[Cite as *Kava v. Boesch*, 2011-Ohio-617.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95018

JULIANNE KAVA

PLAINTIFF-APPELLANT

vs.

JEFFREY W. BOESCH, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-682327

BEFORE: Rocco, J., Kilbane, A.J., and Boyle, J.

RELEASED AND JOURNALIZED: February 10, 2011

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KENNETH A. ROCCO, J.:

{¶ 1} Appellant, Julianne Kava ("appellant") appeals the trial court's award of attorney fees and refusal to tax costs. Because we find the trial court's manner of determining "reasonable attorney fees" appropriate, we affirm the trial court's award. We also find no error by the trial court in referencing the settlement negotiations between the

parties in the context of the results obtained in the case. Lastly, we find no error in either the trial court's denial to tax certain costs, or its order directing the method for the payment of the awarded attorney fees.

{¶ 2} On January 20, 2009, appellant filed this action against Jeffrey Boesch, Medina Glass Block, Inc., and Glass Block U.S.A., Inc. ("appellees") alleging sexual harassment against her employer and other related claims. Appellant sought both compensatory and punitive damages. On February 3, 2010, a jury found in favor of appellant and against appellees in the amount of $10,000 for compensatory damages and $15,000.25 for punitive damages. The jury also awarded appellant reasonable attorney fees against the corporate defendants only.

{¶ 3} On February 8, 2010, appellant filed an application for attorney fees and a motion to tax costs. The trial court denied the motion to tax costs, but, after conducting a hearing on March 18, 2010 and considering the briefs submitted by both parties, awarded appellant $10,000.10 in attorney fees, which represents sixty-seven percent of the punitive damages award. Appellant requests an attorney fees award of $193,950, which includes a twenty-five percent enhancement over and above the lodestar amount, approximately thirteen times the punitive damages award.

{¶ 4} Appellant now appeals and presents three assignments of error for our review. First, she asserts that the trial court abused its discretion by failing to award "reasonable

attorney fees" to her as the prevailing party following an award of punitive damages. We affirm the trial court's award, finding the trial court correctly used the lodestar analysis as a starting point and thereafter considered the factors prescribed in Rule 1.5 of the Ohio Rules of Professional Conduct in determining reasonable attorney fees.

{¶ 5} A trial court *may* award "reasonable attorney fees" to a plaintiff who prevails on a claim of punitive damages. *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 558, 1994-Ohio-461, 644 N.E.2d 397. The appropriate amount to award rests within the sound discretion of the trial court. *Bittner v. Tri-Cty. Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146, 569 N.E.2d 464. Thus, the trial court's award will not be reversed absent an abuse of that discretion. Id.

{¶ 6} In determining the amount of fees to award, the court must first determine the "lodestar" figure, computed by multiplying the number of hours worked on the case by a reasonable hourly rate. Id.; *Turner v. Progressive Corp.* (2000), 140 Ohio App.3d 112, 116, 746 N.E.2d 702; *Fahey Banking Co. v. Rees Ent. Inc.*, Marion App. No. 9-09-40, 2010-Ohio-4172, ¶26; *Landmark Disposal, Ltd. v. Byler Flea Mkt.*, Stark App. Nos. 2005CA00291 and 2005CA00294, 2006-Ohio-3935, ¶13. After determining the lodestar figure, the trial court may modify that number by applying the factors enumerated in Rule 1.5 of the Ohio Rules of Professional Conduct. See Sup.R. 71 ("Attorney fees in all matters shall be governed by Rule 1.5 of the Code of Professional Responsibility"); *Landmark Disposal,*

Ltd., supra at ¶14; see also *Bittner*, supra. The factors in Rule 1.5 are used to determine the reasonableness of an attorney fee and are as follows:

{¶ 7} "(1) the time and labor required, the novelty and *difficulty of the questions involved*, and the skill requisite to perform the legal service properly;

{¶ 8} "(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

{¶ 9} "(3) the *fee customarily charged* in the locality for similar legal services;

{¶ 10} "(4) the *amount involved* and *the results obtained*;

{¶ 11} "(5) the time limitations imposed by the client or by the circumstances;

{¶ 12} "(6) the nature and length of the professional relationship with the client;

{¶ 13} "(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

{¶ 14} "(8) *whether the fee is fixed or contingent*." Ohio Prof. Con. R. 1.5 (emphasis added.)

{¶ 15} In this case, the record demonstrates that the court began with the enhanced lodestar figure of $193,950, requested by appellant's counsel. The court then proceeded to consider factors (1), (3), (4), (7) and (8) enumerated above. More specifically, the court noted that "[w]hile the facts of this case were somewhat novel, * * * the legal issues were not novel." The court acknowledged counsel's experience in the area of employment law. The

court also recognized the jury's disbelief of the expert economist's opinion, the appellant's degree of mental anguish, and noted the monetary results obtained by appellant as *not great*. Also with regard to the fourth factor, the court referenced the settlement negotiations in the context of the results obtained by appellant's counsel. Finally, the court gave weight to the fact that the fee agreement between the appellant and her counsel was contingent on the result obtained rather than fixed. The court noted that:

{¶ 16} "The only basis for ignoring the contingency contract — as plaintiff requests — would be that the contingency agreement is unfair to plaintiff's counsel. But plaintiff's counsel devised the contract. Indeed, it is the conventional fee agreement in cases of this sort. There is no evidence that plaintiffs are charged an hourly rate in cases of this nature. The contingency concept is completely reasonable as the standard for compensation in this case.

{¶ 17} "Accordingly, the court concludes that, based on the contingency fee contract, the reasonable attorney's fee as a compensatory award from defendants is 10,00.10 [sic]."

{¶ 18} Also in her first assignment of error, appellant asserts that the trial court abused its discretion by considering settlement negotiations between the parties as a factor in determining attorney fees. A review of the record indicates that the trial court referred to the settlement negotiations in passing in consideration of the fourth factor of Rule 1.5 — "the amount involved and the results obtained." Although settlement discussions were referenced

by the trial court, it is clear the trial court considered the factors set forth in Rule 1.5 and based its decision in no small part on factor (8). In doing so, we are unable to say that the trial court abused its discretion. The appellant's first assignment of error is overruled.

{¶ 19} In her second assignment of error, appellant complains that the trial court abused its discretion by failing to award certain costs and litigation expenses. A reading of the judgment entry indicates that the trial court correctly considered the merits of the costs and concluded that, as a matter of law, no other expenses, other than the filing fees previously awarded, were recoverable.

{¶ 20} In her motion to tax costs, appellant sought an award of costs or expenses in the amount of $16,178.36. She asserted that the costs were incurred for depositions and their transcripts, subpoenas, copies, trial exhibits, delivery charges, research fees, expert costs, filing fees, and mileage. The court previously awarded appellant $500 in filing fees as expenses for court costs. Thus, we are left to review whether the remaining expenses, totaling $15,678.36, are recoverable as costs.

{¶ 21} Civ.R. 54(D) governs motions to assess costs and provides the following: "Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs." The prevailing party is not automatically entitled to costs. *Naples v. Kinczel*, Cuyahoga App. No. 89138, 2007-Ohio-4851, ¶3. Rather the party has the burden of establishing that the expenses

sought are costs authorized by law. Id. at ¶6. Should the trial court determine that an allowable cost is established, the objecting party then must overcome the presumption favoring an award of costs to the prevailing party. Id. While there exists a presumption in favor of the allowing costs to the prevailing party, the ultimate decision is within the sound discretion of the trial court. Id. at ¶¶3-4.

{¶ 22} "The Ohio Supreme Court 'has consistently limited the categories of expenses which qualify as "costs".' *Centennial Ins. Cov. Liberty Mut. Ins. Co.* (1982), 69 Ohio St.2d 50. 'Costs are generally defined as the statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action *and* which the statutes authorize to be taxed and included in the judgment.' (Emphasis added.) *Williamson v. Ameritech Corp.*, 81 Ohio St.3d 342, 1998-Ohio-347, 1998-Ohio-625, [sic] quoting *Benda v. Fana* (1967), 10 Ohio St.2d 259, paragraph one of the syllabus. Costs do not necessarily cover all of the expenses incurred by a party and are distinguishable from fees and disbursements. *Vance* [*v. Roedersheimer*,] 64 Ohio St.3d [552,] * * * 555. 'The subject of costs is one entirely of statutory allowance and control.' *Williamson*, 81 Ohio St.3d at 343, quoting *State ex rel. Michaels v. Morse* (1956), 165 Ohio St. 599, 607." Id. at ¶8.

{¶ 23} Expert witness fees relating to the deposition and expert report are not recoverable as costs as a matter of law. Id. at ¶11. Nor are the costs for the services of a court reporter for a deposition, other deposition expenses, photocopying expenses, trial exhibit

fees, research fees, or mileage. Id. at ¶¶12-16. Accordingly, the appellant's second assignment of error is overruled.

{¶ 24} Finally, in her third assignment of error appellant contends that the trial court erred in ordering the attorney fees to be paid directly to appellant's counsel. The trial court's order more accurately reads that appellant is to retain from the $10,000.10 award for attorney fees any amount already paid to counsel for their services. The trial court did not err in this regard. Accordingly, the appellant's third assignment of error is overruled. The trial court's manner of distribution of the attorney fees is affirmed as are the court's denial to tax costs and award of attorney fees.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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KENNETH A. ROCCO, JUDGE

MARY EILEEN KILBANE, A.J., and
MARY J. BOYLE, J., CONCUR