STATE OF MICHIGAN

COURT OF APPEALS

MARY TEMPEST,

Plaintiff-Appellant,

v

CHRYSLER CORPORATION, INC., and MICHAEL CHOPP,

Defendants-Appellees.

UNPUBLISHED

No. 198223
Oakland Circuit Court
LC No. 94-470726 CZ

MARY TEMPEST,

Plaintiff-Appellee,

v

CHRYSLER CORPORATION, INC., and MICHAEL CHOPP,

Defendants-Appellants.

No. 198346
Oakland Circuit Court
LC No. 94-470726 CZ

Before: Young, Jr., P.J., and Wahls and White, JJ.

WHITE, J. (concurring in part, dissenting in part)

I concur in the majority's resolution of defendants' appeal (Docket No. 198346).

Regarding plaintiff's cross-appeal, I respectfully dissent from the majority's determination that the trial court did not abuse its discretion when it computed attorney fees under the CRA exclusively according to a formula advanced by defendants, who argued that because plaintiff recovered 2.2% of plaintiff's last settlement demand before trial, she should recover only 2.2% of the attorney fees requested. There is no indication in the record that the trial court considered the remaining factors set

forth in *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982), the trial court placed great weight on its understanding of settlement negotiations, and there is no

indication that the trial court exercised its discretion in light of the legislative purposes of Section 802 of the CRA. I would therefore remand for redetermination of plaintiff's reasonable attorney fees and vacate the award of mediation sanctions to defendant.[1]

The decision to grant or deny an award of attorney fees under the attorney fees provision of the CRA, Section 802, is within the trial court's discretion. *Schellenberg v Rochester Elks*, 228 Mich App 20, 46; 577 NW2d 163 (1998). The purpose of the attorney fees provision is to encourage those who have been deprived of their civil rights to seek legal redress, to insure victims of employment discrimination access to the courts, and to deter discrimination in the work force. *Yuhase v Macomb Co*, 176 Mich App 9, 13; 439 NW2d 267 (1989); *Collister v Sunshine Food*, 166 Mich App 272, 274; 419 NW2d 781 (1988), citing *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 801; 369 NW2d 223 (1985); *King v General Motors Corp*, 136 Mich App 301; 356 NW2d 626 (1984). A decision whether to award attorney fees must be made in light of the purposes of the act and the decision to deny attorney fees may not be based upon a reason inconsistent with those purposes. *Yuhase, supra* at 13; *Collister*, supra at 274; *King, supra*.

In determining the reasonableness of an attorney fees request, the trial court must consider the six factors set forth in *Wood, supra*,[2] although they are not exclusive. *Schellenberg*, supra at 46; *Howard v Canteen Corp*, 192 Mich App 427, 437; 481 NW2d 718 (1991):

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.

While a trial court is not required to detail its findings regarding each specific factor, it is required to make findings of fact with regard to the attorney fee issue. *Howard, supra* at 437.

A court may consider the level of success obtained by the prevailing party[3] as **one** factor in determining the reasonableness of attorneys fees, but may not disregard the remaining *Wood* factors, *Schellenberg, supra* at 44-46, or exercise its discretion without considering the legislative purposes of the CRA's attorney fee provision. *Yuhase, supra* at 13; *Collister*, supra at 274. In *Schellenberg, supra*, this Court rejected a strict proportionality approach to CRA attorney fees.[4]

Under *Schellenberg, supra*, the question remains whether the trial court's failure to address the *Wood* factors requires reversal. Reversal is required only if the trial court's award was an abuse of discretion. *Id.* at 47. I conclude that on this record, the award was not reasonable and was an abuse of discretion. While the court was certainly within its discretion in considering the amount awarded by the jury as relevant to the results achieved, and in concluding that this *Wood* factor militated towards a substantial reduction in the fee, other factors, including plaintiff's attorneys' experience, the skill, time and labor involved in the litigation,[5] and the difficulty of the case (the case was not a "garden variety" civil rights case, and plaintiff presented about a dozen witnesses, including a damages expert), weighed against awarding such a small fee. Further, the trial court failed to exercise its discretion in light of the legislative purposes of the attorney fee provision of the CRA, instead punishing plaintiff for what it

perceived to be her failure to settle the case, without inquiry into the true course of settlement negotiations.[6]

Regarding post-trial attorney fees, while I agree with plaintiff that attorney fees are an element of damages in a CRA case and must be included in the "verdict" when determining whether mediation sanctions are appropriate, I join the majority in concluding that the trial court did not err in refusing to include post-trial attorney fees in determining the amount of the "verdict" to be compared with the mediation evaluation, or in awarding plaintiff only a portion of her requested fees.

Lastly, I agree with the majority's discussion of the reinstatement issue.

I would remand for a redetermination of reasonable attorney fees and vacate the award of mediation sanctions to defendants.

/s/ Helene N. White

[1] Mediation sanctions were awarded because plaintiff failed to improve upon the mediation award by 10%. Plaintiff needed to recover $16,500 to avoid sanctions. Plaintiff's total recovery, not including post-trial attorney fees, was only $14,779.55. Plaintiff's attorney fee award through trial is an element of damages and is included in the total amount that is compared with the mediation figure. Thus, the propriety of the award of mediation sanctions is dependent on the propriety of the amount of attorney fees awarded.

[2] The *Wood* factors have been adopted for use in employment discrimination cases. *Dep't of Civil Rights v Horizon Tube Fabricating, Inc,* 148 Mich App 633, 640; 385 NW2d 685 (1986).

[3] In the instant case, plaintiff prevailed on both her claims, sex discrimination and retaliation. See *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 483; 442 NW2d 705 (1989); *Varney v O'Brien,* 147 Mich App 397, 405; 383 NW2d 313 (1985), remanded on other grds 426 Mich 855 (1986) (plaintiff who recovered one dollar in damages under 42 USC 1988 deemed prevailing party); see also *Farrar v Hobby*, 506 US 103, 116-117; 121 L Ed 2d 494; 113 S Ct 566 (1992) (plaintiff who obtained an enforceable judgment of one dollar was the prevailing party).

In awarding plaintiff $3,919 in damages on her retaliation claim, the jury apparently concluded that plaintiff had been discriminated against and retaliated against for complaining about discriminatory treatment, but that she had successfully mitigated her damages. At trial, the Chrysler manager (Koepke) under whom plaintiff's immediate supervisor (Chopp) worked, testified that Chopp had made gender-based remarks to plaintiff, treated her differently based on her sex, had generally prevented plaintiff from being promoted, and that plaintiff complained to him about Chopp's inappropriate conduct. Koepke also testified that some of Chopp's negative treatment of plaintiff was motivated in part by Chopp's knowledge that plaintiff had complained to Koepke that Chopp had discriminated against her. Plaintiff left Chrysler and obtained a job paying more than she earned at Chrysler. The economic damages

issues included whether plaintiff declined a valuable buy-out opportunity believing that Chopp would be transferred, whether plaintiff would have remained at Chrysler after her division was sold, and the present value of the pension differential. The $3,919 figure was advanced at trial by defendants as representing the present value of the Chrysler credited pension service plaintiff lost.

[4] A plurality of the United States Supreme Court in *Riverside v Rivera*, 477 US 561, 574; 106 S Ct 2686; 91 L Ed 2d 466 (1986), expressly rejected the proposition that fee awards under 42 USC 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers, and affirmed an award of $245,456.25 in attorney's fees where the plaintiff prevailed against the city and police officers and was awarded $13,300 in damages. See also *Morales v City of San Rafael*, 96 F3d 359 (CA 9, 1996) and the discussion therein, and this Court's decision in *Jordan v Transnational Motors*, 212 Mich App 94, 98-99; 537 NW2d 471 (1995), addressing the need to consider the remedial purposes of the Magnuson-Moss Warranty Act and the Michigan Consumer Protection Act, and not simply the size of the recovery, in awarding attorney fees under those acts.

[5] This is not the same as the trial court's conclusion that, in its opinion, plaintiff's counsel made "a misjudgment in appraising the action right from the start, what is was really worth."

[6] It appears the trial court's belief that defendant had made a settlement offer of $60,000 to plaintiff "early on" in this case was erroneous and that the offer came shortly before trial. Plaintiff also contends that she accepted defense counsel's proposal of reinstatement and $38,000, made much earlier, but the proposal was later withdrawn because defendant did not approve it.