STATE OF MICHIGAN

COURT OF APPEALS

ANDREW JACK STRANE,

Plaintiff-Appellant,

v

JEFFREY RUTHIG, JAMES ARMSTRONG, BRET GOODING, RICHARD RULE, and AARON SWEENEY,

Defendants-Appellees.

UNPUBLISHED
May 28, 2009

No. 282189
Emmet Circuit Court
LC No. 06-009331-NZ

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

In this civil rights action, plaintiff brought both state law and federal law claims against five state troopers. The trial court granted summary disposition to all defendants on all claims and awarded them case evaluation sanctions. Plaintiff appeals by right. We affirm the trial court's grant of summary disposition. However, we vacate the award of case evaluation sanctions and remand to the trial court for recalculation of those sanctions as to three defendants only.

I. Basic Facts and Procedural History

On October 13, 2005, plaintiff and his friend were riding their bicycles eastbound on East Mitchell Road. At some point, they had stopped their bicycles and were standing by the side of the road at a "T" intersection when Trooper Jeffrey Ruthig, a Michigan State Police trooper drove by them. Plaintiff asserts that he and his friend had stopped for a drink of water and that before getting back on his bike he adjusted his biking clothes, including his shorts. Trooper Ruthig, testified that given the position of plaintiff's hands near his waist, he thought plaintiff was urinating although he admits that he did not see any urine stream nor did he see plaintiff's genitals.

According to Trooper Ruthig's testimony, because plaintiff was in a residential area with cars passing by, he decided to turn around and admonish plaintiff for public urination. He testified that at that point, he had no intention "of taking names or even getting out of my patrol car if I didn't have to." Trooper Ruthig turned his car around, by which time plaintiff and his friend were back on their bicycles, again heading eastbound in a single-file line on the paved portion of the shoulder of the road. Trooper Ruthig testified that he pulled up next to plaintiff,

put down his window, and told plaintiff, "Pull over." He testified that plaintiff ignored him, so he stated it a second time more forcefully at which point plaintiff looked over at him and said, "What?" Trooper Ruthig testified that he yelled a third time for plaintiff to pull over and that plaintiff again completely ignored his command. Trooper Ruthig then turned on his overhead light, moved up and over "a little bit more" and this time told plaintiff to pull over with "more of a forceful command." Plaintiff ignored him a fourth time, so he hit a blast on the siren. As plaintiff continued to ignore his directives, Trooper Ruthig testified that he turned the siren on, at which point plaintiff, having traveled 2/10's of a mile from their initial interaction, suddenly pulled across in front of the patrol car and went into a parking lot for a convenience store located on the other side of the road. Trooper Ruthig testified that he had to brake to avoid hitting plaintiff and that he then pulled into the store parking lot behind plaintiff.

Trooper Ruthig testified that given plaintiff's repeated refusal to follow his commands, after plaintiff pulled over, he was "chewing [plaintiff] out," but remained a few feet away from plaintiff. He testified that he told plaintiff, "You're required to pull over when ordered by a police officer" and that plaintiff responded by making an insulting remark about his breath. Trooper Ruthig testified that he then asked plaintiff for his identification and plaintiff responded, "Do I look like I have any pockets on me?" at which point he asked for plaintiff's name and plaintiff refused to give it to him. Trooper Ruthig testified that he told plaintiff he had to give identification or go to jail, at which point plaintiff gave Trooper Ruthig his name and birthdate. According to Trooper Ruthig, when he typed the information into the LIEN system the name did not come up, so he went back and asked for plaintiff's driver's license number. Plaintiff provided the number, and this time the search "came back properly." It appeared that the birthday previously entered by Trooper Ruthig was off by a day. Trooper Ruthig conceded that he may have initially written the information down incorrectly. Trooper Ruthig then gave plaintiff a citation for disregarding a police officer who is directing or controlling traffic pursuant to MCL 257.602.

According to plaintiff, after resuming cycling after having his drink of water, he saw Trooper Ruthig shouting at him from inside a police vehicle. Plaintiff testified that he could not hear what Trooper Ruthig was saying, so he shouted "What?" back to Trooper Ruthig. He testified that he then heard Trooper Ruthig say, "Pull over," and he immediately said, "Okay. I will," and motioned with his left hand and nodded to indicate that he would pull into the parking lot of the convenience store they were approaching. Plaintiff testified he was concerned about the possibility of injury if he pulled over to the right and thought that going into the parking lot was the safest thing to do. Plaintiff testified that he informed the trooper of where he was pulling over not only by pointing with his left hand and head, but that he also said to the trooper, "I will [pull over] right there" or something to that effect. Plaintiff testified that the trooper then sped up and then "slammed on the breaks" immediately adjacent to plaintiff's leg and turned on the siren right next to plaintiff. Plaintiff testified that he again held out his left arm again to indicate he was making the left turn into the parking lot and that he then did so.

According to plaintiff, Trooper Ruthig came out of his car and asked, "Why didn't you stop?" to which plaintiff responded, "I thought that this was the safest choice." At that point, according to plaintiff, the trooper "came right up to my face," and plaintiff, in a normal conversational tone, asked him for some room and backed up a couple of feet. Plaintiff testified that the trooper came forward at him again and "got into my face right next to me as though we

were in a baseball game and I were an umpire and he were the manager, and I asked him to give me a little bit of space. And I backed up a little bit because he did not and then he came forward again. And I said, 'Please, really', and then I probably made a stupid mistake in saying 'Plus I can smell your breath and its bad, and he did not like that at all.'" According to plaintiff, the trooper told him he should have stopped when directed to do so and plaintiff replied that he did stop in what he thought was a safe location. The trooper then accused plaintiff and his friend of urinating at the side of the road which both of them denied and the trooper responded by saying "Do you think I'm lying? Do you think I'm stupid or something." Plaintiff described the officer as "aggressive," and Trooper Ruthig admitted that he was irritated.

Eventually, according to plaintiff, the trooper asked him for identification and plaintiff told him that he did not have identification with him at which point the trooper said that he could take plaintiff to jail for using a public roadway without identification. Plaintiff testified that he asked if there was some other way for him to prove his identity and the trooper asked for his name, birthdate, and driver's license number, which he accurately and promptly provided. According to plaintiff, the trooper returned after a moment and said that he could not find plaintiff in the LIEN system and so he would have to take him to jail. The two of them reviewed the information plaintiff had initially given and discovered that the birthdate the officer had written down was incorrect. The trooper gave plaintiff a ticket for disregarding a police officer who is directing or controlling traffic.

Plaintiff and his friend were displeased by what they considered Trooper Ruthig's unprofessional behavior and proceeded to the Michigan State Police post in Petoskey to file a citizen's complaint. They met with defendant Sgt. Richard Rule and requested to speak with the Post Commander who they were told was unavailable. Several days later, plaintiff called the post and inquired with Sgt. Rule regarding the status of his complaint and asked for a copy of the written documentation he presumed had been prepared in response to his complaint. According to plaintiff, Sgt. Rule told him that nothing had been written up and discouraged him from proceeding with the complaint. Plaintiff declined to withdraw it, however. Sgt. Rule testified that he thereafter spoke about the complaint with the Post Commander, defendant Lt. Aaron Sweeney, who told Sgt. Rule that the complaint did not merit investigation by Internal Affairs, and that he then called plaintiff's number and left a message advising of this conclusion.

Although the incident had occurred on October 13, 2005, Trooper Ruthig did not submit his report on the incident until October 18, 2005, at which time he requested a misdemeanor warrant on the charge of disregarding a police officer. MCL 257. 602. The misdemeanor warrant request was received by the prosecutor on October 20, 2005.

On October 21, 2005, plaintiff called the post to again inquire about the status of his complaint. His call was answered by defendant Sgt. Bret Gooding. Plaintiff and Sgt. Gooding recall the conversation differently. According to Sgt. Gooding's affidavit, plaintiff was upset about the message he had received from Sgt. Rule and wanted to know why his complaint was not being addressed. Sgt. Gooding's affidavit states that he told plaintiff that he did not know anything about the incident and that he offered plaintiff the opportunity to leave a message for Sgt. Rule or Lt. Sweeney, but that plaintiff declined.

Plaintiff testified that when Sgt. Gooding asked what plaintiff was calling about, plaintiff told him he was calling to follow up on a complaint and asked to speak to the Post Commander.

According to plaintiff, Sgt. Gooding refused to connect him to the Post Commander and asked for more details. Plaintiff testified that he told Sgt. Gooding that it involved an incident in which "he had been on a bicycle" at which point Sgt. Gooding's voice became "elevated." According to plaintiff, Sgt. Gooding said that he knew about plaintiff's case and that Sgt. Gooding sounded "aggressive,"- "mean" and "very upset with me."

Plaintiff testified that Sgt. Gooding told him: "I remember you. If I were there I would have taken you to jail for [felony] fleeing and eluding." According to plaintiff, Sgt. Gooding then told him that he had in fact seen some of the interaction between plaintiff and Trooper Ruthig as he was at the scene in an unmarked car.

It is uncontested that after he spoke with plaintiff on October 21, 2005, Sgt. Gooding called the prosecutor's office "to inquire into the status of the warrant request submitted by Trooper Ruthig." Sgt. Gooding described the call to the prosecutors' office about the warrant request regarding plaintiff as "a routine phone call made as a part of my supervisory responsibilities."

Later that same day, the assistant prosecutor dismissed the misdemeanor charge and instead charged plaintiff with resisting and obstructing a police officer, MCL 750.81d, which is a felony. The assistant prosecutor prepared the felony complaint and a supporting affidavit that was signed by defendant Trooper James Armstrong pursuant to MCL 764.1a. That evening, two officers came to plaintiff's home and arrested him for resisting and obstructing. He was handcuffed, and taken to jail where he was fingerprinted and booked.

Plaintiff's complaint alleges that in retaliation for his complaint, Sgt. Gooding had convinced the assistant prosecutor to increase the charges against him to resisting and obstructing and that Sgt. Gooding did so in retaliation for plaintiff having filed a complaint against Trooper Ruthig.

A preliminary examination was held on November 17, 2005. The District Court held that plaintiff's conduct did not rise to the level of resisting and obstructing a police officer and dismissed the charge and the prosecutor did not appeal.

After dismissal of the criminal charges, plaintiff filed a complaint against the instant defendants asserting federal civil rights violations under 42 USC 1983. Plaintiff's federal claim against Trooper Ruthig was based on the Fourth Amendment's prohibition against unlawful seizures. His federal claim against Sgt. Rule, Trooper Armstrong and Sgt. Gooding was based on the allegation that they retaliated against plaintiff for the exercise of his First Amendment rights in filing the complaint against Trooper Ruthig. Plaintiff sued Lt. Sweeney, the Post Commander, for violating his Fourteenth Amendment due process rights by having a policy or custom that did not respond to citizen complaints.

Plaintiff also brought state law claims. He alleged malicious prosecution and false arrest/imprisonment against Trooper Ruthig, Trooper Armstrong and Sgt. Gooding and gross negligence against these troopers as well as Sgt. Rule and Lt. Sweeney.

All defendants moved for summary disposition under MCR 2.116(C)(7) and (C)(10). The trial court granted the motion and assessed case evaluation sanctions to all defendants. Plaintiff now appeals.

II. Summary Disposition

We review de novo a trial court's decision on a motion for summary disposition. *Brown v Farm Bureau Gen Ins Co*, 273 Mich App 658, 660; 730 NW2d 518 (2007). The facts are considered in the light most favorable to the nonmoving party. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper where there is no genuine issue of material fact. *Brown*, *supra*. Although defendants moved for summary disposition under both (C)(7) and (C)(10), the record evidences that the trial court relied on evidence outside the pleadings, making its decision pursuant to (C)(10). *Id.* This Court reviews the record and the documentary evidence, but does not make findings of fact or weigh credibility. *Taylor v Lenawee Rd Comm'rs*, 216 Mich App 435, 437; 549 NW2d 80 (1996). All reasonable inferences are drawn in favor of the nonmovant. *De Sanchez v Mich Dep't of Health*, 455 Mich 83, 89-90; 565 NW2d 358 (1997).

As an initial matter, we affirm the trial court's dismissal of all the gross negligence claims. Plaintiff's allegations are of intentional and knowing acts, not reckless acts. As defendants correctly note, "this Court has rejected attempts to transform claims involving elements of intentional torts into claims of gross negligence." *VanVorous v Burmeister*, 262 Mich App 467, 483-484; 687 NW2d 132 (2004). Accordingly, the trial court properly dismissed those claims.

Turning to the claims of intentional conduct, we first address the claims against Trooper Ruthig. The trial court concluded that Trooper Ruthig had probable cause to detain and charge plaintiff for violation of MCL 257.602. The existence of probable cause is a question of law that we review de novo. *Matthews v Blue Cross & Blue Shield of Mich*, 456 Mich 365, 377; 572 NW2d 603 (1998). "'Probable cause involves a determination of both the historical facts and whether the rule of law as applied is violated.'" *Walsh v Taylor*, 263 Mich App 618, 628; 689 NW2d 506 (2004), quoting *Matthews*, *supra*. Generally, whether probable cause existed is a question of law to be determined by the trial court. *Id.* However, "'[w]here the facts on which the issue turns are in dispute, the question is for the jury.'" *Id.*, quoting *Matthews*, *supra* at 381-382. Thus, the jury resolves the factual disputes, and then the trial court determines whether those facts constitute probable cause. *Matthews*, *supra* at 382.

We affirm the trial court's conclusion regarding probable cause for Trooper Ruthig's actions at the scene. Given this conclusion, plaintiff has no basis to maintain any federal or state claims against this trooper. There is no dispute that Trooper Ruthig saw plaintiff adjusting his clothing at the side of the road. There being no question of fact, the issue of whether Trooper Ruthig had probable cause to instigate a stop against plaintiff was a question of law for the trial court to decide. *Walsh*, *supra*. Although plaintiff had a harmless explanation for this behavior, Trooper Ruthig's perception was that plaintiff had been urinating on the side of the road. "Probable cause that a particular person has committed a crime 'is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that the accused is guilty of the offense . . . .'" *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 19; 672 NW2d 351 (2003) (internal citations omitted).

Based on both parties' descriptions of plaintiff's behavior, Trooper Ruthig's perception of plaintiff's behavior was reasonable. Given that Trooper Ruthig's stated intention was to simply admonish plaintiff, Trooper Ruthig had sufficient probable cause to initiate the stop against plaintiff.

Having had probable cause to initiate the stop against plaintiff, Trooper Ruthig then observed what reasonably appeared to him to be plaintiff's refusal to follow his directions, as plaintiff continually ignored his requests to pull over. Indeed, plaintiff admitted that he failed to pull over after having been requested to do so by Trooper Ruthig multiple times and after Trooper Ruthig activated his lights and siren.

Although the arrest warrant issued on October 21, 2005, was for a violation of MCL 750.479, (felony resisting and obstructing), the initial citation issued by Trooper Ruthig, and for which the warrant was initially requested, was for violation of MCL 257.602, a misdemeanor. MCL 257.602 provides: "A person shall not refuse to comply with a lawful order or direction of a police officer when that officer, for public interest and safety, is guiding, directing, controlling, or regulating traffic on the highways of this state."

Under the circumstances as reasonably perceived by Trooper Ruthig and admitted by plaintiff, Trooper Ruthig had probable cause for issuing this ticket.[1] Plaintiff failed to comply with Trooper Ruthig's commands to pull over so that he could discuss the perceived urination incident with plaintiff, and plaintiff initially failed to provide any identification when requested, only offering up his name and birthdate after Trooper Ruthig told plaintiff that he was required to provide identification. Accordingly, the trial court properly determined, as a matter of law, that probable cause existed for Trooper Ruthig's issuing the ticket to plaintiff. Thus, we conclude that the trial court properly dismissed all claims against Trooper Ruthig.

We also conclude that the trial court properly dismissed all claims against Trooper Armstrong. Plaintiff claims that Trooper Armstrong's signing of the warrant affidavit constituted a violation of 42 USC 1983 because the claims were made in reckless disregard for the truth to establish probable cause for plaintiff's arrest. See *Vakilian v Shaw*, 335 F3d 509, 517 (CA 6, 2003). Plaintiff makes much of the fact that Trooper Armstrong was not present at the scene, had no personal knowledge, and did not talk to Trooper Ruthig, but the affidavit states that it is made based on "personal investigation and upon information and belief." That Trooper Armstrong was not present at the incident and did not talk to Trooper Ruthig did not preclude his signing an affidavit based on information he obtained from Trooper Ruthig's report.

Plaintiff also claims that the affidavit deliberately excluded exculpatory information. The affidavit states, in relevant part:

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[1] We note that plaintiff's argument that MCL 257.602 is inapplicable because Ruthig was not "guiding, directing, controlling, or regulating traffic" is without merit. At the time Ruthig was attempting to have plaintiff stop, plaintiff was riding his bicycle. MCL 257.657 provides that a "person riding a bicycle . . . upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this chapter . . . ."

> That Trooper Ruthig of the state police observed two bicyclists standing alongside E. Mitchell Road and from a distance it appeared that one was urinating and that there were numerous residences in the same area; that as he came closer they got on their bicycles and began riding away; that Trooper Ruthig pulled alongside, rolled down the passenger window and asked them to stop so he could speak with them; that they ignored him and continued riding, that he asked them several more times and eventually turned on his emergency overhead light and siren, that the bicyclists continued to ignore him, turning off into a parking lot and he eventually got them to stop; that upon confronting them the defendant refused to identify himself.

There is nothing in this statement that is contrary to Trooper Ruthig's perception of the events as recounted in his report and, thus, Trooper Armstrong did not act with reckless disregard for the truth. There is no evidence that Trooper Armstrong was involved in requesting the warrant or increasing the charge against plaintiff. Indeed, plaintiff argues in his brief that the prosecutor wrote the affidavit and simply had Trooper Armstrong sign it. Trooper Armstrong also played no part in plaintiff's actual arrest and there is no evidence that he took any other actions involving plaintiff at all. Accordingly, summary disposition is also affirmed as to defendant Trooper Armstrong.

As to Lt. Sweeney and Sgt. Rule, although plaintiff claims they failed to properly follow-up on his complaint, plaintiff neither articulated what constitutional deprivation he suffered by this alleged failure, nor how their actions led to his allegedly false arrest or prosecution. That Sgt. Rule and Lt. Sweeney failed to follow their own internal procedures is not actionable absent a causally connected injury. It is undisputed that these two officers played no role in instituting the charges, requesting the warrant, increasing the misdemeanor count to a felony, or in plaintiff's actual arrest. Accordingly, the grant of summary disposition in favor of defendants Sgt. Rule and Lt. Sweeney is affirmed.

As to Sgt. Gooding, we affirm the trial court's dismissal of the claims against him because plaintiff failed to establish a question of fact whether he induced the assistant prosecutor to charge plaintiff with felony resisting and obstructing. Plaintiff has provided evidence that Sgt. Gooding's attitude with him on the phone was aggressive and angry. Sgt. Gooding denies this, but who is accurately recounting the conversation is a question of fact. However, Sgt. Gooding's attitude towards the plaintiff is not in and of itself sufficient to establish a question of fact whether he actually took retaliatory action. Sgt. Gooding testified that his contact with the assistant prosecutor was routine and that he made no statements intended to, or which may have, suggested that plaintiff should be charged with a felony. In addition, the assistant prosecutor has executed an affidavit stating he and his supervising prosecutor alone made the charging decision and that other than Trooper Ruthig's report he received no information regarding plaintiff from anyone at the state police. He also attested that "there was absolutely no influence from anyone at the Michigan State Police to change the requested charge submitted by Trooper Ruthig to the charge I ultimately authorized.". His affidavit further states specifically that Sgt. Gooding did not request or encourage him to increase or change the charges against plaintiff and that the call from Sgt. Gooding was the type of standard call his office routinely received from officers to make sure that the warrant request and other appropriate documents had been received. The affidavit also states: "At the time I authorized the felony complaint against Mr. Strane, I had no

knowledge that Mr. Strane had lodged a complaint with the Michigan State Police regarding Trooper Ruthig, or any other officer. Therefore, his assertion that his complaint had any influence on my charging decision is completely false." Finally, the affidavit states: "I understand that Mr. Strane is claiming in his lawsuit that the Michigan State Police exerted influence on me to authorize a felony complaint against him. This assertion is absolutely and completely false. . . . The decision to charge Mr. Strane with a felony was made by me and me alone."

In his response, plaintiff does not cite testimony or other evidence, the assistant prosecutor's affidavit, or Sgt. Gooding's testimony regarding his conversation with the assistant prosecutor. Nor do we believe that the issue of Sgt. Gooding's attitude or statements on the phone with plaintiff are sufficient to establish a reasonable inference that Sgt. Gooding did retaliate, particularly in the face of the assistant prosecutor's affidavit.[2]

Accordingly, we affirm the trial court's grant of summary disposition as to all defendants.

III. Case Evaluation Sanctions

Plaintiff also argues on appeal that the trial court abused its discretion in awarding defendants $6,300 for attorney fees and $40 in taxable costs as case evaluation sanctions. We agree in part.

A trial court's decision to grant case evaluation sanctions involves a question of law that we review de novo, but the amount granted is reviewed for an abuse of discretion. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000). An abuse of discretion occurs when the result falls outside the range of principled and reasonable outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The case evaluation panel awarded plaintiff $18,000 against defendants Sgt. Gooding and Sgt. Rule, but zero against defendants Lt. Sweeney, Trooper Armstrong, and Trooper Ruthig. Lt. Sweeney, Trooper Armstrong, and Trooper Ruthig accepted their awards, which plaintiff rejected. Sgt. Gooding and Sgt. Rule rejected the awards against them, which plaintiff accepted.

Case evaluation sanctions were not appropriate under the plain language of MCR 2.403(O) as to the claims against Sgt. Gooding and Sgt. Rule because plaintiff accepted the case evaluation as to those defendants. See *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517, 522; 664 NW2d 263 (2003) (noting that none of the three plaintiffs who accepted their case evaluation awards was liable for the defendant's costs even though the defendant prevailed against them at

[2] According to plaintiff's testimony, the only remark made by Gooding that even addresses the charging offense was his statement that he would have arrested plaintiff for fleeing and eluding. However, plaintiff was not later charged with fleeing and eluding, but instead resisting and obstructing.

trial). Thus, case evaluation sanctions can only be assessed in favor of the other three defendants. "This result is consistent with the purpose of the case evaluation rule to place the burden of litigation costs upon the party who insists upon a trial by rejecting a proposed mediation award." *Id.* (internal quotes and citation omitted).

Additionally, a "rejecting plaintiff is only liable for those attorney fees that accrued as a consequence of that plaintiff's rejection, which is determined by examining the rejecting plaintiff's theories of liability and damage claims." *Id.* Therefore, to the extent that plaintiff does not sufficiently improve his aggregate position after trial, the trial court must still award case evaluation sanctions only for that work which counsel performed specifically for those defendants entitled to sanctions. One attorney represented all the defendants and only that work (or the percentage of work) done for the three defendants that are entitled to sanctions may be awarded.

Finally, the trial court awarded case evaluation sanctions without any discussion of the factors required for consideration of whether the attorney fee is reasonable. Our Supreme Court recently provided additional guidance regarding the determination of a reasonable attorney fee:

> We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e. factor 3 under MRPC 1.5(a). In determining this number the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of house expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood* [*v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982)]). The number produced by this calculation should serve as *the starting point for calculating a reasonable attorney fee*. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. *And, in order to aid appellate review, a trial should briefly discuss its view of the remaining factors*. [*Smith v Khouri*, 481 Mich 519, 530-531; 751 NW2d 472 (2008) (emphasis added).]

Thus, on remand the trial court should determine what work was done by defense counsel solely for defendants Lt. Sweeney, Trooper Armstrong, and Trooper Ruthig and award attorney fees only for that time. In addition, in determining the fee, the court should consider the principles outlined in *Smith*.

The trial court's grant of summary disposition to all defendants is affirmed. The case is remanded to the trial court for a determination of case evaluation sanctions in favor of defendants Lt. Sweeney, Trooper Armstrong, and Trooper Ruthig. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro