

STATE OF MICHIGAN
COURT OF APPEALS

ANN COBLENTZ, LEE COBLENTZ, JOHN
LEWANDOWSKI and DEBORAH
LEWANDOWSKI,

UNPUBLISHED
April 15, 2010

Plaintiffs-Appellants,

v

CITY OF NOVI,

No. 288764
Oakland Circuit Court
LC No. 2003-046760-CZ

Defendant-Appellee.

Before: WHITBECK, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's October 2008 opinion and order concerning attorney fees, costs, and punitive damages. We affirm in part, vacate in part, and remand this case to the trial court for a re-determination of the attorney-fee issue pursuant to *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008).

Plaintiffs claim that the trial court erred in failing to apply *Smith* to its attorney-fee determination and awarding an hourly fee less than plaintiffs requested, and in failing to award punitive damages. We agree that the trial court erred in failing to apply *Smith*, but we disagree that the trial court erred in failing to award punitive damages.

This Court reviews for an abuse of discretion a trial court's award of attorney fees and costs. *Smith*, 481 Mich at 526. An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Id.*

In the trial court, plaintiffs moved for attorney fees, costs, and punitive damages pursuant to a November 8, 2006, Supreme Court order.¹ The Supreme Court order directs defendant to

¹ This case has a complicated procedural history and has spawned multiple appeals to this Court and the Michigan Supreme Court. See, e.g., *Coblentz v City of Novi*, 475 Mich 558, 562-566; 719 NW2d 73 (2006).

pay plaintiffs their actual damages attributable to responding to a vexatious motion that defendant had filed in the Supreme Court. *Coblentz v City of Novi*, 477 Mich 1218; 723 NW2d 206 (2006). Plaintiffs sought \$5,928 in attorney fees (15.6 hours at \$380 an hour), \$59.48 in costs, and \$5,987.48 in punitive damages. The trial court held an evidentiary hearing on the request, which took place on several days over the course of months. In its October 2008 opinion and order, the trial court awarded plaintiffs \$2,574 in attorney fees (15.6 hours at \$165 an hour) and \$59.48 in costs, and it denied punitive damages. The trial court's opinion and order briefly addressed the parties' arguments, but did not provide any analysis concerning its award.

Smith provides, in relevant part:

In determining a reasonable attorney fee, a trial court should first determine the fee customarily charged in the locality for similar legal services. In general, the court shall make this determination using reliable surveys or other credible evidence. Then, the court should multiply that amount by the reasonable number of hours expended in the case. The court may consider making adjustments up or down to this base number in light of the other factors listed in *Wood* [*v Detroit Automobile Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982), mod by *Smith, supra*.] and MRPC 1.5(a). In order to aid appellate review, the court should briefly indicate its view of each of the factors. [*Smith*, 481 Mich at 537.]

Smith invokes *Wood*, which lists the following six factors to be considered in determining a reasonable attorney fee:

(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. [*Wood*, 413 Mich at 588 (citations and quotation marks omitted).]

Smith also refers to MRPC 1.5(a), which lists the following factors, many of which overlap with the *Wood* factors:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer performing the services; and

(8) whether the fee is fixed or contingent.

The order appealed from makes no mention of any of these factors, nor does it reflect any analysis.

When the Michigan Supreme Court reviewed the trial court's April 2008 opinion and order regarding a different award of attorney fees that is not at issue here and that involved the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, it concluded that the trial court erred in its consideration of certain factors, including defendant's level of culpability and whether the requested attorney fee would bankrupt defendant, because those factors were not authorized by the substantive statute at issue or by decisions of the Michigan Supreme Court. *Coblentz v City of Novi*, 485 Mich 961, 961; 774 NW2d 526 (2009). It remanded the case to the trial court "for a re-determination of the plaintiffs' reasonable attorney fees pursuant to the factors set forth in *Smith . . .*" *Id.*

In the present appeal, there is no attorney-fee analysis at all, let alone a *Smith*-based analysis, before this Court for review. Because our Supreme Court has indicated that attorney-fee issues should be decided pursuant to *Smith*, we remand this case for a re-determination of the attorney-fee issue pursuant to *Smith*.² Furthermore, the trial court on remand should bear in mind that the Supreme Court's November 2006 order limits defendant's liability to the payment of damages attributable to "responding to the motion in this Court." *Coblentz*, 477 Mich at 1218. Thus, the Supreme Court's November 2006 order may not be used as authority for damages extending beyond plaintiffs' response in the Supreme Court

We next conclude that the trial court did not err in its denial of punitive damages. First, the Supreme Court's November 2006 order does not provide for an award of punitive damages. The order notes that defendant filed a vexatious motion under MCR 7.316(D)(1), and it orders defendant "to pay to the plaintiffs their *actual* damages attributable to responding to the motion in this Court." *Coblentz*, 477 Mich at 1218 (emphasis added). Even though MCR 7.316(D)(1) refers to the possible assessment of "actual and punitive damages," the Court's order refers only to *actual* damages.

Moreover, nothing in MCR 7.316 *compels* an award of punitive damages. MCR 7.316(D)(1) provides that the Supreme Court "may . . . assess actual and punitive damages . . . when it determines that an appeal or any of the proceedings in an appeal was vexatious" MCR 7.316(D)(2) goes on to state that "[d]amages may not exceed actual damages and expenses incurred by the opposing party because of the vexatious appeal or proceeding, including

² The *Smith* case had not been decided when the trial court issued its FOIA-based attorney-fee ruling in April 2008, but it had been decided by the time the trial court issued the October 2008 order challenged here. If *Smith* is to be applied on remand to the FOIA attorney-fee issue, we see no reason why it would not apply to the instant attorney-fee issue.

reasonable attorney fees, and punitive damages in an added amount not exceeding the actual damages.” Plaintiffs suggest that MCR 7.316(D)(2) *requires* an award of punitive damages, but we disagree. This subsection merely explains that punitive damages, if they are awarded, must not exceed actual damages.

Even assuming, for purposes of argument, that punitive damages under MCR 7.316(D)(2) were an *option* here, despite the Supreme Court’s reference to only “actual damages” in the pertinent order, it would not be an abuse of discretion to deny such damages. Indeed, given that plaintiffs prevailed on only some of their claims in the Supreme Court, it was not exceedingly egregious for defendant to contest the imposition of costs on the basis that plaintiffs were not true prevailing parties.³ See MCR 7.318(B).

We vacate the trial court’s October 2008 opinion and order concerning attorney fees⁴ and remand this case to the trial court for a re-evaluation of the attorney-fee issue pursuant to *Smith* and consistent with this opinion.⁵ We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood

³ We are not disputing the Supreme Court’s finding that defendant’s challenge to the imposition of costs was vexatious, but merely pointing out that *punitive* damages were not a clear necessity here.

⁴ We note that plaintiffs do not appeal the award of costs.

⁵ The trial court need not hold additional evidentiary hearings unless it believes them to be necessary.