

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ROBERT SCOTT,

Plaintiff-Appellee,

and

NATALIE SCOTT,

Plaintiff,

v

SHERI ZIMMERMAN,

Defendant-Appellant.

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UNPUBLISHED

April 14, 2011

No. 296077

Wayne Circuit Court

LC No. 09-002233-CK

Before: DONOFRIO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant, Sheri Zimmerman, appeals as of right the trial court's grant of summary disposition in favor of plaintiff, Robert Scott,<sup>1</sup> in this contract matter. Because defendant failed to create a genuine issue of material fact that the promissory note was invalid, defendant has not presented sufficient proof to overcome the presumption of consideration, defendant's argument that the trial court erred when it canceled the promissory note is abandoned, and the trial court properly ordered defendant to pay plaintiff's counsel \$11,481 in attorney fees, we affirm.

I

The central issue in this matter involves the characterization of a \$40,000 payment from plaintiff as a loan or an investment. Plaintiff is a skilled welder and fabricator of race cars. Plaintiff has done work for a company called Team Z that was owned by Dave Zimmerman,

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<sup>1</sup> Natalie Scott is Robert Scott's wife and was a plaintiff in the action before the trial court. However, the trial court stated on the record that judgment would be in favor of Robert Scott only because he was the person who issued the checks to defendant. Natalie Scott is therefore not a party on appeal.

defendant's husband. Plaintiff testified in his deposition that he has known defendant for a long time in a social context. In 2007, plaintiff and defendant decided to enter into a new business venture called Aggressive Suspensions involving the fabrication of race cars or race car components. Plaintiff was to do fabrication work and defendant was going to "take care of the books," according to plaintiff. In furtherance of the start of the business, plaintiff borrowed money from his mother and then provided two checks totaling \$40,000, one made out to Stenod Performance (for the purchase of parts) in the amount of \$14,000 and one made out to Aggressive Suspension in the amount of \$26,000. Plaintiff testified at deposition that it was his understanding that he loaned the money in exchange for a promissory note and amortization schedule prepared and signed by defendant on March 20, 2007 in the amount of \$46,378.

Defendant testified in her deposition that the \$40,000 was not a loan but plaintiff's investment in the new business.<sup>2</sup> When asked why she signed the promissory note, defendant responded as follows:

I signed this on behalf of the president of the company, and when this document was drafted with Rob and Natalie present, this was the draft of what was suppose[d] to transpire from forming the company. Rob's mother was going to loan him \$40,000 to invest in the company. His mother gave him the money and the company was supposed to pay back the loan, and that's when this was drafted up, and at that point we didn't receive any funds, and Rob said sign the document, I'll take it over to my mother, have her look it over, see if she approves it and then I can sign it and we'll get it notarized, and at that point then we were going to finish documenting it as owners, president, treasurer, vice president, whatever titles we have, we were going to document it and then it would be completed. (Zimmerman deposition via Defendant's Motion for Summary Disposition p 5.)

Plaintiff testified that he never received a payment from defendant on the promissory note despite multiple requests for payment from defendant.

## II

Plaintiff filed his complaint on January 29, 2009 alleging breach of contract and unjust enrichment. Plaintiff specifically alleged that "Defendant on or about March 20, 2007 executed and delivered to the plaintiff's a promissory note whereby she promised to pay the amount of \$40,000.00 together with interest at a rate of 6% per annum." Plaintiff also alleged that defendant had failed to make any payments due under the note and that defendant also owed interest. With regard to his unjust enrichment claim, plaintiff alleged that he provided funds to defendant with the understanding that defendant would repay the funds in a timely manner and since she has not paid, she has been unjustly enriched in the amount of \$40,000 at plaintiff's

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<sup>2</sup> While the entirety of defendant's deposition is not contained in the lower court record, a portion of her testimony is replicated in her motion for summary deposition.

expense. Plaintiff requested that the trial court award him \$40,000 together with interest, costs, and reasonable attorney fees.

Plaintiff attached a document to his complaint entitled "Promissory Note" dated March 20, 2007. The dollar amount is listed at \$46,378 and the total principal amount is listed at \$40,000. The promissory note states as follows:

FOR VALUE RECEIVED, the undersigned hereby jointly and severally promise to pay to the order of \_\_\_\_\_, the sum of forty six thousand three hundred seventy eight (\$46,378.00), together with interest thereon at the rate of six percent (6%) per annum on the unpaid balance. Said sum shall be paid in the manner following: See attached schedule.

The promissory note is signed by defendant alone as "Borrower." It appears that defendant signed the note in her individual capacity because she did not sign in any other capacity. No other borrowers signed the note and it is not witnessed or notarized. Attached to the promissory note is a loan amortization schedule showing a total of 60 payments (12 payments a year for five years) totaling \$46,378 (\$40,000 principal and \$6,378 interest.)

On March 23, 2009, defendant filed her answer, affirmative defenses, and demand for jury trial. Defendant denied the allegations in plaintiff's complaint as untrue with regard to both the breach of contract and unjust enrichment claims. Defendant's affirmative defenses were: failure of condition precedent and a condition subsequent, failure of consideration, lack of capacity to sue, lack of standing, premature claim, failure to state a claim for which relief can be granted, plaintiff has failed to name the proper party and has no cause of action, the promissory note fails to contain the language, the conditions, and the actual persons involved to constitute a proper promissory note.

Defendant filed her motion for summary disposition on August 11, 2009 pursuant to both MCR 2.116(C)(8) and (C)(10). In her motion for summary disposition, defendant explained that factual background was necessary to properly analyze the legal issues. Defendant argued that the \$40,000 at issue was not a loan to her but rather an investment into a new company called Aggressive Suspension Technologies formed by plaintiff and defendant. Defendant asserted that plaintiff received a 25% interest in the company for his \$40,000 investment. Defendant alleged that the promissory note was incomplete, unused, and unenforceable. Defendant also argued that plaintiff's failed to state a claim for unjust enrichment because defendant never received any money since the two checks plaintiff wrote went to Stenod Performance to purchase parts and Aggressive Suspension Technologies.

Plaintiff responded on September 24, 2009 requesting that the trial court deny defendant's motion in its entirety and instead grant summary disposition in favor of plaintiff pursuant to MCR 2.116(I)(2). Plaintiff argued that defendant failed to provide any documentary evidence to support her argument that the \$40,000 given to defendant by plaintiff was an investment in Aggressive Suspensions and not a loan as required by MCR 2.116(C)(10). Plaintiff argued that a lack of a named payee does not invalidate a note per MCL 440.3109(1), that the lack of a definite due date does not invalidate the note pursuant to MCL 440.3108(1), the loss of the original note is inconsequential pursuant to MRE 1004(1), and, finally that defendant

never filed an affidavit contesting the validity of the note as required by MCR 2.112(E)(1). Plaintiff also argues that defendant prepared the K-1's for Aggressive Suspension for 2007 and 2008 and they do not show a capital investment. Finally, plaintiff argues that he is free to bring both a breach of contract claim and a claim for unjust enrichment because MCR 2.111 expressly allows for inconsistent claims.

Defendant replied on September 30, 2009 again arguing that the \$40,000 was clearly an investment in the newly formed business, Aggressive Suspension Technologies, LLC and not a loan. Defendant asserted that the \$40,000 investment was in fact a stock purchase and that the investment was represented on plaintiff's K-1. Defendant further reiterated that the note was never intended to be a note payable on demand and that plaintiff presented no testimony supporting that proposition.

The trial court entertained oral argument on the cross motions for summary disposition on October 2, 2009. The trial court held as follows:

Look, I still think it's a rather simple matter and I don't want to complicate things. What I have here is a promissory note. It is signed, it is in the amount of \$40,000. It is signed by Sheri Zimmerman. It is not signed by Sheri Zimmerman on behalf of any business entity or as an officer of any business entity or a corporation to be formed or anything else. It is a simple bearer note. Under the UCC it is a bearer note.

The fact that it does not state a payee makes it payable to the holder. The fact that it doesn't have a time on it within which to pay, although there's an attached, there's an attached amortization, but the note itself is a demand note.

MCL 440.3109(1) is controlling. This is a note and defendant owes the note.

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...defendant owes the note on the promissory note. This is not a matter of unjust enrichment. This is a promissory note under the UCC. It meets all the criteria of the UCC, and in fact, the money, doesn't matter whether she was borrowing it on behalf of someone else. This is her signature as an individual. She prepared the note. She prepared the K1's. The K1's do not hold up her theory that this was capitalization, and she went ahead and signed it as an individual. She did not sign it as an officer of anything, any entity whatsoever other than her own. She can use it for anything she wants. She could have used it for anything. Motion is granted.

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Well, motion is denied on behalf of the defendant. It is granted only as to Robert Scott. He's the only person that wrote the checks.

The parties returned to court two more times to discuss interest and attorney fees. Ultimately, the trial court issued an order granting summary disposition in favor of plaintiff and awarding plaintiff \$46,601.65 for the amount of the note and interest as well as \$11,481 in attorney fees. Defendant now appeals as of right.

### III

We review a motion for summary disposition de novo. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). Defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Plaintiff responded requesting that the trial court deny defendant's motion in its entirety and instead grant summary disposition in favor of plaintiff pursuant to MCR 2.116(I)(2). Both parties, in their briefs, relied on evidence outside of the pleadings, such as documents and depositions. As a result, this Court reviews the record as if the motion for summary disposition was brought under MCR 2.116(C)(10). *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008).

A trial court should grant a motion brought pursuant to MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). If the moving party satisfies its initial burden of supporting its position with evidence, the burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The nonmoving party may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing there is a genuine issue for trial. *Id.* A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

### A

Defendant first argues that the trial court erred in denying defendant's motion for summary disposition where plaintiff failed to create a genuine issue of material fact that the promissory note was a valid contract. The interpretation of a contract is a question of law this Court reviews de novo on appeal. *Archambo v Lawyers Title Insurance Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). Further, whether contract language is ambiguous, thus requiring resolution by the trier of fact, is also a question of law we review de novo on appeal. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). The main goal of interpreting a contract is to honor the intent of the parties. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). Courts must discern the parties' intent from the words used in the contract and must enforce an unambiguous contract according to its plain terms. *Id.* at 656-657; *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). Thus, "when the language of a document is clear and unambiguous, interpretation is limited to the actual words used, and parol evidence is inadmissible to prove a different intent." *Burkhardt*, 260 Mich App at 656, citing *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d

491 (2001), and *Meagher v Wayne State University*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

Defendant asserts specifically, “[t]he promissory note is defective on its face, it is unenforceable as it is an incomplete contract and never intended to be completed.” “A promissory note must be certain as to the sum to be paid, and the time of payment.” *First Nat Bank v Carson*, 60 Mich 432, 436; 27 NW 589 (1886). Here, the document is entitled “Promissory Note,” the sum to be paid is plainly \$46,378, and the time of payment is set out explicitly in an attached amortization schedule outlining repayment of the loan over 60 monthly payments over five years. Payment is not made dependant on any future eventuality, precondition, or contract maturity which is an “uncertainty [] not allowable in a promissory note.” *Id.* at 437. While there are no actual dates listed on the amortization schedule but rather a defined period of five years for repayment, MCL 440.3108(2) states that “A promise or order is ‘payable at a definite time’ if it is payable on elapse of a definite period of time after sight or acceptance . . . .” In this case defendant prepared the amortization schedule, incorporated it into the promissory note, executed the promissory note, and then gave it to plaintiff, the bearer, who accepted it. Clearly pursuant to the operation of MCL 440.3108(2), the promissory note was payable at a definite time of five years after the bearer’s acceptance of the note in March 2007. MCL 440.3108(2). In this case, both the sum to be paid and the time of repayment are sufficiently certain and therefore the promissory note is valid. *First Nat Bank*, 60 Mich at 436-437.

Moreover, simply because defendant left the “pay to the order of” space blank on the promissory does not invalidate the promissory note. MCL 440.3109(1)(b) states that “A promise or order is payable to the bearer if it . . . [d]oes not state a payee.” Here, the plain language of the promissory note itself even signifies that it can properly be read as a bearer note, “All payments hereunder shall be made to such address as may from time to time be designated by *any holder* thereof.” (Emphasis added.) And defendant provides no support whatsoever for her argument that the fact that her signature was not notarized was a fatal defect to the promissory note. “[T]his Court will not search for authority to support a party’s position, and the failure to cite authority in support of an issue results in its being deemed abandoned on appeal.” *Flint City Council v Mich*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002).

Defendant repeatedly implores us in her brief on appeal, as she did in the trial court, to look outside the four corners of the promissory note and conclude that the facts surrounding her execution of the agreement establish that “the parties never intended this to be used as a promissory note.” But, as we stated above, “when the language of a document is clear and unambiguous, interpretation is limited to the actual words used, and parol evidence is inadmissible to prove a different intent.” *Burkhardt*, 260 Mich App at 656, citing *Universal Underwriters Ins Co*, 464 Mich at 496, and *Meagher*, 222 Mich App at 722. As the Michigan Supreme Court stated in *Rory v Cont’l Ins Co*, 473 Mich 457, 468-469; 703 NW2d 23 (2005):

A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*. Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. This Court has previously noted that “the general rule [of contracts] is that competent persons

shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.’”

When a court abrogates unambiguous contractual provisions based on its own independent assessment of “reasonableness,” the court undermines the parties’ freedom of contract. [Footnotes omitted; brackets in original.]

We must point out that in making this argument, defendant contends that the promissory note was ambiguous because of blanks left in the face of the note. As she stated in her affirmative defenses, her argument is that “the [p]romissory [n]ote fails to contain the language, the conditions, and the actual persons involved to constitute a proper promissory note.” Defendant has never argued that the promissory note was unambiguous but void because of fraud. In any event, while parol evidence is normally not admissible to vary the terms of a written contract, it may be admitted to show that a party’s signature to the contract was procured through fraud. *Schupp v Davey Tree Expert Co*, 235 Mich 268; 209 NW 85 (1926), *Rambo v Patterson*, 133 Mich 655, 95 NW 722 (1903), and *Hobbs v Solts*, 37 Mich 357 (1877). In each of these cases the party claiming fraud contended he was duped into signing a document believing it stated something other than what it actually provided. That is certainly not the case here where (1) defendant has never alleged that she was led to believe that the promissory note contained terms other than the written promissory note’s clear and unambiguous terms, and (2) in fact, defendant drafted the note.

Because the language of the promissory note is clear and unambiguous, interpretation is limited to the actual words used, and parol evidence is inadmissible to prove a different intent, defendant failed to create a genuine issue of material fact that the promissory note was invalid and the trial court properly granted summary disposition in favor of plaintiff.

## B.

Next, defendant argues that the trial court erred in granting plaintiff’s motion for summary disposition where defendant presented a genuine issue of material fact that the promissory note was an invalid contract for failure of consideration. Under the uniform commercial code (UCC), the promissory note in this case is a negotiable instrument because it is payable to a bearer, at a definite time, and does not contain an undertaking other than the payment of money. MCL 440.3104. “Under the negotiable instruments law every negotiable instrument is deemed prima facie to have been issued for valuable consideration.” *In re Booth’s Estate*, 326 Mich 337, 343; 40 NW2d 176 (1949).

Consideration is defined as “a benefit on one side, or a detriment suffered, or a service done on the other.” *General Motors Corp v Dep’t of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002) (citation omitted). But, only the existence of consideration is necessary, for “courts do not generally inquire into the sufficiency of consideration,” so as a consequence even “[a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration.” *Id.* at 239, citing *Harris v Bond & Mtg Corp*, 329 Mich 136, 145; 45 NW2d 5 (1950) and *Whitney v Stearns*, 16 Maine 394 (Sup Judicial Ct Maine, Waldo Co, 1839).

Here, defendant merely claims that she did not actually physically receive the checks and that they were not made out to her—she does not claim that plaintiff did not pay the money, or that she did not directly receive the benefit of the money. Plaintiff testified that he gave both checks to defendant’s husband, Dave Zimmerman. One of plaintiff’s checks in the amount of \$14,000 went to Stenod Performance to buy parts for Aggressive Suspension Technologies. Plaintiff’s check in the amount of \$26,000 went into the Aggressive Suspension Technologies bank account. The evidence shows that defendant considered herself 75% owner in Aggressive Suspension Technologies and an influx of parts and money into the business is clearly a “benefit” to her and therefore constitutes valuable consideration. *General Motors Corp* 466 Mich at 238-239. Defendant has not presented sufficient proof to overcome the presumption of consideration.

### C.

Defendant also argues that the trial court erred when it canceled the promissory note. The order and judgment in the matter states as follows, “IT IS FURTHER ORDERED: the promissory note attached to the complaint in this matter dated March 20, 2007 is cancelled.” Without support for her proposition, defendant argues that “[c]anceling the promissory note also cancels the order and judgment.” Plaintiff responds that cancellation of a note is “standard procedure” when a judgment on a note is entered to prevent “a party from attempting to collect on both a judgment and an uncanceled note.” Again, defendant presents no authority for her assertion whatsoever. Again, “this Court will not search for authority to support a party’s position, and the failure to cite authority in support of an issue results in its being deemed abandoned on appeal.” *Flint City Council*, 253 Mich App at 393 n 2. We deem this issue abandoned on appeal, but we do point out that it appears the trial court was attempting to safeguard defendant’s interests when cancelling the promissory note in accordance with plaintiff’s response to the issue. We do not find reversible error.

### IV

Finally, defendant argues that the trial court erred in ordering actual attorney fees. This Court generally “review[s] a trial court’s award of attorney fees and costs for an abuse of discretion.” *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). “An abuse of discretion occurs when the trial court’s decision is outside the range of reasonable and principled outcomes.” *Id.*

The parties to a contract may include a provision that the breaching party will be required to pay the other side’s attorney fees and such provisions are judicially enforceable. *Zeeland Farm Servs v JBL Enters*, 219 Mich App 190, 195; 555 NW2d 733 (1996), also see *McAuley v General Motors Corp*; 457 Mich 513, 519 n 7; 578 NW2d 282 (1998). Recovery in such cases is limited to reasonable attorney fees. *Zeeland Farm Servs*, 219 Mich App at 195. Plaintiff’s request for attorney fees was based on the following sentence from the promissory note: “In the event this note shall be in default, and placed with an attorney for collection, then the undersigned agree to pay all reasonable attorney fees and costs of collection.” This sentence is unambiguous, “the undersigned,” here, defendant, promised to pay “all reasonable attorney fees and costs of collection” to the bearer incurred to enforce payment and collection of the note.

Thus, the trial court's decision to award attorney fees pursuant to the plain language of the promissory note was not error. *Id.*

With regard to the reasonableness of the fees, a trial court should hold an evidentiary hearing when a party is challenging the reasonableness of the attorney fees claimed. *Miller v. Meijer, Inc.*, 219 Mich App 476, 479; 556 NW2d 890 (1996). But a trial court is not required to hold a hearing to determine the reasonableness of fees if the court has sufficient evidence to determine the amount of attorney fees and costs. *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 171; 712 NW2d 731 (2005). It is the burden of the party requesting attorney fees to prove they were incurred and that they are reasonable. *Reed v Reed*, 265 Mich App 131, 165-166; 693 NW2d 825 (2005).

Plaintiff filed a motion requesting attorney fees pursuant to the language in the promissory note. Plaintiff also requested attorney fees in his complaint. The record shows that plaintiff's counsel provided an accounting of attorney fees to the court as well as defense counsel. The accounting is an in depth listing of legal services plaintiff's counsel provided detailing the date of the service, the service provided, the time expended on the task, and the amount charged for the specific service. The total charges for actual services rendered is \$11,481.

The trial court heard oral argument on the motion on December 18, 2009. The trial court asked plaintiff's counsel her hourly rate and counsel responded her rate was \$200 an hour and that she has been practicing since 1986. Plaintiff's counsel also informed the court that the invoices included a total of 57 hours of attorney time. The trial court also asked plaintiff's counsel the total cost of the time and plaintiff's counsel responded that the total was \$11,481. The trial court then held as follows:

The complaint asked for relief of attorney fees, and the amount. But we've gotten to that point now. \$200 an hour is a reasonable amount for an attorney fee for this case. This case in terms of hours appears to be a little bit longer than it should have been, but I would say that that's from the vigorous defense that [defendant] has proposed, and she had, you know, issues that were not frivolous that she brought to the court, but it then in turn cost[s] more attorney fees for the plaintiff to proceed because they had to respond to her advocacy, which was arguable under the law a legitimate argument that she just didn't win.

So the attorney fees are approved and there should be one judgment which would state that it was \$40,000 on the note, then the attorney fees, and for a total judgment of whatever that adds up to and then it carries, you know, the statutory judgment interest.

Plaintiff's counsel clearly explained how she came to the figure of \$11,481 on the record before the trial court and also provided detailed documentation supporting her figures. The trial court did not merely adopt the figure, but questioned plaintiff's counsel about her rate, who was involved in providing attorney services in the case, and total time involved. The trial court made specific determinations with regard to the hourly rate of \$200, the total hours spent on the case of 57 hours, and the total fee imposed of \$11,481. The trial court explained that it thought the

hours were slightly high but rationalized that the hours were justified by defendant's vigorous defense. No error occurred when the trial court ordered defendant to pay plaintiff's counsel \$11,481 in attorney fees because the trial court had sufficient evidence on which to determine the reasonableness of the fees, analyzed the evidence on the record, and determined that the fees were reasonable.

V

Because the language of the promissory note is clear and unambiguous, interpretation is limited to the actual words used, and parol evidence is inadmissible to prove a different intent, defendant failed to create a genuine issue of material fact that the promissory note was invalid and the trial court properly granted summary disposition in favor of plaintiff. Defendant has not presented sufficient proof to overcome the presumption of consideration. Defendant's argument that the trial court erred when it canceled the promissory note is abandoned. The trial court properly ordered defendant to pay plaintiff's counsel \$11,481 in attorney fees because it had sufficient evidence on which to determine the reasonableness of the fees, analyzed the evidence on the record, and determined that the fees were reasonable.

Affirmed. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio

/s/ Mark J. Cavanagh

/s/ Cynthia Diane Stephens