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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 3/14/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CATHERINE PANELLA,) 1 CA-CV 12-0339
)
Plaintiff/Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MAKENZIE LEA ABALOS,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Defendant/Appellee.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-009050

The Honorable John Christian Rea, Judge

VACATED AND REMANDED

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P O R T L E Y, Judge

¶1 Catherine Panella ("Panella") challenges the award of sanctions to Makenzie Lea Abalos ("Abalos") pursuant to Arizona

Rule of Civil Procedure ("Rule") 68(g). For the following reasons, we vacate the award and remand the case.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Panella sued Abalos for injuries related to an automobile accident. Abalos made a Rule 68 offer of judgment but Panella did not accept the offer. The case was tried, and the jury returned a defense verdict.

¶3 Abalos then filed her statement of costs, seeking reimbursement for filing or appearance fees, deposition fees, and expert witness fees. Abalos did not identify that she was seeking Rule 68(g) sanctions, but a footnote in the statement of costs identified the date of her offer of judgment.

¶4 Panella objected to the statement of costs and argued that expert witness fees cannot be awarded under Arizona Revised Statutes ("A.R.S.") section 12-332 (West 2013). Abalos replied by arguing that Rule 68(g) "entitled [her] to double her taxable costs and reasonable expert witness fees." Without objection, Panella replied and argued that Abalos should have provided documentary evidence supporting the claim that she was entitled to \$5,121.88 in expert witness fees.

¶5 The trial court granted Abalos's requests for costs and Rule 68(g) sanctions and entered judgment against Panella for \$6,169.48. This appeal followed.

DISCUSSION

¶16 Panella asserts that the court erred by awarding Abalos's expert witness fees as a Rule 68(g) sanction.¹ She contends Abalos did not submit any documentary evidence that she incurred the expert witness fees after making the offer of judgment. Although Abalos's statement of costs only listed that her expert witness fees totaled \$5,121.88, she contends that her attorney's verification of the statement of costs was sufficient evidence that she incurred the expert witness fees.

¶17 We review an award of sanctions for an abuse of discretion because trial courts "generally have wide discretion in assessing costs and sanctions." *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 15, ¶ 31, 261 P.3d 784, 790 (App. 2011). A court abuses its discretion when its actions are "clearly untenable, legally incorrect, or amount to a denial of justice." *State ex rel. Thomas v. Newell*, 221 Ariz. 112, 114, ¶ 6, 210 P.3d 1283, 1285 (App. 2009).

¹ Rule 68(g) provides:

If the offeree rejects an offer and does not later obtain a more favorable judgment other than pursuant to this Rule, the offeree must pay, as a sanction, reasonable expert witness fees and double the taxable costs, as defined in A.R.S. § 12-332, incurred by the offeror after making the offer.

Ariz. R. Civ. P. 68(g).

¶18 Before expert fees can be awarded as sanctions pursuant to Rule 68(g), the court must determine whether the expert witness fees were "reasonably calculated to produce evidence for presentation at trial." *Flood Control Dist. v. Paloma Inv. Ltd. P'ship*, 230 Ariz. 29, ___, ¶ 58, 279 P.3d 1191, 1207 (App. 2012). For example, in *Lohmeier v. Hammer*, we found that there was ample evidence to support the trial court's partial award of the requested expert fees as sanctions. 214 Ariz. 57, 62-63, ¶¶ 17, 19-20, 148 P.3d 101, 106-07 (App. 2006). Not only did we find that the expert's testimony was hotly contested, but that "the record reflects that [the expert] provided billing statements that adequately detailed the general type of work he performed, his hourly rate, and related expenses." *Id.* at ¶ 20; see also *Flood Control Dist.*, 230 Ariz. at ___, ¶ 62, 279 P.3d at 1208 (finding that the trial court did not abuse its discretion by denying the expert fees as sanctions because there was no evidence that identified the hours expended, which related to the presentation of evidence at trial).

¶19 Here, Abalos did not provide any information to support her request for an award of expert fees. She did not present itemized billing statements that explained how many hours the expert worked after the offer was made, what he did or what fees were incurred in preparing for the trial presentation.

See, e.g., *Levy v. Alfaro*, 215 Ariz. 443, 444, ¶ 4, 160 P.3d 1201, 1202 (App. 2007) (explaining that the defendant's calculations of its expert witness fees identified which "portion of the expert witness fees was for time spent by the experts testifying in court" and which portion was "spent reviewing depositions, conferencing with attorneys, preparing to testify, and other pre-trial activities"). Abalos merely listed the total amount she sought in her statement of costs.

¶10 She argues, however, that the verified statement of costs was sufficient for the court to award the expert's fees as a sanction. We disagree. Counsel's verification signature on the statement of costs merely attested that Abalos sought an award of expert fees. The verification did not provide any detail that would allow the court to independently evaluate what expert fees Abalos incurred after the offer of judgment and whether those fees were reasonable. Consequently, because the court was unable to assess what expert fees were incurred after the offer of judgment and whether those were reasonable, the court abused its discretion in awarding those fees as sanctions.

¶11 Citing *Peters v. M & O Construction, Inc.*, 119 Ariz. 34, 36, 579 P.2d 72, 74 (App. 1978), Abalos, however, argues that the trial court did not abuse its discretion because the sanctions were supported by some reasonable evidence. Although she is entitled to Rule 68(g) sanctions because she fared better

than her offer of judgment, the court has to evaluate the reasonableness of expert witness fees before determining the amount of sanctions to be awarded. *Santee v. Mesa Airlines, Inc.*, 229 Ariz. 88, 90, ¶ 8, 270 P.3d 915, 917 (App. 2012). Because Abalos did not present any billing statements or other documentary evidence, the court did not evaluate the reasonableness of the expert fee request pursuant to *Lohmeier* and *Flood Control District*.

¶12 Abalos also claims that we should not consider the argument that she failed to provide itemized billing statements because Panella only raised it in her "Reply to Defendant Abalos' Response to Plaintiffs' Objection to Defendant Abalos' Statement of Costs," which was, in essence, a sur-reply. The pleading, however, was not stricken sua sponte by the trial court, and Abalos did not move to strike it. Consequently, because the trial court had the pleading before ruling, Abalos has waived the issue. *Harris v. Cochise Health Sys.*, 215 Ariz. 344, 349, ¶ 17, 160 P.3d 223, 228 (App. 2007); *Resolution Trust Corp. v. City of Scottsdale*, 177 Ariz. 234, 237, 866 P.2d 902, 905 (App. 1993).

¶13 Finally, citing to *Aguirre v. Robert Forrest, P.A.*, Abalos asserts that we must "assume the trial court evaluated all relevant factors and made any necessary findings to support its ruling." 186 Ariz. 393, 397, 923 P.2d 859, 863 (App. 1996).

Aguirre, however, did not involve the evaluation of a request for sanctions but whether the court erred in allowing the plaintiff to use one doctor as the sole expert witness. *Id.* Because the case did not address the issue presented here, we cannot assume the court evaluated the reasonableness of the sanctions request without any documents. Consequently, we vacate the inclusion of the expert fees award in the sanction order and remand the case to the trial court. See *Hedru v. Metro-North Commuter R.R.*, 433 F. Supp. 2d 358, 359-60 (S.D.N.Y. 2006) (giving defendant additional time to file appropriate records for the Rule 68 analysis).

CONCLUSION

¶14 For the foregoing reasons, we vacate the award of expert's fees as sanctions and remand the case back to the trial court for further proceedings consistent with this decision.

/s/

MAURICE PORTLEY, Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Presiding Judge

/s/

PHILIP HALL, Judge