

STATE OF MICHIGAN
COURT OF APPEALS

JONATHAN BROWN, a Minor, by his Next
Friend, JACQUELINE ALLEN,

UNPUBLISHED
October 17, 2006

Plaintiff-Appellee,

v

AMERITECH CORPORATION, INC., d/b/a SBC
AMERITECH,

Nos. 262420; 263469
Wayne Circuit Court
LC No. 03-326653-NF

Defendant-Appellant.

Before: Borrello, P.J., and Jansen and Cooper, JJ.

BORRELLO, P.J. (*dissenting*).

I respectfully dissent in this matter because the trial court failed to make a sufficient record from which we can ascertain whether the amounts allotted to both parties as attorney fees amounted to an abuse of discretion. Accordingly, I would reverse the trial court's rulings and remand with instructions to apply the principles to be used in making such determinations as set forth in *Zdrojewski v Murphy*, 254 Mich App 50, 72; 657 NW2d 721 (2002).

I reject the majority's contention that because defendant acknowledged at the May 6, 2005, hearing that the rate of \$300 an hour paid to plaintiff's counsel was reasonable, the issue of plaintiff's counsel's attorney fees has been resolved. Absent the trial court making the necessary findings set forth in *Zdrojewski, supra*, we have no basis to ascertain whether the trial court abused or did not abuse its discretion by setting plaintiff's counsel's fees at \$300 an hour. Failure to make a proper record is sufficient for a finding that the trial court abused its discretion, and I would so hold.

After setting plaintiff's counsel's fees at \$300 per hour, the trial court then set defense counsel's fees at half that rate, by stating ". . . that's what your client paid for the representation per hour" Such a conclusion is contrary to prior holdings of this Court and our Supreme Court. "Actual costs" as used in MCR 2.403(O) does not mean the amount actually expended. *McAuley v Gen Motors Corp*, 457 Mich 513, 524; 578 NW2d 282 (1998), overruled in part on other grounds in *Rafferty v Markovitz*, 461 Mich 265, 273 n 6; 602 NW2d 367 (1999). Because the definition of "actual costs" refers to a reasonable attorney fee, parties are limited "to recovery of a reasonable fee as determined by the trial court, regardless of the fee amount a party may contractually agree to with his attorney or the total amount he may spend on litigation."

McAuley, supra at 524; see also *Zdrojewski, supra* at 72 (“[r]easonable fees are not equivalent to actual fees charged.”)

The trial court provided no reason for its determination of a reasonable attorney fee for defendant other than its opinion that the agreed rate of \$150 an hour was fair. The court did not consider other appropriate factors relevant to the determination of a reasonable attorney fee. Indeed, the court stated that it was “quite likely” that defense counsel’s “services are worth more than that,” reflecting the court’s tacit agreement that defendant’s request for an award based on a higher requested rate was reasonable.

I furthermore find troubling the concept that the trial court, without explanation, found that plaintiff’s counsel was entitled to twice the rate as that of defense counsel. Certainly there are circumstances when such rulings are justified, but in the absence of any factual findings supporting the decisions in this case, I am at a loss to even begin an analysis into the justification for the discrepancy.

Accordingly, I would reverse the rulings of the trial court and remand the matter for further proceedings consistent with this opinion.

/s/ Stephen L. Borrello