

STATE OF MICHIGAN
COURT OF APPEALS

GIARMARCO, MULLINS & HORTON, P.C.,

Plaintiff-Appellee/Cross Appellant,

v

MARK D. MAJKOWSKI,

Defendant-Appellant/Cross
Appellee.

UNPUBLISHED
November 17, 2015

No. 322924
Oakland Circuit Court
LC No. 2013-134069-CZ

Before: STEPHENS, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

In this case involving a fee dispute relating to plaintiff’s legal representation of defendant, defendant appeals as of right from a judgment, entered following a jury verdict in plaintiff’s favor, awarding plaintiff \$65,000 plus case evaluation sanctions, costs, and interest. Plaintiff cross-appeals as of right from an order of the trial court denying its request for additional case evaluation sanctions relating to defendant’s motion for judgment notwithstanding the verdict (JNOV) or, alternatively, a new trial. We affirm the trial court’s judgment as it relates to the jury verdict and the imposition of costs and interest, and reverse its denial of plaintiff’s request for case evaluation sanctions to include its response to defendant’s motions for JNOV. We also vacate in part the award of case evaluation sanctions in light of our Supreme Court’s decision in *Fraser Trebilcock Davis & Dunlap, PC v Boyce Trust* 2350, 497 Mich 265; ___ NW2d ___ (2015), and remand for entry of a new award of case evaluation sanctions.

I. FACTUAL BACKGROUND

Defendant retained plaintiff in 2009 for representation in a business dispute. The parties signed a written “engagement letter” on October 26, 2009, and plaintiff represented defendant until May 7, 2010, when plaintiff informed defendant it could no longer represent him. At some point thereafter, after retaining new counsel, defendant obtained a settlement in the underlying case in the amount of \$800,000. When plaintiff was not compensated for its services between October 2009 and May 2010, it filed the instant action, seeking compensation for the reasonable value of its services. Trial was held and the jury returned a verdict in plaintiff’s favor in the amount of \$65,000.

After the trial, plaintiff moved to enter a judgment in that amount plus costs, interest, and case evaluation sanctions. The trial court entered a judgment in plaintiff’s favor in the amount of

\$83,818, which entailed \$65,000 for the jury verdict, \$16,770 in case evaluation sanctions, \$369 in costs, and \$1,679 in prejudgment interest. The trial court also awarded “[a]dditional case evaluation sanctions in the amount of \$1,800 for proceedings from May 9, 2014 through entry of this Judgment.” Defendant moved for a judgment notwithstanding the verdict (JNOV) or new trial, raising the same issues as he does in this appeal. Plaintiff moved for additional case evaluation sanctions relating to that motion. Both motions were denied, and this appeal followed.

II. ANALYSIS

A. APPEAL

1. JURY INSTRUCTIONS

On appeal, defendant first argues that the trial court erred in failing to instruct the jury that the reasonable value of plaintiff’s services could not exceed 40 percent of the portion of his recovery that is attributable to plaintiff’s services. “Issues regarding the proper interpretation of a contract or the legal effect of a contractual clause are reviewed de novo.” *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012). Claims of instructional error are reviewed de novo, but a trial court’s determination whether a jury instruction is accurate and applicable is reviewed for an abuse of discretion. *Alfieri v Bertorelli*, 295 Mich App 189, 197; 813 NW2d 772 (2012). “An abuse of discretion occurs when a court’s decision results in an outcome that falls outside the range of reasonable and principled outcomes.” *Diez v Davey*, 307 Mich App 366, 389; 861 NW2d 323 (2014) (citation and internal quotation marks omitted).

So long as an agreement between an attorney and a client for legal services is unambiguous, it is interpreted according to the plain and ordinary meaning of its language. *Island Lake Arbors Condominium Ass’n v Meisner & Assoc, PC*, 301 Mich App 384, 393; 837 NW2d 439 (2013). “A contract is clear and unambiguous if, ‘however inartfully worded or clumsily arranged,’ it ‘fairly admits of but one interpretation.’ ” *Id.*, quoting *Farm Bureau Mut Ins Co Mich v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). “When contractual language is unambiguous reasonable people cannot differ concerning the application of disputed terms to certain material facts[.]” *Island Lake Arbors Condominium Ass’n*, 301 Mich App at 393. “[U]nambiguous contracts are not open to judicial construction and must be *enforced as written*.” *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005) (emphasis in original).

The agreement between plaintiff and defendant includes the following provision:

TERMINATION

8. This Agreement may be terminated by Client for any reason on 30 days written notice. Attorneys may terminate this Agreement for any reason on 30 days written notice and to the extent permitted under the Michigan Rules of Professional Conduct.

9. If this Agreement is terminated, Attorneys shall be entitled to a lien on any gross recovery and proceeds in this matter. Attorneys shall be compensated based on the reasonable value of their services, considering the risk taken, outcome achieved, expertise, amount of time incurred and any other factor which would place Attorneys in a position as if this Agreement had been performed.

All witnesses, including defendant, testified that the attorney-client relationship between plaintiff and defendant was terminated, prior to defendant obtaining a settlement on May 7, 2010. Consequently, according to the unambiguous language in the parties' agreement, plaintiff was entitled to "be compensated based on the reasonable value of their services." *Island Lake Arbors Condominium Ass'n*, 301 Mich App at 393. The trial court's instructions were consistent with this conclusion.

Defendant claims, however, that the opposite outcome is compelled by this Court's decision in *Island Lake Arbors Condominium Ass'n*, where we held "that the quantum meruit recovery of a discharged attorney is capped by the contingency-fee percentage set forth in the contract, applied to the amount of the recovery attributable to the attorney's work." *Id.* at 396. In that case, unlike in this case, the parties' agreement did not include a provision explaining compensation in the event that the representation terminated. *Id.* at 389-390. Instead, the agreement in that case provided only for costs relating "to 'wind-up fees[.]'" *Id.* at 390. The attorneys' compensation remained controlled by the remainder of the agreement, which provided for both hourly and contingency fees. *Id.* at 387-388.

Here, however, the parties *expressly agreed* that plaintiff would "be compensated based on the reasonable value of their services" upon the termination of the representation.¹ Nothing in this provision, or in the agreement when read as a whole, *Vushaj v Farm Bureau General Ins Co of Mich*, 284 Mich App 513, 520; 773 NW2d 758 (2009), suggests that this compensation is controlled by the contingency-fee provision provided for in a separate section of the agreement. If the parties had intended such, they could have easily referenced the contingency-fee provision as setting forth the parameters of "the reasonable value" of services rendered. Indeed, if plaintiff's recovery was limited according to the contingency-fee provision, the contractual language regarding termination of the agreement would be rendered nugatory. *McCoig Materials, LLC*, 295 Mich App at 694 ("Every word, phrase, and clause in a contract must be given effect, and contract interpretation that would render any part of the contract surplusage or nugatory must be avoided.").

In sum, because the trial court's jury instructions properly reflected the parties' agreement, we find no error as it relates to those instructions.

2. CASE EVALUATION SANCTIONS

¹ Defendant's lengthy discussion of case law addressing recovery of attorney fees under a quantum meruit theory has no application to this case, which is controlled by the express language of the contract. *Plunkett & Cooney PC v Capitol Bancorp Ltd*, 212 Mich App 325, 331; 536 NW2d 886 (1995).

Defendant next argues that the trial court erred in awarding an additional \$1,800 in case evaluation sanctions to plaintiff relating to plaintiff's motion to enter judgment, because plaintiff "made no reference to additional fees" in its motion and because the costs associated with that motion were not necessitated by defendant's rejection of the case evaluation. However, plaintiff expressly requested case evaluation sanctions in its motion to enter judgment when it asked for "Judgment in its favor and against Defendant in the amount of \$65,000, plus costs, interest, case evaluation sanctions and attorney fees necessitated by the preparation and entry of *this motion*, and post-judgment interest until the Judgment is satisfied." (Emphasis added.) Further, plaintiff's motion was to enter a judgment against defendant, not an after-the-fact proceeding to obtain case evaluation sanctions, and the motion to enter a judgment was causally connected to defendant's rejection of the case evaluation. See *Young v Nandi*, 490 Mich 889, 890 (2011) ("There is not a sufficient causal nexus between the post-appeal proceedings and the defendants' rejection of the case evaluation."). Post-appeal proceedings and a motion to enter judgment are not equivalent.

Therefore, plaintiff is entitled to case evaluation sanctions relating to its motion to enter judgment.

B. CROSS-APPEAL

On cross-appeal, plaintiff argues that the trial court erred in failing to award mandatory case evaluation sanctions relating to defendant's motion for JNOV or new trial. A trial court's decision whether to grant case evaluation sanctions are reviewed de novo. *Allard v State Farm Ins Co*, 271 Mich App 394, 397; 722 NW2d 268 (2006).

MCR 2.403(O)(1) provides, in part, that "[i]f 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." Actual costs include "those costs taxable in any civil action" and "a reasonable attorney fee[.]" MCR 2.403(O)(6). This Court has held that case evaluation sanctions under MCR 2.403 are mandatory. *Allard*, 271 Mich App at 398 ("The use of the word 'must' indicates that the imposition of these sanctions is mandatory.").

Defendant concedes the mandatory nature of the sanctions, but argues that plaintiff waived the issue by not pursuing it more vigorously below. As defendant acknowledges, plaintiff raised the issue of case evaluation sanctions relating to defending defendant's motion for JNOV or new trial in its motion for additional fees before the trial court. The fact that its counsel did not elaborate on the request during oral argument or take exception to the court's ruling after it was made does not affect this reality.

However, plaintiff is incorrect in stating that MCR 2.403 requires that it "receive its costs, *including attorney fees*, for all proceedings in the trial court necessitated by Defendant's rejection." (Emphasis added.) To support this proposition, plaintiff relies on this Court's decision in *Fraser Trebilcock Davis & Dunlap, PC v Boyce Trust 2350*, 304 Mich App 174; 850 NW2d 537 (2014), rev'd in part and vacated in part by *Fraser Trebilcock Davis & Dunlap, PC v Boyce Trust 2350*, 304 Mich App 174; 850 NW2d 537 (2014). The Michigan Supreme Court reversed that decision after the parties filed their briefs in this matter, holding that a law firm

“cannot recover a ‘reasonable attorney fee’ under MCR 2.403(O)(6)(b)” “for the legal services performed by its own member lawyers in connection with its suit to recover unpaid fees from . . . former clients of the firm.” *Fraser Treiblock Davis & Dunlap, PC*, 497 Mich at 267, 271. Therefore, because the attorneys representing plaintiff were its members, it is not entitled to attorney fees. However, it is still entitled to “those costs taxable in any civil action[.]” *Id.*; MCR 2.403(O)(6)(b).

Here, aside from the \$1,800 in case evaluation sanctions relating to plaintiff’s motion to enter judgment, plaintiff sought and was awarded an additional \$16,770 in “case evaluation sanctions.” While it is not expressly stated in the judgment that those sanctions included attorney fees, plaintiff argued that case evaluation sanctions in the amount of \$16,770 was proper based on “the proper hourly rate” of “\$300/hour” for the attorneys who are members of and represented plaintiff in this matter below. Further, the costs and prejudgment interest awarded are set forth separately. Accordingly, it appears that the case evaluation sanctions sought and obtained by plaintiff represented its own members’ attorney fees, which it is not entitled to. *Fraser Treiblock Davis & Dunlap, PC*, 497 Mich at 267, 271. We therefore vacate the case evaluation award and remand to the trial court for the entry of a new award that does not include attorney fees as a component of the case evaluation award, but does include any other costs associated with plaintiff’s response to defendant’s motion for JNOV.

Affirmed in part, reversed in part, vacated in part and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray