

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MICHELLE GREEN, GREGORY GREEN, and  
ELAINE GREEN,

UNPUBLISHED  
October 23, 2008

Plaintiffs/Counter-Defendants-  
Appellees,

v

No. 276175  
Oakland Circuit Court  
LC No. 2005-067504-CK

BELFOR USA GROUP, INC., MATT  
SNOWDEN, and SHELDON YELLEN,

Defendants/Counter-Plaintiffs-  
Appellees,

and

DANIELLE P. MCCLUSKEY,

Appellant.

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Before: Fort Hood, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Appellant (hereinafter “petitioner”) appeals as of right from the trial court’s order granting attorney fees in favor of defendants/counter-plaintiffs (“defendants”) as a sanction for a violation of MCR 2.114. We affirm in part and vacate in part.

This appeal arises from petitioner’s representation of plaintiffs. Plaintiffs’ residence became uninhabitable following an incident involving the furnace that caused smoke/soot damage. Plaintiffs entered into a contract with the corporate defendant to complete repairs to the home and to handle affairs with plaintiffs’ insurance carrier, AAA. Before filing this lawsuit, petitioner attempted to contact the individual defendants, but did not receive a response. Consequently, petitioner filed and signed a complaint against the corporate defendant as well as the individual defendants, Snowden, an agent of the corporation who dealt with plaintiffs, and Yellen, the CEO of the corporation.

The individual defendants filed a motion for summary disposition alleging that the complaint against them was frivolous because the contract was entered into with the corporate entity. These defendants also requested sanctions, MCR 2.114, in the amount of \$10,000

because the complaint was allegedly not based on a reasonable investigation of fact and law. After receipt of the motion, petitioner did not move for dismissal before the trial court. Rather, petitioner filed a response to the motion for summary disposition, alleging that an agreement to stipulate to dismiss had been reached, but defense counsel insisted on proceeding with the hearing on the dispositive motion. Petitioner asserted that sanctions should be awarded against defendants because an agreement to dismiss had been reached. In reply, defendants asserted that petitioner refused to outright dismiss the individual defendants, but sought to file an amended complaint with the dismissal that would require the defense to expend additional fees and costs to respond to the documents. The trial court granted the motion for summary disposition and concluded that sanctions were warranted. The trial court held that an agreement to dismiss had not been reached because the parties had not dismissed the action against the individual defendants.

After the trial court rendered its summary disposition decision, petitioner withdrew from her representation of plaintiffs, and new counsel was substituted in her place. The attorneys could not agree regarding an award of attorney fees, and an evidentiary hearing was scheduled. Testimony was taken from counsel for defendants regarding his invoices. Because one attorney represented all three defendants, the charged amounts were not correlated to one particular defendant. When counsel for defendants was asked to apportion each charge and the amount of work performed for each defendant, he opined that the work should be divided equally among each defendant. Alternatively, defense counsel testified that it was impossible to conclude whether the corporate defendant would have incurred the costs if the individual defendants had never been named in the action. Early in the hearing, the trial court agreed, stating that it was impossible to “unscramble the egg,” and the invoices submitted by defense counsel would be divided into thirds and an award of two-thirds would be granted. Despite this expression of agreement, the trial judge allowed the hearing to continue, but limited the proofs presented by petitioner. Thus, petitioner was unable to present proofs contesting the testimony by defense counsel that the legal fees could not be separating among the three defendants. The trial court stated that petitioner was merely attempting to re-litigate the prior decision wherein the judge held that the filing of the complaint against the individual defendants was frivolous. Ultimately, the trial court entered an award of \$17,782.33 against plaintiffs and petitioner, jointly and severally. The underlying lawsuit was dismissed with prejudice, and petitioner appeals as of right.

Attorney fees are not recoverable unless they are expressly allowed by statute or court rule. *Spectrum Health v Grahl*, 270 Mich App 248, 252-253; 715 NW2d 357 (2006). The decision to award attorney fees and the reasonableness of an attorney fee award are reviewed for an abuse of discretion. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007). When there is no single correct outcome, and the trial court selects an outcome within the range of principled outcomes, an abuse of discretion does not occur. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A trial court’s failure to exercise the power of discretion constitutes a clear abuse of discretion. *Kowalski v Fiutowski*, 247 Mich App 156, 159; 635 NW2d 502 (2001). The trial court’s factual findings underlying the award of attorney fees are reviewed for clear error. *Taylor, supra*. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made. *Solution Source, Inc v LPR Associates Ltd Partnership*, 252 Mich App 368, 381-382; 652 NW2d 474 (2002).

A trial court's finding that an action is frivolous is reviewed for clear error. *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 169, 168; 712 NW2d 731 (2005). The facts of the case determine whether a claim is frivolous as contemplated by MCR 2.114(F). *Id.* In determining whether the attorney fees are reasonable, the trial court must examine: (1) the professional standing and experience of the attorney; (2) the skill, time, and labor involved; (3) the fee charged and the results achieved; (4) the degree of difficulty; (5) the expenses incurred; and (6) the nature and length of the professional relationship between the attorney and client. *Id.* at 171-172. The trial court is not required to provide a detailed finding of each factor. *Id.* at 172.

The trial court's decision to grant an attorney fee is reviewed for an abuse of discretion, but the findings of fact upon which the trial court based the award of attorney fees are reviewed for clear error. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007). When calculating the reasonable attorney fee, the trial court must begin its analysis by determining "the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence." *Smith v Khouri*, 481 Mich 519, 522; 751 NW2d 472 (2008).<sup>1</sup> To perform an objective analysis and aid appellate review, the trial court must multiply the reasonable attorney fee by the reasonable number of hours expended before considering the other factors required to reach a reasonable award. *Id.* Reasonable fees are not equivalent to the actual fee charged. *Id.* at 529, n 12.

Petitioner first alleges that the trial court erred in awarding attorney fees pursuant to MCR 2.114 where the individual defendants "thwarted" petitioner's attempt to learn the facts by failing to contact her before she filed the complaint. Additionally, in a letter to defense counsel, petitioner asserted that her complaint was pleaded in the alternative in the event individual defendant Snowden had absconded with the checks. On this record, we cannot conclude that the trial court's decision to award attorney fees was clearly erroneous with regard to the fee and attorney fees associated with preparation of the summary disposition motion.

MCR 2.114(D)(2) provides that the signature of an attorney constitutes a certification that "the document is well grounded in fact and is warranted by existing law ...." Although petitioner contends that the individual defendants "thwarted" her efforts to learn of their involvement, petitioner fails to cite any authority for the proposition that a party must respond to inquiry of counsel before a lawsuit has been filed. Moreover, the extent of the involvement of the individual defendants could have been learned through inquiry of petitioner's clients, plaintiffs. Specifically, in deposition, plaintiffs testified that the individual defendants were named because they handled the transaction. Plaintiffs also testified that the contract was

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<sup>1</sup> The *Smith* decision was rendered in the context of a reasonable attorney fee award as part of case evaluation sanctions. *Id.* However, there is no indication that the reasonable attorney fee analysis is limited to case evaluation sanctions. We note that only two justices signed the lead opinion in *Smith, supra*. However, the concurring opinion, joined by a second justice, agreed with the holding cited by this panel. *Smith, supra* at 538 (opinion by Corrigan, J.). Rather, the disagreement with the lead opinion regarding the elimination of two factors is not relevant to our disposition.

entered into with the corporation, not the individual defendants. Plaintiffs' deposition testimony did not reveal any action that occurred on an individual basis.

Petitioner's explanation that filing the lawsuit against the individual defendants on an alternative basis is also without merit. Petitioner opined that the lawsuit was properly filed because of the potential dealing by individual defendant Snowden who may have, in an individual capacity, absconded with the checks from the insurance company. However, this information was available to petitioner without naming individual defendants. That is, petitioner could have consulted with plaintiffs' insurer to determine if checks had been redeemed without plaintiffs' knowledge. Perhaps more importantly, the filing of the complaint was contrary to legal principles. Basic agency law provides that the principal is liable for the acts of an agent acting within his actual or apparent authority. *James v Alberts*, 464 Mich 12, 15; 626 NW2d 158 (2001). ("Under fundamental agency law, a principal is bound by an agent's actions within the agent's actual or apparent authority.") With regard to corporate law, the general rule is that the separate corporate entities are to be respected. *Wells v Firestone Co*, 421 Mich 641, 650; 364 NW2d 670 (1984). The fiction of a distinct corporate entity separate from stockholders is a convenience designed to subserve the ends of justice, and the fiction is ignored by the courts when it is used to subvert justice. *Id.* Petitioner has offered no reason to counter these basic legal principles. Accordingly, we cannot conclude that the trial court's holding was clearly erroneous under the circumstances with regard to the request for attorney fees and the cost of preparation of summary disposition motion in the amount of \$10,000.

Petitioner next asserts that the trial court erred by pre-judging the hearing, erred in conducting the hearing, and erred in the amount of the award. Due process enforces the rights enumerated in the Bill of Rights and includes both substantive and procedural due process. *Kampf v Kampf*, 237 Mich App 377, 381-382; 603 NW2d 295 (1999). Procedural due process serves as a limitation on government action and requires government to institute safeguards in proceedings that affect those rights protected by due process, including life, liberty, or property. *Id.* at 382. Due process is a flexible concept applied to any adjudication of important rights. *Thomas v Pogats*, 249 Mich App 718, 724; 644 NW2d 59 (2002). The procedural protections, which include fundamental fairness, are based on what the individual situation demands. *Id.* Fundamental fairness includes: (1) consideration of the private interest at stake; (2) the risk of an erroneous deprivation of such interest through the procedures used; (3) the probable value of additional or substitute procedures; and (4) the interest of the state or government, including the function involved and the fiscal or administrative burdens imposed by substitute procedures. *Dobzenski v Dobzenski*, 208 Mich App 514, 515; 528 NW2d 827 (1995). In civil cases, due process generally requires notice of the nature of the proceedings, a meaningful time and manner to be heard, and an impartial decision maker. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). The opportunity to be heard does not require a full trial-like proceeding. *Id.* However, it does require a hearing such that a party has the chance to learn and respond to the evidence. *Id.* "A trial judge has 'great power and wide discretion' in controlling the course of a trial and in exercising control over the conduct of witnesses and attorneys." *People Smith*, 64 Mich App 263, 266; 235 NW2d 754 (1975).

Petitioner contends that the trial court simply concluded that it would award 2/3 of the invoices and did not allow her to present evidence, did not allow her to make a separate record, and did not allow any reduction for the filing of the counter-complaint. Although we cannot

conclude that petitioner was deprived of due process of law, it is apparent on the record that the trial court failed to exercise discretion, and that lapse constitutes a clear abuse of discretion. *Kowalski, supra*. Initially, it was understood that the costs and attorney fee issue was to address the validity of the requested \$10,000. However, the trial court expressed its concern regarding the need for the evidentiary hearing and then allowed attorney fees in excess of that amount.

Further, the trial court failed to perform the analysis set forth by the *Smith* Court. *Smith, supra*. Specifically, the trial court failed to determine the reasonable rate in conjunction with the reasonable number of hours expended to reach a baseline figure. *Id.* at 522, 530-533. Thereafter, the trial court failed to individually examine the other factors, such as the difficulty of the case, the nature of the professional relationship, and the skill involved, to determine a reasonable attorney fee. Rather, the trial court stated very early on in the hearing that the logical resolution of the issue was to simply split the requested fee into thirds and award two-thirds of the requested amount. The court did not address petitioner's argument that the inclusion of two individual defendants<sup>2</sup> did not create additional costs and did not allow petitioner to submit proofs on the issue. Although a party must present an offer of proof for excluded evidence, MRE 103(a)(2), it is apparent from the record that the trial court would not allow the admission of the proofs particularly in light of its expressed agreement with the position of defendants early in the hearing. Under these circumstances, the award of costs and attorney fees in excess of the initial request for \$10,000 was clearly erroneous. Consequently, we vacate the award in excess of that amount and remand for a determination regarding a reasonable attorney fee.<sup>3</sup>

Affirmed in part, vacated in part. We do not retain jurisdiction.

/s/ Karen M. Fort Hood  
/s/ Michael J. Talbot  
/s/ Stephen L. Borrello

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<sup>2</sup> Although defense counsel may have been required to research the validity of the claim against the individual defendants, there was no record evidence to indicate that the research differed between the two individual defendants. As noted in the *Smith* decision, an attorney fee award serves a purpose and should not provide a windfall. See *Smith, supra* at 528. Moreover, the trial court abused its discretion by failing to consider the counterclaim seemingly filed on behalf of all defendants.

<sup>3</sup> We note that the presiding judge has since retired, and the parties will expend additional resources to address the *Smith* decision. On remand, the burden is on the fee applicant to produce satisfactory evidence, in addition to the attorney's own affidavits, that the fee charged is similar to those in the community for similar services by lawyers of comparable skill, experience, and reputation. *Id.* at 531-532. Thus, the parties may wish to resolve this matter amicably in lieu of additional hearings.