, a trial court's determination of reasonable attorney fees is reviewed for an abuse of discretion. *Id.* at 377; *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003).

MCR 2.403(O)(6)(b) allows a party to recover "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 case evaluation." In *Cleary v The Turning Point*, 203 Mich App 208, 212; 512 NW2d 9 (1993), this Court stated:

Nothing in the language of MCR 2.403(O) requires a trial court to find that reasonable attorney fees are equivalent to actual fees. *Trojanowski v Village of Kent City*, 175 Mich App 217, 227; 437 NW2d 266 (1988). Moreover, plaintiffs fail to set forth any specific case law that supports their position. We conclude, therefore, that the trial court did not abuse its discretion in awarding

defendant attorney fees calculated at an hourly rate higher than the hourly rate that defendant was charged by defense counsel.

And in this Court's previous opinion in this case, this Court stated:

The language of MCR 2.403(O)(6) does not limit the hourly rate for attorneys' fees to the rate actually charged by the prevailing party. *Cleary v The Turning Point*, 203 Mich App 208, 211-212; 512 NW2d 9 (1993). Instead, the trial court must determine a reasonable hourly rate. *Id.*⁸ In evaluating the reasonableness of an attorneys' fees, the trial court should consider the following factors: (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. *Zdrojewski v Murphy*, 254 Mich App 50, 72; 657 NW2d 721 (2002). Other factors considered by the trial court may include, the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the attorney, the fee customarily charged in that locality for similar services and the time limitations imposed by the client or the circumstances. *Bolt v City of Lansing*, 238 Mich App 37, 60; 604 NW2d 745 (1999), citing *In re Condemnation of Private Property for Hwy Purposes*, 209 Mich App 336, 341-342; 530 NW2d 183 (1995); MRPC 1.5(a)(1)-(8).

Thus, MCR 2.403 (O)(6) clearly does not limit reasonable attorney fees to the hourly rate actually charged by the attorney for the prevailing party.²

On appeal, RVP challenges only the trial court's decision not to limit the attorney fee award to *actual* attorneys' fees.³ Apparently realizing that MCR 2.403(O)(6) does not limit an

² RVP's reliance on the general rule that a subrogee may be limited to the amounts actually paid in discharging an obligation is misplaced. The cases on which RVP relies stand for the general principles disfavoring duplicative recoveries and discouraging recovery of anticipated future expenses. See, e.g., *Estate of Brian Hales, LIP v Trowbridge*, 182 Mich App 55; 451 NW2d 867 (1990); *Morrow v Shah*, 181 Mich App 742; 450 NW2d 96 (1989).

³ In *Smith v Khoury*, 481 Mich 519, 530-531; 751 NW2d 472 (2008), our Supreme Court outlined a process that should be employed by trial courts when awarding attorney fees under MCR 2.403. Our Supreme Court held that "a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services In determining this number the court should use reliable surveys or credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee." The Supreme Court added that this preliminary number may be adjusted upward or downward on the basis of the factors found in Michigan Rule of Professional Conduct 1.5(a) and *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982). We need not review the reasonableness of the fees imposed by the trial court, as RVP

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award of reasonable attorneys' fees to *actual* fees charged, RVP now seems to agree that if Furness were pursuing sanctions an award would not be limited to actual attorney fees charged. RVP contends, however, that because CNA is pursuing sanctions as a subrogee of Furness, CNA is limited to an award of *actual* fees paid pursuant to the transfer of rights provision in the insurance contract between Furness and CNA. I disagree.

RVP is not a party to the insurance contract between Furness and CNA and, therefore, does not have standing to assert the terms of the contract in defense of CNA's motion for case evaluation sanctions. The majority concludes that RVP has standing to challenge the scope of CNA's subrogation rights because, as the party ultimately responsible for the payment of case evaluation sanctions, RVP has an interest "that is singularly unique and on which it has every reason to ensure sincere and vigorous advocacy." There is no doubt that RVP has the right to defend the motion for sanctions. In fact, this is precisely what RVP did in arguing with regard to the reasonableness of the attorney fees. However, RVP does not have standing to challenge the scope of CNA's subrogation rights under the insurance contract between Furness and CNA, or to seek a declaration under the declaration that CNA's subrogation claim is limited to the amount of attorney fees actually paid, because it is not a party to the contract, is not a third-party beneficiary of the contract, and has no interest in the contract. Rather, RVP is attempting to use the contract between Furness and CNA to diminish the amount of case evaluation sanctions for which it, as the non-prevailing party, might be responsible under MCR 2.403(O)(6). Indeed, under the majority's reasoning, RVP is placed in a better position (i.e., liable only for actual attorney fees, rather than reasonable attorney fees) simply because CNA, rather than Furness, brought the motion for case evaluation sanctions.⁴ While it is true that RVP is the party that ultimately is responsible for payment of the sanctions, the amount of sanctions to be awarded under the court rule is not dependent upon whether it is Furness or CNA that brings the motion. If CNA is awarded more in attorney fees as a case evaluation sanction than it actually paid in defense of the lawsuit against Furness, Furness would be the appropriate party to raise an argument that CNA is contractually limited to recovering only the amount it paid, as Furness might arguably be entitled to any attorney fees awarded beyond the amount paid by CNA.

RVP has not presented any other challenge to the trial court's decision that an hourly attorney fee of \$385 is reasonable in this case.⁵ Consequently, RVP has provided no grounds on

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has not presented a reasonableness challenge to the fees awarded on remand. Rather, the appellant is challenging only the court's refusal to limit the attorney fee award to *actual* attorney fees. In any event, I note that the trial court's analysis, which was rendered before the release of the Supreme Court's opinion in *Smith*, is consistent with *Smith* and supports the conclusion that the hourly fee awarded was reasonable, even though it was in excess of the actual fee charged.

⁴ Indeed, I have to wonder if RVP would be presenting a similar argument regarding "actual fees paid" if CNA had paid attorney fees at a significantly higher rate.

⁵ Contrary to RVP's contention, this Court did not previously hold that \$385 could not be a reasonable hourly attorney fee in this case. Rather, this Court found that the evidence that had been presented at that time did not support a finding that \$385 was a reasonable hourly attorney fee.

which to conclude that the trial court abused its discretion by finding that \$385 is a reasonable hourly attorney fee in awarding case evaluation sanctions in this case. I would affirm.

/s/ E. Thomas Fitzgerald