

STATE OF MICHIGAN
COURT OF APPEALS

ALPHA TITLE AGENCY, INC.,

Plaintiff-Appellant,

v

PEOPLES STATE BANK,

Defendant-Appellee.

and

WADI CHOLAK, INTSAR CHOLAK and
CHASE MANHATTAN BANK,

Defendants.

UNPUBLISHED

March 23, 2004

No. 243508

Wayne Circuit Court

LC No. 00-036705-CH

Before: Owens, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order of no cause of action entered following a jury trial, and from the post-judgment order granting case evaluation sanctions. We affirm but remand for an evidentiary hearing.

I. Factual Background

Wadi Cholak and his wife Intsar¹ were sued by defendant² when Cholak's supermarket went out of business and Cholak failed to pay a debt owed to defendant that was secured by a

¹ Intsar was sued because, as Wadi's wife, her name was on the mortgage documents. The allegations in this case deal almost exclusively with Wadi, however, so references in this opinion to "Cholak" will generally refer only to Wadi Cholak.

² Madison National Bank, defendant's predecessor, sued the Cholaks. This opinion will refer both Madison and defendant Pontiac State Bank collectively as "defendant." The Cholaks were dismissed from the lawsuit before trial and plaintiff further agreed to represent the interests of Chase Manhattan, the mortgage holder, so it was not an active party at trial.

second mortgage on the Cholaks' home. In an effort to resolve the lawsuit, Cholak refinanced his home; the refinancing provided \$260,000 to pay off the amount owed on the original mortgage of approximately \$162,000 and left \$95,000 available to pay toward his debt to defendant of \$227,000. In a July 14, 1997, letter to Cholak's attorney, defendant agreed to discharge its second mortgage in return for fulfillment of the following conditions: (1) Cholak was to pay \$95,000 to defendant on or before July 25, 1997; (2) Cholak was to sign a consent judgment in the pending lawsuit; and (3) Cholak was to sign a settlement agreement. The settlement agreement was signed the following day at the refinancing closing. The agreement contained a requirement that Cholak pay \$5,000 to defendant within thirty days. Failure to timely make the \$5,000 payment would permit defendant to declare Cholak's entire indebtedness in default and to foreclose on the Cholaks' home.

Despite signing the settlement agreement, Cholak failed to sign the consent judgment, despite repeated requests, and defendant then refused to discharge its mortgage. Subsequently, when Cholak failed to timely pay the \$5,000 as required by the settlement agreement, defendant demanded payment of the full indebtedness that remained after the receipt of the \$95,000 from the refinancing. Defendant eventually foreclosed on the Cholaks' home and they were evicted.

In the meantime, unaware defendant had refused to discharge its mortgage, the refinancing mortgagor, Capstone Mortgage, had sold its mortgage to Chase Manhattan (Chase), and plaintiff, who functioned as the closing agent, had issued a "first lien" letter and a policy of title insurance to Chase assuring the bank that it now had first lien priority on the Cholaks' house. After the foreclosure, plaintiff sued defendant alleging, among other claims, that defendant had negligently misrepresented information that damaged plaintiff by failing to disclose the existence of the \$5,000 additional payment requirement and by failing to inform plaintiff that defendant was not going to discharge its second mortgage. The jury found no cause of action. The trial court subsequently denied plaintiff's motion for a new trial and granted defendant's motion for a directed verdict, a motion regarding which it had previously reserved ruling.

II. Trial court's grant of directed verdict

Plaintiff raises claims regarding alleged instructional error, the improper granting of a directed verdict, the use of an inappropriate curative instruction, and the presentation of irrelevant evidence. With regard to the instructional and evidentiary issues, plaintiff contends that the alleged errors presented by those issues influenced the jury's verdict. Because we find that the trial court properly granted defendant's motion for a directed verdict, we deem it unnecessary to discuss defendant's other trial issues.

Plaintiff claims that the trial court committed error requiring reversal when, after the jury returned a verdict of no cause of action and the court denied plaintiff's motion for a new trial, the court granted defendant's motion for a directed verdict. Plaintiff argues on appeal that it alleged both ordinary negligence³ and negligent misrepresentation and that the basis for both claims was

³ To the extent that plaintiff now attempts to claim that the trial court erred in granting
(continued...)

(1) defendant's failure to notify plaintiff of the Cholaks' agreement to pay an additional \$5,000 and (2) defendant's failure to notify plaintiff that the Cholaks failed to sign the consent judgment (along with its negotiation of the \$95,000 check), which caused plaintiff to reasonably determine that defendant intended to discharge the mortgage.

This Court reviews de novo the trial court's decision on a motion for a directed verdict. *Tobin v Providence Hosp*, 244 Mich App 626, 642; 624 NW2d 548 (2001). "The appellate court is to review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted." *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000), citing *Orzel v Scott Drug Co*, 449 Mich 550, 557-558; 537 NW2d 208 (1995).

To establish a claim of negligent misrepresentation, plaintiff was required to prove "that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 30; 436 NW2d 70 (1989), citing *Raritan River Steel Co v Cherry, Bekaert & Holland*, 322 NC 200; 367 SE2d 609 (1988). "[T]here can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization had not been prohibited by the defendant." *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992).

Defendant insisted that plaintiff's theory of negligent misrepresentation changed throughout the trial.⁴ In granting the motion for a directed verdict, the trial court agreed that plaintiff's theory changed through the course of the case from complaint to trial and further ruled:

(...continued)

defendant's motion for a directed verdict because the court did not address plaintiff's ordinary negligence claim, that argument is not preserved because plaintiff did not raise it in the trial court. *Napier v Jacobs*, 429 Mich 222, 227-228; 414 NW2d 862 (1987).

⁴ In its complaint, plaintiff alleged that defendant was negligent in failing to disclose its "private agreement" with the Cholaks that required them to pay \$5,000 "in order to receive and be entitled to a discharge of [the] mortgage" and in failing to disclose "the true nature of the contents of the settlement agreement." Immediately before trial, plaintiff argued that although its complaint did not use the term "negligent misrepresentation," that fact was not fatal because the actual allegations stated in the complaint under the negligence count actually pleaded a count of negligent misrepresentation. Plaintiff then argued to the jury that defendant was negligent because it cashed the \$95,000 check but did not notify plaintiff that it was not discharging the mortgage. At the conclusion of the trial, the trial court, without objection, instructed the jury concerning only negligent misrepresentation. At the post-trial argument on the motion for a directed verdict, defendant claimed that plaintiff had alleged ordinary negligence in its complaint, but that plaintiff subsequently alleged that defendant committed negligent misrepresentation. Plaintiff responded that the language contained in the complaint alleged a claim of negligent misrepresentation, *not* ordinary negligence. Now, on appeal, plaintiff claims that it alleged both negligence and negligent misrepresentation.

The Motion for Directed Verdict that was taken under advisement is in fact granted. The plaintiff did not establish that there was any negligent misrepresentation on the part of Peoples State Bank, failed to establish that there was a duty of Peoples State Bank to advise Chase Manhattan or anybody else, for that matter, of the so-called, the consent judgment [or] of the \$5,000.00 so-called side deal or any other obligation on the part of Peoples State Bank that plaintiff claimed was owed Alpha Title

We agree with the trial court's determination that plaintiff did not prove the elements of the negligent misrepresentation claim. Defendant's attorney, Tragge, prepared a letter that disclosed that PSB would grant Cholak a discharge of the second mortgage *if*: he paid \$95,000 by July 25, 1997, signed a consent judgment, and signed a settlement agreement. Defendant's attorney faxed a copy of this letter to Suzanne Cavanaugh of Capstone Mortgage and she testified that she considered it a "payoff letter." Therefore, Capstone and its agent, plaintiff, were aware of the discharge condition that required Cholak to sign the consent judgment. Knowing of this condition, plaintiff permitted the closing to occur. At the same time, plaintiff took no steps to ensure that the Cholaks signed the consent judgment and settlement agreement at the closing so that the conditions in the discharge/payoff letter would be accomplished. And plaintiff took no steps to verify with defendant – or by inspecting the records of the county register of deeds – that defendant had in fact discharged its second mortgage. Therefore, plaintiff had "the means of knowledge regarding the truthfulness of the representation," *Webb, supra* at 474, by contacting defendant to verify that a discharge had been filed, requesting a copy of the discharge, or inspecting the records of the register of deeds, but it chose not to utilize that means of knowledge. Furthermore, defendant did nothing to prevent plaintiff from utilizing the means of knowledge.⁵ *Id.*

Plaintiff also did not prove that, at the time it conducted the closing, any representation made to it by defendant was false or was "prepared without reasonable care." *Stockler, supra* at 30. At the time defendant prepared and provided the payoff letter, it truthfully informed the Cholaks' attorney and Capstone Mortgage what the terms of the discharge agreement were. Defendant's agreement to discharge was based on the fulfillment of these *future* conditions, only one of which Capstone or plaintiff would have control over – the disbursement of the \$95,000

⁵ Plaintiff sought to rely on the "established practices" of the title industry as testified to by David Martyn, a lawyer and title company employee who testified as an expert witness, and Sandra Olsen (plaintiff's president). However, if the established practice of the title industry lends itself to negligence and the conduct of business on the basis of assumptions rather than facts because of the time delays inherent in conducting title searches – or because such searches are actually never conducted – that sloppy practice should not form the basis for holding defendant liable. Furthermore, plaintiff did not establish that defendant was familiar with these supposed practices of the title industry, or that it sought to use its knowledge of those practices to prevent plaintiff from discovering that the mortgage discharge had not been filed, yet it would ask this Court to infer such knowledge on defendant's part.

check. At the time plaintiff made its decision to go forward with the closing, defendant had not made any negligently false representation.

Plaintiff knew – or should have known – that the discharge might not occur if the Cholaks did not sign the consent judgment and the settlement agreement. Plaintiff nevertheless went ahead with the refinancing closing, apparently presuming that the Cholaks would comply with the terms of the payoff letter. Plaintiff did not contact either the Cholaks’ or defendant’s attorneys before disbursing the checks to determine whether the Cholaks had complied with the requirement that they sign the consent judgment. Instead, plaintiff claimed that it simply relied on the payoff letter and the alleged industry practice that the title company could infer from the subsequent cashing of the payoff check that a discharge of defendant’s second mortgage had been entered. Therefore, plaintiff did not prove the element of justifiable reliance.

Finally, plaintiff has failed to provide any support for its contention that defendant owed it a duty to inform it that it had refused to grant a discharge of the second mortgage because the Cholaks had failed to perform the conditions required by the payoff letter. In *Maiden v Rozwood*, 461 Mich 109, 131; 597 NW2d 817 (1999), our Supreme Court summarized as follows:

Whether a duty exists to protect a person from a reasonably foreseeable harm is a question of law for the court. *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997); *Trayer v Thor*, 445 Mich 95, 105; 516 NW2d 69 (1994). “A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm.” *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

In determining whether the relationship between the parties is sufficient to establish a duty, the proper inquiry is “whether the defendant is under any obligation for the benefit of the particular plaintiff” *Buczowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992), quoting *Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 585 (1981). This analysis concerns whether the relationship of the parties is of a sort that a legal obligation should be imposed on one for the benefit of another. *Id.*

Defendant had no legal relationship with plaintiff or Capstone; defendant was not a party to the refinancing or the closing. Its relation to the Cholaks was adversarial both because the parties were engaged in litigation in Oakland County and also because the Cholaks owed a large debt to defendant. The Cholaks had a relationship with plaintiff and Capstone because they had entered into a refinancing agreement with them. To the extent that defendant had a duty to provide truthful information to plaintiff when it drafted and sent the payoff letter, defendant fulfilled that duty because it truthfully disclosed the conditions with which the Cholaks were required to comply before a mortgage discharge would be granted. Plaintiff did not establish that defendant had a continuing duty to keep plaintiff informed concerning whether the Cholaks had complied with the discharge requirements. Defendant did not do anything to prevent plaintiff from learning that the Cholaks had not complied with the discharge conditions and that a

discharge had not been granted. Defendant was therefore not “under any obligation for the benefit of the particular plaintiff.” *Buczowski, supra* at 100, quoting *Friedman, supra* at 22.

For these reasons, we conclude that the trial court correctly determined that plaintiff failed to establish any of the elements necessary to prove defendant’s liability for negligent misrepresentation. We therefore affirm the trial court’s decision.

III. Attorney fees

Plaintiff also contends that the trial court erred by granting defendant’s motion for attorney fees. The trial court ruled that the hourly rate was reasonable “given the nature of this litigation, having competing financial institutions with [a] tremendous number of documents, given the fact that this was a last-minute substitution of counsel, that a number of motions were made during the course of trial that necessitated research, writing of briefs and so forth” and then stated, without further elaboration, that the entire \$90,370.20⁶ amount requested by defendant was reasonable. We agree with plaintiff that it is necessary to remand this case for an evidentiary hearing on this claim. We review the trial court’s decision regarding the amount of a sanction award for an abuse of discretion. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000).

Plaintiff rejected the mediation award and the jury returned a verdict of no cause of action. Because plaintiff did not improve its position at trial, it was subject to mediation sanctions including actual costs. MCR 4.603(O)(1).⁷ “Actual costs” are defined by MCR 2.403(O)(6)(a) and (b) as “those costs taxable in any civil action, and . . . a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation.” See also *Elia, supra* at 378-379. Our Supreme Court in *McAuley v General Motors Corp*, 457 Mich 513, 524; 578 NW2d 282 (1998), has emphasized that MCR 2.403(O)(6)(b) limits an award by the trial court to the rule’s definition of “actual costs”; that is, to “a reasonable fee as determined by the trial court, regardless of the fee amount a party may contractually agree to with his attorney or the total amount he may have spent on litigation.”

In *Miller v Meijer, Inc*, 219 Mich App 476, 479-480; 556 NW2d 890 (1996), this Court stated:

⁶ This figure was subsequently increased to \$91,070.20 by including costs and attorney fees associated with the post-judgment motions.

⁷ MCR 2.403(O)(1) provides:

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 case evaluation.

Where, as in this case, the party opposing the taxation of costs challenges the reasonableness of the fee requested, the trial court should inquire into the services actually rendered before approving the bill of costs. *Wilson v General Motors Corp*, 183 Mich App 21, 42; 454 NW2d 405 (1990). “Although a full-blown hearing is not necessary, an evidentiary hearing regarding the reasonableness of the fee request is.” *Id.* at 42-43; *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 33; 335 NW2d 710 (1983). “[T]he trial court need not detail its findings as to each specific factor considered” in its determination of reasonableness. *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982). However, the court is required to make findings of fact with regard to the attorney fee issue. *Howard v Canteen Corp*, 192 Mich App 427, 439; 481 NW2d 718 (1992).

In subsequent cases, this Court has held that, while normally a trial court should conduct an evidentiary hearing, “if the parties created a sufficient record to review the issue, an evidentiary hearing is not required.” *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 488-489; 652 NW2d 503 (2002) (affidavits of defense counsel, itemized billing statements, and surveys of hourly rates sufficient to support trial court’s ruling awarding attorney fees “in an amount less than requested”), citing *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999) (trial court awarded \$2,500 out of a requested \$23,987 without holding evidentiary hearing, but record was sufficient to permit review where “court fully explained the reasons for its decision”)⁸ and *Giannetti Bros Constr Co, Inc, v Pontiac*, 175 Mich App 442, 450; 438 NW2d 313 (1989) (trial court disallowed most of claimed expert witness fees without holding evidentiary hearing, but “issue of costs had been before trial court off an on for nearly three years” and was “extensively briefed by both parties”).

Plaintiff objected that defendant’s billing sheet attached to its motion contained several listings for “trial preparation” without any accompanying detail concerning what was done. Several of these listings were for substantial sums. Defendant claimed that the billings were justified because of the “last-minute” need to substitute attorneys. But the billing records indicate that the so-called substitute attorney was deeply involved in the preparation of the case long before trial, and the transcripts demonstrate that the “substitute” consistently appeared as defendant’s primary attorney well before the alleged “substitution” was necessitated by a “last-minute” motion. At each appearance, the “substitute” announced that he was representing defendant and argued at length, and in depth, about the factual and legal background of the case. On those occasions when the alleged “lead” attorney was present, that attorney made either minimal or no comments at all. It therefore appears to this Court that defendant’s argument that

⁸ We particularly note that in *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999), because this Court was granting a new trial, it ordered the trial court to reconsider the award of attorney fees and advised the trial court to utilize the non-exclusive set of factors listed in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). The trial court in this case made some reference to some of these factors, but its ruling appears to have considered those factors only with reference to the reasonableness of plaintiff’s hourly rate.

its fee request was justified largely by plaintiff's "last-minute motion to disqualify" that necessitated the expenditure of greatly increased amounts of time to familiarize the "substitute" with the case simply does not derive support from the record.

We additionally note that in *McAuley, supra* at 525, our Supreme Court concluded that the trial court had "appropriately deducted portions of plaintiff's legal expenditures attributable to . . . duplicative work made necessary by substitution of plaintiff's counsel." The Court stated that such expenses as duplicative work "are properly excluded when determining what constitutes a reasonable attorney fee." *Id.* This suggests that, both factually and legally, it was inappropriate to award such a substantial attorney fee based on the alleged "last-minute substitution" of defendant's counsel.

Nevertheless, it is not our function to make the ultimate determination on this question, but rather to review the trial court's exercise of discretion regarding the request for attorney fees. We offer our observations simply as support for our conclusion that the existing record does not appear to support the trial court's decision. Part of the reason the legitimacy of these observations cannot be tested is that the trial court did not resolve plaintiff's objections other than to make the conclusory judgment that the total sum requested by defendant was reasonable. Furthermore, it appears that the trial court's decision blurs two distinct concepts: the reasonableness of the hourly rate claimed by defendant (\$175 per hour – which was not challenged) and the reasonableness of the entire amount requested (\$90,370.20 – which was challenged). Having determined that the per-hour rate was justified, the court then simply pronounced the full amount of the requested attorney fee award "entirely reasonable" without indicating why this was so.

The trial court's pronouncement did not comport with the requirement announced in *Head, supra* at 114, that the trial court "consider the factors set forth in *Crowley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973)," and it did not comport with the admonition in *Miller, supra* at 479-480 that although the court "'need not detail its findings as to each specific factor considered' in its determination of reasonableness . . . the court is required to make findings of fact with regard to the attorney fee issue." Citing *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982) and *Howard v Canteen Corp*, 192 Mich App 427, 439; 481 NW2d 718 (1992). Without a more detailed finding of fact considering the appropriate factors, it is impossible for this Court to determine whether an abuse of discretion occurred.

Affirmed but remanded for an evidentiary hearing regarding attorney fees. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Christopher M. Murray