

FILED: August 21, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

QUICK COLLECT, INC.,
an Oregon corporation,
Plaintiff-Appellant,

v.

BRIAN PATRICK HIGGINS,
Defendant-Respondent.

Multnomah County Circuit Court
100506548

A149114

Edward J. Jones, Judge.

Argued and submitted on May 08, 2012.

Willard Merkel argued the cause for appellant. With him on the briefs was Merkel & Associates.

Kenneth E. Kahn II argued the cause and filed the brief for respondent.

Before Ortega, Presiding Judge, and Hadlock, Judge, and Edmonds, Senior Judge.

ORTEGA, P. J.

Affirmed.

1 ORTEGA, P. J.

2 In this appeal, plaintiff challenges the trial court's denial of plaintiff's
3 exceptions to an arbitrator's award of attorney fees to defendant, contending that
4 defendant's fee petition was fatally defective or, alternatively, that defendant was
5 awarded fees for noncompensable work. We affirm, concluding that plaintiff did not
6 preserve its argument that the fee petition was fatally defective, and that the trial court did
7 not abuse its discretion in denying plaintiff's exceptions under ORS 36.425(6), and
8 awarding defendant \$15,800 in attorney fees.

9 The facts are undisputed. Plaintiff, a debt collection company, originally
10 filed a complaint in small claims court in December 2009 to collect a debt owed by
11 defendant for medical treatment. That case was transferred to circuit court and then
12 dismissed without prejudice by stipulated judgment. Plaintiff again filed suit in circuit
13 court in May 2010, seeking to recover the debt. Several months later, the case was
14 transferred to court-mandated arbitration. *See* ORS 36.400 (establishing mandatory
15 arbitration program in circuit court for certain cases). In January 2011, before the
16 arbitration hearing, defendant filed counterclaims that alleged that plaintiff had engaged
17 in unlawful collection practices in violation of the federal Fair Debt Collection Practices
18 Act, 15 USC sections 1692 to 1692p, and Oregon's statutory counterpart, ORS 646.639.

19 After the arbitration hearing, the arbitrator issued an award in favor of
20 plaintiff on the debt, but also issued an award in favor of defendant on his counterclaims
21 for unlawful collection practices. Accordingly, the arbitrator awarded plaintiff \$5,584.00

1 on its claim, plus pre-award interest and costs, and \$3,062.50 in attorney fees. The
2 arbitrator awarded defendant \$1,200 for his counterclaims, as well as costs, and \$15,800
3 in attorney fees.

4 Pursuant to ORS 36.425(6),¹ plaintiff filed an exception to the arbitrator's
5 award of costs and attorney fees to defendant, acknowledging that defendant was entitled
6 to fees by statute, but contending that the fees sought were "unreasonable and
7 unjustified." In particular, plaintiff maintained that defendant could not recover any fees
8 that were incurred before defendant filed his counterclaims. Plaintiff explained that,
9 because defendant had prevailed on his counterclaims, but not on plaintiff's claim on the
10 debt, defendant was only eligible to recover fees incurred while prosecuting his
11 counterclaims. In addition, plaintiff generally objected to the amount of fees awarded for
12 work performed after defendant filed his counterclaims as "unreasonable."

¹ ORS 36.425(6) provides:

"Within seven days after the filing of a decision and award under subsection (1) of this section, a party may file with the court and serve on the other parties to the arbitration written exceptions directed solely to the award or denial of attorney fees or costs. Exceptions under this subsection may be directed to the legal grounds for an award or denial of attorney fees or costs, or to the amount of the award. Any party opposing the exceptions must file a written response with the court and serve a copy of the response on the party filing the exceptions. Filing and service of the response must be made within seven days after the service of the exceptions on the responding party. A judge of the court shall decide the issue and enter a decision on the award of attorney fees and costs. If the judge fails to enter a decision on the award within 20 days after the filing of the exceptions, the award of attorney fees and costs shall be considered affirmed. The filing of exceptions under this subsection does not constitute an appeal under subsection (2) of this section and does not affect the finality of the award in any way other than as specifically provided in this subsection."

1 Defendant responded to plaintiff's exception by outlining the history of the
2 case and indicating that defendant, in response to plaintiff's complaint in small claims
3 court, had actually filed an answer and counterclaims back in December 2009. In
4 addition, defendant countered that his fee request was reasonable, particularly because he
5 had reduced it to 62 hours of work from the 73.7 hours his attorney actually spent on the
6 case.

7 The trial court held a hearing on the attorney fees issue and subsequently
8 entered an order concluding that

9 "the arbitrator's decision to award the \$15,800.00 [is] reasonable. To the
10 extent there is any issue about the inclusion of hours unrelated to the claim
11 upon which the defendant succeeded, those concerns are adequately
12 addressed by the defendant's voluntary reduction in the number of hours for
13 which payment is sought."

14 The trial court then entered a general judgment. Plaintiff appeals.

15 On appeal, plaintiff assigns error to the trial court's denial of its exceptions
16 to the arbitrator's attorney fee award. First, plaintiff argues that defendant's fee petition
17 was fatally defective because it "fails to segregate compensable from noncompensable
18 time so that a compensable fee could be calculated." In particular, plaintiff asserts that
19 the fee petition does not adequately identify which tasks are related to defending against
20 plaintiff's debt claim and which tasks are related to prosecuting defendant's
21 counterclaims. Plaintiff contends, relying on ORCP 68 C(4)(a)(i), that defendant's failure
22 to segregate his time entries in such a manner renders his fee petition deficient in its
23 entirety as a matter of law.

1 Alternatively, plaintiff challenges the amount of attorney fees awarded to
2 defendant, asserting that "the majority of the task descriptions contained in the fee
3 petition are for noncompensable work." Plaintiff explains that the statutes authorizing
4 attorney fees to defendant, ORS 646.641(2) and 15 USC section 1692k(a)(3), only allow
5 recovery of the fees incurred to prosecute an unlawful collection practices action, *i.e.*,
6 defendant's counterclaims. Plaintiff identifies time periods in defendant's fee petition that
7 it maintains include work that could not be related to defendant's prosecution of his
8 counterclaims. First, plaintiff contends that 17 hours and 29 minutes of time billed
9 between November 30, 2009 and February 23, 2010, was not compensable because that
10 work occurred before plaintiff filed the present action. To the extent that any of the work
11 in that time frame related to the action initially filed in small claims court, plaintiff
12 contends that that time is not compensable because that case was dismissed by a
13 stipulated judgment that "did not provide either party a fee award." Second, plaintiff
14 asserts that 18 hours and 48 minutes of time billed between June 21, 2010 and January
15 11, 2011, was not compensable because those tasks relate exclusively to the defense of
16 plaintiff's debt claim. Third, plaintiff attacks 35 hours and 3 minutes billed between
17 January 12, 2011 and April 24, 2011, claiming that defendant's use of "block billing"
18 makes it impossible to determine how much time defendant expended defending against
19 plaintiff's claim.

20 Finally, plaintiff attacks the trial court's award of fees, asserting that,
21 because ORS 646.641 and 15 USC section 1692k(a)(3) allow a discretionary award of

1 attorney fees, the court was required to consider the factors under ORS 20.075 for
2 discretionary fee awards. Plaintiff maintains that nothing in the record indicates that the
3 trial court considered those factors in denying plaintiff's exceptions to the arbitrator's fee
4 award.

5 Defendant responds that plaintiff failed to preserve most of the arguments it
6 now makes on appeal. In defendant's view, plaintiff's written exceptions to the
7 arbitrator's fee award only objected generally to the recovery of any attorney fees
8 incurred prior to the date defendant filed his counterclaims, and also to some of the fees
9 sought for time billed subsequent to that time. Defendant contends that plaintiff's
10 objections at the trial court's hearing also were focused on the propriety of awarding fees
11 for work performed prior to the date of filing the counterclaims. In short, defendant
12 complains that plaintiff's main arguments on appeal--that the fee petition was fatally
13 defective and that defendant's use of block billing lacks the specificity to allow the court
14 to determine which work was compensable--are fundamentally different than the
15 arguments presented to the trial court.

16 Defendant argues that plaintiff also loses on the merits. First, defendant
17 maintains that he is entitled to, and did recover, "the fees reasonably incurred to achieve
18 the success that the party actually achieved." *Freedland v. Trebes*, 162 Or App 374, 378,
19 986 P2d 630 (1999). Defendant also asserts that the only arguments that plaintiff
20 preserved--*i.e.*, plaintiff's challenges to specific time entries--were resolved appropriately
21 by the trial court, which concluded that defendant's voluntary reduction of 11.7 hours was

1 sufficient to account for any time sought that did not fairly relate to defendant's
2 prosecution of his counterclaims.

3 We begin with preservation. A party claiming error must present the claim
4 of error to the trial court before we will consider it on appeal. ORAP 5.45(1). That
5 requirement has both prudential and pragmatic purposes. *Peeples v. Lampert*, 345 Or
6 209, 220, 191 P3d 637 (2008). As a prudential matter, one purpose of the preservation
7 rule is to allow the adversary to present its position and to permit the court to understand
8 and avoid or correct the error. *Peiffer v. Hoyt*, 339 Or 649, 656-57, 125 P3d 734 (2005).
9 In addition, preservation "ensures fairness to an opposing party, by permitting the
10 opposing party to respond to a contention and by otherwise not taking the opposing party
11 by surprise." *Peeples*, 345 Or at 219. It also "fosters full development of the record,
12 which aids the trial court in making a decision and the appellate court in reviewing it."
13 *Id.* at 219-20.

14 Plaintiff's written exceptions to the trial court, which under ORS 36.425(6)
15 "may be directed to the legal grounds for an award or denial of attorney fees or costs, or
16 to the amount of the award," objected to "any recovery of attorney's fees for time and fees
17 billed prior to the filing of [d]efendant's [c]ounterclaim, because defendant did not prevail
18 on that claim * * *. Plaintiff further objects to the award of costs and fees requested
19 subsequent to the counterclaim as unreasonable."

20 At the hearing, plaintiff explained that it objected to an award of fees for
21 anything done before defendant filed his counterclaims on January 12, 2011, and clarified

1 that "we're not objecting to the fees that were incurred on their counterclaim, which was
2 filed on January 12th of this year after the case had been open two years." Further,
3 plaintiff complained that defendant's attorney fee petition "included a whole bunch of
4 time that was spent on the part of the case that they lost, and we're objecting to any
5 attorney fees prior to January 12th, when he sat down and drafted the answer in the
6 counterclaim." When asked by the court what the correct amount of fees might be,
7 plaintiff identified several time entries after January 12, 2011, that it contended reflected
8 an unreasonable amount of time spent on relatively simple tasks.

9 Later in the hearing, the court set out its understanding of plaintiff's
10 exceptions:

11 "[Court]: Well, there's two different issues, obviously. There's one,
12 time spent on matters for which no compensation should be paid.

13 "[Plaintiff's Counsel]: Exactly.

14 "* * * * *

15 "[Court]: Second class, time spent on matters that should be paid
16 but the time is more than a reasonable lawyer would spend.

17 "[Plaintiff's Counsel]: Correct, Your Honor.

18 "* * * * *

19 "[Court]: And on your first category you're objecting to everything
20 before or after--everything before some--January of 2010, right?

21 "[Plaintiff's Counsel]: Wednesday, January 12th, 2011, * * *. That
22 was when the counterclaim was prepared and filed, and our position is clear
23 on that--and I'm repeating myself now.

24 "* * * * *

1 "And our position is--

2 "[Court]: Nothing done before that time should get paid.

3 "[Plaintiff's counsel]: Be paid. And after that--

4 "[Court]: After that--

5 "[Plaintiff's Counsel]: --the two glaring examples of the twelve
6 hours and the seven hours, we think that that was either a typo--I mean
7 that's--Is it--I think humanly possible, could I sit down for twelve hours?
8 Did I take a break? Did I have lunch? Did I go to dinner? Twelve hours to
9 review a case that is pretty clear-cut on its face--This is not a complicated
10 case, Your Honor. There's virtually no research that is required in a case
11 like this. It was clear from the very outset."

12 At the end of the hearing, the court stated:

13 "I will look at the fee issue, come to my own determination of the extent to
14 which the waived hours by [defendant] are an accurate reflection of your
15 argument that there were hours that--prehours or unsuccessful hours or
16 hours related to losing claims that shouldn't be paid, that may be a wash. I
17 don't know. I'll come up with a--I'll look at that."

18 At no time did plaintiff present the trial court with an argument that
19 defendant's fee petition was invalid as a matter of law because it failed to comply with
20 ORCP 68 C or otherwise impermissibly "commingled" time entries for prosecuting
21 defendant's counterclaim and defendant's claim. Plaintiff, relying on *State v. Hitz*, 307 Or
22 183, 188, 766 P2d 373 (1988), contends that it is not necessary to raise a particular
23 argument or cite a particular authority to preserve an issue, as long as the court
24 understood and identified the issue. And plaintiff argues that the court was fairly
25 informed during the hearing of its argument that the petition was fatally defective. We
26 disagree. As reflected in the colloquy between the court and plaintiff's counsel, the court
27 understood plaintiff to be arguing that defendant could not recover any fees for work

1 prior to January 12, 2011, because that was the day the counterclaim was filed, and
2 separately, that some of defendant's time entries after January 12, 2011, reflected
3 unreasonable amounts of time spent on relatively simple tasks. Those arguments do not
4 reflect plaintiff's current contention that defendant's fee petition was fatally defective as a
5 matter of law; to the contrary, plaintiff acknowledged that it was not challenging
6 defendant's entitlement to fees incurred in prosecuting his counterclaim. Accordingly,
7 plaintiff's argument that the fee petition was fatally defective is not preserved for our
8 review.

9 Similarly, plaintiff failed to preserve its contention on appeal that the 35
10 hours of time billed between January 12, 2011 and April 24, 2011, should not have been
11 awarded because defendant "block-billed." At the hearing, plaintiff identified a few
12 specific time entries from that time period and argued that defendant had spent too much
13 time on what plaintiff deemed relatively simple tasks. Plaintiff did not suggest to the
14 court that, because defendant "block-billed," it was impossible to tell how much time
15 defendant spent defending plaintiff's claims and prosecuting his own counterclaims.
16 Accordingly, we do not consider plaintiff's argument that time after January 12, 2011,
17 was not compensable because it was "block-billed."²

18 In addition, plaintiff did not preserve the argument he now makes on appeal
19 that any fees incurred before February 23, 2010, were not compensable because the

² We note that, on appeal, plaintiff does not reprise the argument he made to the trial court that certain time entries reflected an unreasonable amount of time spent on simple tasks.

1 action that is the subject of this appeal had not yet been filed as of that date, and the prior
2 action had been dismissed by stipulated judgment that "did not provide either party a fee
3 award." Plaintiff did not raise the preclusive effect of any prior stipulated judgment to
4 the trial court, and we do not consider that contention on appeal.³

5 Plaintiff did, however, preserve its argument that defendant is not entitled
6 to any fees incurred before January 12, 2011, and that defendant should only be awarded
7 fees for time spent prosecuting his counterclaims. We review the trial court's legal
8 determinations with respect to entitlement to attorney fees for errors of law. *Barber v.*
9 *Green*, 248 Or App 404, 410, 273 P3d 294 (2012). We review the amount of an attorney
10 fee award for an abuse of discretion. *Ashley v. Garrison*, 162 Or App 585, 591, 986 P2d
11 654 (1999).

12 As noted, plaintiff did not challenge defendant's entitlement to attorney fees
13 under ORS 646.641 and 15 USC section 1692k(a)(3). Rather, after acknowledging to the
14 trial court that defendant was entitled to recover fees related to his counterclaim, plaintiff
15 argued that defendant should not be awarded fees for any work performed before filing
16 his counterclaims. Plaintiff is incorrect to the extent that he now argues that, as a matter
17 of law, when a statute authorizes an award of attorney fees to a party who prevails in the
18 proceeding, fees are only available for work that occurred after the date on which the

³ Moreover, the record does not include the stipulated judgment; accordingly, even if preserved, we would have no manner of reviewing plaintiff's contention on this point. *See Farhang v. Kariminaser*, 232 Or App 353, 356, 222 P3d 712 (2009) (it is appellant's burden to provide the appellate court with a record adequate to demonstrate trial court error).

1 claim or counterclaim was filed. As we recently reiterated, "[s]tatutes that authorize an
2 award of attorney fees to a party who succeeds or prevails in a proceeding authorize an
3 award of fees reasonably incurred to achieve the success that the party actually
4 achieved." *Fadel v. El-Tobgy*, 245 Or App 696, 709, 264 P3d 150 (2011), *rev den*, 351
5 Or 675 (2012) (internal quotation marks omitted). In *Fadel*, we explained that, because a
6 plaintiff's attorney often must perform a significant amount of work before filing a
7 complaint, "the court is not limited to awarding only those fees incurred after the plaintiff
8 filed her complaint." *Id.* Accordingly, the legal principle that plaintiff advances is
9 incorrect, and the trial court was not prohibited from awarding defendant fees for work
10 performed before January 12, 2011, that were reasonably incurred to achieve success on
11 defendant's counterclaims.

12 To the extent that plaintiff is challenging the amount of the trial court's fee
13 award, we conclude that the court did not abuse its discretion. Plaintiff's exception to the
14 arbitrator's award asserted that the arbitrator awarded fees for work that related only to
15 defending plaintiff's claim. Plaintiff did not identify specific time entries, but rather
16 challenged all time entries before January 12, 2011. The trial court, in its ruling,
17 indicated that plaintiff's concern that defendant's fee petition included hours that were
18 unrelated to defendant's counterclaim was "adequately addressed by * * * defendant's
19 voluntary reduction in the number of hours for which payment is sought." Having
20 reviewed the fee petition, we cannot conclude that the trial court abused its discretion in
21 so deciding, particularly where, as here, plaintiff only generally objected to all time

1 entries before a certain date, and did not identify specific time entries and task
2 descriptions as unrelated to defendant's claims.

3 Finally, we address plaintiff's argument that the attorney fee award should
4 be reversed because the trial court record did not indicate that it considered the factors in
5 ORS 20.075 related to discretionary fee awards. ORS 20.075 generally governs
6 situations in which a court has discretion to decide whether to award attorney fees. ORS
7 20.075(1) provides several factors that a court must consider when deciding if fees should
8 be awarded. If the court decides to award fees under subsection (1), ORS 20.075(2)
9 requires the court, in deciding the amount of the award, to consider the factors in ORS
10 20.075(1), as well as additional factors in ORS 20.075(2)(a) to (h). In *McCarthy v.*
11 *Oregon Freeze Dry, Inc.*, 327 Or 185, 190-91, 957 P2d 1200 (1998), the Supreme Court,
12 when discussing the need for findings when deciding attorney fee awards, stated:

13 "Efficient and meaningful appellate review for abuse of discretion
14 cannot occur on the present record, because we can only speculate about the
15 possible relevant facts and legal criteria relied on for the court's award of
16 attorney fees. Adequate findings about those matters need not be complex
17 or lengthy. Rather, they must describe the relevant facts and legal criteria
18 for the court's decision to award or deny attorney fees in any terms that are
19 sufficiently clear to permit meaningful appellate review."

20 In explaining that requirement, the court noted that, "[s]tanding alone, the
21 absence of explanatory findings to support an award or denial of attorney fees is not a
22 ground for reversal." *Id.* at 189. Further,

23 "the objections of a party who resists a petition for attorney fees play an
24 important role in framing any issues that are relevant to the court's decision
25 to award or deny attorney fees. No party will be heard to complain of the
26 absence of a finding by the court on an issue that the party did not raise in a

1 petition, objection, or reply * * *. Moreover, the court need address only
2 the objection or objections that are material to its decision."

3 *Id.*

4 Here, plaintiff acknowledged that defendant was entitled to attorney fees
5 for work related to his counterclaims. Therefore, plaintiff cannot now complain that the
6 court failed to consider whether a discretionary fee award was appropriate under ORS
7 20.075(1). Further, as we have explained, plaintiff's objections to the trial court were
8 limited to a general objection to fees incurred before January 12, 2011, and its contention
9 that defendant was awarded fees for work related only to defending plaintiff's claims.
10 The trial court disagreed with the former objection at the hearing and explicitly addressed
11 the latter in its order awarding fees:

12 "To the extent there is any issue about the inclusion of hours unrelated to
13 the claim upon which the defendant succeeded, those concerns are
14 adequately addressed by the defendant's voluntary reduction in the number
15 of hours for which payment is sought."

16 Plaintiff's objections framed the issues relevant to the trial court's decision, and the court's
17 findings are sufficient for efficient and meaningful appellate review.

18 Affirmed.