STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT, f/k/a DEPARTMENT OF ENVIRONMENTAL QUALITY, Plaintiff-Appellant,	UNPUBLISHED November 26, 2013
v	No. 297663 Ingham Circuit Court
REXAIR, INC., Defendant-Appellee.	LC No. 89-064557-CE

Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Following reversal of our previous opinion and a remand from our Supreme Court, plaintiff appeals by right the trial court's April 2010 order imposing approximately $3.8 million in attorney fees and expert witness costs as sanctions against plaintiff. We vacate the trial court's order and remand for further proceedings.

I. Facts

Plaintiff and defendant entered into a consent judgment in 1991 relevant to their dispute concerning groundwater contamination. The consent judgment required that defendant undertake certain remedial measures and provided for a court-based mechanism to address any disputes that might arise regarding the scope of those, or other, necessary, measures. In 2004, plaintiff filed a post-judgment motion for dispute resolution with the trial court asserting that defendant had not complied with all the provisions of the consent judgment and seeking to require defendant to perform additional remediation of the groundwater contamination. In 2009, plaintiff filed a notice withdrawing this long-pending motion. The trial court refused to allow plaintiff to withdraw the motion and instead directed plaintiff to seek dismissal in accordance with MCR 2.504. Plaintiff then moved to dismiss its post-judgment motion without prejudice. Defendant filed a response requesting that the dismissal be with prejudice and that defendant be awarded attorney fees and costs. The trial court ruled on the motion without a hearing, issuing an order dismissing the matter with prejudice and awarding defendant attorney fees and costs, the amount of which it provided "shall be determined at a hearing to be set by the Court." Plaintiff then brought a motion for relief from the court's order, noting that it had requested a dismissal without prejudice only, that it preferred to proceed to trial rather than dismiss the case

with prejudice, and arguing, therefore, that the court lacked authority to dismiss the case with prejudice. The court denied plaintiff's motion, citing its "inherent powers."

On initial appeal, we recognized "a trial court's inherent power to control the proceedings before it and to impose sanctions on parties and counsel for egregious behavior." *Dep't of Environmental Quality v Rexair, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 8, 2008 (Docket No. 272652), slip op p 2. However, we concluded that the trial court erred by requiring plaintiff to file a motion under MCR 2.504 which by its terms applies to "actions" rather than "motions." We further concluded, after a review of the record, that the trial court had erred in finding that plaintiff had engaged in misconduct. Accordingly, we vacated the order of dismissal and remanded. *Id*., unpub op p 3. Defendants appealed to our Supreme Court, which reversed this Court and remanded for further proceedings. The majority's order stated in its entirety:

> On order of the Court, the motion for leave to file brief amicus curiae is GRANTED. The application for leave to appeal the May 8, 2008 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and we REINSTATE the August 7, 2006 order of the Ingham Circuit Court. The Court of Appeals erred by holding that the circuit court lacked the inherent authority, as well as the authority under the consent judgment, the Michigan Rules of Court, and MCL 600.611, to dismiss with prejudice the dispute resolution proceeding initiated by the plaintiff and to award the defendant costs and attorney fees. The Court of Appeals further erred by disregarding the undisputed facts in the record that supported the circuit court's findings and by failing to accord the proper deference to the circuit court's determination that the plaintiff had invoked the circuit court's jurisdiction for an improper purpose and abused the dispute resolution process. *Maldonado v Ford Motor Co*, 476 Mich 372, 376 [; 719 NW2d 809] (2006). [*Dep't of Environmental Quality v Rexair, Inc*, 482 Mich 1009; 761 NW2d 91 (2008).]

On remand, the trial court allowed the parties to file proofs and objections relevant to the sought fees. After a hearing, the court awarded defendant the entirety of its sought fees and costs which totaled more than $3.8 million. The court, after considering the proofs, concluded that the hourly fee for attorneys sought by defendant was reasonable under *Smith v Khouri*, 481 Mich 519, 528-529; 751 NW2d 472 (2008). It also concluded that defendant should be awarded fees for all the attorney time for which it was billed. It is unclear whether the trial court ruled that the total number of hours was reasonable, or if it determined that a reasonableness determination was not required as to the number of hours billed. Plaintiff now appeals.

II. REASONABLENESS OF FEE AND COST AWARD

A. REASONABLE VS ACTUAL FEES

The first question before us is whether plaintiff was entitled to an award of "actual" attorney fees and costs or "reasonable" attorney fees and costs. Defendant argues that it is entitled to "actual" fees and costs; i.e., the amounts they paid in attorney fees and costs,

regardless of whether they were reasonably incurred and of reasonable amount. For the following reasons, we disagree.

Defendant argues that, in certain circumstances, courts may award actual costs and fees. We agree that a court may do so where specifically provided for by statute and note that every case on which defendant relies for an award of actual costs involved such a specific authorizing statute. Defendant does not refer us to a single Michigan case in which an award of "actual attorney fees" has been ordered in the absence of specific statutory authority relating to the cause of action in question. Our research confirms this. The only cases we have found in which a party was awarded actual attorney fees were cases in which a statute specifically relevant to the cause of action expressly authorized it. See, e.g., *Speicher v Columbia Twp Bd of Election Comm'rs*, 299 Mich App 86, 90-93; 832 NW2d 392 (2012) (discussing the award of actual attorney fees under MCL 15.271(4) of the Open Meetings Act); *Zelinksi v Kallo*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2011 (Docket No. 295424), slip op pp 2-4 (discussing the propriety of a required surety bond in light of the mandatory award of costs and actual fees under MCL 600.2955b[1]).[1] By contrast, under the statute outlining sanctions available for the filing of frivolous claims, the court must award the "reasonable" costs and fees incurred by the prevailing party, "including court costs and reasonable attorney fees." MCL 600.2591(1), (2).

Defendant also does not refer us to any Michigan statute that provides generally for an award of actual attorney fees. Defendant directs us to MCL 600.611, which provides circuit courts with "jurisdiction and power to make any order proper to fully effectuate [its] jurisdiction and judgments." As in *Maldonado*, this statute has provided authority for a circuit court to dismiss a case where the attorneys were "belligerent, antagonistic or incompetent" and engaged in abuses that prevented the "orderly operation of justice." *Maldonado*, 476 Mich at 375. Indeed, our Michigan Supreme Court cited *Maldonado* in its order reversing our prior decision. *Rexair, Inc*, 482 Mich at 1009. However, the *Maldonado* Court did not conclude that actual attorney fees could ever be granted under the statute, nor did it define what standards would be applied if that was the case. Moreover, the general authority provided for under MCL 600.611 must be read in conjunction with MCL 600.2421b, which governs costs and fees in litigation. MCL 600.2421b does not provide general authority for an award of "actual" attorney fees, but instead provides only for an award of "*reasonable and necessary attorney fees.*"

Similarly, defendant does not refer us to a court rule under which actual attorney fees may be awarded. MCR 2.114 provides for sanctions for frivolous claims, which the trial court concluded was the proper characterization of the post-judgment proceedings instituted here by

[1] It appears that even when actual attorney fees are warranted, such an award remains subject to the limitation of the Michigan Rules of Professional Conduct, 1.5(a), which prohibits the charging of an illegal or clearly excessive fee. *Speicher*, 299 Mich App at 90-93 (discussing the award of actual attorney fees under MCL 15.271(4)). Under MRPC 1.5(a), "[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."

plaintiff. The court rule provides that a party "pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)," which in turn refers us to MCL 600.2591 governing costs and fees in frivolous actions. MCL 600.2591(2) provides that the amount of costs and fees that may be awarded are "all *reasonable* costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and *reasonable* attorney fees" (emphasis added).

We are also not convinced by defendant's argument that an award of actual attorney fees is provided for in the consent judgment into which the parties entered in 1991. "A consent judgment is in the nature of a contract, and is to be construed and applied as such." *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). Defendant does not refer us to any language in the consent judgment mentioning actual attorney fees. Instead, it refers us only to paragraph 27 which provides, "Any party to this Consent Judgment may apply to the Court for resolution of a dispute concerning this Consent Judgment" and paragraph 35 which provides that the trial court "shall retain jurisdiction over the action" until it is terminated, and that the court may "take any action necessary or appropriate for implementation or enforcement of [the] Consent Judgment." This authority does include the authority to award sanctions as sanctions are within a court's power to impose. *Rexair*, 482 Mich at 1009. However, as just discussed, a court does not have authority to assess *actual* attorney fees as a sanction unless there is specific statutory authorization to do so as to that cause of action. The parties cannot grant the court a power it does not have.

Defendant also fails to address the fact that our Legislature has, in MCL 600.2421c, specifically addressed what sanctions may be imposed on the state where it pursues a frivolous action. It provides that where a court finds that the state's action was frivolous and that the "state's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party," MCL 600.2421c(1)(a):

> [T]he amount of costs and fees awarded under this section shall include those reasonable costs actually incurred by the party and any costs allowed by law or court rule . . . . *[T]he amount of fees awarded under this section* shall be based upon the prevailing market rate for the kind and quality of the services furnished, except that *an attorney fee shall not be awarded at a rate of more than $75.00 per hour* unless the court determines that special circumstances existed justifying a higher rate or an applicable law or court rule provides for the payment of a higher rate. [MCL 600.2421c(4) (Emphasis added)].

Finally, defendant asserts that our Supreme Court's order reversing this Court mandates that actual attorney fees be awarded. We do not find the word "actual" anywhere in that Order, however. Our Supreme Court uses language with particular care and had it concluded that defendant should receive an award of "actual" attorney fees, we have no doubt that it would have said so. In addition, for us to read the remand order in the manner suggested by defendant would require us to conclude that our Supreme Court intended to judicially alter the applicable statutory limitations in MCL 600.2421c(4) and MCL 600.2421b, just discussed. We decline to do so.

Accordingly, we conclude that defendant was entitled to an award of reasonable costs and reasonable attorney fees.

B. TIME PERIOD FOR WHICH COSTS AND FEES MAY BE IMPOSED

Plaintiff also argues that the trial court improperly awarded defendant its costs and fees for expenditures made prior to October 10, 2003, the time when plaintiff filed its latter motion for dispute resolution. This claim is without merit. When discussing the initial decision to award sanctions, the trial court specifically found that plaintiff:

> has repeatedly attempted to delay or bypass the dispute resolution process established by the terms and conditions of the Consent Judgment[,]" and "[i]n retrospect, it is now apparent to the Court that since 2001, when [plaintiff] first invoked this Court's jurisdiction, it has attempted to use the dispute resolution process as a vehicle for simply imposing its own unilateral position on both [defendant] and the Court.

From this, as well as the trial court's additional comments in its 2006 findings of fact, we conclude that the trial court intended from the beginning to award costs and fees from 2001, not 2003. While this Court reversed the trial court,[2] our Supreme Court upheld the trial court's determination that plaintiff "had invoked the circuit court's jurisdiction for an improper purpose and abused the dispute resolution process." *Rexair*, 482 Mich at 1009. Plaintiff apparently did not raise this claim in the earlier proceedings. Thus, plaintiff cannot now argue that the trial court erred when it actually awarded sanctions for plaintiff's actions that occurred prior to 2003.

C. CALCULATING REASONABLE ATTORNEY FEES

In determining reasonable fees, our Supreme Court has set out a number of guidelines, first in *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982), and later in *Smith*. Defendant maintains that this Court is not bound to review this case under the principles in *Smith* because that case involved sanctions under MCR 2.403(O), Michigan's case evaluation rule. Defendant's argument is not persuasive. *Smith* is a self-described "fine tuning" of *Wood*'s multi-factor analysis. *Smith*, 481 Mich at 531. Moreover, while *Smith* involved a trial court's award of "reasonable" attorney fees as part of case-evaluation sanctions under MCR 2.403(O), these factors have been used extensively in other contexts, see e.g., *Adair v State*, 494 Mich 852; 830 NW2d 383 (2013) (involving costs to be awarded to plaintiffs under § 32 of the Headlee Amendment, Const 1963, art 9, § 32); *Coblentz v. City of Novi*, 485 Mich 961; 774 NW2d 526; (2009) (involving an award of the attorney fees, costs and disbursements pursuant to the Freedom of Information Act, MCL 15.231, *et seq*.). And as with the determination of whether the award of fees is to be reviewed for reasonableness generally, defendant has presented no case that supports its argument that the *Wood* analysis does not apply in this context. Thus, defendant's contention that *Smith* is an outlier or a holding limited only to cases involving case evaluation sanctions is unpersuasive.

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[2] We acknowledge that this Court also discussed the 2004 postjudgment motion in its initial opinion. However, plaintiff's first motion for a dispute resolution was filed in 2001, and the trial court apparently considered that to be the start of plaintiff's misconduct.

As plaintiff argues, "the burden of proving the reasonableness of the requested fees rests with the party requesting them." *Smith*, 481 Mich at 529 (Taylor, C.J.); see also *Smith*, 481 Mich at 519 (Corrigan, J., concurring in part, dissenting in part). *Smith* in turn relied on the *Wood* factors, as well as those found in Rule 1.5(a) of the Michigan Rules of Professional Conduct, to determine the proper factors to review:

> *Wood* listed the following six factors were to be considered in determining a reasonable attorney fee:
>
> > (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*, 413 Mich at 588 (citation omitted)].
>
> * * *
>
> [The factors found in Rule 1.5(a)] include:
>
> > (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> >
> > (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> >
> > (3) the fee customarily charged in the locality for similar legal services;
> >
> > (4) the amount involved and the results obtained;
> >
> > (5) the time limitations imposed by the client or by the circumstances;
> >
> > (6) the nature and length of the professional relationship with the client;
> >
> > (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> >
> > (8) whether the fee is fixed or contingent. [MRPC 1.5(a).]
>
> [*Smith*, 481 Mich at 529-530.]

Importantly for the review of the instant case, *Smith* also altered our Supreme Court's previous holding concerning the trial court's duties:

> We also stated in *Wood* that a trial court is not limited to those factors in making its determination and that the trial court need not detail its findings on each specific factor considered. *Wood*, 413 Mich at 588. We clarify today that in order to aid appellate review, the court should briefly address its view of each of the factors on the record. [*Smith*, 481 Mich at 529 n 14.]

Smith also approved of the common practice of relying "on data contained in surveys such as the Economics of the Law Practice Surveys that are published by the State Bar of Michigan" when determining "the fee customarily charged in the locality for similar legal services." *Id*. at 531-532.

In the instant case, the trial court cited *Smith*, and listed some of the factors from MRPC 1.5(a) and from *Wood* which influenced its decision. The trial court also specifically stated that it had considered the remaining factors, and deemed them not to have an impact on the baseline adjustment, at least to the extent they would warrant a downward adjustment. However, a number of other reasons support a remand.

As to the "baseline" fees approved by the trial court, plaintiff takes issue with the fact that the trial court looked at comparable rates from Washington, D.C. when determining the rate for out-of-state counsel, and the fact that the trial court interpolated the rates for associate counsel from those of lead counsel. As to the first objection, plaintiff is correct that the trial court should have reviewed defendant's out-of-state counsel rate in light of fees customarily charged in Michigan. *Smith*, 481 Mich at 530.

Of greater concern is the trial court's failure to consider MCL 600.2421c(4), which contains a specific attorney fee hourly rate limitation. Here, the trial court made no mention of this limitation, nor what "special circumstances" in the continuum of proceedings by and against the state would justify a higher rate. Therefore, on remand, the trial court should address this provision and should explain in detail its reasons for departing from the statutory rate.

As to the hours billed, plaintiff argues that the trial court did not perform its duties in determining that all of the hours expended were reasonably necessary for defendant's defense of the dispute resolution proceedings. The trial court issued a general statement that the award was warranted by the fact that this case involved complicated environmental issues and extensive discovery, where counsel was required to seek out experts and consultants "from around the country" with knowledge of the spread of water contamination. The trial court also noted that the attorneys attended "five motion hearings and a status conference." For this, defendant's attorneys charged a total of $2,468,501.63.

While the matter is complex and this litigation did occur over a number of years, the fees charged are stunning. And the number of actual hearings involved was very few. More importantly, while the bill summaries furnished to this Court do contain summaries of tasks and the time each attorney or other professional spent in accomplishing the task "in toto," the summaries do not contain a breakdown of which attorney or other professional performed each

task, a fact that defendant's in-house counsel also discussed during the hearing. This hampers our review as to whether the time billed for each task was "reasonable."

More importantly, the record leaves little doubt that the trial court did not actually review the bills presented. Rather, the trial court opined that it would be "overly burdensome" to review the over 660 pages of exhibits and calculate the fees and hours for each of defendant's 13 attorneys. Its opinion does not reference any individual bills and appears to have simply accepted the testimony from defendant's in-house counsel that the fees were reasonable and necessary without any independent review. According to the trial court's opinion, the entire litigation process included only five motion hearings and one status conference, yet defendant claimed and the court awarded $2,468,501.63 in attorney fees. Notably, the trial court did not find *any* of the sought fees unreasonable, despite plaintiff's extremely detailed objection to certain charges, and a number of charges that appear to be unreasonable on their face and certainly justify further inquiry. In addition to many other charges, these include: 1) a charge of 60 hours for preparation of a three-page motion in 2002; 187 hours of attorney time in 2002 for drafting a 16-page opposition to plaintiff's motion to compel compliance; 2) 32 hours of work preparing to attend a 30-minute hearing in 2002, separate from the above 187 hours charged preparing the supporting documentation; 3) 50 hours for preparation of an internal trial strategy outline in 2002 and; 4) 28 hours in 2004 for three partner-level attorneys to prepare a stipulated scheduling order.

We thus find the trial court's determination that the time expended and the hourly fees were reasonable constitutes a clear abuse of discretion requiring reversal. *Wood*, 413 Mich at 588; *Hill*, 276 Mich App at 308. We further direct the trial court to again follow the *Smith* framework on remand.[3]

D. CALCULATING ALLOWABLE EXPERT WITNESS FEES

Plaintiff next argues that the trial court erred when it awarded defendant the entirety of its sought expert witness costs. As with the fee issue above, defendant maintains that the trial court's inherent power under MCL 600.611 permits it to award actual costs, while plaintiff maintains that the trial court should have been constrained by the general rules concerning allowable "reasonable" expert witness fees.

MCL 600.611 does not speak directly to this issue, while MCL 600.2591(2) provides for the award of "reasonable costs actually incurred by the prevailing party." Likewise, MCL

[3] We also question the use of a "graduated" reasonableness scale for defendant's firms' subordinate counsel and to simply extrapolate its findings concerning lead counsel. Plaintiff has not to date presented anything to demonstrate that this was not appropriate. However, we note that plaintiff did object to this approach, and proposed reasonable rates for each attorney, in its proposed findings of fact. We do not intend to foreclose further discussion of this issue on remand. In addition, the trial court should also discuss the application of MCL 600.2421c(4) to each of defendant's attorneys.

600.2421b and MCL 600.2421c, which discuss the award of costs in "a civil action brought by or against the state as a party" where "the court finds that the position of the state to the civil action was frivolous," allows for the award of "reasonable" costs and fees. In contrast, neither our Supreme Court's prior opinion nor the language of the consent judgment discusses the award of "actual" costs.

In pertinent part, MCL 600.2421b provides:

> (1) "Costs and fees" means the normal costs incurred in being a party in a civil action after an action has been filed with the court, those provided by law or court rule, and include all of the following:
>
> (a) The reasonable and necessary expenses of expert witnesses as determined by the court.
>
> (b) The reasonable cost of any study, analysis, engineering report, test, or project which is determined by the court to have been necessary for the preparation of a party's case.

This appears to be less restrictive than the discussion of allowable expert witness fees from recently decided case of *Van Elslander v Thomas Sebold & Assoc*, 297 Mich App 204; 823 NW2d 843 (2012). Thus, we find *Van Elslander*'s discussion of witness fees limitations applicable to the instant case to the extent the limitations can be reconciled with the more specific provisions of MCL 600.2421b. In discussing allowable expert witness fees, *Van Elslander* provides:

> [A]n expert is not automatically entitled to compensation for all services rendered. [C]onferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position [are not regarded as] properly compensable as expert witness fees. Experts are properly compensated for court time and the time required preparing for their testimony. In addition, the traveling expenses of witnesses may be taxed as costs, MCL 600.2405(1); MCL 600.2552(1); MCL 600.2552(5)[.] [*Van Elslander*, 297 Mich App at 218 (internal quotations marks and citations omitted; alterations by *Van Elslander*).]

In addition, "[i]f the preparation undertaken by an expert witness to testify requires the work of assistants, the labors of those assistants will be taxable if the aid provided is directed to preparing the expert witness to express an opinion." *Id*. at 220.

Here, given the limitations discussed in *Van Elslander*, the additional expenses allowed under MCL 600.2421b(1), and the testimony from defendant's counsel, we reverse the trial court's expert witness fee award in part and remand for further proceedings. Below, defendant's in-house counsel James Williams discussed the types of expert witness costs defendant had incurred. As to these costs, Williams described the complexity of the groundwater

contamination in the area,[4] defendant's need to comply with the consent judgment, and the further, and unwarranted in defendant's view, need to expand the containment and monitoring system. Williams explicitly admitted that a good portion of the expert witnesses' time occurred in trying to bring defendant's attorneys sufficiently up to speed to adequately prepare for and participate in depositions of plaintiff's experts. Williams described the hiring of expert witnesses who produced three-dimensional modeling of the site which, among other things, was used to "inform" defendant's legal team "as to what we were finding in terms of our conclusions and the strength of those conclusions."

Under MCL 600.2421b and the discussion in *Van Elslander*, a portion of the expert witness fees would not be recoverable.[5] Standard "reasonable" expert witness expenses would be recoverable, as would the reasonable costs of any additional "study, analysis, engineering report, test, or project which is determined by the court to have been necessary for the preparation of a party's case." Some of the experts' time here was spent, presumably, in preparing their own testimony for use during the dispute resolution proceedings. This time should thus be recoverable. Likewise, any of the experts' time expended in directly preparing reports for use by other experts or by defense counsel should be recovered from plaintiff. However, the time spent "informing" counsel or getting them up to speed, whether through meetings or otherwise, to the extent it involved "educating counsel about expert [reports], strategy sessions, and critical assessment of the opposing party's position," should not have been recoverable from plaintiff. *Van Elslander*, 297 Mich App at 220. The trial court did not so differentiate the billed consultant or expert fees. We thus reverse the trial court's award concerning costs and remand for further proceedings.

In addition, the trial court provided little analysis as to the amount of time spent by the consultants in performing their tasks and, more importantly, how much of the time was actually spent on defending the "frivolous" or "vexatious" use of the parties' dispute resolution process. For example, the trial court noted that plaintiff continued to pursue its claims against defendant "both in and out of court." The previous orders awarded fees only for the instant misuse of the dispute resolution process. However, it appears from the testimony of defendant's in-house counsel that some of the expert witnesses' time was spent determining whether plaintiff's allegations that defendant was the source of the new/spreading contamination were true, and in calculating the cost of undertaking the actions that the plaintiff was requesting. Some of these activities were apparently related to the ongoing consent judgment generally, rather than to any misuse of the dispute resolution procedure. The trial court did not discuss this difference. Therefore, on remand, the trial court should address which fees relate to the abuse of the dispute resolution process itself.

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[4] This contamination also involved discharges from other companies, one of which, as did defendant, had also discharged TCE.

[5] The trial court found that what it termed the "consultant costs" involved here were not, in fact, expert witness fees. However, no matter what the characterization of the individuals performing the work, whether the costs are recoverable should be determined by reference to the statute and relevant expert witness fee caselaw.

E. INTEREST

Plaintiff also argues that the trial court erred when it awarded interest to defendant as part of the sanction award. Plaintiff first maintains that the proceedings here were prejudgment because the 2006 orders were not final judgments. Plaintiff then argues that it was an abuse of discretion for the trial court to award prejudgment interest to defendant when no judgment has been entered against plaintiff. See MCL 600.6013. However, plaintiff's arguments are based on a false premise. The consent judgment occurred in 1991. As noted by this Court's previous opinion, these proceedings were postjudgment ones.

The trial court and both parties appear to rely on MCL 600.6013 in support of their positions, but neither party demonstrates why this provision is applicable. MCL 600.6013(1) applies to money judgments recovered in a civil action. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 508; 475 NW2d 704 (1991). MCL 600.6013(1) is designed "to compensate the prevailing party for expenses incurred in bringing actions for money damages and for any delay in receiving such damages." *Phinney v Perlmutter*, 222 Mich App 513, 541; 564 NW2d 532 (1997); see also *In re Forfeiture of $ 176,598*, 465 Mich 382, 386 n 9; 633 NW2d 367 (2001). Defendant cites to *Cyranoski v Keenan*, 363 Mich 288; 109 NW2d 815 (1961), *Olson v Olson*, 273 Mich App 347; 729 NW2d 908 (2006), and *Dept of Treasury v Cent Wayne Co Sanitation Auth*, 186 Mich App 58; 463 NW2d 120 (1990), in support of its arguments that interest on the cost and fee award was appropriate here. However, none of these cases involve sanctions for improper conduct, and only the latter found that MCL 600.6013 was even applicable. See *Cyranoski*, 363 Mich at 294-295; *Olson*, 273 Mich App at 352-354. Moreover, as noted in *Olson*, 273 Mich App 352-353:

> The Supreme Court has more recently confirmed that application of MCL 600.6013(1) is not always mandated in civil actions. *In re Forfeiture of $ 176,598, supra*. Citing [*Reigle v Reigle*, 189 Mich App 386, 393-394; 474 NW2d 297 (1991)], as well as other cases, the Court noted that interest may be denied in proceedings that are not typical civil actions preceding an award of a money judgment. *In re Forfeiture of $ 176,598, supra* at 388. A party, despite prevailing in the underlying action, has not obtained "a money judgment recovered in a civil action" if that party has not filed a complaint in the proceeding. *In re Forfeiture of $ 176,598, supra* at 386-388.

The instant case does not involve a money judgment in the sense that defendant did not file a complaint in this proceeding. While *Cyranoski* and *Olson* discuss a trial court's equitable power to award interest under certain circumstances, the trial court in the instant case did not appear to base its decision on this power. Given the erroneous reliance on MCL 600.6013, we reverse the interest award and remand for a further discussion of whether interest would otherwise be available to defendant.

III. EVIDENTIARY ISSUES

Plaintiff raises a number of evidentiary issues and maintains that the trial court's errors require reversal because they prevented plaintiff from adequately challenging the sought costs and fees and led to an unreasonable award.

In general, this Court reviews the "reasonableness" of a trial court's award of attorney fees and costs for an abuse of discretion. *Wood*, 413 Mich at 588. Similarly, a court's exercise of its inherent power is reviewed for an abuse of discretion. *Maldonado*, 476 Mich at 388. An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Id*. However, "[t]he scope of a trial court's powers is a question of law," which is reviewed de novo. *Traxler v Ford Motor Co*, 227 Mich App 276, 280; 576 NW2d 398 (1998). The lower court's interpretation of a court rule or statute is also reviewed de novo. *In re Bail Bond Forfeiture*, 276 Mich App 482, 488; 740 NW2d 734 (2007). In contrast, a lower court's factual findings are reviewed for clear error. *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). "[F]actual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake." *Id.* "[W]here the trial court's factual findings may have been influenced by an incorrect view of the law, an appellate court's review of those findings is not limited to clear error." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

Plaintiff first argues that the trial court improperly refused to qualify plaintiff's proffered attorney witness as an expert on reasonable attorney fees. MRE 702 provides in part that "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify . . . in the form of an opinion." "Whether a witness is sufficiently qualified to provide opinion testimony is a decision within the sound discretion of the trial court, and that court's decision will not be disturbed absent an abuse of discretion . . . ." *Dybata v Kistler*, 140 Mich App 65, 68-69; 362 NW2d 891 (1985).

According to plaintiff, the trial court placed far too much emphasis on the lack of the proffered attorney's "specialized training" in the area of attorney fees and the fact that the witness had not published any materials on this subject, while ignoring the witness's other qualifications. We disagree. Plaintiff correctly asserts that the witness stated that he had been practicing in Wayne County for 35 years. However, the witness also acknowledged that his prior experience providing such testimony was limited to a single occurrence in another state. More importantly, the witness admitted that no committee set hourly billing rates at his law firm and he "did not know" how the hourly rates were set in the firm, although he admitted that there was such a process. Rather, the witness was involved only in setting the billing rates for the cases he was involved in. He stated that "people under [his] direction" had "in the past two years" studied what lawyers were charging in Detroit. He discussed the fact that he followed publication surveys, such as those in the Michigan Lawyer's Weekly. He admitted that he had not had any training about how the State of Michigan compiled its reports of attorney fees, had not received other training concerning customarily charged fees, and was not a member of the law practice section of the bar. He further appeared to concede that he had not reviewed any of the underlying motions, depositions, or other materials prepared in the instant case. Given this vague presentation of the proffered expert's qualifications and methods, the trial court did not abuse its discretion in deciding not to qualify him as an expert witness.

Plaintiff also contends that the trial court improperly limited the testimony of another witness to the amount of hours that could reasonably be charged for certain environmental tasks, while barring his opinion concerning the more general question about whether the charged costs were reasonable. However, when questioned about his duties, the expert testified that although

he determined the number of hours to be spent on various projects, he did not determine the rates, which had already been established. He admitted that his expertise consisted of knowledge of what it would take, in hours, to accomplish various tasks. He also admitted he did not have an accounting degree and had only done limited comparisons of rates in the private sector. Given this information, the trial court did not abuse its discretion when it limited this expert's testimony.[6]

Plaintiff next argues that the trial court abused its discretion when it permitted defendant to present evidence concerning the reasonableness of expert witness fees through affidavits from various vendors. Plaintiff maintains that the trial court's actions were improper under MRE 1101(a), which provides in pertinent part that, except for certain proceedings not at issue here, the rules of evidence "apply to all actions and proceedings in the courts of this state."

Neither party discusses in any detail whether MCR 1101(a) applies in the instant circumstances. In particular, plaintiff does not present any argument that the parties intended that this process, set forth in an earlier consent judgment and apparently solely a creation of the judgment itself, strictly adhere to the rules of evidence. An appellant may not leave it to this Court to discover the legal basis for its claims. *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 530; 730 NW2d 481 (2007). "A consent judgment is in the nature of a contract, and is to be construed and applied as such." *Laffin* 280 Mich App at 517. Here, nothing in the language of the consent judgment explicitly constrains the trial court from considering such hearsay evidence. Plaintiff has thus not shown that the trial court erred. Moreover, even if the trial court's decision was erroneous, any error is harmless under the circumstances. As defendant notes, the trial court suggested that if plaintiff's counsel had any questions she wished to ask concerning the affidavits, then the court would provide her with an opportunity to cross-examine the affiants by phone. Counsel stated that this would be a "suitable approach." Later, the trial court stated that it would extend the hearing should plaintiff's counsel wish to cross-examine the vendor affiants, although counsel chose not to do so. Plaintiff was thus not prevented from obtaining testimony from the affiants, and cannot complain of counsel's strategic decision not to pursue this. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 96-97; 693 NW2d 170 (2005) (stating that a party may not harbor error as an appellate parachute).

Plaintiff next argues that the trial court erred when it considered unredacted versions of certain attorney invoices when these were not presented to plaintiff in unredacted form. We disagree.

After plaintiff requested the supporting documentation, defendant refused to provide it until the parties entered into a confidentiality agreement. When they could not arrive at one, the

[6] We also note that plaintiff was permitted to present other expert testimony concerning the reasonableness of the rates charged by defendant's environmental experts and thus find that plaintiff was not prejudiced in any event. Nevertheless, we understand that, on remand, plaintiff should be permitted to introduce further testimony, expert or otherwise, to the extent necessary to evaluate the reasonableness of the sought fees and costs, and the trial court should comply with the court rules concerning any proffered expert witness testimony.

trial court issued a separate protective order, allowing defendant to submit its documents to the trial court for an in camera review. Included in this order was a provision allowing the parties to submit "confidential materials" which would be placed under seal. Importantly, the documents that defendant submitted in this matter could only be reviewed by plaintiff's counsel; counsel could not share the information with MDEQ employees or any other experts or contractors.

The confidential documents the parties submitted include defendant's report, plaintiff's brief in support of its motion to lift or modify the protective order, the parties' joint report, and plaintiff's individual report. In plaintiff's individual report to the court, plaintiff contended that, in all but a few instances, an actual dollar amount could not be reached, due to the "lack of detail and specificity in the supporting documentation." Plaintiff initially argued that it should be permitted to view unredacted copies of defendant's attorney's billing statements and other materials. Shortly thereafter, the parties stipulated to releasing some of the documents from the earlier protective order. Notably, the stipulation continued to provide for confidentiality of the attorney invoices defendant provided to the Court for an in camera review, while plaintiff retained its right to assert in the future that they should not be protected. However, during the hearing on the motion, plaintiff's counsel repeatedly stated that plaintiff did not want any information concerning attorney/client privileged information, such as research descriptions, and that redaction of this information was appropriate.

Plaintiff does not argue on appeal that it objected during the evidentiary hearing about the use of the redacted materials, or the trial's review of the unredacted versions of the invoices. At the end of the hearing, the trial court stated that it would review the evidence presented, and noted, "[C]learly I will have the advantage of having looked and will look again at the unredacted copies, so I will consider that along with everything else." The trial court then asked whether there was "anything else" and all counsel replied, "Nothing, Your Honor."

Plaintiff may have technically preserved this issue initially, and the later stipulation could be seen as reserving the right to challenge the use of the unredacted invoices. However, given counsel's admission that plaintiff only sought information on how many staff worked on which issue, and plaintiff's failure to object to the trial court's later statement that it would review the unredacted fee invoices, we conclude that plaintiff has waived this issue. See *Sampeer v Boschma*, 369 Mich 261, 265; 119 NW2d 607 (1963) ("If the action of the trial court was irregular, the irregularity was waived by making no objection until after the verdict was rendered."); *In re Vanidestine*, 186 Mich App 205, 212; 463 NW2d 225 (1990) (defense counsel's stipulation to the admission of evidence was binding on the defendant). Plaintiff is not entitled to relief from plaintiff's counsel's strategic decision. *Pellegrom*, 265 Mich App at 96-97.

III. ADDITIONAL SANCTIONS

Plaintiff lastly argues that the trial court erred when it found that plaintiff must pay defendant's costs and fees related to the proceedings to determine the proper amount of the earlier sanctions.

The trial court concluded that plaintiff's objections to the sought costs and fees were "frivolous" and assessed sanctions for the sanctions proceeding under MCR 2.114 which

provides for sanctions for frivolous claims and defenses under section (F). However, the trial court did not state what specific objections it found to be frivolous. Moreover, for the reasons discussed above, we believe the court erred in concluding that the objections to the amount of costs and fees were frivolous. The trial court's view that any objections were inherently frivolous is at odds with our conclusion that only reasonable fees and costs may be awarded and that *Smith* requires an evidentiary hearing where a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant. *Smith*, 481 Mich at 532. Accordingly, we thus reverse the trial court's award of defendant's costs and fees connected to the proceedings to determine the proper amount of sanctions and remand for further proceedings.

In conclusion, we vacate the trial court's April 9, 2010, order and remand for a determination of the amount of reasonable and necessary costs and fees consistent with this opinion.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro

Court of Appeals, State of Michigan

ORDER

Department of Natural Resources and Environment v Rexair Inc

Docket No. 297663

LC No. 89-064557-CE

Elizabeth L. Gleicher
Presiding Judge

Jane M. Beckering

Douglas B. Shapiro
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 28 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

NOV 26 2013
Date

Jerome W. Zimmer Jr.
Chief Clerk