

STATE OF MICHIGAN
COURT OF APPEALS

T-CRAFT, INC., and MARK EIKHOFF,

Plaintiffs/Counter-Defendants-
Appellees/Cross Appellants,

UNPUBLISHED
July 1, 2010

v

GLOBAL HR, d/b/a TRIAD BUSINESS
SOLUTIONS, and W GROUP PROCESS
CONSULTING, L.L.C.,

No. 285916
Macomb Circuit Court
LC No. 2006-000673-CK

Defendants/Counter-Plaintiffs-
Appellants/Cross Appellees.

Before: SAAD, C.J., and O'CONNELL, and ZAHRA, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order awarding them case evaluation sanctions of \$20,000 against plaintiff T-Craft, Inc., and nothing against plaintiff Mark Eikhoff. Plaintiffs cross appeal, challenging the trial court's denial of their request for contractual attorney fees. We affirm in part, reverse in part, vacate in part, and remand for further proceedings.

II. CASE EVALUATION SANCTIONS

Defendants first argue that the trial court erred by declining to award sanctions against plaintiff Eikhoff. A trial court's decision whether to grant case evaluation sanctions under MCR 2.403(O) is reviewed de novo as a question of law. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). However, a trial court's decision to deny case evaluation sanctions pursuant to the interest of justice exception, MCR 2.403(O)(11), is reviewed for an abuse of discretion. *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005).

Attorney fees are generally not recoverable unless authorized by statute, court rule, or the common-law. *Smith*, 481 Mich at 526. Case evaluation sanctions are specifically authorized by MCR 2.403. *Id.* at 526-527. If one party accepts a case evaluation award and one rejects it, as occurred here, and the case proceeds to a verdict, the rejecting party "must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." MCR 2.403(O)(1) and (3); *Smith*, 481 Mich at 527.

The trial court declined to award case evaluation sanctions against Eikhoff by exercising its discretion pursuant to MCR 2.403(O)(11), which states, “If the ‘verdict’ is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.” MCR 2.403(O)(2)(c) provides that for the purpose of MCR 2.403, a “verdict” includes a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

The record indicates that the trial court ultimately entered a judgment of no cause of action with respect to Eikhoff’s claims after a nonjury trial pursuant to a delayed decision on defendants’ motion for a directed verdict. However, subrule (O)(2) also provides that a “verdict” is a judgment by a court after a nonjury trial, MCR 2.403(O)(2)(b), which subrule (O)(11) clearly excludes. Thus, MCR 2.403(O)(11) does not provide for situations such as this in which a verdict is the result of both a motion and a nonjury trial. Accordingly, the trial court erred in applying MCR 2.403(O)(11) to deny defendants’ motion for case evaluation sanctions against plaintiff Eikhoff.¹

Defendants also argue that the trial court erred in awarding them case evaluation sanctions of only \$20,000 against plaintiff T-Craft, without considering the reasonableness of their requested fees and costs of approximately \$200,000.² “[T]he burden of proving the reasonableness of fees is on the party requesting them.” *Smith*, 481 Mich at 528-529. When determining the reasonableness of requested fees, a trial court is required to consider the totality of the specific circumstances of the case, the factors set forth in *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982), the factors listed in MRPC 1.5(a), which overlap the *Wood* factors, and any other factor that is relevant to the case. *Smith*, 481 Mich at 529-530.

In *Smith*, our Supreme Court revised this multifactor approach and set forth the procedure a trial court should employ in making its determination.

¹ Plaintiffs also assert that Eikhoff withdrew his claims because they were tied to the unpaid payroll taxes and that when defendants paid the taxes, his claims were extinguished. Plaintiffs contend that this is an unusual circumstance that should fall within the “interests of justice” exception. However, the trial court, in its opinion and order, expressly found that “[t]he payroll [taxes] were paid . . . by Triad and are not an element of damages for T-Craft.” This finding clearly stands in contrast to plaintiffs’ position that the payroll tax claim was abandoned. Further, and more important, the trial court’s opinion and order was not appealed. Plaintiffs’ claim that payroll taxes should be considered as part of the verdict for case evaluation purposes amounts to an improper collateral attack on the trial court’s findings in its opinion and order. Accordingly, we reject plaintiffs’ argument.

² Plaintiffs’ argument that defendants were not entitled to any case evaluation sanctions is not properly before this Court. Because this claim seeks relief more favorable than that rendered by the trial court, plaintiffs were required to raise this issue in a cross appeal, which they have not done. *Vanslebrouck v Halperin*, 277 Mich App 558, 565-566; 747 NW2d 311 (2008).

We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of 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. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors. [*Smith*, 481 Mich at 530-531 (brackets used in original).]

In this case, the trial court explained its decision by referring only generally to concepts of proportionality, fairness, and justice. The court did not engage in the type of analysis required by *Smith*. Therefore, we vacate the trial court's \$20,000 award in favor of defendants and remand for further proceedings. On remand, the trial court should determine the amount of case evaluation sanctions to be awarded to defendants against both plaintiffs, Eikhoff and T-Craft, in accordance with the procedure outlined in *Smith* for each attorney who defendants claim a right to fee reimbursement under MCR 2.403. *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 175; 761 NW2d 784 (2008).³

III. PLAINTIFFS' CROSS APPEAL

Plaintiffs argue that the trial court erred in denying their post-judgment motion for attorney fees, which they sought pursuant to a provision in the parties' contract. Whether a party is entitled to attorney fees and costs pursuant to a contract is a question of law that we review de novo. *Fleet Business Credit, LLC v Krapohl Lincoln Mercury Co*, 274 Mich App 584, 588; 735 NW2d 644 (2007). Attorney fees awarded under a contractual provision that entitles a prevailing party to recover its attorney fees are considered general damages rather than taxable costs. *Id.* at 589, 592. Thus, a party claiming a right to recover attorney fees under a contract must introduce evidence of the reasonableness of the attorney fees to establish a prima facie case and avoid a directed verdict. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 196; 555 NW2d 733 (1996). Plaintiffs do not assert, nor does the record indicate, that plaintiffs presented evidence at trial to support their request for contractual attorney fees. Therefore, the trial court did not err in denying plaintiffs' post-judgment motion for attorney fees.

³ Defendants argue that this case be reassigned to a different judge on remand. We recognize that this may be a moot issue due to the trial judge's retired status. However, while the record reflects that trial court expressed frustration with the parties' continuing litigation, we cannot conclude it affected its consideration of defendants' requested attorney fees.

Affirmed in part, reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. Neither party having prevailed in full, we award no costs. MCR 7.219. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Peter D. O'Connell

/s/ Brian K. Zahra