STATE OF MICHIGAN

COURT OF APPEALS

PATRICK SHELSON,

Plaintiff-Appellee,

v

SCHMIDT INDUSTRIES, INC.,

Defendant-Appellant.

UNPUBLISHED
March 10, 2009

No. 281123
Bay Circuit Court
LC No. 05-003336-NZ

Before: Murphy, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from a September 21, 2007, judgment entered in favor of plaintiff in this case in which plaintiff alleged that defendant violated MCL 418.301(11) of the Michigan Worker's Disability Compensation Act, MCL 418.101 *et seq.*[1] (WDCA), by discharging plaintiff in retaliation for exercising his rights under the act and for threatening to sue defendant. We affirm.

Plaintiff injured his hand while working for defendant Schmidt Industries, Inc. He underwent surgery on his hand and was unable to work for a period of time during which he received worker's compensation benefits. According to plaintiff, defendant's owner, David Schmidt, allegedly became quite upset on July 16 when he learned that plaintiff's doctor did not release him to return to work until July 19, and told plaintiff that if he did not return to work the next day he would "suffer the consequence," because "it was costing him entirely too much money for [plaintiff] to be on comp [sic]." Plaintiff was placed on light duty work upon his return to work on July 19, and Schmidt told him that he was not working fast enough and that he needed to "speed things up. Plaintiff was heard threatening to sue defendant, and was thereafter discharged from his employment. Defendant stated in response to plaintiff's interrogatories, "[t]he plaintiff's employment was terminated because he threatened to file a lawsuit against this company."

Defendant raises a myriad of issues, none of which challenge the evidence supporting the conclusion that plaintiff was discharged for exercising his rights under the WDCA. First,

[1] MCL 418.101 *et seq.*

defendant argues that the trial court erred by denying its motion for summary disposition under MCR 2.116(C)(7). Specifically, defendant maintains that plaintiff's action was untimely because it was filed outside the limitations period contained in the employment agreement. We review de novo both a decision on a motion for summary disposition and a question of contractual construction. *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008).

The employment agreement provided that plaintiff had three months from the time of termination of his employment to institute any action against defendant, notwithstanding any other period of limitations set forth by Michigan law, "to the extent that any court finds said period to be reasonable." However, defendant failed to comply with the rules of civil procedure, specifically MCR 2.111(F)(2) and (3), by not raising the contractual limitations period in its answer, and by failing to amend its answer to include this affirmative defense. These rules clearly provide that a party who fails to raise in its pleadings or by motion the affirmative defense of the expiration of a limitations period waives that defense. Defendant first invoked the limitations period in the contract in its motion for summary disposition that was filed more than a year after the commencement of litigation, and after the close of discovery. We conclude that the trial court properly denied the motion for summary disposition based on the contractual limitations period.[2]

Defendant next argues that the trial court improperly granted plaintiff's motion to exclude the defense of failure to mitigate of damages. We disagree. The failure of a discharged employee to mitigate damages is an affirmative defense that is to be established by the employer. *Rasheed v Chrylser Corp*, 445 Mich 109, 124; 517 NW2d 19 (1994). Again, defendant failed to comply with MCR 2.111(F)(2) and (3) by not pleading the affirmative defense in its answer to the complaint and, therefore, waived the defense.[3]

Defendant also asserts that it should have been permitted to submit evidence of plaintiff's collateral sources of income, namely from workers' compensation and Michigan Employment Security Commission benefits, because the judgment should have been offset by the amount of collateral income received. See MCL 600.6303. However, MCL 600.6303 applies to personal injury suits, whereas the present suit involves a violation of the WDCA. The statutory collateral source rule thus does not apply.

Defendant next argues that the trial court improperly admitted evidence under MRE 608(b) of Schmidt's offer to perjure himself in an unrelated proceeding under MRE 608(b). We

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[2] Defendant's argument on appeal focuses solely on the legal propriety of contractually shortening a limitations period. Defendant does not address on appeal the failure to timely raise the limitations period and has not provided this Court with any reason why the contractual provision in the employment contract that existed since 1998 was not invoked earlier.

[3] Defendant merely raised the issue but merely raised it verbally during the hearing on plaintiff's motion, almost two years after the answer was filed. Defendant never filed a motion to amend its answer, nor did it file a response to plaintiff's motion in limine to exclude mitigation evidence.

review a trial court's decision on evidentiary matters for an abuse of discretion. *People v Miller*, 242 Mich App 38, 54; 617 NW2d 697 (2000). A trial court abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Michigan Dep't of Transportation v Haggerty Corridor Partners Ltd*, 473 Mich 124, 134; 700 NW2d 380 (2005).

Plaintiff had requested admissions from Schmidt regarding his offer to commit perjury and make untruthful statements about an incident that he did not witness. Because Schmidt did not timely respond to the request for admissions, the trial court deemed them admitted, and held that all but one of the admissions was admissible. The admissions did not reveal anything about Schmidt's plea of no contest to a charge of obstruction of justice, a conviction, or any actual testimony given by Schmidt.

MRE 608(b) provides as follows:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The evidence in question clearly concerns Schmidt's character for truthfulness and, therefore, the trial court properly exercised its discretion in admitting it.

Further, evidence of Schmidt's prior conduct was presented in the form of testimony from himself and other witnesses. Thus, that the request for admissions was admitted is of little import. Schmidt testified that he had a meeting with his staff in 1998 in which he informed them of his offer to perjure himself regarding the criminal matter in order that they would not be shocked to read about it in the newspaper. A long-time employee answered in the affirmative when asked if Schmidt "acknowledged that he offered to perjure himself in another matter" in order to warn employees that it would be in the newspaper. Aside from the requested admissions, the record clearly indicates that Schmidt offered to give false testimony and statements in the criminal matter. Although the record lacks the level of detail that the requested admissions provide, it well establishes Schmidt's prior conduct in question. Thus, even if the requested admissions were improperly admitted, any error was harmless.

Next, defendant argues that the trial court erred by redacting the employment agreement before admitting it into evidence because the entire contract was relevant under MRE 401 and 402. However, defendant fails to argue with specificity why the entire contract was relevant, why it "materially changed" the employment relationship, or how defendant's case suffered because of the redaction. Under MRE 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The trial court properly redacted the contract in order to avoid confusion, excluding any portion that may imply defenses that were not before the jury.

Defendant argues next that the trial court erred by failing to make findings regarding the reasonableness of the attorney fees in awarding case evaluation sanctions under MCR 2.403(O) where defendant objected to the reasonableness of the $250 hourly attorney fee rate requested by plaintiff.[4] We review a trial court's ruling on a request for attorney fees for an abuse of discretion. *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008).

Under MCR 2.403(O), a prevailing party is entitled to 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. The following factors should be considered when determining the reasonableness of a fee award:

> (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. [*Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982).][5]

Defendant argues that the trial court's ruling was made without apparent consideration of these factors and requests that the case be remanded for a determination of the issue of attorney fees in accordance with *Wood*. However, "the trial court need not detail its findings as to each specific factor considered," *Wood, supra* at 588, and under MCR 2.517(A)(4) decisions on motions do not require findings of fact. *Michigan Nat'l Bank v Metro Institutional Food Service, Inc*, 198 Mich App 236, 241-242; 497 NW2d 225, 227 (1993).

Here, plaintiff's counsel asked for attorney fees at an hourly rate of $250 based on the Economics of Law Practice that was produced by the State Bar of Michigan in 2003, but plaintiffs were only awarded $200 per hour. This exhibit indicated that an attorney practicing in excess of 25 years[6] and charging $225 an hour would fall in the 75th percentile. For an attorney that specialized in labor law, the rate would be $285 per hour at the 75th percentile. Counsel also presented evidence of the hourly rates he had been awarded as sanctions in past cases, including $125 in 1993 and $200 in 1996. It would not be unreasonable to assume that the court was familiar with plaintiff's counsel experience and background. Defendant has not noted any deficiencies in plaintiff's counsel's experience and background such that an hourly rate of $200

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[4] Initially, we note that defendant argues that plaintiff is not entitled to fees and costs because the case evaluators considered mitigation of damages, an issue not presented at trial. Defendant provides no legal authority for this argument, and we decline to address it.

[5] In *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), a case decided after the judgment was entered in this case, our Supreme Court elaborated on the method for calculating attorney fees as case-evaluation sanctions, concluding that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, and multiplying this number by the reasonable number of hours expended in the case. The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee.

[6] Plaintiff's counsel has been licensed to practice law since 1982.

would be unreasonable. Further, at the hearing on the issue, defendant expressly recognized that fees for 150 hours of work should be awarded. In light of defense counsel's recommendation, and plaintiff's attorney's unchallenged credentials, we conclude that the hourly attorney rate is reasonable, and that there was no abuse of discretion regarding the award of attorney fees.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey