STATE OF MICHIGAN

COURT OF APPEALS

JOHN SINGER III,

Plaintiff-Appellant,

v

ANURADHA SREENIVASAN and BALAJI GANAPATHY,

Defendants-Appellees.

UNPUBLISHED
September 1, 2009

No. 284575
Macomb Circuit Court
LC No. 06-002281-NI

Before: Cavanagh, P.J., and Markey and Davis, JJ.

PER CURIAM.

Plaintiff appeals by right judgment entered after a jury trial, awarding defendants case evaluation sanctions. We affirm.

Plaintiff first argues that the trial court erred when it awarded defendants attorney fees under MCR 2.403(O)(1) because both parties rejected the case evaluation award. We disagree.

Our Supreme Court in *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008) (Taylor, C.J., plurality opinion), stated the applicable standard of review:

> A trial court's decision whether to grant case-evaluation sanctions under MCR 2.403(O) presents a question of law, which this Court reviews de novo. We review for an abuse of discretion a trial court's award of attorney fees and costs. An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. [Citations omitted.]

The pertinent portions of the court rule regarding case-evaluation sanctions, MCR 2.403(O), provide:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the evaluation.
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> * * *

(6) For the purpose of this rule, actual costs are

(a) those costs taxable in any civil action, and

(b) 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.

For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.

"The purpose of MCR 2.403 is to expedite and simplify the final settlement of cases to avoid a trial." *Bennett v Weitz*, 220 Mich App 295, 301; 559 NW2d 354 (1996). "'Actual costs, including attorney fees, are awardable when both parties reject the award as well as when only one does.'" *Haliw v City of Sterling Heights (On Remand)*, 266 Mich App 444, 451; 702 NW2d 637 (2005), quoting *Zalut v Andersen & Assocs Inc*, 186 Mich App 229, 232-234; 463 NW2d 236 (1990). "Actual costs" are defined as "those costs taxable in any civil action," as well as "a reasonable attorney fee . . . ." MCR 2.403(O)(6); *Badiee v Brighton Area Sch*, 265 Mich App 343, 376; 695 NW2d 521 (2005).

In this case, both plaintiff and defendants rejected a case evaluation award for plaintiff in the amount of $95,000. After trial, a jury returned a verdict of $42,500 in plaintiff's favor, which the trial court adjusted for prejudgment interest to $46,758.41. MCR 2.403(O)(3). Plaintiff does not dispute that the outcome was more favorable to defendant because it was more than 10% below the case evaluation. *Id*. Rather, plaintiff argues that the first sentence of MCR 2.403(O)(1) specifically references "actual costs," whereas the second sentence, addressing a situation where both parties reject a case evaluation award, provides that the party entitled to sanctions is entitled to only to "costs," which do not include attorney fees. Although plaintiff concedes that this Court interprets the terms "actual costs" and "costs" in MCR 2.403(O)(1) as both including attorney fees, he argues this Court's reading of the court rule violates the precept that exceptions to the "American Rule"[1] are to be construed narrowly. We disagree.

The *Smith* Court stated, "[c]onsistently with the American rule, this Court has specifically authorized case-evaluation sanctions through court rule, allowing the awarding of reasonable attorney fees to promote early settlements." *Smith, supra* at 527 (Taylor, C.J., plurality opinion). Moreover, as noted by defendants, the argument plaintiff advances was specifically rejected in *Zalut*, in which this Court explained:

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[1] "The general 'American rule' is that 'attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary.'" *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004), quoting *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 37-38; 576 NW2d 641 (1998). "As such, the term 'costs' ordinarily does not encompass attorney fees unless the statute or court rule specifically defines 'costs' as including attorney fees." *Id.*

> We have found nothing in the commentary to the rule or in the case law which would support plaintiffs' reading of the court rule. It is our opinion that the omission of the word "actual" in the second sentence of MCR 2.403(O)(1) describing costs was inadvertent. We believe that to read the rule any other way would create a distinction where one is not warranted or intended. [*Zalut, supra* at 232-233.]

Thus, as explained in *Zalut* and followed in *Haliw, supra,* it is clear that attorney fees are included in the costs awarded under MCR 2.403, even when both parties have rejected the case evaluation award, and therefore, plaintiff's argument is without merit.

Plaintiff next argues that this Court has ignored prior case law by permitting the recovery of a "reasonable attorney fee" based on a rate higher than the rate actually billed. We disagree.

We interpret a court rule the same way as we interpret a statute, so this is a question of law we review de novo. *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 553-554; 640 NW2d 256 (2002). As discussed above, "actual costs" are defined in MCR 2.403(O)(6) as "those costs taxable in any civil action," and "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 *Smith* Court explained that this rule "only permits an award of a *reasonable* fee, i.e., a fee similar to that customarily charged in the locality for similar legal services, which, of course, may differ from the *actual* fee charged or the highest rate the attorney might otherwise command." *Smith, supra* at 528 (Taylor, C.J., plurality opinion).

Although this statement certainly supports an award of an attorney fee *less* than the hourly rate charged, this Court has held simply that "[r]easonable fees are not equivalent to actual fees charged." *Zdrojewski v Murphy*, 254 Mich App 50, 72; 657 NW2d 721 (2002). Moreover, in *Cleary v Turning Point*, 203 Mich App 208; 512 NW2d 9 (1993), this Court stated, "[n]othing in the language of MCR 2.403(O) requires a trial court to find that reasonable attorney fees are equivalent to actual fees . . . . We conclude, therefore, that the trial court did not abuse its discretion in awarding defendant attorney fees calculated at an hourly rate higher than the hourly rate that defendant was charged by defense counsel." *Id*. at 212.

In the case at bar, defense counsel admitted billing the retaining insurance company at a rate of $110 an hour, but requested a reasonable attorney fee calculated at a rate of $250 an hour, supported by the 2007 Economics of Law Survey from the State Bar of Michigan and affidavits from himself and an another attorney. The trial court determined that a rate of $175 an hour was "reasonable under the circumstances." Plaintiff does not argue that this hourly rate was unreasonable or that the trial judge abused his discretion. Rather, plaintiff argues that the statute requires that an attorney fee "must be incurred." Plaintiff asserts the reasoning of this Court in *Cleary* cannot control, but instead contends that the reasoning of *McAuley v General Motors Corp*, 457 Mich 513; 578 NW2d 282 (1998), overruled on other grounds, *Rafferty v Markovitz*, 461 Mich 265, 602 NW2d 367 (1999), should control. According to plaintiff, awarding as a reasonable attorney fee an amount greater than the rate charged is the equivalent of awarding punitive damages; it constitutes a double recovery and gives attorneys a windfall.

Our decisions, however, leave no doubt that a reasonable attorney fee awarded can be calculated at an hourly rate higher than the rate charged. Moreover, *McAuley* is not on point.

McAuley held that under the circumstances of that case, the prevailing party was not entitled to recover a second award of attorney fees under MCR 2.403(O) when reasonable attorney fees had already been awarded pursuant to the Handicappers' Civil Rights Act, MCL 37.1101 *et seq*. *McAuley*, *supra* at 515. Thus, plaintiff has failed to persuade us that our past precedent is erroneous.

Plaintiff's last argument on appeal is that he was entitled to costs under MCR 2.625. We disagree.

"When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation." *Grievance Administrator v Underwood*, 462 Mich 188, 193-194; 612 NW2d 116 (2000) (Citations omitted).

MCR 2.403(O)(6) provides "[F]or the purpose of determining taxable costs under this subrule *and* under MCR 2.625, *the party entitled to recover actual costs under this rule* shall be considered the prevailing party." (Emphasis added.) Plaintiff argues that "to the extent that a party who has rejected the case evaluation is not entitled to 'actual costs' pursuant to MCR 2.403(O)(1)," plaintiff would be the prevailing party pursuant to MCR 2.625 and entitled to costs. As discussed above, plaintiff's argument that a party who rejected a case evaluation award cannot recover actual costs, including a reasonable attorney fee, is without merit. Therefore, under the plain language of MCR 2.403(O)(6), defendants are the prevailing parties under MCR 2.403 and MCR 2.625; plaintiff is not entitled to costs under MCR 2.625.[2]

We affirm. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Alton T. Davis

[2] We also note that MCR 2.625(A)(1) provides: "Costs will be allowed to the prevailing party in an action, *unless prohibited* by statute or *by these rules* or unless the court directs otherwise, for reasons stated in writing and filed in the action." On the facts and circumstances of this case, MCR 2.403(O)(6) prohibits plaintiff from be considered the "prevailing party" for purposes of MCR 2.625.