STATE OF MICHIGAN

COURT OF APPEALS

MONAGHAN, LoPRETE, McDONALD, SOGGE & YAKIMA, P.C.,

Plaintiff/Counter-Defendant and Third Party Plaintiff/Appellee,

v

WILLIAM P. FROLING, SR., and HATHERLY COMMONS, INC., a Michigan corporation, jointly and severally,

Defendants and Counter-Plaintiffs/ Appellants,

v

BRADLEY E. FROLING,

Third Party Defendant/Appellant,

and

RONALD R. SOGGE and BORIS YAKIMA,

Third Party Defendants/Appellees.

UNPUBLISHED
September 22, 1998

No. 200594
Oakland Circuit Court
LC No. 93-450226 CK

Before: Smolenski, P.J., and White and Markman, JJ.

PER CURIAM.

Defendants William P. Froling, Sr., Hatherly Commons, Inc., and Bradley E. Froling appeal by leave granted the circuit court's order[1] requiring them to pay $4,890.62 in special mediators' fees, and an additional $1,520 for the special mediators having attended court to seek payment of fees. We affirm.

I

This case was initiated by the law firm of Monaghan, LoPrete, McDonald and Sogge, P.C. (Monaghan firm), to collect legal fees allegedly owed by defendants William P. Froling, Sr., (Froling) and Hatherly Commons in connection with the Monaghan firm's representation of defendants in an underlying suit for collection of percentage rent. Defendants Froling and Hatherly Commons asserted legal malpractice as a defense and counterclaimed for damages.

Defendants Froling and Hatherly Commons joined Sogge and Yakima, the Monaghan firm attorneys who had appeared in the underlying case, as individual third party defendants. The Monaghan firm joined Bradley E. Froling, Froling's son and an attorney who had appeared in the underlying case and monitored the Monaghan firm's work, as a third party defendant.

A

On January 22, 1996, pursuant to the parties' stipulation, the circuit court entered an order for special mediation that provided:

> This matter having come on for hearing on January 10, 1996, and the court having suggested that the parties agree to a special mediation procedure, the parties having come to the agreement as set forth below, and the court being otherwise fully advised in the premises,
>
> IT IS HEREBY ORDERED,
>
> 1. That this matter shall be submitted to a special mediation panel in accordance with the following procedures:
>
> > A. Each side shall select two potential special mediators listed in order of preference and the names shall be submitted to the court for approval within five (5) days of entry of this order.
> >
> > B. The court shall contact the two mediators designated by the parties as their first preference, advise them of their selection by the parties, and ascertain their availability and willingness to serve as special mediators in this case.
> >
> > C. In the event that the first selection of a party declines to act as a special mediator in this case, the court shall then contact the second selection, advise of his or her selection by the parties, and ascertain his or her availability and willingness to serve as a special mediator in this case.
> >
> > D. If either party's two selections cannot serve as special mediators, this order shall be null and void and the present mediation of 1/31/96 shall remain in effect.

E. The two special mediators designated by the parties shall within five (5) days of agreeing to serve as special mediators, designate a third mediator and contact him or her regarding the selection, availability, and willingness to serve.

2. Neither the parties nor their attorneys shall have any ex parte contact with the mediators prior to or after the mediation hearing regarding this matter.

3. The fees of the special mediators shall be reasonable, subject to approval of the court, and shall be split equally between the law firm of Monaghan, LoPrete, McDonald, Sogge & Yakima, Ronald Sogge, and Boris Yakima on the one hand and William P. Froling, Hatherly Commons, Inc., and Bradley Froling on the other.

4. The date, time, and place of the special mediation hearing shall be completed by the special mediation panel, but shall in no event occur any later than February 29, 1996.

5. The present mediation hearing scheduled for January 31, 1996 shall be canceled without costs to any party in the event special mediation can be accomplished.

6. The parties shall have the 28 days afforded by MCR 2.403(L) to accept or to reject the mediation award.

7. The special mediation shall proceed in all other respects in accordance with MCR 2.403.

8. The special mediation will in no way affect the scheduled trial date of April 22, 1996.

On February 16, 1996, the circuit court entered an order appointing retired Judge T. John Lesinski (defendants' choice), Patrick Barrett (plaintiff's choice) and Robert Best (agreed on by Lesinski and Best) as special mediators, and set a mediation date of March 22, 1996. The order further provided that "at the request and agreement of the parties, there shall be no ex-parte communication between the attorneys of record and the mediators without first obtaining approval from the Court." The special mediation did not go forward as scheduled, apparently because of Judge Lesinski's death.

Defendants contacted Konrad Kohl and, through predecessor counsel, chose him to replace Judge Lesinski. Kohl's selection was apparently communicated to the court, and the court met with Kohl and Barrett.

On September 12, 1996, the circuit court entered an amended order pertaining to special mediation that provided:

This Court having met with mediators, Konrad Kohl and Patrick Barrett, on September 10, 1996, this Court having reviewed this matter with the mediators and the Court being otherwise fully advised in the premises;

> NOW THEREFORE IT IS ORDERED AND ADJUDGED that the special mediation panel in this matter consist of Konrad Kohl, Alexander McGarry and Patrick Barrett;
>
> IT IS FURTHER ORDERED AND ADJUDGED that if there are any objections on the basis of bias or prejudice to any of these three mediators, **such objections must be submitted to the Court, in writing, within ten days to [sic] the entry of this Order**;
>
> . . . that there shall be no contact between the parties themselves and the mediators; . . . that there may be contact between counsel for the parties and the mediators, but such contact may take place only for the purpose of scheduling and may only be initiated by the mediators and not by counsel; . . . that the special mediation in this matter is hereby scheduled for Friday, September 27, 1996, at 9:00 a.m. at . . .; . . . that there shall be no live testimony at this mediation; . . . that the parties may each submit an additional mediation summary, to those summaries already filed and any such supplemental summary must be provided to the mediators no more than seven days prior to mediation; . . . that the mediation may be attended by their parties and their counsel only; . . . **that the mediators be compensated for all time put into this matter at the rate of $250.00 per hour, per mediator and that cost of each mediator be shared equally between the parties; . . . that the mediators be paid at the time of the September 27, 1996, mediation in this matter; . . .** that trial in this matter remains scheduled for November 19, 1996. [Emphasis added.]

On September 24, 1996, twelve days after entry of the amended order, defendants filed their "Answer and Objections to Mediators and Objection to Entry of Order Amending Agreement of Parties."[2]

On October 11, 1996, the circuit court entered an order recusing Barrett and appointing J. Michael Malloy as replacement special mediator:

> This matter has come before the Court on the parties' request for the recusal of special mediator, Patrick Barrett.
>
> Pursuant to said request the Court hereby recuses Mr. Barrett.
>
> Due to the unavailability or unwillingness of the replacement mediators proffered to the Court the Court hereby appoints Mr. J. Michael Malloy as replacement special mediator who was proffered to the Court by the existing special mediators.

On October 23, 1996, defendants filed a motion to vacate the circuit court's amended order pertaining to mediation (entered on September 12, 1996), the circuit court's October 11, 1996 order recusing Barrett, and the mediation hearing scheduled for November 2, 1996. Defendants argued that pursuant to the parties' special mediation agreement (entered by the circuit court on January 22, 1996) the agreement became null and void if either party-appointed mediator could not serve. Defendants further argued that mediators Barrett and Kohl had had an unauthorized in camera meeting with the

circuit court on September 10, 1996, as a result of which the circuit court entered the September 12, 1996 amended order pertaining to special mediation. Defendants argued that the amended order, without the agreement of the parties and contrary to the special mediation agreement: 1) appointed Alexander McGarry as the neutral mediator, 2) set a hearing date for September 27, 1996, and 3) set the mediators' fee at $250 per hour. Defendants also argued that the circuit court's October 11, 1996 order directed that special mediation be held on November 2, 1996, thereby infringing on defendants' right to have twenty-eight days to accept or reject mediation, as trial was set for November 19, 1996.

The circuit court denied defendants' motion following a hearing on October 30, 1996, and ruled that the special mediation was to take place as scheduled on November 2, 1996. At the October 30 hearing, in response to defendants' arguments, the circuit court noted that none of the parties had objected to its order recusing Barrett. The circuit court also noted that the case had been filed in 1993.

Special Mediation took place on November 2, 1996 and a non-binding mediation evaluation was rendered. Defendants did not pay their half of the special mediators' fees.

On December 10, 1996, the mediators filed a Petition for Payment of Special Mediator Fees seeking payment for the special mediation and also for the filing of the petition. Defendants responded, again contesting the circuit court's authority to enter the September 12, 1996 order, and arguing the most that the mediators were entitled to was $75.00 each, pending resolution of the issue in the Court of Appeals. Defendants also argued that the mediators had not stated the amount of fees sought, had not attached invoices for their services, and had not sought approval of the invoices submitted by each mediator. However, defendant Bradley Froling's brief in support of his response to the mediators' petition stated that Malloy had submitted a bill for $2,100 for 8.4 hours at $250 an hour; Kohl had submitted a bill for $4,400 "without any support for the time spent"; and McGarry had submitted a bill for $3,281.25 for 13.125 hours at $250 an hour, plus for $129.86 for expenses for postage, copy charges, legal research and facsimiles, even though the circuit court's September 12, 1996 order did not provide for the reimbursement of such expenses.

At the December 18, 1996 hearing on the mediators' petition for payment, McGarry noted that the reason Malloy's fees were substantially less than the other mediators was that Malloy was substituted in late in the case and thus spent less time on it. McGarry stated that since defendants had objected to paying for costs, the mediators sought only payment for their fees. McGarry stated that the Monaghan firm had paid half of the original figure of $9,911.11, and that the mediators would reimburse the Monaghan firm for the difference. McGarry requested that each of the mediators be compensated for two hours in court to attend the hearing, at the mediators' designated rate, which included the time it took McGarry to prepare the petition for payment. After defendants' counsel objected to payment of the additional $1,500, McGarry noted that it was necessary for the special mediators to attend the hearing because defendants had not objected to the mediators' invoices (which had been mailed out on November 4, 1996) until they responded to the petition for payment by fax the day before the instant hearing. Thus, the special mediators believed they should be present at the hearing to respond to any objections defendants might raise or any question the circuit court might have.

At the hearing, defendants' counsel[3] stated that defendants did not dispute the reasonableness of the mediators' bills.

The circuit court concluded the hearing by stating:

> Having heard the moving parties [sic] request and finding that it's not unreasonable since they never had any written response in objection that might have alleviated the necessity of all three mediators to be here to answer to the accountability of the fees and their services, the Court would feel it's appropriate that all three should be here.
>
> I have no questions to ask. And I recognize that counsel is preserving the record by being here on behalf of the defendants to preserve this issue about the legality of me even appointing. And that will be preserved for purposes of appellate review, as all other matters will be in this case.
>
> As to the fifteen hundred, that is granted as well as the twenty dollars [motion fee], for a total sum that the Court would so grant as an order against the three defendants jointly and/or severally in the amount of ten thousand four hundred and one dollars and an order may enter in that respect.

The circuit court entered an order on January 7, 1997, stating that the special mediators' fees totaled $9,781.25, and ordering that defendants pay one half of the special mediators fees, totaling $4,890.62, plus $1,520 for the mediators having filed the petition and having attended the hearing. It is from this order that defendants appeal.[4]

II

Defendants first argue that the circuit court lacked the power to submit the case to special mediation in a manner not provided for in MCL 600.4951 *et seq.;* MSA 27A.4951 *et seq.* and MCR 2.403. Defendants also argue that the circuit court lacked authority to order that the mediators be paid $250 an hour. Under the circumstances presented here, we disagree.

A

MCL 600.4953(2); MSA 27A.4953(2) provides that the procedure for selecting mediation panel members and their qualifications shall be as prescribed by the Michigan court rules or local court rules. Defendants argue that special mediation was not permissible under MCR 2.403 because MCR 2.404, which expressly provides for special mediation panels, MCR 2.404(C)(3),[5] did not become effective until July 1, 1997. Defendants argue that an amendment is construed to change the statute amended, and thus the promulgation of this new court rule specifically providing for special mediation indicates that special mediation was not permissible under the prior court rules. Defendants assert that the agreement they entered into regarding special mediation "may or may not have been valid, but that is not an issue of consequence for this appeal." We do not agree.

In the instant case the parties stipulated to special mediation and to entry of the circuit court's order for special mediation. Defendants have cited no case supporting their argument that the circuit court lacked authority to order special mediation pursuant to the parties' agreement. Moreover, nothing in the court rules in effect at times pertinent to this case precluded parties from stipulating to special mediation or to terms governing a special mediation. We reject defendants' argument that the promulgation of MCR 2.404(C) is support for the assertion that special mediation was not permissible under MCR 2.403. MCR 2.404(C)(3) expressly states that "[n]othing in this rule **or MCR 2.403** precludes parties from stipulating to other procedures similar to mediation that may aid in resolution of the case. [Emphasis added.]" We conclude that the circuit court had authority under MCR 2.403 to submit the case to special mediation.

B

Defendants also argue that the circuit court's subsequent orders relating to special mediation were outside its authority because under the special mediation agreement, once the mediators designated by the parties could not serve, the agreement became null and void and the case was to proceed to regular mediation. We reject this argument because defendants did not timely object to the circuit court's amended order of September 22, 1996, which provided that objections had to be submitted within ten days. Further, defendants revived the stipulated procedure when they chose Kohl as a mediator after Judge Lesinski's inability to serve.[6]

C

Defendants next argue that the circuit court lacked authority to order that the mediators be compensated at a rate of $250.00 an hour. However, the special mediation agreement expressly stated that the mediators would be paid reasonable fees subject to approval of the court, and the court's amended order pertaining to special mediation, dated September 22, 1996, expressly specified that rate. We conclude that $250.00 an hour was a reasonable rate and was approved by the circuit court. We also note that the amended order additionally specified that any objections had to be submitted within ten days of entry of the amended order. Defendants did not timely object to the amended order regarding special mediation.

D

Regarding defendants' arguments that the meeting between Kohl, Barrett and the circuit court was secret or closed, we note that Kohl sent counsel for the parties a letter dated September 4, 1996, stating that he and Barrett were meeting with the circuit court judge on September 10, 1996 to discuss the special mediation hearing, and that if there were any comments or requests concerning the hearing, the parties should contact the circuit court directly. Kohl also advised that the neutral mediator had disqualified himself, that it would be necessary to select another neutral mediator, and that the mediation hearing scheduled for September 10, 1996 would be rescheduled at the meeting with the court. The special mediation agreement provided that "neither the parties nor their attorneys shall have any ex parte contact with the mediators prior to" the mediation hearing. Under these circumstances, the mediators could properly meet with the circuit court in a closed meeting.

We conclude that the circuit court did not exceed its authority by ordering special mediation or by its subsequent orders regarding special mediation.

III

Defendants next argue that the circuit court lacked legal authority to order that the special mediators be compensated for the time they spent in court seeking to collect their fees. Under the circumstances presented here, we disagree.

Defendants do not dispute that the mediators sent invoices to the parties on November 4, 1996, two days after the special mediation occurred on Saturday, November 2, 1996. Nor do defendants dispute that they did not in any way respond or object to the invoices until they responded to the mediators' petition for payment on December 17, 1996, one day before the hearing set for that petition. It is clear from the transcript of the hearing on the mediators' petition for payment that the circuit court accepted the mediators' argument that defendants' failure to respond or object to the mediators' billings until the day before the hearing necessitated that the mediators appear for the hearing to address defendants' objections or any questions the court might have. Mediator Malloy represented the mediators at the hearing, and MCR 2.119(E)(4)(b) requires that the moving party appear at a hearing on a motion. In addition, defendants' failure to pay the mediators fees was a violation of the circuit court's orders, and defendants' response to the mediators' petition for payment was untimely filed, in violation of MCR 2.119(C). We conclude that under these circumstances the circuit court did not abuse its discretion by ordering defendants to pay the mediators for the time they expended appearing in court on their petition for payment.

Defendants' last argument is that the award of $1,500 to the mediators was also improper because attorney fees for pro se litigants who also happen to be licensed attorneys are not awardable by Michigan courts. In support of this argument, defendants cite *Watkins v Manchester*, 220 Mich App 337; 559 NW2d 81 (1996). *Watkins* was a breach of contract action in which the plaintiff, whom the defendant had represented in a divorce action, sued the defendant attorney alleging improper billing in the divorce matter. *Id.* at 340-341. The trial court granted a partial directed verdict in the plaintiff's favor, and the jury returned a verdict of no cause of action on the plaintiff's remaining claim. The plaintiff appealed the trial court's grant of attorney fees to the defendant as a mediation sanction under MCR 2.403(O) for that portion of the fee award that reflected the time the defendant had spent working on the case. This Court vacated the award of attorney fees as a mediation sanction, noting:

> The purpose of the mediation sanction rule, MCR 2.403(O), is to encourage settlement by 'plac[ing] the burden of litigation costs upon the party who insists upon trial by rejecting a proposed mediation award.' This purpose is best served when a party hires an objective attorney—rather than serving as both litigant and advocate—to provide a 'filtering of meritless claims.' Moreover, we believe that to allow litigant-attorneys to recover compensation for time spent in their own behalf, while not extending such a rule to nonattorneys would most likely contribute to the widespread public perception that the courts exist primarily for the benefit of the legal profession. Pro se litigants who are

not attorneys also may suffer lost income or lost business opportunities as the result of their time spent in litigation. [*Watkins, supra* at 344-345.] [7]

The instant case is distinguishable from *Watkins*. The mediators in the instant case were not parties to the action. Their petition for payment was necessitated by defendants' failure to comply with the circuit court's orders. The circuit court's award for their time spent in court seeking payment for their services cannot be said to constitute a windfall for them, nor does it contravene a public policy to encourage the hiring of an objective attorney to provide a filtering of meritless claims. Defendants do not argue that they challenged below the propriety of the mediators filing a petition for payment in the circuit court. Under these circumstances, we conclude defendants' argument is without merit.

Affirmed.

/s/ Michael R. Smolenski
/s/ Helene N. White
/s/ Stephen J. Markman

[1] The circuit court's order, entered on January 7, 1997, stated in pertinent part:

> Alexander B. McGarry, having filed a Petition for Payment of Special Mediator Fees dated December 10, 1996, and Defendants, Counter-Claim Plaintiffs and Third-Party Defendant Bradley E. Froling having filed a Response thereto and submitted a supporting Brief to the Court, and the matter having come on for hearing on December 18, 1996, and for all the reasons stated on the record on December 18, 1996 which are incorporated herein by reference as if fully contained herein, it is
>
> ORDERED, that Special Mediators fees total $9,871.25,
>
> FURTHER ORDERED, that Defendants and Counter-Claim Plaintiffs, Hatherly Commons, Inc. and William P. Froling, Third-Party Defendant Bradley E. Froling, shall pay one-half of the aforesaid Special Mediators Fees which are $4,890.62 to be divided proportionately between Alexander B. McGarry, J. Michael Malloy and Konrad D. Kohl, based on their invoices,
>
> FURTHER ORDERED, Petitioner having first requested on December 18, 1996 at the hearing that each of the Special Mediators be paid for attending Court, that Defendants and Counter-Claim Plaintiffs, Hatherly Commons, Inc. and William P. Froling, Third-Party Defendant Bradley E. Froling, shall pay the sum of $520.00 to Alexander B. McGarry (which sum includes the $20.00 motion fee), $500.00 to J. Michael Malloy and $500.00 to Konrad D. Kohl.

[2] Defendants' answer and objections argued that the circuit court's amended order should be set aside because it violated both MCR 2.403 and the parties' agreement. Specifically, defendants argued that the only means by which mediation is permissible, other than by court rule, is either by agreement of the parties or after a hearing during which all parties are consulted, neither of which occurred. Defendants' answer and objections objected to mediators Barrett and Kohl, arguing that a conflict of interest existed regarding Barrett, because he was, on information and belief, employed by the malpractice insurance company providing a defense in this case. Defendants further argued that Barrett and Kohl had expressed reservations about serving as mediators in this matter in a letter to the circuit court, in which both Barrett and Kohl had expressed a willingness to be relieved of their responsibilities. Defendants additionally objected to Kohl because, in the letter to the circuit court, Kohl implied that defendants had engaged in improper conduct, and because Kohl, who had been selected by predecessor counsel for defendants, had been informed that defendants filed a grievance against the predecessor counsel.

[3] Attorney Gordon Becker argued on behalf of all three defendants.

[4] The Monaghan firm and Sogge & Yakima, appellees, did not file an appellate brief. By order dated October 17, 1997, the Chief Judge of this Court granted the motion for oral argument on behalf of the special mediators, allowing them to intervene as amicus curiae and allowing them to argue as appellees.

[5] MCR 2.404(C)(3) provides:

> (3) *Special Panels.* On stipulation of the parties, the court may appoint a panel selected by the parties. In such a case, the qualification requirements of subrule (B)(2) do not apply, and the parties may agree to modification of the procedures for conduct of mediation. Nothing in this rule or MCR 2.403 precludes parties from stipulating to other procedures similar to mediation that may aid in resolution of the case.

[6] Any objection to the selection procedure employed in selecting Malloy would be appropriately raised by plaintiff, not defendants.

[7] The *Watkins* Court found persuasive the reasoning in *Laracey v Financial Institutions Bureau*, 163 Mich App 437; 414 NW2d 909 (1987) and *Kay v Ehrler*, 499 US 432; 111 S Ct 1435; 113 L Ed 2d 486 (1991). This Court held in *Laracey, supra*, that a pro se plaintiff-attorney could not recover fees under the attorney fee provision of the Freedom of Information Act (FOIA). The *Laracey* Court noted that the purpose of the FOIA's attorney fee provision was to facilitate the disclosure of full and complete information regarding governmental affairs, and that lay persons who proceed pro se are not entitled to a mandatory award of attorney fees since they are not represented by an attorney. 163 Mich App at 441-442. This Court further noted that the FOIA's attorney fee provision was not enacted to provide a windfall for litigants who elect to use the act to recover for legal services not performed by an attorney, *id.* at 442, and that both a client and an attorney are necessary ingredients for an attorney fee award under the FOIA. *Id.* at 446.

In *Kay, supra,* the United States Supreme Court held that a pro se litigant who is also an attorney was not entitled to an attorney fees award under the federal civil rights statute, 42 USC § 1988. The Court

noted that although § 1988 was intended to encourage litigation protecting civil rights, its more specific purpose was to enable potential plaintiffs obtain the assistance of competent counsel in vindicating their rights. The Court also noted:

> A rule that authorizes awards of counsel fees to pro se litigants—even if limited to those who are members of the bar—would create a disincentive to employ counsel whenever such a plaintiff considered himself to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case. [499 US at 438.]