

STATE OF MICHIGAN
COURT OF APPEALS

KIM WHITE,

Plaintiff-Appellee,

v

NORTH OAKLAND MEDICAL CENTER, a/k/a
PONTIAC GENERAL HOSPITAL,

Defendant-Appellant.

UNPUBLISHED

March 6, 1998

No. 199443

Oakland Circuit Court

LC No. 94-471628 NH

Before: Markey, P.J., and Doctoroff and Smolenski, J.

PER CURIAM.

In this nonmalpractice medical negligence case, see, e.g., *Gold v Sinai Hospital of Detroit, Inc*, 5 Mich App 368, 369-370; 146 NW2d 723 (1966), citing *Fogel v Sinai Hospital of Detroit*, 2 Mich App 99; 138 NW2d 503 (1965), plaintiff sued for personal injuries sustained while waiting to be radiographically examined for diagnosis and treatment at defendant's emergency room. Before trial, the case was mediated in the amount of \$1,200. Both sides rejected the mediation award. The case was then tried by a jury, which returned a verdict in favor of plaintiff in the amount of \$750.

Both sides then sought mediation sanctions pursuant to MCR 2.403(O)(1). Treating the reference to "assessable costs" in MCR 2.403(O)(3) as a reference to "taxable costs," *Frank v William A. Kibbe & Associates, Inc*, 208 Mich App 346, 351-352; 527 NW2d 82 (1995), the trial court allowed plaintiff to tax \$122 in filing fees, \$20 in pretrial proceedings costs, a \$125 mediation fee, and \$925 for expert witness fees. When added to the jury verdict along with \$49.32 in interest on that verdict, the amount exceeded by more than 10% the mediation evaluation. The trial court accordingly awarded plaintiff actual attorney fees, which it calculated for 156.25 uncontested hours reasonably devoted by plaintiff's counsel to post-mediation activities in the case, finding that the reasonable amount for such services was \$200 per hour, for a total of \$31,250. Defendant appeals by right. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We reverse.

Proper analysis of this appeal begins with the fundamental proposition that, in Michigan, for costs to be taxable there must be statutory authority permitting their recovery. *Beach v State Farm*

Mutual Automobile Ins Co, 216 Mich App 612, 621; 550 NW2d 580 (1996). The Legislature, mainly in the Revised Judicature Act, has established the costs that may be taxed but has granted to the Michigan Supreme Court the authority to promulgate rules respecting the procedures used in taxing allowable costs. MCL 600.2401; MSA 27A.2401.

Some of the costs plaintiff sought to tax are allowable: the \$62 filing fee is taxable pursuant to MCL 600.2529(1); MSA 27A.2529(1), the \$20 for proceedings before trial is taxable pursuant to MCL 600.2441; MSA 27A.2441, and the \$49.32 in interest on the verdict, MCL 600.6013; MSA 27A.6013, is also properly included for purposes of MCR 2.403(O)(1).

Contrary to plaintiff's argument, the mediation fee is not taxable. Plaintiff concedes that there is no statute allowing taxation of such costs but asserts that defendant, by failing to cite authority for a contrary argument in the trial court, waived the issue. This is incorrect. The burden of proof was on plaintiff to establish that any costs sought were taxable. In any event, the trial court was bound to follow the law, notwithstanding the fact that it may not have been called to the court's attention. *People v Glover*, 47 Mich App 454, 458; 209 NW2d 533 (1973).

It should here be noted that both parties have cited various subparagraphs of MCL 600.2421b; MSA 27A.2421b. The cited statute is completely inapposite, by its terms being relevant only to the taxation of costs in actions between the State and a citizen. As this litigation is between two private parties, that statute provides no assistance in resolving the present controversy.

The question then becomes whether the trial court properly allowed plaintiff to tax \$925 in expert witness fees, representing the presuit evaluation by one expert in the amount of \$400 and consultation and preparation for mediation by a second expert in the amount of \$525. The only taxable expert witness fees are those allowed by MCL 600.2164(1); MSA 27A.2164(1), which permits taxation of expert witness fees only for a witness who "is to appear, or has appeared" in an action. Fees for witnesses who did not testify at trial (or if their deposition is not read at trial) are not taxable. *Put v FKI Industries, Inc*, 222 Mich App 565, 573; 564 NW2d 184 (1997); *Portelli v I R Construction Products Co, Inc*, 218 Mich App 591, 605; 554 NW2d 591 (1996). Accordingly, the trial court erred in finding such costs taxable.¹

Defendant makes one further argument that needs to be briefly addressed and rejected. Defendant contends that plaintiff was not the "prevailing party". The term of art "prevailing party" has a particular meaning under MCR 2.403, and a different meaning under MCR 2.625(B)(2). For purposes of taxing costs, plaintiff is the prevailing party because there was a single cause of action alleged, and plaintiff prevailed on the entire record by obtaining a verdict in his favor. Therefore, to the extent that costs are taxable, the verdict in favor of plaintiff is to be adjusted by such amount before determining which party, if either, is entitled to mediation sanctions. The trial court did not err in that respect.

As it cannot now be determined whether either party is entitled to mediation sanctions, including attorney fees, the question of the reasonableness of such attorney fees may not now properly be adjudicated. On remand, however, if the necessity for determining a reasonable attorney fee again arises, the trial court should note that actual fees are not determinative, and a

reasonable attorney fee may be higher or lower than the actual fee incurred. *Cleary v The Turning Point*, 203 Mich App 208; 211-212; 512 NW2d 9 (1993). In determining a reasonable hourly fee, note should be taken of this Court's decision in *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326, 333 n 3; 454 NW2d 610 (1990).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Martin M. Doctoroff

/s/ Michael R. Smolenski

¹ Defendant, having failed to supply the full transcript of trial as required, in the absence of a contrary stipulation or order of this Court or the trial court, MCR 7.210(B)(1), has left this Court unable to determine whether plaintiff did adduce any expert testimony at trial for which witness fees may be taxable. *Nye v Gable, Nelson & Murphy*, 169 Mich App 411, 416-417; 425 NW2d 797 (1988). Plaintiff accordingly is entitled to an opportunity to seek to tax such additional costs on remand.