

STATE OF MICHIGAN
COURT OF APPEALS

NOVUS CENTURIAE REINSURANCE CO.,¹

UNPUBLISHED
April 23, 2013

Plaintiff-Appellee,

v

SMITH & ASSOCIATES INSURANCE
AGENCY, INC. and GREGORY J. SMITH,

No. 308875
Genesee Circuit Court
LC No. 07-086789-CK

Defendants-Appellants.

Before: DONOFRIO, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Defendants appeal by right the order apportioning sanctions between plaintiff and plaintiff's attorney, Thomas R. Charboneau, Jr. We affirm.

Defendants contend that plaintiff's counsel, Charboneau, is equally liable for the entire amount of the sanctions imposed.² We disagree.

On remand from this Court, the trial court imposed \$6,500 of the \$130,000 sanction award on Charboneau. The original imposition of sanctions was based on a finding that the claim was frivolous under MCL 600.2591(3)(a)(iii).

¹ On May 12, 2009, an order was entered modifying the caption to reflect Novus Centuria, Inc. as the party-plaintiff. However, the order appealed from identifies Novus Centuria Reinsurance Company as plaintiff. The parties' briefs refer to Novus Centuria, Inc. as plaintiff.

² At oral argument, counsel for defendants asserted that there was no client to hold accountable for attorney fees because the client did not exist. The trial court remedied the problem of a non-existent corporate entity as the plaintiff by modifying the caption to add Novus Centuria, Inc. as a party-plaintiff. The trial court also concluded that Robert Feala was the alter ego of the corporate entity and held him responsible for sanctions. Accordingly, the trial court cured the corporate entity defect and held an individual corporate representative accountable for sanctions.

This case involves the interpretation of MCL 600.2591, and whether costs and fees must be imposed jointly and severally against a party and its attorney. We review issues of statutory interpretation de novo. *Curry v Meijer, Inc*, 286 Mich App 586, 590; 780 NW2d 603 (2009). “We review the amount of an award of sanctions for an abuse of discretion.” *In re Costs and Attorney Fees*, 250 Mich App 89, 104; 645 NW2d 697 (2002). “An abuse of discretion occurs when the trial court’s decision falls outside the range of reasonable and principled outcomes.” *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008) (citations omitted).

We begin with the plain language of the statute to determine the Legislature’s intent. *Curry*, 286 Mich App at 592. MCL 600.2591 provides:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

(2) The amount of costs and fees awarded under this section shall include 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.

(3) As used in this section:

(a) “Frivolous” means that at least 1 of the following conditions is met:

(i) The party’s primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party’s legal position were in fact true.

(iii) The party’s legal position was devoid of arguable legal merit.

(b) “Prevailing party” means a party who wins on the entire record.

Section (1) requires costs and fees to be assessed against both the party and its attorney. MCL 600.2591(1). However, the plain language of the statute does not require that the assessment be equal or joint and several. This language is not ambiguous. “A statute is ambiguous when it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning.” *Hardaway v Wayne Co*, 298 Mich App 282, 286; ___ NW2d ___ (2012). “Where the language is clear and unambiguous, ‘further construction is neither required nor permitted.’” *Curry*, 286 Mich App at 592 (citation omitted). Accordingly, Charboneau was not required to be held jointly and severally liable under the plain statutory language.

Although, as defendants assert, the statute provides that the trial court “shall” award costs and fees, MCL 600.2591(1), it does not indicate that such costs and fees must be apportioned equally between the party and the party’s attorney. Contrary to defendants’ assertion, this interpretation does not insert a provision into the statute. Rather, defendants’ interpretation,

requiring joint and several liability, would add a provision to the statute. Although, as defendants contend, there is no language specifically permitting pro rata liability, there is no language prohibiting such or requiring joint and several liability. The language of the statute indicates that the Legislature intended to allow trial courts to assess and apportion the fees.

This interpretation is consistent with this Court's decision in *John J Fannon Co v Fannon Prods, LLC*, 269 Mich App 162, 172; 712 NW2d 731 (2005), which found that "[t]he imposition of joint and several liability for attorney fees and costs is permissible under Michigan law." By ruling joint and several liability was permissible, this Court implied that it was not mandatory. Similarly in *In re Attorney Fees & Costs*, 233 Mich App 694, 696, 705-707; 593 NW2d 589 (1999), this Court upheld an award of joint and several liability, but did not state that it was mandatory.

Even if we were to find that the statute is ambiguous, the intent of the Legislature, as cited by defendants, does not support their position. That "[t]he statutory scheme is designed to sanction attorneys and litigants who file lawsuits or defenses without reasonable inquiry into the factual basis of a claim or defense," *Louya v William Beaumont Hosp*, 190 Mich App 151, 163; 475 NW2d 434 (1991), does not imply that liability must be joint and several, only that some fees must be imposed against both the party and the attorney.

Plaintiff contends that this Court's language in footnote three of the prior opinion supports this interpretation wherein this Court stated: "Once a trial court determines that an action is frivolous, the court must impose sanctions, but we note that the amount of the sanction imposed is discretionary with the trial court and may be minimal depending on the trial court's determination of the frivolousness of the complaint." *Novus Centuria Reinsurance Co v Smith & Assoc Ins Agency, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2010 (Docket No. 292161) (unpub op at 4 n 3). This language indicates that the trial court may impose only minimal sanctions on the party and its attorney.

Defendants contend that this footnote is dictum and does not constitute the law of the case because the amount of sanctions was not before this Court. Whether language is dictum depends on whether it creates a rule of law and is essential to the holding of the case. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 436-437; 751 NW2d 8 (2008). Similarly, whether language is binding under the law of the case doctrine depends on whether the Court ruled on the issue. *KBD & Assoc, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 679; 816 NW2d 464 (2012) ("The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue."). The issue before this Court in the prior appeal was whether the trial court erred in failing to impose sanctions against Charboneau after finding that plaintiff's action was frivolous. *Novus Centuria Reinsurance Co*, unpub op at 3. This Court ruled that sanctions must be imposed against the party and its attorney. *Id.* at 3-4. Footnote three, however, indicates that the amount is within the trial court's discretion. *Id.* at 4 n 3. Although the amount of fees was not before the Court, this ruling was essential to the Court's holding that sanctions must be imposed against the party and its attorney and directly guided the trial court on remand, which had to decide the amount of sanctions to impose. Therefore, it is not dictum and is binding under the law of the case doctrine. *Allison*, 481 Mich at 436-437.

Nonetheless, the language in footnote three is not determinative of the issue. This Court indicated only that the fees could be minimal. *Novus Centuria Reinsurance Co*, unpub op at 4 n 3. The Court did not indicate whether the fees could be apportioned or whether they had to be the same for the party and the attorney.

Alternatively, defendants contend that even if pro rata liability is proper, Charboneau should be liable for the entire amount.³ We recognize that the statute does not provide any means for determining the apportionment of fees between the party and its attorney.⁴ Nonetheless, this Court’s previous rulings suggest that joint and several liability is not mandatory and, thus, the fees and costs imposed may be apportioned. The trial court’s apportionment was not an abuse of discretion. See *Smith*, 278 Mich App at 207. The trial court found that Charboneau should have known that Novus did not exist at the time of any misrepresentation, but would have only discovered such by consulting various statutes. The record supports the finding that Charboneau did not have actual knowledge that Novus did not exist when the alleged misrepresentation occurred. Charboneau relied on the insurance policy, he previously represented Novus, and he only discovered when Novus was incorporated at the deposition of Nate Feala. After learning such, Charboneau did not dismiss the case. “To determine whether sanctions are appropriate under MCL 600.2591 . . . it is necessary to determine whether there was a reasonable basis to believe that the facts supporting the claim were true *at the time the lawsuit was filed*” *Louya*, 190 Mich App at 162 (emphasis in original). Accordingly, the trial court’s finding that Charboneau should only be liable for \$6,500 of the costs and fees was within “the range of reasonable and principled outcomes.” *Smith*, 278 Mich App at 207.

Affirmed. Plaintiff, the prevailing party, may tax costs. MCR 7.219.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto

³ Plaintiff argues that this issue is not preserved. However, in the trial court, defendants argued that Charboneau should be liable for the full \$130,000 and provided factual support for this argument. Therefore, this issue is preserved. See *Gen Motors Corp v Dep’t of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). Defendants also argue the issue in their brief on appeal.

⁴ We also note that defendants are not challenging the reasonableness of the fees and costs, just the apportionment. See *John J Fannon Co*, 269 Mich App at 171.