STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH SHANEBERGER, Protected Person, by SUSAN SHANEBERGER, Guardian, Plaintiff-Appellee, v HOPE NETWORK BEHAVIORAL HEALTH SERVICES, Defendant-Appellant.	UNPUBLISHED August 15, 2013 No. 310035 Ionia Circuit Court LC No. 2009-027408-NO

Before: WHITBECK, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

Defendant Hope Network Behavioral Health Services appeals of right the trial court's order awarding case evaluation sanctions to plaintiff Joseph Shaneberger. For the reasons explained below, we vacate the trial court's orders awarding Shaneberger his costs and attorney fees as actual costs and remand for further proceedings.

I. BASIC FACTS

Shaneberger's guardian sued Hope Network to recover damages for injuries from a sexual assault that Shaneberger suffered while in Hope Network's care. Before trial, Hope Network admitted liability, but contested the amount of damages. The trial court submitted the damages question to the jury and the jury found, in a December 2011 verdict, that Shaneberger's damages were $300,000.

In January 2011, Hope Network rejected a $350,000 case evaluation in Shaneberger's favor, which Shaneberger accepted. Following the verdict, Shaneberger moved for an award of his actual costs as a sanction for Hope Network's rejection of the case evaluation. See MCR 2.403(O)(1). Shaneberger argued that he was entitled to his actual costs because the total award—with $11,125.73 in interest and $5,440 in taxable costs—came to $316,565.73, which was not more favorable to Hope Network.

Hope Network objected to the motion arguing, in relevant part, that Shaneberger could not properly adjust the verdict to include the $4,900 in fees paid to his treating social worker, Craig Cottrell, for his testimony at trial. Hope Network did not argue that Cottrell's fees could not be included because they were incurred after the case evaluation; rather, it argued that the

fees could not be included because Cottrell did not did not testify as an expert. Hope Network contended that, once the challenged fees were removed from the calculation, the verdict was more favorable to it for purposes of MCR 2.403(O)(1). And, for that reason, it maintained that Shaneberger was not entitled to his actual costs.

The trial court rejected Hope Network's argument that Cottrell's fees were not taxable because he did not offer expert testimony. The trial court entered an order in February 2012 that provided for an adjusted verdict of $316,565.73, which included $5,365 in taxable costs and $11,125.73 in interest. Because the adjusted verdict was not more favorable to Hope Network (that is, not more than 10 percent below the evaluation), see MCR 2.403(O)(3), the trial court determined that Shaneberger was also entitled to his actual costs. See MCR 2.403(O)(6).

The trial court held a hearing in April 2012 to determine the reasonableness of Shaneberger's attorney fees, which were for 213 hours at $375 per hour. The trial court determined that the fee structure was reasonable and entered an order awarding Shaneberger $60,000 for his attorney fees on April 13, 2012.

II. COSTS AND ATTORNEY FEES

A. STANDARDS OF REVIEW

Hope Network now appeals the trial court's award of actual costs. Specifically, Hope Network contends that the trial court erred in three ways: it erred when it adjusted the verdict to include costs that Shaneberger incurred after Hope Network rejected the case evaluation, contrary to MCR 2.403(O)(3); it erred when it determined that Cottrell's fee was a taxable cost even though he did not provide expert testimony; and it abused its discretion when it determined that Shaneberger's attorney fees were reasonable. This Court reviews de novo the trial court's interpretation and application of statutes and court rules. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012). However, this Court reviews a trial court's decision to award attorney fees for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

B. JURISDICTION AND FAILURE TO PRESERVE

As a preliminary matter, we shall address Shaneberger's claim that this Court lacks jurisdiction to address Hope Network's first two claims of error. Shaneberger contends that this Court lacks jurisdiction because Hope Network did not appeal the trial court's order adjusting the verdict and including Cottrell's fees as taxable costs. However, Hope Network appealed a postjudgment order awarding or denying attorney fees, which is a final order. See MCR 7.202(6)(a)(*iv*). And, to the extent that our review might be limited to the issues involved in the entry of that order, see MCR 7.203(A), we shall treat Hope Network's additional claims as though on leave granted. See MCR 7.203(B)(5).[1]

[1] We also reject Shaneberger's contention that Hope Network is collaterally estopped from challenging the trial court's January order. Collateral estoppel applies to bar relitigation of an

We agree, however, that Hope Network failed to properly preserve its first issue for appellate review. As already noted, Hope Network did not object to the inclusion of Cottrell's fee in the adjustment to the verdict on the ground that Shaneberger did not incur that fee before the case evaluation. See *Dessart v Burak*, 470 Mich 37, 42-43; 678 NW2d 615 (2004) (interpreting MCR 2.403(O)(3) and concluding that assessable costs are limited to those incurred between the filing of the complaint and the date of the case evaluation). As such, it waived appellate review of that claim of error. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (explaining that Michigan generally follows a raise or waive rule of appellate review in civil cases). The "raise or waive" rule of appellate review has its origins in judicial efficiency and fundamental fairness:

> By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute. [*Id.* at 388.]

Although Hope Network waived this claim or error on appeal, we have the discretion to consider it under certain limited circumstances. *Id.* at 387; see also *Smith v Foerster-Bolser Constr*, 269 Mich App 424, 427; 711 NW2d 421 (2006) ("[T]his Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented."). But this Court will exercise that discretion sparingly and only where exceptional circumstances warrant review. *Booth v University of Michigan Board of Regents*, 444 Mich 211, 234 n 23; 507 NW2d 422 (1993).

On the record before us, we cannot conclude that the circumstances involved here are so exceptional as to warrant review. For whatever reason, Hope Network's lawyer chose not to contest Cottrell's fees on the ground that the fee was not incurred before case evaluation, as required under MCR 2.403(O)(3), and we decline to relieve Hope Network of the effect of that tactical decision. *Walters*, 481 Mich at 388. Accordingly, we will not address this claim.

C. COTTRELL'S EXPERT FEE

The prevailing party in a civil suit is generally entitled to have the opposing party pay its costs. MCR 2.625(A)(1). Whether and to what extent a particular expense may be taxed as a cost is purely statutory. MCL 600.2401; *Guerrero v Smith*, 280 Mich App 647, 670-671; 761

---

issue in a new action when the earlier proceeding resulted in a valid final judgment, which is not the case here. See *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006).

NW2d 723 (2008). The Legislature has provided that an expert witness may be paid a witness fee in excess of the fee paid to an ordinary witness with the trial court's permission and that the fee paid to the expert witness may be taxed as part of the taxable costs. MCL 600.2164(1). An expert is not, however, entitled to compensation—as a witness—for every service that the expert may have provided. *Mich Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25, 107; 709 NW2d 174 (2005), rev'd not in relevant part 479 Mich 280 (2007). Rather, an expert is entitled to compensation as a witness only for the time that the expert actually spent in court and for the time that the expert spent to prepare for his or her testimony as an expert. *Id.*; see also *State Hwy Comm'r v Rowe*, 372 Mich 341, 343; 126 NW2d 702 (1964).

On appeal, Hope Network first challenges the trial court's determination that Cottrell was an expert witness. Whether Cottrell participated in the litigation as an expert witness is a question of law that must be determined from the totality of the circumstances.

A witness can be an expert witness and be entitled to excess compensation even if the expert witness never actually testifies. See *Jones v Antrim Circuit Judge*, 223 Mich 141, 145-146; 193 NW 873 (1923) (holding that fees for expert witnesses who attended trial, but who were never called to testify, could be taxed as a cost because the witnesses were "in good faith made to attend" and would have testified as to matters of opinion had they been called); *Herrera v Levine*, 176 Mich App 350, 357; 439 NW2d 378 (1989). As such, whether the witness was ultimately called to testify or admitted as an expert is not, by itself, dispositive. Rather, the expert may be entitled to compensation for preparation related to his or her testimony as an expert in addition to compensation for his or her time spent actually attending court. *State Hwy Comm'r*, 372 Mich at 343. Notwithstanding that, the prevailing party may not tax as a cost those fees paid to the expert for services other than time spent at trial or preparing for trial. *Michigan Citizens for Water Conservation*, 269 Mich App at 107-108.

An expert witness is one who has "scientific, technical, or other specialized knowledge" that will "assist the trier of fact to understand the evidence or to determine a fact in issue" and who testifies "thereto in the form of an opinion or otherwise." MRE 702. The key to qualifying for compensation as an expert is that the witness offers or will offer opinion testimony in his or her area of expertise: "The provisions of [MCL 600.2164] shall not be applicable to witnesses testifying to the established facts, or deductions of science, nor to any other specific facts, but only to witnesses testifying to matters of opinion." MCL 600.2164(3). Nothing within MRE 702 or MCL 600.2164, however, precludes an expert witness from offering both fact testimony and expert opinion testimony. See, e.g., *United States v Lopez-Medina*, 461 F3d 724, 743 (CA 6, 2006) (stating that police officers may testify as both experts and fact witnesses). An expert witness remains an expert witness, even when the witness testifies about facts in addition to offering expert opinion testimony.

At trial, Shaneberger's lawyer called Cottrell and established his academic credentials and that he had significant experience lecturing on sexual abuse issues and treating children who have been victims of sexual abuse. Although Cottrell testified about how he came to treat Shaneberger and indirectly discussed how he treated him, he also repeatedly offered testimony concerning Shaneberger's current mental state and his prognosis for recovery; he testified that Shaneberger functions at a "7 or 8 year old" mental level on coping issues and opined that, as a result, he did not have the coping mechanisms that would permit him to get past the sexual

assault. Cottrell also explained to the jury how a person with better coping skills might be better able to handle the emotional trauma of a sexual assault. Cottrell also offered his opinion about Shaneberger's future need for a caregiver and his need for continued mental health treatment. Whether Cottrell was qualified to offer these opinions, which is an issue not properly before this Court, his testimony clearly implicated the kind of specialized knowledge that only an expert witness could provide. See MRE 702; *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 787-790; 685 NW2d 391 (2004). Moreover, the fact that Shaneberger's lawyer did not move to have Cottrell testify as an expert does not alter the fact that he did testify as an expert and did so without objection.[2] As such, we cannot conclude that the trial court erred when it determined that Cottrell testified as an expert and, for that reason, could be compensated as an expert witness consistent with MCL 600.2164.

We reject Hope Network's contention that, to the extent that Cottrell offered both expert and fact testimony at trial, he would be entitled to compensation only for that portion that constituted expert testimony. The Legislature did not provide for apportionment under MCL 600.2164(3) (stating that the statutory provisions apply to "witnesses testifying" as an expert rather than a witnesses' testimony). Rather, once a witness testifies as an expert by offering opinion testimony, the witness is entitled to seek compensation "in excess of the ordinary witness fees provided by law" without regard to whether the witness also offered testimony on facts. MCL 600.2164(1). Nevertheless, we conclude that, when exercising its discretion to award a fee in excess of the ordinary witness fee, the trial court may consider the nature and complexity of the expert's opinion testimony in relation to his or her lay testimony when determining whether the witness' expert fee was reasonable.

Here, the trial court did not consider the degree to which Cottrell testified as an expert at trial when considering whether his overall fee was reasonable. In addition, we agree with Hope Network that, when considering the reasonableness of Cottrell's fee, the trial court should have considered Cottrell's total fee in light of the time actually spent in court and the complexity of his testimony. The trial court should also have assessed the reasonableness in the light of the typical fee charged by similar experts for a similar period of trial preparation and time spent in court. Finally, we agree with Hope Network's contention that the trial court did not adequately address whether and to what extent Cottrell's pretrial fees were actually and reasonably incurred for preparing to testify as an expert at trial. *Michigan Citizens for Water Conservation*, 269

[2] Had Hope Network properly objected, the trial court would have been able to settle the matter by determining that Cottrell was or was not qualified to offer expert testimony. See *Grow v WA Thomas Co*, 236 Mich App 696, 714; 601 NW2d 426 (1999) (holding that a certified social worker could offer expert testimony regarding posttraumatic stress disorder). And that determination would have settled the matter of his fees. In any event, assuming that he was qualified, Cottrell plainly had sufficient information on which to base his opinions. See *People v Yost*, 278 Mich App 341, 362 n 2, 362-365; 749 NW2d 753 (2008) (identifying the types of evidence that a mental health professional may rely on in formulating an opinion about a patient's mental health).

Mich App at 107-108. For all these reasons, we conclude that the trial court did not properly exercise its discretion to approve Cottrell's fee as a cost under MCL 600.2164.

III. CONCLUSION AND REMEDY

Because the trial court did not properly exercise its discretion when it approved Cottrell's entire fee without taking into consideration the factors that we have identified, we vacate the trial court's February 2012 order adjusting the verdict to the extent that it included Cottrell's entire fee as a taxable cost. We further remand this case for a hearing to determine whether and to what extent Cottrell's fee may be taxed as a cost under MCL 600.2164 consistent with our discussion above. Because the adjusted verdict might be more than 10 percent below the evaluation after the trial court reassesses Cottrell's fee, Shaneberger might not be entitled to his actual costs under MCR 2.403(O)(3). Accordingly, we must also vacate the trial court's April 2012 order awarding Shaneberger his attorney fees.

Because we are vacating the April 2012 order, we decline to address Hope Network's remaining claim that the trial court did not properly address all the factors identified by our Supreme Court in *Smith* when exercising its discretion to award attorney fees. If after examining whether and to what extent Cottrell's fee is taxable as a cost under MCL 600.2164, the trial court determines that Shaneberger is still entitled to his actual costs under MCR 2.403(O)(3), the trial court shall also reexamine the reasonableness of Shaneberger's attorney fee consistent with *Smith*. The trial court should provide sufficient information for appellate review of the award; in particular, it should identify the "fee customarily charged in the locality for similar services" and the source for that determination. *Smith*, 481 Mich at 530-531; see also *Augustine v Allstate Ins Co*, 292 Mich App 408, 427-428; 807 NW2d 77 (2011) (stating that it was insufficient for the trial court to simply find that the fee was reasonable; it must first determine the fee customarily charged in the locality for similar legal services and then adjust from there). It should also state the number of hours that it believes were reasonably spent on the litigation and should briefly address its view of the remaining factors identified in *Smith* and how the overall fee should be adjusted considering those factors. *Smith*, 481 Mich at 530-533.

Vacated in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Hope Network may tax its costs. MCR 7.219(A).

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Michael J. Kelly