STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN NEUROLOGY ASSOCIATES, PC,

Plaintiff/Counterdefendant-Appellee/Cross-Appellant,

v

STEVEN S. BEALL, MD,

Defendant/Counterplaintiff-Appellant/Cross-Appellee.

UNPUBLISHED
September 16, 2021

No. 354565
Macomb Circuit Court
LC No. 2016-004048-CB

Before: CAMERON, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

To succeed on a motion for case evaluation sanctions, the requesting party must present some evidence to prove the reasonableness of the fee requested and the number of attorney work hours claimed. This case involved two rejected case evaluations—one arising from a complaint and the other from a counterclaim. The parties stipulated that to calculate the sanctions, the hours spent by their attorneys would be allocated between litigating the complaint and litigating the counterclaim. But the parties then claimed that this was an impossible task and presented no evidence of the allocation. Given the absence of this critical evidence, we affirm the circuit court's denial of both parties' motions for case evaluation sanctions.

I. BACKGROUND

Dr. Steven S. Beall is a physician who was previously employed by Michigan Neurology Associates, PC (MNA). Dr. Beall resigned in 2011, after a medical assistant accused him of sexual harassment and a human resources employee alleged that a physician- partner in the practice asked her to cover up Dr. Beall's misconduct. *Mich Neurology Assocs, PC v Beall*, unpublished per curiam opinion of the Court of Appeals, issued April 2, 2020 (Docket No. 347341) (*MNA I*), p 5. Those two employees subsequently filed suit against MNA for constructive discharge, which MNA settled for a total of $150,000. *Id*. at 6. MNA then filed suit against Dr. Beall, seeking indemnification for the settlement it paid and return of overpaid compensation (referred to by the

parties as the "clawback" claim). Dr. Beall filed a counterclaim, asserting that MNA's "clawback" math was wrong and that MNA actually owed him withheld compensation. *Id.*

The matter was submitted to case evaluation. A three-member panel valued MNA's complaint at $60,000, but evaluated Dr. Beall's counterclaim at zero. Both parties rejected the case evaluation.

The matter proceeded to a three-day bench trial. *Id.* at 6. On January 2, 2019, the circuit court determined that neither party had a cause of action. *Id.* at 8. This Court affirmed. *Id.* at 12.

Dr. Beall then sought case evaluation sanctions against MNA pursuant to MCR 2.403(O)(1) because MNA had rejected the $60,000 case evaluation and the court's ultimate judgment—$0—was less favorable. Citing MCR 2.403(O)(6)(b), Dr. Beall sought $24,187.50 " 'for services necessitated by the rejection of the case evaluation.' "

MNA retorted that Dr. Beall was not entitled to case evaluation sanctions because the court's finding of "no cause of action with respect to the parties' claims" was not a "verdict" under the definition of MCR 2.403(O)(2) from which case evaluation sanctions could be assessed. MNA has abandoned that challenge on appeal. MNA also described the case evaluation as "two-fold"—the panel evaluated MNA's complaint at $60,000 and Dr. Beall's counterclaim at $0. Dr. Beall's rejection of the case evaluation for his counterclaim negated his request for sanctions, MNA contended.

The hearing on Dr. Beall's motion was adjourned from a date in late January 2019 until February 2019, a fact of consequence to one of the legal issues presented. MNA subsequently filed its own motion for sanctions. MNA noted that Dr. Beall rejected the case evaluation of $0 for his counterclaim. "Dr. Beal[l] needed the verdict to be more favorable to him" and it was not. Accordingly, MNA sought $15,345 in sanctions.

Dr. Beall challenged the timeliness of MNA's motion for case evaluation sanctions, noting that it had not been filed within 28 days of the judgment's entry as required by MCR 2.403(O)(8). Dr. Beall conceded that MNA accurately described the case evaluation award as involving two components—one related to MNA's complaint and the other to Dr. Beall's counterclaim. But, he posited, MNA failed to explain the legal significance of this distinction and MNA did not improve its position on either count. Dr. Beall continued that his counsel's work to defend against MNA's clawback claim was the same work performed to litigate Dr. Beall's counterclaim. Specifically, MNA sued Dr. Beall under his employment contract for overpaying him during his employment, and Dr. Beall defended based on the same provisions that MNA had actually underpaid him. "His counterclaim was just based on an extension of the math."

After a hearing on the legal aspects of the parties' arguments, the court took under advisement whether it could grant MNA case evaluation sanctions as MNA filed its motion beyond the 28-day deadline. MNA's counsel reminded the court that the parties had been before the court on January 27, 2019, and on that date the court adjourned the hearing because MNA announced its intent to file its own motion for case evaluation sanctions. MNA's counsel implied that Dr. Beall could not be prejudiced even if MNA filed its motion a few days late as he was on notice. The court determined that "based upon your arguments," each party was entitled to case evaluation

sanctions under the court rule. "You both acknowledge it. Neither one of them did better at trial, based on their rejection, and so they would - - on complaint and counter complaint, they'd both be entitled to sanctions."

On March 18, 2019, the circuit court issued an order resolving only the issue of whether it could consider MNA's late filed motion for case evaluation sanctions. The court noted that MCR 2.403(O)(8) provides that a motion for case evaluation sanctions "must be filed and served within 28 days after the entry of judgment." The court looked to an unpublished opinion of this Court stating that although the court rule requires a party to file the motion within 28 days, courts retain the discretion "to entertain pleadings filed after a stated deadline." The court further cited *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), for the proposition that a court has discretion to consider late-filed motions as part of its inherent authority to control the proceedings before it.

Following the resolution of the appeal on the merits of the case in *MNA I*, the parties entered a stipulated order in lieu of an evidentiary hearing. The parties agreed to reasonable hourly rates for each attorney and stipulated that each side spent 50 hours on the case after rejecting the case evaluation award. The parties asked the court to consider each parties' legal entitlement to case evaluation sanctions, and to allocate the hours spent by the attorneys on the claim and counterclaim.

The parties then submitted supplemental briefs regarding the allocation of their attorney's hours between the complaint and the counterclaim. MNA asserted that this was "a difficult subjective task . . . [s]ince hours were not kept separately for billing purposes." Moreover, "[t]he time spent on this case is intertwined between the complaint and counter claim. When preparing for trial the stronger the case is in supporting the complaint[,] the weaker the counter claim case was for" Dr. Beall. MNA noted that reviewing Dr. Beall's testimony, his attorney's hours were intermingled too—"because preparation was strategized to deal with both the complaint and counter claim." Absent any method for dividing the hours, MNA recommended simply allocating them equally, with 25 hours being spent by each party in preparation for the complaint and 25 hours in preparation for the counterclaim.

Dr. Beall, on the other hand, argued that all 50 hours should be allocated to preparing to litigate on the complaint, describing the counterclaim as "purely incidental." Dr. Beall further posited that "[t]he history of this dispute" was important to resolving the sanctions issue. Dr. Beall described that he "retired in 2011 and quietly honored his noncompete thereafter." Although he had grounds to file suit, Dr. Beall "was satisfied with the status quo." MNA was not satisfied, however, and filed suit against Dr. Beall in 2014 seeking indemnification "related to the settlement of an earlier lawsuit" and a return of pay under a "clawback" theory. That case was dismissed without prejudice so the parties could attempt to resolve the dispute outside of court. Negotiations failed, and Dr. Beall described himself as "willing to let the status quo continue" and "satisfied with a situation where neither party made any payment to the other." When MNA filed suit again in 2016, Dr. Beall "filed a short counterclaim" because his "mathematical analysis demonstrated to him that he was actually entitled to payment based on his employment contract." In Dr. Beall's

estimation, the trial court "essentially adopted" his position at trial, concluding "that neither side should pay anything to the other."[1]

Dr. Beall contended that the court must "separate out MNA's claim for indemnification related to the earlier settlement agreement." Dr. Beall did not file a counterclaim in relation to that claim, and he successfully defended against it. Accordingly, Dr. Beall asserted that he was entitled to repayment of his attorney fees and costs for the hours spent on the reimbursement issue, estimated at 20% of his attorney's total hours, or 10 hours. "All of the remaining time on the 'clawback' claim was necessitated by MNA's complaint," Dr. Beall insisted, representing his attempt to defend himself against a claim seeking the return of "hundreds of thousands of dollars" in salary. While Dr. Beall filed a counterclaim seeking recompense for withheld salary, this work "would have been done anyway to defend him on the main complaint," and therefore could not be extricated. As such, Dr. Beall sought 100% of his attorney fees as sanctions for his need to litigate the allegations of MNA's complaint after MNA rejected the case evaluation award.

The circuit court awarded neither side case evaluation sanctions. First, the court noted that the burden was on each claimant to prove its fees. And neither party established how many of the stipulated 50 hours of attorney work "were spent in connection with defending against the other party's claims as opposed to prosecuting their own claims." The party's blanket statements and bald assertions were not proof.

"[E]ven if the Court were to determine that the parties[']claims were so intertwined as to conclude that the amount of time spent is properly split 50/50 between the two categories of claims," the circuit court remained "satisfied that neither side would be entitled to case evaluation sanctions." Although the parties stipulated to different rates for their attorneys—$350 per hour for Dr. Beall and $250 per hour for MNA—the Court found that "both sides' counsel performed equally and that awarding one side a higher hourly rate . . . would be improper." As a result, if case evaluation sanctions were awarded, the two awards would offset each other.

Dr. Beall appealed the circuit court's order as of right and we granted MNA's delayed application to file a cross-appeal. *Mich Neurology Assocs, PC v Beall*, unpublished order of the Court of Appeals, entered November 30, 2020 (Docket No. 354944).

II. ANALYSIS

We review de novo a trial court's decision whether to award case evaluation sanctions. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). We also review de novo the interpretation of the court rule underlying the court's decision. *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517, 520; 664 NW2d 263 (2003). At the heart of this appeal is MCR 2.403(O), which provides, in relevant part:

Rejecting Party's Liability for Costs.

[1] Dr. Beall's portrayal of himself as a victim of this lawsuit is irrelevant to the issue at hand. Only events *after* the case evaluation rejection can be subject to sanction.

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the evaluation.
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> (3) For the purpose of subrule (O)(1), . . . the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.
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> (8) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment. . . .

A. TIMELINESS OF MNA'S MOTION

Dr. Beall continues to contend that the circuit court should not have considered MNA's motion for case evaluation sanctions as it was filed beyond the 28-day limitation period. As noted, the circuit court issued its opinion and order resolving the issues in this case on January 2, 2019. MCR 2.403(O)(8) provides that a motion for case evaluation sanctions "must be filed and served within 28 days after the entry of the judgment." The deadline for filing this motion was January 30, 2019. MNA did not its motion until February 4, five days later.

"The term 'must' indicates that something is mandatory." *Vyletel-Rivard v Rivard*, 286 Mich App 13, 25; 777 NW2d 722 (2009). In *Braun v York Props, Inc*, 230 Mich App 138, 149; 583 NW2d 503 (1998), the circuit court rejected the defendants' motion for mediation sanctions because it was filed beyond the 28-day limitation period of MCR 2.403(O)(8). This Court affirmed that decision because it "must apply the clear language of the court rule as written." *Braun*, 230 Mich App at 150. And the statute provided "[i]n unambiguous terms" the point at which the clock begins to run. *Id*.

Braun stands for the proposition that this Court is bound by the language of the court rule to uphold a trial court's decision if it determines to reject a late-filed motion for case evaluation sanctions. But neither the court rule nor *Braun* eliminate a trial court's discretion to control the proceedings before it and to allow late-filed motions if justice so requires.

As recognized by our Supreme Court, trial courts have "essential authority . . . to control the proceedings before them." *Maldonado*, 476 Mich at 375. A necessary adjunct to a court's role of "declar[ing] what the law is and . . . determin[ing] the rights of parties," is "the authority necessary to exercise its powers as a coordinate branch of government." *In re Parole of Hill*, 298 Mich App 404, 428; 827 NW2d 407 (2012). "The court has the inherent right to function and to function efficiently." *People v Brown*, 238 Mich 298, 300; 212 NW 968 (1927). Our Legislature has recognized this right as well—MCL 600.611 of the Revised Judicature Act grants "[c]ircuit

courts . . . jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." To effectuate these principles, we must give trial courts wide discretion to exercise their inherent power to control the proceedings before them. Where, as here, a court uses its inherent authority to control the proceedings before it, our review is for an abuse of discretion. *Maldonado*, 476 Mich at 388; *Parole of Hill*, 298 Mich App at 429.

It appears that MNA stated its intent to seek case evaluation sanctions at a hearing that commenced on January 27 or 28, 2019, and was adjourned until February 11 pending MNA's filing of its sanctions motion. At the February 11, 2019 hearing, the parties confirmed that they were last in court on January 27. (The lower court docket sheet places this event on January 28.) The court stated on the record that Dr. Beall and his counsel were on notice that MNA would be filing a case evaluation sanctions motion and that the January 27 hearing was adjourned to allow MNA time to do so. Dr. Beall's counsel expressly agreed with this statement—"Yes, Judge." Dr. Beall had adequate notice that the court intended to consider MNA's motion despite that it was filed a few days late. We can find no abuse of discretion under these circumstances.[2]

B. ENTITLEMENT TO SANCTIONS

The circuit court correctly determined that both parties were entitled to case evaluation sanctions under the court rule. MCR 2.403(O)(1) provides that a party who rejects a case evaluation "must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party." If both parties reject the evaluation, "a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation." *Id.*

The case evaluation panel valued MNA's claim at $60,000 and Dr. Beall's counterclaim at $0. Both rejected the evaluation. And the court found no cause of action for either party after trial, meaning that their claims essentially were valued at $0. MNA fared far worse after trial than it had during case evaluation, entitling Dr. Beall to sanctions against it.

Dr. Beall's counterclaim was valued at $0 at case evaluation and the trial court found no cause of action against MNA. MCR 2.403(O)(3) provides, "If the evaluation was zero, a verdict finding that a defendant [here, MNA as the counterdefendant] is not liable to the plaintiff [here, Dr. Beall as the counterplaintiff] shall be deemed more favorable to the [counter]defendant." As Dr. Beall's claim was valued at $0 and the court then found no cause of action, the judgment was more favorable to MNA than the case evaluation award. Therefore, MNA was also entitled to case evaluation sanctions against Dr. Beall.

[2] We note that Dr. Beall contends that MNA should have filed a motion for a time extension under MCR 2.108(E) to trigger the trial court's consideration of its belated motion for case evaluation sanctions. MCR 2.108(E) does not require a written motion. The court rule simply provides that a court may extend filing deadlines if the party requests an extension before the expiration of the filing period and with notice to the other party. The discussion that apparently occurred in court on January 27 or 28 meets these criteria.

C. ALLOCATION

Although both sides were entitled to sanctions under the court rule, the court rejected both parties' bids because (1) the parties failed to adequately support what proportion of their costs went to litigate the complaint versus the counterclaim, and (2) as both parties stipulated to spending the same number of hours preparing for trial, the sanctions essentially cancelled each other out.

The requesting party bears the burden of proving the reasonableness of fees sought as a case evaluation sanction. *Smith*, 481 Mich at 528-529. One factor to consider is the time and labor involved in the matter. *Id*. at 529-530, quoting *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982), and MRPC 1.5(a)(1). "In considering the time and labor involved . . . the court must determine the reasonable number of hours expended by each attorney." *Smith*, 481 Mich at 532. *Smith* further describes:

> The fee applicant must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness. The fee applicant bears the burden of supporting its claimed hours with evidentiary support. If 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*.]

In lieu of an evidentiary hearing, the parties stipulated that each of their attorneys spent 50 hours working on the case following their mutual rejection of the case evaluation awards. Despite their stipulation "that no further evidentiary hearing is necessary," the parties agreed that there remained an issue to be resolved by the court—"allocating those hours between the Complaint and the Counterclaim." This allocation was required because a party rejecting a case evaluation award "is only liable for those attorney fees that accrued as a consequence of that [party's] rejection," meaning the rejecting party's liability is limited to the attorney fees "associated with the defense against that [party's] theories of liability." *Ayre*, 256 Mich App at 522-523.

In their trial court briefs on this issue, the parties agreed that the hours spent litigating the complaint and counterclaim were inextricably intertwined. MNA suggested dividing the hours 50/50. Dr. Beall sought to subtract from the allocation formula 20% of its attorney's hours as spent on the indemnification issue to which he had not filed a counterclaim. Dr. Beall contended that the remaining hours were spent preparing to litigate the complaint alone, as the counterclaim was encompassed within the work done on the complaint. Stated differently, the same amount of work would have been required had Dr. Beall not filed a counterclaim. Accordingly, Dr. Beall sought recompense of 100% of the attorney fees sought.

As found by the circuit court, however, neither party established their entitlement to any amount of attorney hours. MNA provided no evidence whatsoever with its motion for case evaluation sanctions or thereafter in the trial court. Dr. Beall presented significant evidence about the reasonableness of the fee charged by his attorney, but only a single page detailing the hours spent on particular tasks. That document provided no insight into the topics labored over during those hours. There is no way to determine that 20% of Dr. Beall's attorney's hours were dedicated to litigating the indemnification issue, let alone to allocate any time to either the complaint or

counterclaim on the clawback issue. Absent any evidence supporting their suggested allocations, the circuit court did not abuse its discretion by denying both parties' motions for case evaluation sanctions.

We affirm.

/s/ Thomas C. Cameron
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher