STATE OF MICHIGAN

COURT OF APPEALS

HOOPER HATHAWAY, PC,

Plaintiff/Counterdefendant,

and

KOHN FINANCIAL CONSULTING, LLC,

Intervening Plaintiff/Counterdefendant-Appellee,

v

ATLAS TECHNOLOGIES, LLC, and PRODUCTIVITY TECHNOLOGIES CORP,

Defendants/Counterplaintiffs-Appellants,

and

RICHARD J. LANDAU,

Appellant.

UNPUBLISHED
September 15, 2022

No. 357185
Washtenaw Circuit Court
LC No. 18-001131-CB

Before: M. J. KELLY, P.J., and CAMERON and HOOD, JJ.

PER CURIAM.

In this second appeal from an action arising from unpaid fees for professional service,[1] defendants/counterplaintiffs, Atlas Technologies, LLC, and Productivity Technologies, Corp.,

[1] See *Hooper Hathaway, PC v Atlas Technologies, LLC & Productivity Technologies, Corp*, unpublished per curiam opinion of the Court of Appeals, issued February 24, 2022 (Docket No. 354976).

appeal of right the April 28, 2021 order granting the postjudgment motion of intervening plaintiff/counterdefendant, Kohn Financial Consulting, LLC (KFC), for attorney fees, costs, and interest. Because the trial court ordered defendants and their lawyer, Richard J. Landau, jointly and severally responsible for paying KFC a total of $80,548.44, Landau joins the appeal as an appellant. Defendants also challenge the trial court's April 27, 2021 order granting KFC's motion for a restraining order. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BASIC FACTS

In August 2016, defendants filed two federal lawsuits against Jesse Levine and his father alleging breach of fiduciary duty, conversion, and tortious interference. Jesse Levine was a former manager and director of Atlas who had been fired from his position five months earlier. Lawyers from Hooper Hathaway represented defendants in the federal lawsuits, and KFC entered into a written engagement letter with defendants to provide expert services. KFC provided defendants with a preliminary expert report and, upon defendants' request, provided a preliminary rebuttal report analyzing the opinion of the Levines' expert. Defendants made two payments to KFC, but after being invoiced for the remaining balance of $44,331.25, defendants only paid an additional $4,000.

By June 2018, defendants agreed to settle the federal lawsuits. One result of the settlement was that Jesse Levine and his family gained control of the defendant companies. When defendants, now controlled by Jesse Levine, refused to pay Hooper Hathaway for legal services rendered in the federal lawsuits against the Levines, Hooper Hathaway filed a lawsuit to recover its unpaid legal fees. By stipulation of the parties, KFC intervened as a plaintiff in the action to recover its unpaid fees from defendants. Defendants responded by filing a $2.8 million counterclaim for professional malpractice against Hooper Hathaway and a $2.7 million counterclaim for accounting malpractice against KFC.

In October 2019, the trial court granted Hooper Hathaway's motion for summary disposition and dismissed defendants' professional-malpractice claim against the law firm. Nine months later, the trial court granted KFC's motion for summary disposition and dismissed defendants' counterclaim against KFC. Relevant to this appeal, the trial court found that defendants' counterclaim was frivolous.[2]

[2] Defendants argue on appeal that the trial court erred by holding that its counterclaim was frivolous. After the parties filed their appellate briefs in the present appeal, this Court decided the parties' first appeal, in which we affirmed the trial court's ruling that defendants' counterclaim against KFC was frivolous. *Hooper Hathaway, PC*, unpub op at 15-16. Defendants' appeal in Docket No. 354976 involved the same parties, the same set of facts, the same law, and the same argument against the trial court's finding that the counterclaim was frivolous. Therefore, our decision on this issue in Docket No. 354976 is the law of the case for purposes of the present appeal. See *In re Wayne Co Treasurer*, 265 Mich App 285, 297; 698 NW2d 879, 886-887 (2005). Therefore, we decline to address the issue further.

Subsequently, KFC moved for attorney fees and costs against defendants and their lawyer under MCL 600.2591 and MCR 1.109(E)(6) and (7). KFC sought $68,212.5 in attorney fees, proposing $375 an hour as a reasonable rate and 181.9 hours as a reasonable number of hours, and sought $27,736 in costs. KFC's costs were comprised of $138.50 in costs incurred by KFC's lawyer and $27,597.50 as compensation for the time KFC's principal, Maurice Kohn, spent on the matter. Defendants argued in opposition that the criteria for the imposition of sanctions under MCL 600.2591 and MCR 1.109(E)(6) and (7) had not been met, that KFC's proposed hourly rate and number of billed hours were unreasonable, that KFC was seeking fees and costs for time that were not compensable. Defendants further argued that, because the trial court awarded KFC attorney fees and costs as part of their damages award in their action for account stated, an award under MCL 600.2591 and MCR 1.109(E) would be an impermissible double recovery. They also contended that if KFC was entitled to costs, it was under the engagement letter, not as a prevailing party or pursuant to a statute. Defendants requested an evidentiary hearing to address their challenges to KFC's proposed fees and costs.

Without holding an evidentiary hearing, the trial court sanctioned defendants under MCL 600.2591 and MCR 1.109(E), awarding KFC attorney fees and costs incurred in defending against defendants' frivolous counterclaim. The court found that KFC's lawyer's hourly rate and number of billed hours were reasonable, that his time entries were sufficiently detailed, and that defendants' argument that Kohn was not entitled to expert fees was meritless. Consequently, the trial court awarded KFC attorney fees of "$42,812.44,"[3] costs of $27,736, and interest on any unpaid balance accruing at 1% a month. The court also found that MCL 600.2591 and MCR 1.109(E) warranted a $10,000 sanction against defendants. Lastly, the court ordered that defendants and their lawyer were jointly and severally liable to pay KFC $80,548.44.

II. ATTORNEY FEES AND COSTS

A. STANDARD OF REVIEW

Defendants first argue that the trial court abused its discretion by awarding attorney fees and costs without sufficient evidentiary support and without holding an evidentiary hearing. This Court reviews for an abuse of discretion a trial court's award of attorney fees and costs. *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 145; 946 NW2d 812 (2019). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Zaremba Equip Inc v Harco Nat Ins Co*, 302 Mich App 7, 21; 837 NW2d 686 (2013).

B. ANALYSIS

KFC moved for attorney fees and costs under MCL 600.2591, which provides in relevant part:

[3] Notwithstanding the merits of the court's decision to award attorney fees to KFC, the parties agree that the amount of $42,812.44 is an error in the court's order. Indeed, the parties direct this Court to a number of minor errors in the court's order. However, given our disposition of this appeal, we need not further address the errors.

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

Having found defendants' counterclaim to be frivolous, the trial court was, therefore, required to award KFC the costs and fees it incurred in connection with defendants' counterclaim, including "court costs and reasonable attorney fees."[4] See MCL 600.2591.

When evaluating the reasonableness of an attorney fee, the trial court must first consider "the fee customarily charged in the locality for similar legal services." *Smith v Khouri*, 481 Mich 519, 530; 751 NW2d 472 (2008) (quotation marks and citation omitted). When determining that number, the court "should use reliable surveys or other credible evidence of the legal market." *Id.* at 530-531. Courts may use the data provided in the Economics of Law Practice Surveys published by the State Bar of Michigan for this purpose. *Vittiglio v Vittiglio*, 297 Mich App 391, 409; 824 NW2d 591 (2012). The resulting fee "should be multiplied by the reasonable number of hours expended in the case." *Smith*, 481 Mich at 531. This product serves as a starting point for the reasonable fee analysis. *Id.* Thereafter, the court should consider the remaining factors in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982), and MRPC 1.5(a) to determine whether an up or down adjustment is appropriate. *Id.* In *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 282; 884 NW2d 257 (2016), the Michigan Supreme Court distilled the *Wood* and MRPC 1.5(a) factors into the following list:

> (1) the experience, reputation, and ability of the lawyer or lawyers performing the services,
>
> (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
>
> (3) the amount in question and the results obtained,

[4] Defendants argue that, because the trial court awarded KFC attorney fees and costs under the engagement letter, KFC could not obtain an award of fees and costs under MCL 600.2591 or MCR 1.109(E). Defendants did not set forth in their statement of the questions presented the issue of whether, under the circumstances, KFC was required to seek an award of attorney fees and costs based on contract rather than as a sanction, and they cite no authority that prohibits KFC from choosing to request fees and costs under MCL 600.2591 and MCR 1.109(E) rather than the engagement letter. Ordinarily, this Court will not consider an issue that was not set forth in the statement of questions presented. *Mich Ed Ass'n v Secretary of State*, 280 Mich App 477, 488; 761 NW2d 234 (2008), aff'd 489 Mich 194 (2011).

(4) the expenses incurred,

(5) the nature and length of the professional relationship with the client,

(6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,

(7) the time limitations imposed by the client or by the circumstances, and

(8) whether the fee is fixed or contingent.

Defendants first argue that the trial court's award of attorney fees lacked evidentiary support because KFC's lawyer did not submit an affidavit or other evidence to support his proposed hourly rate of $375. In *Smith*, our Supreme Court stated that "the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skills, experience and reputation." *Smith*, 481 Mich at 531 (quotation marks and citation omitted.) The expectation is that a lawyer will submit an affidavit in support of his or her request for attorney fees. However, defendants do not cite, nor have we found, any authority expressly requiring fee applicants to submit supporting affidavits in order to meet their burden. Thus, the failure to support a request for attorney fees with an affidavit is not dispositive. Instead, the relevant question is whether the evidence that KFC presented was sufficient to allow the trial court to determine a reasonable hourly rate.

Here, the trial court based its determination that $375 an hour was reasonable on the "reasons argued by counsel." KFC submitted empirical data from the 2017 Economics of Law Practice and its lawyer's professional biography, which showed that KFC's lawyer: (1) had 38 years' experience: (2) has been admitted to practice in state and federal courts in Michigan: (3) was admitted to practice in federal district courts in Arkansas, Wisconsin, Indiana, and Texas, and in the Sixth Circuit Court of Appeals and the Seventh Circuit Court of Appeals, and (4) is a "Martindale Hubbell AV peer rated lawyer." In addition, KFC noted in its brief that the trial court had already found that hourly rates of $400 and $552 for Hooper Hathaway's lawyers—who had less experience than KFC's lawyer—were reasonable. Although KFC did not present any evidence of the results its lawyer had achieved over his career, the trial judge deciding the motion for attorney fees was the same judge who presided over the matter and had first-hand knowledge of the difficulty of the case, the skill requisite to perform the required legal services properly, and the amount in question and the results obtained. In light of the evidence that KFC presented in support of its request for attorney fees and the trial court's familiarity with the case, the mere failure to file an affidavit did not necessarily prevent the trial court from determining a reasonable hourly rate.

Defendants next contend that KFC's lawyer's use of block billing prevented the trial court from determining whether the hours billed were reasonable. This Court recently held that there was nothing intrinsically vague about block billing and that block billing was permissible "so long as the block billing entries are sufficiently detailed to permit an analysis of what tasks were performed, the relevance of those task to the litigation, and whether the amount of time expended on those tasks was reasonable." *Lakeside Retreats, LLC v Camp No Counselors LLC*, ___ Mich

App ___; ___ NW2d ___ (2022) (Docket No. 355779); slip op at 9. Defendants disputed numerous billing entries on KFC's lawyer's invoices with annotations such as "block billing," "vague," or "excessive time," or with assertions that the activities were unrelated to the counterclaim. Defendants' objections to block billing in itself are unavailing in light of *Lakeside Retreats, LLC*. However, defendants raised valid objections to time entries that it deemed vague, taking excessive time, or unrelated to the counterclaim. Accordingly, defendants were entitled to an evidentiary hearing to challenge these entries, and the trial court abused its discretion by not granting defendants' request for a hearing. See *Smith*, 481 Mich at 532 (stating that if a factual dispute exists regarding the number of hours billed, the party opposing the fee request is entitled to an evidentiary hearing to challenge the evidence).

Defendants also contend that the trial court abused its discretion by awarding costs for the time that Kohn spent on this matter during the pendency of the litigation. "The power to tax costs is purely statutory, and the prevailing party cannot recover such expenses absent statutory authority." *Guerrero v Smith*, 280 Mich App 647, 670; 761 NW2d 723 (2008). The statutory authority for the recovery of costs in the present case is MCL 600.2591.[5] Once a trial court has found that an action or a defense is frivolous, the court must assess against the nonprevailing party "all reasonable costs actually incurred by the prevailing party and any costs allowed by law or court rule . . . ." MCL 600.2591(2). "Costs" or "taxable costs" are not the equivalent of "expenses." " 'While "expenses" is used by the Michigan Court Rules in its generic sense, i.e., the reasonable charges, costs, and expenses incurred by the party directly relating to the litigation, "costs" or "taxable costs" are strictly defined by statute, and the term is not as broad . . . .' " *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 621; 550 NW2d 580 (1996), quoting 3 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), pp 720-721.

KFC implies that all the time Kohn recorded was time spent "preparing to provide testimony as to KFC's services and the absence of any 'malpractice.' " However, KFC also indicates that some of the time Kohn recorded was spent "explaining underlying materials to counsel." Typically, this time would not be recoverable as a cost. As this Court explained in *Van Elslander v Thomas Sebold & Assoc*, 297 Mich App 204, 218; 823 NW2d 843 (2012):

> An expert is not automatically entitled to compensation for all services rendered. Conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position are not regarded as properly compensable as expert witness fees. [Quotation marks and citations omitted.]

[5] MCR 1.109(E)(6) allows a party to recover "the amount of the reasonable expenses incurred" because of the filing of a document that violated MCR 1.109(E)(5). MCR 1.109(E)(7) allows for the recovery of costs as provided by MCR 2.625(A)(2), which refers one back to MCL 600.2591.

See also *Hartland Twp v Kucykowicz*, 189 Mich App 591, 599; 474 NW2d 306 (1991) ("Experts are properly compensated for court time and the time required to prepare for their testimony").

Further, KFC presented no evidence in the trial court that it "actually incurred" any expense for the time that Kohn recorded. The Legislature has not defined "actually incurred" for purposes of MCL 600.2591. In such cases, this Court may use a dictionary to determine a word's common meaning. *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015). "Actually" means "in act or in fact," and is synonymous with "really." *Webster's Collegiate Dictionary* (11th ed), p 13. "Incur" means "[t]o suffer or bring on oneself (a liability or expense)." *Black's Law Dictionary* (11th ed). KFC did not present any evidence in the trial court that it "actually incurred" the costs for all Kohn's recorded time, nor has it presented to this Court any authority supporting its position that all Kohn's time was compensable as costs for an expert witness.

Defendants argued in the trial court, as they do on appeal, that because Kohn never testified, he *ipso facto* could not have prepared to testify. This argument is unavailing. MCL 600.2164(1), addressing expert witness fees, states in pertinent part:

> No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case.

This Court has interpreted MCL 600.2164(1) to allow the prevailing party to tax costs for an expert's trial preparation, even when the expert did not testify at trial. See *Peterson v Fertel*, 283 Mich App 232, 241; 770 NW2d 47 (2009) ("[I]t is well settled that, regardless of whether the expert testifies, the prevailing party may recover fees for trial preparation"). Here, Kohn recorded that he spent six hours preparing for and attending the summary disposition hearing. If "actually incurred," KFC may recover this expense as a cost. As to the remaining 72.85 hours that Kohn spent on this matter, not only is there nothing in the record indicating that KFC "actually incurred" the costs for these hours, but Kohn's billing sheets do not allow one to determine how much of the recorded time was for preparing himself to testify, for educating KFC's lawyer, or for routine acts done as a party in a lawsuit. As such, the record is unclear with regard to whether the costs were appropriately awarded.

Because defendants have not challenged the $138.50 awarded to KFC for its attorney's costs, we affirm that award. However, for the foregoing reasons, we reverse the trial court's award of attorney fees and the $27,597.50 awarded for Kohn's time and remand for an evidentiary hearing to address the reasonableness of KFC's billed hours and what, if any, recoverable expert witness costs KFC actually incurred.

III. SANCTIONS

A. STANDARD OF REVIEW

Defendants next contend that the trial court erred by imposing a $10,000 sanction when neither MCL 600.2591 nor MCR 1.109(E) allows punitive damages. This Court reviews de novo whether the trial court properly interpreted and applied the relevant statutes, *Makowski v Governor*, 317 Mich App 434, 441; 894 NW2d 753 (2016), and court rules, *Jenson v Puste*, 290 Mich App 338, 341; 801 NW2d 639 (2010).

B. ANALYSIS

Neither MCL 600.2591 nor MCR 1.109(E) permit the assessment of punitive damages. KFC argues that the $10,000 sanction "was not punitive but was supported by the outrageous conduct of Appellants." Punitive damages are "damages assessed by way of penalizing the wrongdoer or making an example to others." *Black's Law Dictionary* (11th ed). Imposing a $10,000 penalty for egregious conduct is the very definition of "punitive damages" and precisely what MCR 1.109(E)(6) and (7) prohibit. Once the trial court awarded KFC its reasonable attorney fees and actual costs, and any other relief allowed by statute or court rule, it was prohibited by the language of MCR 1.109(E)(6) and (7) from awarding any additional relief in the form of an award based on the conduct of defendants and their lawyer. Accordingly, we reverse the trial court's imposition of a $10,000 sanction.

IV. RESTRAINING ORDER

A. STANDARD OF REVIEW

Lastly, defendants contend that the trial court erred by granting KFC's request for an order restraining defendants from transferring or otherwise disposing of assets. This Court reviews for an abuse of discretion a trial court's decision to issue an order restraining a judgment debtor from transferring or otherwise disposing of property that could be used to satisfy the judgment. See MCL 600.6104(5); MCL 600.6116.

B. ANALYSIS

MCL 600.6104 provides in relevant part:

> After judgment for money has been rendered in an action in any court of this state, the judge may, on motion in that action or in a subsequent proceeding:
>
> * * *
>
> (5) Make any order as within his discretion seems appropriate in regard to carrying out the full intent and purpose of these provisions to subject any nonexempt assets of any judgment debtor to the satisfaction of any judgment against the judgment debtor.

MCL 600.6116(1) provides:

> An order for examination of a judgment debtor may contain a provision restraining the judgment debtor from making or suffering any transfer or other disposition of, or interference with any of his property then held or thereafter acquired by or becoming due to him not exempt by law from application to the satisfaction of the judgment, until further direction in the premises, and such other provisions as the court may deem proper.

Both statutes allow a judgment creditor to obtain a restraint on the transfer of a judgment debtor's assets.

In this case, after defendants claimed their appeal of the trial court's July 2020 order granting summary disposition in favor of KFC and dismissing defendants' counterclaim, defendants moved in the trial court for a stay of execution without a bond, stating that they were out of business and lacked the cash or liquid assets to purchase an appeal bond. The trial court denied the motion. Thereafter, KFC moved the trial court to issue a subpoena for the production of defendants' financial documents and to enter an order restraining defendants' transfer or disposition of assets. Relevant to the issues raised on appeal, defendants objected to provisions in the proposed restraining order that would prevent them from continuing to do business, including paying employees and secured creditors. Defendants also took exception to KFC's allegation that defendants "have a 'track record of wrongfully diverting monies for their own personal benefit and to the detriment of legitimate creditors.' " Ultimately, the trial court signed KFC's proposed orders for a subpoena and for a restraining order.

On appeal, defendants argue that they should have been allowed to continue to conduct their ordinary course of business, including to pay employees and secured creditors. However, defendants argued in their motion for a stay without a bond that they were out of business and lacked the cash or liquid assets to purchase an appeal bond. Further, KFC offered to carve out an exception from the restraining order for employees that defendants identified as engaged in winding-up activities. There is no record of defendants' having identified any such personnel.

Defendants contend that KFC's assertion that "[t]hose in control of defendants have a known track record of wrongfully diverting monies for their own personal benefit and to the detriment of legitimate creditors" was a slanderous assertion. However, nothing in either statute suggests that a trial court must consider the judgment debtor's past conduct or whether there exists good cause for the restraining order. The statutes' only requirement is that one party has obtained a judgment against another. In the present case, there is no dispute that KFC obtained a judgment against defendants in the amount of $42,812.44. The inclusion of the allegation, therefore, does not warrant reversal of the court's order granting KFC's motion for a restraining order.

On this record, the trial court did not err by granting KFC's motion for a restraining order.

V. CONCLUSION

We affirm the trial court's April 27, 2021 restraining order. With respect to the trial court's April 28, 2021 order, we: (1) reverse the trial court's award of attorney fees; (2) affirm $138.50 of the costs awarded and reverse the remaining $27,597.50 of costs; (3) reverse the $10,000 sanction, and (4) remand the matter for an evidentiary hearing regarding the reasonableness of KFC's billed hours and what, if any, recoverable costs KFC actually incurred.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs are awarded. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Thomas C. Cameron
/s/ Noah P. Hood