STATE OF MICHIGAN

COURT OF APPEALS

ALLAN FALK, P.C., Plaintiff-Appellant,	UNPUBLISHED December 7, 2010
v	No. 292855 Wayne Circuit Court
LINDA OLSON, Defendant-Appellee.	LC No. 08-102027-CK

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order awarding plaintiff $7,861.30 in attorney fees, inclusive of costs and interest, in this dispute over the amount due and owing for appellate work performed by plaintiff for defendant in the course of defendant's divorce proceedings. We affirm.

Plaintiff represented defendant, via referral from defendant's trial attorney, in connection with a number of appeals arising in defendant's divorce case, a very lengthy, acrimonious and litigious affair involving a substantial marital estate. Ultimately, plaintiff and defendant had a dispute over the amount of fees and costs properly chargeable to defendant, and plaintiff filed the instant action. Plaintiff alleged that it was owed in excess of $11,000 in unpaid fees and costs; defendant asserted that she had overpaid plaintiff by approximately $10,000. Considering the amount involved,[1] rather than proceed to trial, the parties agreed, at a September 19, 2008 hearing before the trial court, to dismiss the pending claims and withdraw all pending motions, and to settle the case by submitting the issue of the amount of fees owed, or due to be refunded, to the trial court for determination "in accordance with MCR 8.122,"[2] and based on the

[1] The matter was filed in Wayne Circuit Court, because defendant resides in Grosse Pointe Farms, which has no district court, and the jurisdiction of the municipal court is limited to claims seeking $3,000.

[2] MCR 8.122 provides:

principles and criteria for determining a reasonable attorney fee set forth in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982), *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973), and Rule 1.5(a) of the Michigan Rules of Responsibility. The parties' discussions both on and off the record on September 19, 2008, culminated in the following unambiguous agreement between the parties:

> THE COURT: FALK versus LINDA OLSON. Gentlemen, you have had a chance to confer with your clients and I propose that we proceed under the Court's authority. *And my understanding is that having had an opportunity to confer with one another and your clients, that you're in agreement to, essentially, dismiss this case and have the Court settle it under the Court rule [MCR 8.122.]. Is that correct?*
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> [Defense counsel]: *Yes. And that means that the motions are withdrawn. The Court will establish whatever procedural scheme, device, it wants to use to resolve this matter. It's off the docket. You're going to tell us what it is that we're going to do, and you will determine an amount that either one party owes the other or visa [sic] versa or no one owes anything, and that will become a judgment of the Court and that will end this. And on behalf of Linda Olson, yes.*
>
> THE COURT: *We'll reopen the case just for the purpose of entering that order, is that your understanding of the agreement?*
>
> [Plaintiff's counsel]: *Yes. That is my understanding on behalf of Allan Falk.*
>
> * * *
>
> [Plaintiff's counsel]: So, Your Honor, just to recap just to make sure: *All filed motions are being withdrawn. . .* [Emphasis added.]

Thus, as a result of the parties' agreement to settle the case, to avoid incurring additional expense considering the minimal amount at issue, all motions – including plaintiff's pending motion for summary disposition – were withdrawn, the case was dismissed, and the entire matter was submitted to the trial judge for a determination of the amount of outstanding fees owed. Pursuant to this stipulation, the trial judge considered documentary evidence, affidavits and

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> Attorneys are officers of Michigan's one court of justice and are subject to the summary jurisdiction of the court. The circuit court of the county in which an attorney resides or maintains an office has jurisdiction, on verified written complaint of a client, and after reasonable notice and hearing, to enter an order for the payment of money or for the performance of an act by the attorney which law and justice may require. All courts have like jurisdiction over similar complaints regarding matters arising from actions or proceedings in those courts.

deposition testimony, in accordance with the foregoing legal authority, and, as previously noted, awarded plaintiff "attorney fees and costs in the amount of $7,861.30."

Plaintiff asserts, broadly, that the trial court erred by construing the parties' stipulation as permitting it to resolve the entirety of the dispute by determination of a reasonable fee according to the criteria set forth in *Khouri*, *Wood*, *Crawley*, and MRPC 1.5(a), and by declining to award plaintiff precomplaint and postcomplaint interest and taxable costs. We disagree.

The interpretation of a stipulation presents a question of law that this Court reviews de novo. *Oakland Hills Dev Corp v Lueders Drainage Dist*, 212 Mich App 284, 294; 537 NW2d 258 (1995). Likewise, settlement agreements constitute contracts and are governed by the legal principles applicable to the construction of a contract. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). The existence and interpretation of a contract involves a question of law that this Court reviews de novo. *Bandit Indus, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001).

Plaintiff first argues that the trial court erred by resolving its claims against defendant other than by way of a decision on its motion for summary disposition. Plaintiff asserts that the parties' reference to MCR 8.122 was intended to permit the trial court to resolve only defendant's assertion that she overpaid plaintiff; it was not intended to permit the trial court to resolve the amount of fees owed to plaintiff. However, the transcripts of the September 19, 2008 and December 18, 2008 hearings plainly belie this assertion. It was plain throughout these hearings that the parties were contemplating, and ultimately agreed to permit, the trial court's resolution of the *entirety* of the dispute between them, not by way of a decision on plaintiff's motion for summary disposition, or based on principles of contract interpretation or notions of account stated, but rather, by determining a reasonable fee under *Khouri*, *Wood*, *Crawley*, and MRPC 1.5(a). First, from the September 19, 2008 transcript:

> THE COURT: We're going to fight about attorney fees. There is a Court rule about Judges getting involved in attorney/client fee disputes *and working it out*.
>
> [PLAINTIFF'S COUNSEL]: I suggested to send it to the State Bar, they refused.
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> THE COURT: Well, there is a Court rule. Let me see if I can find it.
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> * * *
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> THE COURT: Because I can do this myself.
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> [PLAINTIFF'S COUNSEL]: *All these motions going back and forth is a total waste of the time and designed to increase attorney fees to make this so unreasonable to try to collect what is owed my client.*
>
> [DEFENDANT'S COUNSEL]: While you are looking, that's interesting because –

THE COURT: Claims by clients against attorneys. The Circuit Court – this is MCR 8.122. (Inaudible) as an officer has jurisdiction on a verified written complaint of a client, and after reasonable notice of hearing enter an order for the payment of money or for the performance of an act by an attorney which law and justice may require.

I think I can do this. Have you ever looked at this rule 8.122?

[DEFENDANT'S COUNSEL]: I'm not familiar with it. I'm going to be this afternoon I can tell you that.

THE COURT: Well, I think the rule is designed, based on the Court's inherent authority over counsel, and the Court's unique position to decide the reasonableness of attorney fees and *the guidance of the authority, not on point for our situation, but on point for the Judge to understand how to look at fee disputes.* This rule allows the Court to step in if there is jurisdiction to work out these kinds of disputes. I can *work this out* under this rule.

* * *

[PLAINTIFF'S COUNSEL]: *That's okay with us.*

* * *

[PLAINTIFF'S COUNSEL]: *Well, we can take care of all of this. My client will consent to a decision by this Court under the Court rule that you just cited, attorney fee disputes. That will take care of all of it.*

* * *

THE COURT: Sure. *It's a settlement.*

[DEFENDANT'S COUNSEL]: We've agreed that you are brilliant, and, therefore, what we are going to do is you are going to resolve this under 8.122 and that's the end of it. . . . And I have spoken to my client, and I'm authorized to tell you, yes, we'll resolve it this way. *And even though 8.122 doesn't specifically say that you can award money the other way against the attorney, not necessarily against the client, let's get rid of the whole darn thing and you can do it that way*. [Emphasis added.]

And, from the December 19, 2008 hearing:

THE COURT: Okay. I want you to know that besides the WOOD case, even though that case interprets case evaluation sanctions and that kind of thing, that CRAWLY [sic], the rule of professional conduct [MRPC 1.5(a)], those were the ones that *govern how to assess attorney fees and the reasonableness of attorney fees that I have been using as my standard to try to figure out how to*

resolve this dispute. But the latest case is KHOURY [sic]. And are you familiar with that case? . . .

. . . I know you didn't know that [Khouri] was something that I was reading to guide me in how to decide this matter. *So, I want you to be on notice . . .*

* * *

The other thing I said that I needed is that I needed to understand what your outcomes were, what your results were [in the appellate matters], so that I could *analyze the factor under WOOD, [KHOURI], CRAWLY [sic] [c]ase[s] and the rule of professional responsibility* of what outcome and result you obtained. And I also need to understand that issue you posed about the benefit (inaudible) to who. I need to try to figure that out. And I want either the opinions from the Court of Appeals that might help me figure that out. And I also want the bills that – and invoices that Falk sent to [defendant's trial counsel] that itemized and separated the work he determined was for [defendant's trial counsel] only that amounted to the $22,000.00 some odd dollars, and the $6,000 and how they arrived at that. And how they extracted that out of her bill. . . .

. . . . So to do that, I need to understand what was the agreement between [defendant's trial counsel] and Falk. What did he bill him for? What was he doing? And if I'm understanding your theory, you billed her for those things initially and then subtracted it out. I need too – I want to be able to compare date for date, work for work, hour for hour, amount for amount, how that happened?

* * *

Okay. The other thing I wanted to cover with you is *that I was looking at the case in view of Wood, Crawly [sic] and Khoury [sic], and if you took issue with that at all, and the rule of professional responsibility.* Since those cases they're only *giving me guidance* because they're not on point for the rule that we decided to operate under. . . .[Emphasis added.]

It was agreed that plaintiff would submit an affidavit addressing the experience and credentials of Allan Falk, explaining "why he is the super appellant [sic] lawyer under the *Crawley* factors," and that affidavit, with numerous supporting attachments, was filed with the trial court on January 20, 2009. At no point did counsel for either party object to the trial court's approach to resolving the entirety of the parties' dispute over the amount of fees, or of a refund, due and owing, or to the trial court's intention to resolve the dispute via consideration of the factors set forth in MRPC 1.5(a) and the decisions in *Wood*, *Khouri*, and *Crawley*.

To reiterate, the record is clear that the parties agreed to settle this matter by permitting the trial court to determine the amount owed if any, not by rendering a decision on plaintiff's withdrawn motion for summary disposition, but rather in accordance with the principles for determining a reasonable attorney fee set forth in the decisions of our Supreme Court in *Khouri*, and *Wood*, and of this Court in *Crawley*, and in accordance with MRPC 1.5(a). As noted above, the trial court indicated on numerous occasions during the hearings on September 19, 2008 and

December 18, 2008 that this would be its approach to resolving the dispute; at no time did either party object. Indeed, the trial court specifically noted that its approach to resolving the dispute as discussed, and ultimately agreed to, by the parties would be different than the approach it would take if deciding a dispositive motion:

> [PLAINTIFF'S COUNSEL]: Judge, can we decide it on the motion, the summary disposition motion[?]
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> THE COURT: Well, then do you want me to use the law - I told you how I would approach it under the Court rule, but if you decide it on the motion then there all kinds of rules that have to be addressed.

Ultimately, plaintiff agreed to settle this matter by allowing the trial court to resolve the dispute under the guidance of the court rule, the Michigan Rules of Professional Responsibility, and the cited cases, and the parties unequivocally agreed to withdraw *all* motions, including plaintiff's motion for summary disposition. Therefore, plaintiff cannot now argue that the trial court erred by proceeding to resolve the dispute in the manner agreed, rather than render a decision on the motion for summary disposition.

Consistent with the parties' stipulation to settle this case, the trial court evaluated the documentary evidence presented to it according to the principles and criteria for determining a reasonable attorney fee set forth in our Supreme Court's decisions in *Khouri*, 481 Mich at 530-533, and *Wood*, 413 Mich at 588, the decision of this Court in *Crawley*, 48 Mich App at 737, and the criteria set forth in MRPC 1.5(a), to determine the reasonable amount of fees and costs due to plaintiff. Plaintiff next challenges the amount awarded as insufficient.

Because the trial court suggested, and the parties agreed, that the trial court would determine the amount of fees owed by application of the principles and criteria set forth in *Khouri*, *Wood*, and *Crawley*, we find that the appropriate standard of review to be applied to the trial court's determination of the amount of fees due and owing is an abuse of discretion standard. *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003); *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000). An abuse of discretion will be found where the trial court, in the exercise of its discretion, reaches a result that is outside the range of principle outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

In *Wood*, 413 Mich at 588, our Supreme Court "adopted the guidelines for determining [the] 'reasonableness'" of an attorney fee award set forth in this Court's decision in *Crawley*, 48 Mich App at 737. The Supreme Court first noted "that there is no precise formula for computing the reasonableness of an attorney's fee," but explained that, as set forth in *Crawley*, the following factors are to be considered:

> (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 of the professional relationship with the client. [*Wood*, 413 Mich at 588, quoting *Crawley*, 48 Mich App at 737.]

Similarly, MRPC 1.5(a), which prohibits a lawyer from charging or collecting a "clearly excessive fee," sets forth the following eight factors "to be considered in determining the reasonableness of a fee":

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent, to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
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> (8) whether the fee is fixed or contingent.

Finally, as noted by the trial court in its February 10, 2009 opinion, our Supreme Court has recently explained, in *Khouri*, 481 Mich 430-433:

> . . . We hold that [when determining a reasonable attorney fee] 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. The number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5(a) and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. . . . 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 court should briefly discuss its view of the remaining factors.
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> The reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work. The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question. . . The fees customarily charged in the locality for similar legal

> services can be established by testimony or by empirical data found in surveys and other reliable reports. . . . Both the parties and the trial courts of this state shall avail themselves of the most relevant available data . . .
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> In considering the time and labor involved (factor 1 under MRPC 1.5(a) and factor 2 under *Wood*) the court must determine the reasonable number of hours expended by each attorney. The fee applicant must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness. The fee applicant bears the burden of supporting its claimed hour with evidentiary support. . . .
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> Multiplying the reasonable hourly rate by the reasonable hours billed will produce a baseline figure. After these two calculations, the court should consider the other factors and determine whether they support an increase or decrease in the base number. [Citations and internal punctuation omitted.]

The trial court's analysis of the fees owed to plaintiff follows exactly the approach outlined by our Supreme Court in *Khouri*, with due consideration of the factors set forth in *Crawley*, *Wood*, and MRPC 1.5(a). The trial court began its analysis by determining the "fee customarily charged in the locality for similar legal services," concluding, based on the materials and surveys presented, that the plaintiff's fee should be based on a rate of $272 an hour. The trial court noted that this rate, "represents the average of what an attorney in the top 5 percentile could expect to charge," and was warranted by "plaintiff's years of practice and recognition as a preeminent specialist in appellate practice." Plaintiff complains that the trial court erred by determining a customary rate, because the retainer agreement plainly provided for a rate of $300. However, considering that the parties specifically agreed that the trial court was to determine the amount owed under the criteria set forth in *Khouri*, *Wood*, *Crawley*, and MRPC 1.5(a), and that each of these include as a criterion the rate customarily charged in the locality and for the type of work at issue, plaintiff cannot now argue that the trial court abused its discretion by determining such a rate.

Next, the trial court determined the "reasonable number of hours billed," to which it multiplied the $272 rate to "produce a baseline figure," as instructed by *Khouri*. Here, plaintiff argues that the trial court abused its discretion by apparently considering only fees and costs billed by plaintiff for September 2003-January 2004, and by thereafter excluding 19.2 hours, which the trial court attributed to the issues identified as assigned to defendant's trial counsel ("trial counsel's issues"). According to plaintiff, had the trial court properly exercised its discretion to consider the entire billing history, and had it not excluded the 19.2 hours, for which (plaintiff asserts) defendant was already credited by way of the separate billings to, and payments received by plaintiff from, defendant's trial counsel, the trial court would have concluded that plaintiff was entitled to recover the full $11,612.69 sought.

First, it does at least appear that the trial court believed plaintiff to be seeking payment only for the 47.5 hours billed for work performed for defendant during September, October, November and December 2003, and January 2004. Such an approach seems to presume that all previously invoiced amounts were paid in full, which plaintiff denies to be the case. However, we note that plaintiff originally sought to recover fees and costs in an amount of $11,612.69, an

amount that corresponds to fewer than 40 hours. Thus, the 47.5 hours considered as the starting point by the trial court exceeds the total amount of unpaid hours sought by plaintiff. Further, despite plaintiff's assertion otherwise, defendant was not previously credited with all of the 19.2 hours excluded by the trial court as attributable to trial counsel's issues Rather, our review of documentation submitted by plaintiff reveals that defendant was previously credited with only 11.2 of these 19.2 hours, leaving 8 such hours not yet credited.[3] Additionally, our review of the documentation submitted to the trial court revealed two occasions of double billing reflected in plaintiff's accounting records, and plaintiff's accounting summary does not include credit for a payment by defendant reflected elsewhere, on a subsequent invoice, and does not correctly reflect the amount of all adjustments by plaintiff set forth on invoices sent to defendant. Accounting for these discrepancies, the maximum amount of outstanding fees and costs potentially owed by defendant, without any adjustment for the eight additional hours attributed to trial counsel's issues that were identified by the trial court but not previously credited to defendant, and invoicing all hours at the charged rate of $300 per hour, is $8,807.84. Certainly, excluding the additional eight hours identified by the trial court as attributable to defendant's trial counsel's issues, or reducing the rate for the outstanding hours to $272 per hour, would result in an amount owing that is less than the trial court awarded. Thus, while this Court might quibble with the trial court's approach to determining the amount of hours for which plaintiff was owed, the approach resulted in an award more favorable to plaintiff than might have been warranted by a review of the complete billing and payment history. Therefore, we find no basis to conclude, on the whole record presented, that the trial court abused its discretion by awarding plaintiff $7,861.30 in fees and costs. *Woodard*, 476 Mich at 557; *Campbell*, 257 Mich App at 197; *Elia*, 242 Mich App at 376-377.

With regard to plaintiff's claim for interest and taxable costs, by agreeing to dismiss the complaint, to withdraw all motions and to settle the case in the agreed-upon manner, plaintiff unequivocally waived its claim to interest and taxable costs. While MCL 600.6013 provides for

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[3] Plaintiff argues that there was no legal basis for the trial court to "absolve" defendant from her legal obligation to pay plaintiff for his services, regardless whether those services were related to defendant's trial counsel's issues, because at no time was plaintiff representing defendant's trial counsel, and because all work performed relating to defendant's trial counsel's issues benefited plaintiff. However, plaintiff acknowledges that defendant's trial counsel agreed to pay for all fees and costs relating to defendant's trial counsel's issues and plaintiff consented to that arrangement by billing defendant's trial counsel separately for, and accepting payment for, those hours. Thus, it was not an abuse of discretion for the trial court to evaluate whether defendant was being charged for time attributable to defendant's trial counsel's issues as part of her efforts to determine a reasonable fee so as to settle the parties' dispute. Whether plaintiff would have prevailed on a legal argument that defendant remained obligated for those fees, despite plaintiff's agreement to bill them to defendant's trial counsel, is immaterial; plaintiff agreed to settle this matter by submitting the parties' claims, including defendant's claim that she was being improperly billed for work attributable to defendant's trial counsel's issues to the trial court for resolution according to the considerations set forth in *Khouri*, *Wood*, *Crawley*, and MRPC 1.5(a).

an award of interest "on a money judgment recovered in a civil action," that statute does not apply here, where the parties agreed to dismiss the civil action filed by plaintiff and to settle their dispute by submitting it to the trial court by way of an agreed-upon alternative method of dispute resolution. And, MCR 2.625(H) provides that "[u]nless otherwise specified a settlement is deemed to include the payment of any costs that might have been taxable." Therefore, the trial court did not err by denying plaintiff precomplaint and postcomplaint interest, and by declining to tax costs against defendant.

Further, the withdrawal of the motion for summary disposition withdrew plaintiff's request for "administrative costs" "framed" by that motion, and plaintiff's agreement to settle the case in the agreed-upon manner, with the trial court to determine the amount owed according to the considerations set forth in *Khouri*, *Wood*, *Crawley*, and MRPC 1.5(a), waived any claim plaintiff may have had to recover such "administrative costs." Stated differently, regardless of whether plaintiff may have been entitled to recover the "administrative costs" to which it refers, plaintiff waived any claim to those costs by agreeing to settle this case, rather than to proceed to a formal decision on the legal merits of its claim.

Finally, plaintiff argues that the trial court erred by denying its repeated requests for sanctions for defendant's frivolous arguments asserted in its affirmative defenses, for defendant's alleged false statements in various pleadings, and for defense counsel's "*ex parte* communications" with the prior judge assigned to preside over this matter. Without regard to the fact that many of the alleged "false statements" plaintiff claims to have been made by defendant are merely statements establishing the dispute between the parties, we conclude that plaintiff's agreement to settle this case, and to withdraw all pending motions before the trial court, waived any claim it may have had to sanctions, even were plaintiff to have later established the falsity and frivolity that it alleges.

We affirm.

/s/ Richard A. Bandstra
/s/ Christopher M. Murray