STATE OF MICHIGAN

COURT OF APPEALS

RICHARD M. GEERDES,

Plaintiff-Appellee,

v

DEBORAH JEAN GLUPKER,

Defendant-Appellant,

and

MARK FREDERICK HAASE,

Defendant.

UNPUBLISHED
January 25, 2011

No. 291295
Kent Circuit Court
LC No. 02-008670-NI

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Defendant Deborah Jean Glupker appeals as of right the judgment in favor of plaintiff following a jury trial in this third-party, no-fault insurance action. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

On September 29, 1999, plaintiff was in his vehicle, stopped at a red light, when his car was struck by a vehicle driven by defendant Deborah Jean Glupker. Plaintiff filed suit against both defendants[1] in September 2002, alleging that he suffered a serious impairment of body function as a result of the accident, and seeking tort recovery for noneconomic damages, pursuant to MCL 500.3135(1). [2] At the conclusion of a jury trial, the jury returned a verdict in

[1] According to the complaint, defendant Mark Haase was the owner of the vehicle driven by defendant Glupker.

[2] The trial in this case was a second trial following this Court's decision in a previous appeal. *Geerdes v Glupker*, unpublished per curiam opinion of the Court of Appeals, issued December 4, 2007 (Docket No. 264856).

favor of plaintiff in the amount of $50,000.00. The trial court thereafter entered a judgment for plaintiff in that amount, plus an award of taxable costs, case evaluation sanctions, and interest.

Glupker first argues that the trial court failed to properly instruct the jury. "Jury instructions are reviewed in their entirety to determine whether the theories of the parties and the applicable law were adequately and fairly presented to the jury." *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 403; 628 NW2d 86 (2001).

In this case, Glupker requested numerous standard jury instructions, including SJI2d 15.01 (definition of proximate cause), and SJI2d 15.03 (more than one proximate cause), and the trial court's jury instructions comported with those standard jury instructions. "A standard jury instruction must be given if it is requested by a party, is applicable, and accurately states the applicable law." *Walker v City of Flint*, 213 Mich App 18, 20; 539 NW2d 535 (1995). On the third day of trial, Glupker apparently asked the trial court, during an in-chambers meeting with opposing counsel, to provide a supplemental jury instruction on proximate cause. After the jury was instructed using the standard instructions and retired to deliberate, the trial court noted that Glupker's previous objection to the instructions was preserved and asked whether there were any other issues that required its attention. Glupker again made the supplemental instruction request and was again denied. A trial court is required to provide a supplemental jury instruction if it properly informs the jury of the applicable law when the standard jury instructions do not adequately address an area. *Guerrero v Smith*, 280 Mich App 647, 661; 761 NW2d 723 (2008).

Glupker's proposed supplemental instruction would have required a jury finding that her negligence was the proximate cause of plaintiff's serious impairment of body function, namely his right side radiculopathy, in order to impose liability. In the previous appeal, however, we agreed with the trial court's finding that "plaintiff's cervical spine condition . . . constituted a serious impairment of body function." *Geerdes*, unpub at 3. In this case, the issue of serious impairment of body function was already decided, and the proposed supplemental instruction sought to resurrect that threshold injury inquiry. Our ruling in the previous appeal was binding on the trial court, as well as the appellate court on subsequent appeals. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). Regardless, the supplemental instruction was unnecessary to properly inform the jury of the applicable law. In this case, it was certainly a natural and probable consequence of Glupker's negligence that physical injury, including neck trauma and radiculopathy, was caused to plaintiff, the driver of the other vehicle. See *Wilkinson v Lee*, 463 Mich 388, 397; 617 NW2d 305 (2000). The given instructions allowed the jury to make the necessary finding. Reviewing the trial court's jury instructions in their entirety, we conclude that the trial court's jury instructions on proximate cause adequately and fairly presented the applicable law to the jury. *Bouverette*, 245 Mich App at 403. Moreover, there is no indication that the jury misunderstood the parties' theories, the applicable legal principles, or the evidence. *Guerrero*, 280 Mich App at 665.

Next on appeal, Glupker objects to the imposition of case-evaluation sanctions, particularly to the amount of attorney fees and costs awarded to plaintiff. A trial court's decision regarding case-evaluation sanctions under MCR 2.403(O) presents a question of law that is subject to de novo review. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). A trial court's award of attorney fees and costs is reviewed for an abuse of discretion, which occurs when a trial court's decision is outside a range of reasonable and principled outcomes. *Id.*

At the outset, Glupker claims that plaintiff was not entitled to case evaluation sanctions because of Glupker's rejection of the first case evaluation, because the costs associated with the first trial were not necessitated by Glupker's rejection of the case evaluation, but due to the trial court's erroneous rulings. "[T]he phrase 'necessitated by the rejection' denotes only a temporal demarcation, precluding recovery of fees for hours spent before rejection of the mediation evaluation." *Severn v Sperry Corp*, 212 Mich App 406, 417; 538 NW2d 50 (1995). The question whether sanctions should be awarded ultimately depended on the outcome of the case, including the result of any appeal. *Id.* MCR 2.403 also does not limit the award of attorney fees to only fees for services performed at the trial itself. *Troyanowski v Kent City*, 175 Mich App 217, 226-227; 437 NW2d 266 (1988). The attorney fees and costs generated in connection with both trials were "necessitated by the rejection of the first mediation evaluation." *Severn*, 212 Mich App at 417. Plaintiff ultimately prevailed in this case, and the purpose of the rule "is to impose the burden of litigation costs upon the rejecting party." *Id.* Case-evaluation sanctions were properly imposed in this case, where "[t]he cost of two trials was part of the risk assumed by" Glupker in rejecting the mediation evaluation. *Id.*

Next, Glupker complains on appeal that the trial court erred in determining the attorney fees awarded to plaintiff. Generally, trial courts have relied on factors set forth by our Supreme Court in case law, as well as factors set forth in the Michigan Rules of Professional Conduct. *Smith*, 481 Mich at 529-530. However, our Supreme Court recently opined that the aforementioned multifactor approach needed some fine-tuning. *Id.* at 530. The Court held "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)." *Id.*

> 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 [the case law]. The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. *Id.* at 530-531.

The trial court should subsequently consider the remaining factors as expressed by our case law and the MRPC "to determine whether an up or down adjustment is appropriate." *Id.*

In this case, the trial court awarded plaintiff $131,328 in attorney fees, with an hourly rate of $275. Below, as well as on appeal, Glupker contended that the average hourly rate for litigation firms in Grand Rapids is $237.50. In examining the $275 hourly rate, the only support for such rate was by way of affidavits, where plaintiff's counsel averred that his current hourly rate was $275, and another Grand Rapids personal injury attorney averred that such rate was a reasonable fee for someone with the skills, experience, and reputation of plaintiff's counsel. Plaintiff, then, did nothing more than present anecdotal statements to establish the customary fee for the locality—and our Supreme Court opined that such practice is insufficient for the fee applicant to carry his or her burden in establishing the customary fee for the locality. *Id.* at 532.

There is no indication that the trial court used reliable surveys or other credible evidence of the legal market to determine the reasonable hourly rate for this case; rather, it appears that the trial court merely accepted plaintiff's request that was only supported by affidavits, and the trial court indicated that such hourly rate was justified based on plaintiff's counsel's expertise and

experience. *Id.* at 530-532. Thus, the trial court failed to follow our Supreme Court's mandate to determine a starting point for calculating a reasonable attorney fee and failed to adequately determine "the fee customarily charged in the locality for similar legal services . . . ." *Smith*, 481 Mich at 530.

With respect to the number of hours billed, plaintiff attached a statement to his case-evaluation request that demonstrated the time expended for various legal services on this case. In total, plaintiff's counsel expended 493.2 hours on this case. Here, plaintiff, as fee applicant, appears to have supported its claimed hours with evidentiary support. *Id.* at 532. On appeal, Glupker complains that the hours billed by plaintiff's counsel are generally overinflated. Because the trial court did not specifically determine the reasonable number of hours expended in this case (*Id.* at 530-531), such a complaint should be addressed by the trial court in an evidentiary hearing. See *Id.* The trial court indicated that it reviewed plaintiff's billing statements, although there is no indication that it reviewed the attorney fees claimed by plaintiff "in order to prevent double payment for work if it was needlessly duplicated for the second trial." *Severn*, 212 Mich App at 417.

We vacate the trial court's award of attorney fees in the amount of $131,328 because the trial court failed to determine the customary hourly rate charged in Grand Rapids for similar legal services. *Smith*, 481 Mich at 530-532. While plaintiff may have established the time and labor involved in this case, "[i]f a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence." *Id.* at 532.

Additionally, Glupker complains that plaintiff's taxable costs are overstated. She objects to the fee for plaintiff's biomechanical expert in the amount of $5,000; unidentified litigation costs amounting to $8,556.79; a filing fee in the amount of $150; the jury fee amounting to $85; the motion filing fee in the amount of $120; the witness fee for Brittany Geerdes; the video redaction fee amounting to $598.60; and, a conference fee with a testifying physician for $250.

With one exception, we reject Glupker's objections. The fee for plaintiff's biomechanical expert was taxable. MCL 600.2164(1); *Guerrero*, 280 Mich App at 675. The filing, jury, and motion filing fees were taxable. MCL 600.2441(2)(a); MCL 600.2455; MCL 600.2529(1)(c). Brittany's witness fee for her travel expenses was taxable. MCL 600.2405(1); MCL 600.2552(1). The video redaction fee was taxable. MCR 2.315(I); MCL 600.2549. And, the "conference fee" for the testifying physician was taxable. MCL 600.2405(1); MCL 600.2164(1); *Id.* As a result, the trial court did not abuse its discretion in taxing such costs. *Smith*, 481 Mich at 526.

However, we find that the trial court abused its discretion in taxing $8,556.79 for litigation costs incurred by plaintiff. Contrary to Glupker's complaint on appeal, plaintiff included a summary regarding these litigation costs incurred below, although calling the costs "case evaluation" sanctions, the litigation costs include medical records, hearing transcript fees, deposition fees, deposition travel expenses, case valuation fees, mediation fees, mileage, copy expenses, postage, and long distance telephone calls. Here, some of the expenses, like the deposition expenses, are taxable, while others, such as the copying charges and the case

evaluation fees, are not. *Guerrero*, 280 Mich App at 673-674. Similarly, long distance telephone calls and postage are not included (and therefore not awardable) as taxable costs under the revised judicature act, MCL 600.2401 *et seq.* See J.C. *Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 429; 552 NW2d 466 (1996)("Costs are not recoverable where there is no statutory authority.").

Additionally, plaintiff's statement regarding some of his litigation costs was rather vague. For instance, it is unknown whose mileage was being claimed in this case. Identification is necessary because traveling expenses of witnesses may be taxed, but traveling expenses for attorneys may not be taxed. *Guerrero*, at 673. We therefore vacate the portion of the judgment that awarded plaintiff $8,556.79 in litigation costs and on remand, the trial court may determine which litigation costs may be taxed.

We affirm in part, vacate in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto