STATE OF MICHIGAN

COURT OF APPEALS

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.,	FOR PUBLICATION February 6, 2014
Plaintiff-Appellee,	
v	Nos. 302835, 305149, and 307002 Midland Circuit Court LC No. 09-006135-CZ
BOYCE TRUST 2350, BOYCE TRUST 3649, and BOYCE TRUST 3650,	
Defendants-Appellants.	

Before: MURPHY, C.J., and FITZGERALD and BORRELLO, JJ.

MURPHY, C.J. (*concurring in part, dissenting in part*).

I am in accord with the majority with respect to the jury instruction and evidentiary issues; however, I respectfully disagree with the majority concerning whether plaintiff is entitled to an award of attorney fees as case evaluation sanctions. I would hold that there was no "attorney fee" to award plaintiff for purposes of MCR 2.403(O)(6)(b). Accordingly, I concur in part and dissent in part.

Under MCR 2.403(O)(6)(b), a case evaluation award of actual costs includes "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." (Emphasis added.) In *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423; 733 NW2d 380 (2007), the Michigan Supreme Court construed the Open Meetings Act (OMA), MCL 15.261 *et seq.*, and in particular MCL 15.271(4), which provides for the recovery of "costs and actual attorney fees" in a successful action against a noncompliant public body. In *Omdahl*, the plaintiff was an attorney who proceeded *in propria persona*, and he won a judgment against the defendant for violating the OMA. However, the trial court denied the plaintiff's request for attorney fees. This Court reversed the trial court's ruling in a divided decision. *Id.* at 424-425. Our Supreme Court, in reversing this Court, held "that because an attorney is defined as an agent of another person, there must be separate identities between the attorney and the client before the litigant may recover actual attorney fees." *Id.* at 424.

The *Omdahl* Court, relying on dictionary definitions, reasoned that an "attorney" is a "lawyer" or an "attorney-at-law," and a lawyer is defined as being in the profession of

representing clients in court or advising or acting for them in various legal matters, while, similarly, an attorney-at-law is defined as a court officer authorized to appear in court as a party's representative in a legal controversy. *Id.* at 428. The Court observed that "[t]he courts of this state as well as the federal courts have, in deciding cases of this sort, focused on the concept that an attorney who represents himself or herself is not entitled to recover attorney fees because of the absence of an agency relationship." *Id.* at 428-429.

In challenging the dissent's position, the majority in *Omdahl* noted that "[t]he dissent claims that the definitions of 'attorney' do not explicitly require an agency relationship; however, the most reasonable interpretation of the term does require such a relationship, and the dissent does not cite a single instance in which 'attorney' is defined in any context other than an agency relationship." *Id.* at 428 n 1. The Court further stated:

> While the dissent criticizes the majority for relying on cases interpreting the statutory language "reasonable attorney fees," and claims that the difference between actual attorney fees and reasonable attorney fees is significant, we note that our focus in this case is on "attorney" not "actual." In this respect, the dissent's attempt to distinguish *Laracey* [*v Financial Institutions Bureau*, 163 Mich App 437; 414 NW2d 909 (1987),] fails. *Laracey* is relevant because both *Laracey* and the instant case involve attempts by an attorney appearing *in propria persona* to recover attorney fees. We find *Laracey* persuasive for the relevant portion of its holding, which states that "both a client and an attorney are necessary ingredients for an attorney fee award." *Laracey, supra* at 446. [*Omdahl*, 478 Mich at 430 n 4.]

"'The fact that . . . [a] plaintiff is admitted to practice law and available to be an attorney for others, does not mean that the plaintiff has an attorney, any more than any other principal who is qualified to be an agent, has an agent when he deals for himself.'" *Id.* at 430, quoting *Laracey*, 163 Mich at 445 n 10, quoting *Duncan v Poythress*, 777 F2d 1508, 1518 (CA 11, 1985) (Roney, J., dissenting).

The *Omdahl* Court also relied on *Watkins v Manchester*, 220 Mich App 337; 559 NW2d 81 (1996), which construed "the attorney fee provisions in the case evaluation rules[.]" *Omdahl*, 478 Mich at 431. Our Supreme Court found that while *Watkins* interpreted MCR 2.403(O), which had somewhat different language than the OMA statute given the reference to "reasonable" and not "actual" attorney fees, the panel nonetheless "focused on the availability of any attorney fees when the agency relationship was missing[.]" *Id.* at 431.

The *Omdahl* Court also quoted with favor *Falcone v Internal Revenue Service*, 714 F2d 646, 648 (CA 6, 1983), agreeing with *Falcone* that "'[b]oth a client and an attorney are necessary ingredients for an award of fees[.]'" *Omdahl*, 478 Mich at 431. The *Omdahl* Court additionally relied on *Kay v Ehrler*, 499 US 432, 435-436; 111 S Ct 1435; 113 L Ed 2d 486 (1991), observing that *Kay* "noted that the use of the word 'attorney' assumed an agency relationship and found it likely that Congress intended to predicate an award under § 1988 on the existence of an attorney-client relationship." *Omdahl*, 478 Mich at 431. Our Supreme Court then concluded:

> Thus, with these definitions and the caselaw we have discussed in mind, it being clear that there was no agency relationship between two different people, there was no lawyer-client relationship as understood in the law. Therefore, there were no "actual attorney fees" for Omdahl to recover under MCL 15.271(4). [*Id.* at 432.]

I conclude that *Omdahl* dictates reversal of the trial court's award of attorney fees to plaintiff. As stated by plaintiff law firm, a professional services corporation like plaintiff provides professional legal services through its licensed attorneys. A law firm necessarily acts through its attorneys and other personnel. The firm's attorneys are thus agents of the law firm, and this agency relationship exists because the attorneys are employed by the law firm, not because the law firm is a client of its attorneys. And "[u]nder fundamental agency law, a principal is bound by an agent's actions within the agent's actual or apparent authority." *James v Alberts*, 464 Mich 12,15; 626 NW2d 158 (2001). Stated otherwise, when an attorney acts within his or her actual or apparent authority, the firm employing the attorney has acted. "The appearance of an attorney is deemed to be the appearance of every member of the law firm." MCR 2.117(B)(3)(b). Accordingly, "a client's employment of one member of a law firm is deemed to be the employment of the firm itself." *Plunkett & Cooney, PC v Capitol Bancorp, Ltd*, 212 Mich App 325, 329; 536 NW2d 886 (1995); see also *Estate of Mitchell v Dougherty*, 249 Mich App 668, 681; 644 NW2d 391 (2002). Therefore, when a law firm's attorney appears in litigation on behalf of a client, all of the firm's attorneys are deemed to have appeared, and the law firm itself is deemed to be employed by the client. Thus, if a law firm itself becomes embroiled in litigation as a party litigant, and if the firm proceeds in the litigation using one or more of its own attorneys, the law firm has in theory employed itself to go forward in the action. In such circumstances, the law firm is effectively proceeding *in propria persona*, and the firm does not have an identity that is separate from its attorney(s) for purposes of establishing an attorney-client relationship. When an attorney is already an agent of the law firm because of his or her employment status with the firm, the use of that attorney to handle litigation in which the firm is a party is no different than the employee or agent of any other company handling a matter in court; the action is being pursued *in propria persona*. This necessarily means that there is an absence of a true attorney-client relationship, as required to be entitled to an "attorney" fee. *Omdahl*, 478 Mich at 432. Plaintiff and the attorneys who handled the litigation for plaintiff did not have a "lawyer-client relationship as understood in the law." *Id.* Plaintiff dealt for itself the only way possible, through its personnel. *Id.* at 430.

Plaintiff argues that a corporation such as plaintiff is a separate entity under the law, which distinguishes it from its attorneys; therefore, there were separate identities and the *Omdahl* requirement of an agency relationship was present. I agree that a corporation constitutes an artificial entity that is separate and distinct from the holders of the corporation's individual stock. *Bourne v Muskegon Circuit Judge*, 327 Mich 175, 191; 41 NW2d 515 (1950). However, this general principle does not mean that an incorporated law firm is separate and distinct from its attorneys *in the context of determining whether an attorney-client relationship exists*, given that a firm's attorney is an agent of the firm due to his or her employment status and considering that an appearance by a firm's attorney is an appearance by all of the attorneys in the firm, resulting in employment of the law firm by the client; the client and the law firm cannot be one in the same.

The majority suggests that *Omdahl* is distinguishable because the OMA referred to "actual" and not "reasonable" attorney fees, but *Omdahl* directly confronted and rejected that argument as raised in the dissenting opinion, noting that its focus was on the presence or absence of an attorney-client relationship, not the term "actual." *Omdahl*, 478 Mich at 430 n 4. Additionally, *Omdahl* favorably cited *Watkins*, 220 Mich App 337, employing its agency-relationship analysis, and *Watkins* concerned the very case evaluation provision at issue here. *Omdahl*, 478 Mich at 431.

The majority's reliance on *FMB-First Mich Bank v Bailey*, 232 Mich App 711; 591 NW2d 676 (1998), is misplaced. First, it predates *Omdahl*, which governs. Regardless, *Bailey* is entirely consistent with *Omdahl*, and it actually provides strong support for my dissenting view. This Court ruled "that pro se parties are not eligible for attorney fee sanctions under MCR 2.114, and we vacate the order to the extent that it awards pro se litigants attorney fees." *Bailey*, 232 Mich App at 719. In *Bailey*, the litigation involved, in part, a party attorney, James Koetje, and a party law firm, Schenk, Boncher & Prasher, P.C. (S, B & P), and the defendant argued that the trial court erred in awarding attorney fees under MCR 2.114 to Koetje and S, B & P because they were pro se litigants. *Id.* at 714-715, 719. The Court observed:

> One who represents himself cannot be said to have had a liability cast on himself. A person cannot impose a liability for attorney fees on oneself. Thus, Koetje and S, B & P did not "incur" attorney fees, because they represented themselves. Similarly, the definition of "attorney" seems to preclude the possibility of incurring attorney fees unless someone is represented by a separate individual. Because an attorney is an agent or substitute who acts in the stead of another, a party acting in propria persona cannot truly be said to be an attorney for himself. It is thus impossible to incur attorney fees when one is not represented by an attorney, i.e., someone other than the actual party. [*Id.* at 726.]

The Court, however, found that sanctions could still be awarded under MCR 2.114(E), *id.* at 727, and MCR 2.114(E) provides:

> If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, *an appropriate sanction, which* ***may*** include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages. [Emphasis added.]

The Court reasoned that MCR 2.114(E) does not restrict the sanction to expenses or costs incurred, such as attorney fees; "[r]ather, it gives the trial court discretion to fashion another appropriate sanction." *Bailey*, 232 Mich App at 726-727. The *Bailey* panel ultimately concluded, "We vacate the sanction order to the extent that it awards attorney fees to pro se litigants. We remand for further consideration of sanctions in accordance with this opinion." *Id.* at 728.

Given that S, B & P was a pro se litigant, I can safely and confidently assume that one or more of its attorneys handled the litigation, as was the case here; therefore, *Bailey* provides on-

point precedent supporting reversal of the trial court's ruling on the basis that there was no attorney-client relationship. I would reverse the trial court's decision to award attorney fees to plaintiff, considering that there was no "attorney fee" for purposes of MCR 2.403(O)(6)(b) in light of the missing element of an attorney-client relationship.

I respectfully concur in part and dissent in part.

/s/ William B. Murphy