STATE OF MICHIGAN

COURT OF APPEALS

EDWARDS PUBLICATIONS, INC.,

Plaintiff/Counter Defendant-Appellant,

v

TRACY KASDORF,

Defendant-Appellee,

and

BILBEY PUBLICATIONS, L.L.C.,

Defendant-Counter Plaintiff.

UNPUBLISHED
February 25, 2014

No. 310907
Tuscola Circuit Court
LC No. 06-023444-CK

Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Plaintiff, Edwards Publications, Inc., appeals as of right the jury's verdict finding no cause of action, rendered following a trial to enforce a noncompetition agreement between plaintiff and defendant, Tracy Kasdorf.[1] Plaintiff also appeals the trial court's order awarding Kasdorf case evaluation sanctions. For the reasons stated in this opinion, we affirm.

I. FACTUAL BACKGROUND

Kasdorf worked as a sales representative for plaintiff for about 13 years. As a condition of employment, Kasdorf signed an agreement not to compete that precluded her from working for a competitor within a 25-mile area for a period of two years after leaving plaintiff's employment. In 2005, Kasdorf left her employment with plaintiff and immediately accepted a position as a sales representative for Bilbey Publications, Inc. Bilbey was a competitor of plaintiff located within 25 miles. Plaintiff sent Kasdorf cease-and-desist letters regarding her new employment; however, Kasdorf continued to work for Bilbey. Eventually, plaintiff filed a

[1] Defendant Bilbey Publications, Inc. was dismissed by stipulation after accepting a case-evaluation award.

multi-count complaint against Kasdorf and sought and received a temporary restraining order requiring Kasdorf to stop working for Bilbey until a hearing could be held. Kasdorf complied with the order and ceased working for Bilbey. Kasdorf responded to the complaint by moving for summary disposition, and the trial court granted her motion on all counts. Relevant to the instant appeal, the trial court specifically concluded that the noncompetition agreement was unenforceable in granting summary disposition in favor of Kasdorf. After receiving the favorable ruling from the trial court, Kasdorf went back to work for Bilbey.

Plaintiff appealed the trial court's order granting summary disposition to Kasdorf to this Court, which affirmed in part, reversed in part, and remanded for further proceedings. *Edwards Publications, Inc. v Kasdorf*, unpublished opinion per curiam of the Court of Appeals, issued January 20, 2009 (Docket No. 281499). This Court upheld that trial court's grant of summary disposition in favor of Kasdorf on plaintiff's claims for breach of contract based on the non-disclosure or confidentiality provisions, and for violation of the uniform trade secrets act, MCL 445.1901 *et seq*. *Id.* at slip op 6, 8. However, this Court held that the agreement not to compete was enforceable, and that Kasdorf breached the agreement as a matter of law. *Id.* at slip op 7. Thus, this Court remanded for further proceedings to determine causation and damages. *Id.* This Court also found that there were genuine issues of material fact regarding plaintiff's claims for tortious interference with a business relationship or expectancy and civil conspiracy. *Id.* at slip op 8.

After remand, a trial was held regarding causation and damages for Kasdorf's breach of the noncompetition agreement, tortious interference with a business relationship or expectancy, and civil conspiracy. The jury found no cause of action for the first two claims, but found in plaintiff's favor on the claim for civil conspiracy and awarded $15,822 in damages. Kasdorf moved for judgment notwithstanding the verdict (JNOV), or alternatively, for a new trial. Plaintiff also moved for an amended judgment and attorney fees, or alternatively, a new trial. The trial court denied both motions, and both parties appealed to this Court. In *Edwards Publications, Inc. v Kasdorf*, unpublished opinion per curiam of the Court of Appeals, issued May 3, 2011 (Docket No. 293617), this Court reversed and remanded for a new trial because it concluded that the jury's verdict was irreconcilably inconsistent and contrary to law.

Accordingly, in September 2011, a second jury trial regarding causation and damages for Kasdorf's breach of the noncompetition agreement, tortious interference, and civil conspiracy was held. Before trial, plaintiff filed a motion in limine to preclude testimony about the trial court's original order, which was overruled by this Court in the first appeal, finding that the noncompetition agreement was unenforceable. The trial court granted the motion, finding that its prior decisions were irrelevant to the current trial and that admission would be prejudicial. However, the trial court recognized the fact that the previous ruling could become relevant if plaintiff argued that Kasdorf intentionally breached the contract and continued to work for Bilbey after receiving cease-and-desist letters. The trial court warned plaintiff that it could open the door to testimony regarding its previous ruling that the agreement was unenforceable by eliciting testimony about Kasdorf's continued employment with Bilbey despite plaintiff's cease-and-desist letters.

During trial, Gerald Edwards, the operator of Edwards Publications, testified that after Kasdorf began working for Bilbey in violation of the agreement not to compete, plaintiff made

telephone calls and sent two cease-and-desist letters to inform Kasdorf and Bilbey of its intent to enforce the agreement. Edwards further testified that Kasdorf continued to work for Bilbey despite the letters. Plaintiff also called Kasdorf to testify, and similarly asked her whether she recalled receiving the cease-and-desist letters. Kasdorf admitted to receiving the letters. Plaintiff then asked whether Kasdorf ever stopped working for Bilbey's publication, the *Cass River Trader*. Kasdorf maintained that she did stop working there, and plaintiff impeached Kasdorf with her prior testimony that she never stopped working for the *Cass River Trader*. After being confronted with her previous testimony, Kasdorf admitted that was how she previously testified, and also acknowledged that she did not stop contacting the same customers that she had contacted previously while working for plaintiff. Plaintiff's counsel then stated she had no further questions, and the jury was excused.

After the jury was in recess, plaintiff's counsel renewed her motion in limine to bar testimony regarding the trial court's previous ruling that the agreement not to compete was unenforceable. In response, defense counsel argued that plaintiff's questioning of Kasdorf about receiving the cease-and-desist letters but continuing to work for the *Cass River Trader* opened the door to admission of the fact that there was a court order finding the agreement not to compete unenforceable in order to explain why Kasdorf continued to work for the *Cass River Trader*. The trial court agreed that the evidence could be introduced in order to rehabilitate the witness.

Consistent with the trial court's ruling, the jury returned and defense counsel questioned Kasdorf about the fact that her current testimony was different from her previous testimony, and Kasdorf testified that she did temporarily stop working for the *Cass River Trader* after receiving an order requiring her to stop, but that she went back to work for the paper after the trial court entered a subsequent order saying that she could. Kasdorf acknowledged that the order saying that she could go back to work was later overruled. After further extensive questioning by both parties it was made plain that the trial court's order saying she could go back to work was based on the trial court's conclusion that the noncompetition agreement was unenforceable as a matter of law. In addition, Kasdorf testified that this Court's decision overruled the trial court's decision by holding that the noncompetition agreement was enforceable and breached as a matter of law.

During Kasdorf's testimony, plaintiff again objected to the discussion of the trial court's previous order finding the agreement unenforceable, and the trial court indicated it would give a curative instruction but permitted the testimony. The parties jointly drafted the instruction for the jury, and plaintiff did not object to the instruction.[2] The trial court instructed the jury in relevant part:

[2] We note that while plaintiff never objected to the text of the instruction, plaintiff argued after the conclusion of the trial at a hearing specifically held for the purpose of allowing the parties to place their objections on the record that there was no instruction that could cure the prejudice caused by the testimony.

> You have heard testimony that the trial court ruled in March of 2006 that the non-compete clause was unenforceable. . . . In January of 2009 the non-compete clause was subsequently ruled valid and enforceable. As a result, the non-compete clause is considered to have been valid and enforceable for the entire period between November 28, 2005 and November 28, 2008. You may not consider the trial court's ruling . . . that the non-compete clause was unenforceable for any purpose other than the intentional interference and conspiracy claims.

Moreover, the jury was also instructed generally that "in this case, it has been determined that there was a contract between the plaintiff and the defendant and the defendant breached the contract. The only element you need to consider is whether plaintiff suffered damage as a direct result of the breach." Similarly, the verdict form assumed that there was a breach of contract, and simply asked the jury to determine whether plaintiff suffered damages as a result of the breach.

Ultimately, the jury returned a verdict finding no cause of action in regard to all three of plaintiff's claims. Before entry of judgment on the jury's verdict, Kasdorf moved for case-evaluation sanctions pursuant to MCR 2.403(O). Kasdorf requested $38,314.50 in attorney fees related to the first trial, and $35,546.50 in attorney fees related to the second trial.[3] Plaintiff contended that the motion was untimely, and that the fees requested were excessive or not authorized by the court rule. The trial court granted Kasdorf's motion in its entirety. On February 7, 2012, the trial court entered its judgment of no cause of action and awarded Kasdorf her requested attorney fees and costs. Plaintiff subsequently moved for a new trial and reconsideration of the trial court's award of case-evaluation sanctions. The trial court denied the motion for a new trial, but reduced the awarded fees by $2,275 with Kasdorf's consent. Plaintiff now appeals as of right.

II. TESTIMONY REGARDING THE OVERRULED TRIAL COURT ORDER

On appeal, plaintiff first argues that the trial court abused its discretion by admitting Kasdorf's testimony regarding the fact that she resumed working for the *Cass River Trader* after the trial court held that the agreement not to compete was unenforceable. Specifically, plaintiff maintains that the testimony permitted the jury to reconsider the validity of the noncompetition agreement and of plaintiff's breach of contract claim despite the fact that this Court overruled the trial court and held that the noncompetition agreement was enforceable and that Kasdorf breached the agreement as a matter of law.

Kasdorf argues that the evidence was properly admitted because plaintiff opened the door to the evidence by asking Kasdorf about whether she continued working after receiving cease-and-desist letters.

[3] Kasdorf engaged two different attorneys in the course of this litigation.

"We review a trial court's decision to admit or exclude evidence for an abuse of discretion." *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). "An abuse of discretion exists when the trial court's decision falls outside the range of principled outcomes." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 162; 792 NW2d 749 (2010). It is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Craig*, 471 Mich at 76. Errors in the admission or exclusion of evidence will not warrant appellate relief unless the failure to grant relief is inconsistent with substantial justice, or affects a substantial right of the opposing party. *Id.*

Michigan law has long recognized that a party cannot complain about admission of evidence when that party "opened the door" to the evidence. *McGraw v Sturgeon*, 29 Mich 426, 428 (1874). See also *Lewis v LeGrow*, 258 Mich App 175, 201; 670 NW2d 675 (2003); *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 704 n 47; 630 NW2d 356 (2001); *Bishop v St. John Hosp*, 140 Mich App 720, 726; 364 NW2d 290 (1984). Under the "opening the door" doctrine, otherwise irrelevant evidence may become relevant and admissible when the opposing party first introduces evidence on that same issue. See *People v Figgures*, 451 Mich 390, 399-400; 547 NW2d 673 (1996); *People v Whetstone*, 119 Mich App 546, 554; 326 NW2d 552 (1982); *Clark v State*, 332 Md 77, 84-85; 629 A2d 1239 (1993).[4]

In this case, after reviewing the record of the questioning by plaintiff's counsel of Kasdorf, we agree with the trial court that plaintiff opened the door to admission of the testimony regarding the trial court's previous order finding that the noncompetition agreement was unenforceable. Plainly, plaintiff's counsel's questioning of Kasdorf put her in a position where she could not fully explain herself without reference to the evidence excluded by the motion in limine.

Further, we conclude that even if the evidence was improperly admitted, it would not constitute error requiring reversal in light of the specific instructions given to the jury. We note that plaintiff also challenges the limiting instruction given to the jury on appeal. Specifically, plaintiff maintains that the instruction did not cure the prejudice caused by the testimony that the agreement not to compete was determined to be unenforceable. However, "[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors," *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 25; 837 NW2d 686 (2013), and the instructions clearly explained that whether the agreement was valid and breached was not at issue. Thus, we conclude that plaintiff has failed to overcome the presumption that the instruction cured any error.

III. CASE EVALUATION SANCTIONS

Plaintiff also argues that the trial court erred by awarding Kasdorf attorney fees under MCR 2.403(O).

[4] We note that judicial decisions from foreign jurisdictions are not binding on Michigan courts, but may be persuasive. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

We review de novo a trial court's decision whether to grant case-evaluation sanctions. *Peterson v Fertel*, 283 Mich App 232, 235; 770 NW2d 47 (2009). We review for an abuse of discretion a trial court's specific award of costs and attorney fees. *Id*.

Plaintiff argues the attorney fee award was erroneous for several specific reasons. First, plaintiff maintains the award was untimely under MCR 2.403(O)(8). MCR 2.403(O)(8) provides that "[a] request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion (*i*) for a new trial, (*ii*) to set aside the judgment, or (*iii*) for rehearing or reconsideration."

In this case, Kasdorf requested attorney fees and costs before entry of the judgment. However, this Court held in *Mahrle v Danke*, 216 Mich App 343, 349; 549 NW2d 56 (1996), that "MCR 2.403(O)(8) does not, on its terms, preclude a party from filing a motion for sanctions *before* entry of judgment. The provision was added to address stale motions for costs, not to provide a starting point from which motions could be filed." (Emphasis in original).[5] Accordingly, plaintiff is not entitled to reversal of the attorney fee award on this basis.

Next, plaintiff argues that the trial court improperly awarded Kasdorf appellate attorney fees. See *Haliw v Sterling Heights*, 471 Mich 700, 702; 691 NW2d 753 (2005) (holding that appellate attorney fees are not recoverable as case-evaluation sanctions). However, a review of the record indicates that Kasdorf did not request appellate attorney fees and was not awarded appellate attorney fees. Accordingly, this argument has no merit.

Plaintiff also argues that Kasdorf was not entitled to costs and attorney fees incurred for the first trial, given that the outcome of the first trial was more favorable to plaintiff than defendant. However, this argument was considered and rejected in *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 212-215; 823 NW2d 843 (2012) (holding that the trial court properly awarded the defendants case-evaluation sanctions for both trials when the first trial was favorable to the plaintiff but the second trial after remand was favorable to the defendants).

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[5] We note that in *Braun v York Prop, Inc*, 230 Mich App 138, 150; 583 NW2d 503 (1998), this Court held that "[i]n unambiguous terms, MCR 2.403(O)(8) provides that the period for requesting costs begins on the date the court enters judgment or the date the court enters an order denying a timely motion for a new trial or to set aside the judgment." And in *O'Neill v Home IV Care, Inc*, 249 Mich App 606, 617; 643 NW2d 600 (2002), this Court again held that "[w]e believe that the language of MCL [sic] 2.403(O)(8) envisions that a judgment must first be entered before a party even makes a request for mediation sanctions, let alone before a judge entertains consideration of the mediation evaluation." However, neither case mentions *Mahrle*, and to the extent that *O'Neill* and *Braun* do not comport with *Mahrle*, the latter, having been issued before those two, and after November 1, 1990, provides the binding precedent. See MCR 7.215(J)(1); *People v Posby*, 459 Mich 21, 22; 583 NW2d 458 (1998) (recognizing the "first-out rule").

Finally, plaintiff argues that the attorney fees were palpably excessive and unreasonable, and that the trial court should have held an evidentiary hearing regarding the reasonableness of the fees.

Generally, a trial court should conduct an evidentiary hearing on the reasonableness of the attorney fees upon request. See *Miller v Meijer, Inc*, 219 Mich App 476, 479-480; 556 NW2d 890 (1996). However, an evidentiary hearing is not required when a trial court has sufficient evidence to determine the reasonableness of the attorney fees requested. *John J Fannon Co v Fannon Prod, LLC*, 269 Mich App 162, 171; 712 NW2d 731 (2005). Affidavits of counsel, itemized billing statements, and surveys of hourly rates from legal publications can constitute a sufficient record to review the issue without an evidentiary hearing. See *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 489; 652 NW2d 503 (2002), overruled on other grounds by *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005).

Our Supreme Court has explained that the reasonableness of attorney fees is determined by the following factors:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent. [*Smith v Khouri*, 481 Mich 519, 530; 751 NW2d 472 (2008), quoting MRPC 1.5(a).]

Here, Kasdorf supported her request for hourly fees for her two attorneys by referring to the 2010 State Bar of Michigan Economics of Law Practice, which indicated that the $210 and $185 respective hourly rates were reasonable, given the complexity of the case and the fact that plaintiff sought about $600,000 in damages. Itemized billing statements and affidavits from both of Kasdorf's attorneys were also submitted to the trial court. The trial court's determinations regarding a reasonable attorney fee and a reasonable number of hours were in accordance with our Supreme Court's directive in *Smith*. Further, the fees related to the substitution of attorneys were reasonable in light of the complexity of this case. See *Campbell v Sullins*, 257 Mich App 179, 198-201; 667 NW2d 887 (2003), statutorily overruled on other grounds by MCL 600.2919a (finding that the trial court did not err by awarding case evaluation sanctions for multiple attorneys, given the complexity and specific facts of the case). Accordingly, we conclude that

the award of attorney fees did not constitute an abuse of discretion, nor did the trial court's decision not to conduct an evidentiary hearing on the reasonableness of the attorney fees.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Riordan