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STATE OF MICHIGAN
COURT OF APPEALS

VINCENT OWEN,

Plaintiff-Appellant,

v

DENNIS CONTO, LUTHER LOGISTIC
TRANSPORTATION, LLC, and LUTHER
LEASING LLC,

Defendants-Appellants,

and

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,¹

Defendant.

Before: CAVANAGH, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

In this third-party no-fault action, plaintiff appeals as of right a judgment in favor of defendants, Dennis Conto, Luther Logistic Transportation, LLC, and Luther Leasing, LLC, for \$172,984.70 in attorney fees and costs as case evaluation sanctions. We affirm.

Facts regarding the underlying litigation in this case can be found in *Owen v Conto*, unpublished per curiam opinion of the Court of Appeals, issued January 7, 2020 (Docket No. 345253). Relevant to this appeal, case evaluation was held on July 10, 2017 and the acceptance or rejection deadline was August 7, 2017. Plaintiff and defendants both rejected the award of

¹ Because plaintiff’s claim against State Farm was dismissed and resolved through arbitration, *Owen v Conto*, unpublished per curiam opinion of the Court of Appeals, issued January 7, 2020 (Docket No. 345253), p 1 n 1, the term “defendants” in this opinion does not refer to State Farm.

\$275,000 against defendants. The case went to trial in May 2018. Trial lasted approximately two weeks, after which the jury returned a verdict of no cause of action. On August 24, 2018, defendants moved for case evaluation sanctions against plaintiff. In response, plaintiff argued that defendants had failed to demonstrate that they had incurred attorney fees in the amount claimed, necessitating an evidentiary hearing.

Over the course of four hearings, the trial court made various rulings related to plaintiff's document requests and subpoenas, and defendants revised their bill of costs to more clearly show that pre-evaluation fees and costs were not being sought. Defendants also agreed to remove certain costs that were not recoverable. Ultimately, defendants requested \$341,490 in case evaluation sanctions: \$281,240 for attorney fees and \$57,984.70 in costs. The trial court awarded defendants all of their requested costs. Plaintiff objected to the inclusion of postverdict attorney fees incurred by defendants in seeking the case evaluation sanctions and the trial court held that it would remove those as unrecoverable. Without disclosing how much defendants' counsel actually billed to or was paid by the insurance company, the trial court agreed with plaintiff that the amount of attorney fees sought by defendants were "extremely excessive," described the requested hourly rates between \$200 and \$450 as "high," and noted that it would not "comment on the number of hours. There is a very large number of hours." The court then awarded attorney fees in the amount of \$115,000. Plaintiff now appeals.

We review de novo a trial court's decision whether to grant case evaluation sanctions under MCR 2.403(O). *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). The amount of case evaluation sanctions is reviewed for an abuse of discretion. *Peterson v Fertel*, 283 Mich App 232, 239; 770 NW2d 47 (2009). We also review for an abuse of discretion a trial court's decision regarding the admission of evidence, *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 200; 555 NW2d 733 (1996), and whether an evidentiary hearing is warranted, *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith*, 481 Mich at 526.

Plaintiff first argues that the trial court abused its discretion by awarding attorney fees in an amount greater than what defendants' counsel was actually paid. We disagree.

Defendants' counsel billed for 765.7 hours. Using that number, the \$115,000 award would calculate to a rate of just over \$150 for all 765.7 hours, or \$158.46 per hour with the removal of 40 hours for postverdict evaluations. Defendants' motion for sanctions set forth the professional standing and experience of each of the attorneys who billed hours on the case and set forth a reasonable fee. In addition, attached to defendants' amended bill of costs were affidavits from Mark Masters and Matthew J. Consolo setting forth their qualifications and stating that the rates of \$450 for senior partners, \$350 for partners, and \$200 for associates were reasonable. There is no evidence to support plaintiff's assertion that \$160 per hour or \$115,000 is an amount greater than either the amount actually charged or the amount the insurance company actually paid.

We are aware that some of the lack of evidence resulted from the trial court's determination that plaintiff was not entitled to know the rates and total amount of attorney fees charged by defendants' counsel and ultimately paid by the insurance company. However, contrary to plaintiff's assertion, these numbers were not required to determine a reasonable fee.

MCR 2.403(O) provides for the award of “a reasonable attorney fee.” MCR 2.403(O)(6)(b). Reasonable fees are not equivalent to the actual fees charged. *Cleary v Turning Point*, 203 Mich App 208, 212; 512 NW2d 9 (1993). Indeed, in *Cleary*, this Court expressly held “that the trial court did not abuse its discretion in awarding defendant attorney fees calculated at an hourly rate *higher* than the hourly rate that defendant was charged by defense counsel.” *Id.* at 212 (emphasis added). Furthermore, our Supreme Court cited *Cleary* for its position in *Smith* that MCR 2.403(O) is not intended to exactly replicate the attorney’s private fee agreement. *Smith*, 481 Mich at 534. Accordingly, to the degree that there is any record evidence to support that the trial court’s award of \$115,000 was greater than the amount defendants’ counsel charged or received from the insurance company, that evidence is not sufficient, by itself, to justify a determination that the trial court abused its discretion.

Plaintiff next argues that the trial court abused its discretion by failing to hold an evidentiary hearing on defendants’ request for case evaluation sanctions. Again, we disagree.

“Generally, a trial court should hold an evidentiary hearing when a party is challenging the reasonableness of the attorney fees claimed.” *Kernen*, 252 Mich App at 691. However, a defendant’s bill of costs and accompanying documentation can “provide[] the trial court with a reasonable evidentiary basis to evaluate and decide [the] defendant’s motion for costs” without holding an evidentiary hearing. *Id.* at 692. “[I]f the parties created a sufficient record to review the issue, an evidentiary hearing is not required.” *Id.* at 691. In this case, the trial court held no fewer than four hearings on defendants’ motion for case evaluation sanctions. At several of these hearings, the trial court temporarily adjourned to permit the parties the opportunity to resolve differences related to defendants’ bill of costs. Ultimately, although plaintiff made vague claims about the number of hours billed by defendants’ attorney Matthew Consolo being high, plaintiff never provided a single objection to the hours billed. Plaintiff’s only arguments centered on the rate and amount actually billed and charged, and the failure to obtain unredacted billing records. The records provided by defendants’ counsel itemized all of the work completed and identified which attorney had completed it.

With regard to the evidence plaintiff asserts he intended to obtain at an evidentiary hearing, plaintiff states that he would have questioned defendants’ counsel regarding the rate charged and whether “any reduced payments were received.” However, as discussed above, the rate charged and whether counsel accepted reduced payments were not relevant to the issue of what constituted a reasonable fee. Plaintiff also asserts that he challenged the number of hours expended, “including one of the attorneys itemizing more than 500 hours—the vast majority of which occurred within a two-month span.” Plaintiff is referring to an argument made at a hearing regarding a subpoena requesting “documents related to Consolo’s yearly billings” so that plaintiff could compare the hours Consolo spent on this case versus other cases during the year. Plaintiff argued that these records were necessary because Consolo was claiming over 500 hours which was a lot of hours in a year. The trial court denied the request for Consolo’s billing records because it concluded that they were not relevant to the issue before the court. Plaintiff notes in his appeal brief that although the trial court quashed his subpoena for documents, “his counsel intended to address the number of hours Defendants’ attorneys expended during the litigation with materials that were available from previous filings and proceedings.” However, Consolo was present at the final hearing on defendants’ motion, providing plaintiff with the opportunity to take testimony from him on that issue, but counsel never even attempted to do so and did not raise the issue of the number of hours

billed as an issue of controversy at any time during that hearing. Thus, plaintiff could have obtained the specific information sought at the hearing. His counsel's failure to do so did not render the trial court's failure to sua sponte offer yet another hearing to ostensibly obtain additional evidence erroneous.

Plaintiff also asserts that he wanted to inquire why certain charges remained on the invoices submitted by defendants' attorneys when other similar charges had been removed. However, at the hearing, plaintiff's only argument was that the invoices attached to the amended bill of costs did not total the amount of costs on the front of the amended bill of costs, which defendants' counsel explained occurred because certain invoices that had been attached to the original bill of costs had not been reattached to the amended bill of costs. The trial court then asked plaintiff's counsel twice whether he had any "specific objections" to the costs and, both times, plaintiff's counsel's only response was to argue about the missing invoices from the amended bill of costs. In light of the trial court expressly affording plaintiff an opportunity to provide specific objections to any of defendants' claimed costs and plaintiff's failure to provide any such objection, plaintiff waived any issue regarding specific costs. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008).

Finally, plaintiff argues that the trial court's award must be vacated and the matter remanded because the trial court failed to follow the analysis required in *Smith*, 481 Mich at 529-530. We agree with plaintiff that the trial court committed errors of law related to its determination of a reasonable attorney fee. The trial court did not specifically discuss any of the *Smith* factors in reaching its decision. Indeed, from the record, it appears the trial court primarily considered the amount actually charged to and paid by the insurance company, which as discussed above, are factors that are irrelevant to the question of a reasonable attorney fee. Nevertheless, under the specific circumstances of this case, we conclude that these errors were harmless.

As discussed above, the \$115,000 award would calculate to a rate of just over \$150 for all 765.7 hours, \$158.46 per hour with the removal of 40 hours for postverdict evaluations, or a total of only 287.5 hours at the maximum requested rate of \$400 per hour. Thus, the total attorney fee award is not excessive in either the rate or the number of hours billed no matter which of those numbers is calculated at the maximum requested by defendants. Moreover, the trial court erred when it determined that attorney fees incurred pursuing case evaluation sanctions were not recoverable. See *Sabbagh v Hamilton Psychological Servs, PLC*, 329 Mich App 324, 364; 941 NW2d 685 (2019). The addition of those fees in the total amount to which defendants' counsel would be entitled would actually increase the award. Indeed, had defendants cross-appealed the amount awarded by the trial court, we would have remanded. But the errors committed by the trial court benefited plaintiff. Were this case to be remanded and the trial court instructed to follow a *Smith* analysis and include postverdict fees incurred seeking case evaluation sanctions, plaintiff

would likely be responsible for much more than \$115,000 in attorney fees. But because defendants did not cross-appeal, they cannot receive a more favorable decision on appeal. See *Turcheck v Amerifund Fin, Inc*, 272 Mich App 341, 351; 725 NW2d 684 (2006). Accordingly, the errors committed by the trial court were harmless to plaintiff and remand is not necessary.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro