



NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

DIVISION II

SEP 29 2022

MITCH PALMER, an individual,)
)
Plaintiff/Appellant,)
)
vs.)
)
STEVE BERTRAM, an individual,)
)
Defendant/Appellee.)

JOHN D. HADDEN
CLERK

Case No. 119,398
(Companion to
Case No. 118,714)

APPEAL FROM THE DISTRICT COURT OF
LINCOLN COUNTY, OKLAHOMA

HONORABLE CYNTHIA FERRELL ASHWOOD, TRIAL JUDGE

AFFIRMED

Richard L. Rose
Richard J. Gore
Lincoln C. Hatfield
J. Matt Hill
MAHAFFEY & GORE, P.C.
Oklahoma City, Oklahoma

For Plaintiff/Appellant

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Timothy F. Campbell
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For Defendant/Appellee

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Plaintiff, Mitch Palmer, appeals the trial court's order awarding defendant, Steve Bertram, attorney fees and costs after a jury rendered a verdict in favor of Bertram and against Palmer.

BACKGROUND

This case is a companion to *Palmer v. Bertram*, Case No. 118,714. On July 5, 2022, this Court issued an opinion affirming the jury's verdict in favor of Bertram. The facts leading to the conclusion of the jury trial are set forth in the companion case.

After the jury rendered a verdict in favor of Bertram and against Palmer on Palmer's trespass claim and on Bertram's unjust enrichment claim, the parties attempted to memorialize the verdict in a journal entry but were unable to agree on the appropriate language. The parties filed motions to settle the journal entry. After hearing argument, the trial court again found that Bertram's claims of trespass and nuisance were intended as affirmative defenses and/or setoffs. The trial court entered a *Final Journal Entry of Judgment* on February 12, 2020.

Bertram filed an *Application for Attorney Fees and Costs* arguing he was entitled to attorney fees and costs pursuant to Title 12 O.S. § 940(A). Bertram alleged he was entitled to attorney fees and costs as the prevailing party on Palmer's claim for trespass and willful or negligent damage to property. Bertram requested an attorney's fees award of \$144,795.00 and costs of \$38,197.35.

In response, Palmer did not dispute Bertram was entitled to attorney fees and costs, but argued Bertram was entitled to a minimal portion of the fees and costs requested. Palmer alleged Bertram was entitled to fees incurred defending against Palmer's trespass claim but was not entitled to fees and costs on

Bertram's counterclaims of trespass and nuisance. Palmer argued the trial court was required to apportion the award for attorney fees.

Palmer also argued Bertram failed to adequately describe the fee and costs entries and did not properly record the attorney's time. In addition, Palmer claimed Bertram was not entitled to expert witness fees under Section 940(A) and *Young v. Spencer*, 2017 OK CIV APP 58, 405 P.3d 701. Finally, Palmer alleged Bertram's rates were not reasonable for similar work in the local area.

The trial court conducted a hearing on Bertram's application for fees and costs on November 18, 2020. A transcription of this hearing is not included in the appellate record.

Bertram filed a supplemental request for fees and costs and attached the actual time entries for the invoices to Bertram. Bertram explained the trial court "requested additional information detail supporting [his] claim for attorney fees and costs."¹

The trial court conducted a hearing on Bertram's application and supplemental application for attorney fees and costs on January 20, 2021. Bertram called attorney, Michael Duncan, as an expert on attorney fees. Palmer's attorney did not object.

At the hearing, Bertram's attorney argued the work performed by Bertram's counsel in this case was necessary to prevail on Palmer's claim of

¹ R. 1232, *Defendant Steve Bertram's Supplement to Application for Attorney Fee and Costs*.

trespass and Bertram was thereby entitled to attorney's fees and costs as the prevailing party pursuant to Title 12 O.S. § 940.

Bertram's attorney questioned Mr. Duncan based on the factors listed in *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659. Mr. Duncan opined that the time, labor, and the amount of fees expended by Bertram's counsel were reasonable. He explained that he reviewed the billing records line-by-line to determine whether the fees were reasonable. He also testified that the rates of \$225 per hour for a partner and \$195 per hour for an associate were reasonable in the legal community. He explained the fees appeared modest compared to other fees he had seen in the legal community. Mr. Duncan also noted that this action involved a three-day jury trial involving expert witnesses and, therefore, required a higher level of skill.

On cross-examination, Palmer's attorney inquired about apportionment of attorney fees based on different claims. In response, Mr. Duncan explained that he did not think it was practical to apportion the fees in this case because the issues were so intertwined. Palmer's attorney also inquired concerning Bertram's "counterclaims" of trespass and nuisance. Mr. Duncan explained on redirect that if Bertram's attorneys expended time on defenses or offsets, those theories would be directly related to Palmer's trespass claim.

Palmer did not offer any testimony or evidence to rebut Mr. Duncan's testimony.

The trial court entered an order, filed on February 4, 2021, granting in part and denying in part Bertram's request for attorney fees and costs. The trial

court found that expert witness fees are not allowable costs under 12 O.S.2011 § 940(A) and *Young v. Spencer*, 2017 OK CIV APP 58, 405 P.3d 701 and, therefore, denied Bertram's request for expert witness fees in the amount of \$27,783.82. The court granted Bertram's application for the remaining costs.

The trial court also reduced the hourly rate for Bertram's attorneys. The court found that the rate of \$225 per hour billed by two of Bertram's attorneys and the rate of \$195 for the third, less experienced, attorney was higher than the hourly rate for similar work in Lincoln County. The trial court allowed \$200 per hour for the two more experienced attorneys and \$175 per hour for the third, less experienced attorney. The trial court held that "[t]his is more in line with the current rates for such cases in the community and the comparative experience of the lawyers."

The trial court adjusted the requested fees to exclude time for travel to and from the courthouse. The court also held it was unnecessary and not reasonably possible to apportion the time spent by Bertram's attorneys on their affirmative defenses in this matter.

The trial court awarded Bertram attorney fees in the total sum of \$128,635.00 and costs in the sum of \$10,413.53 and entered judgment accordingly.

Palmer appeals.

STANDARD OF REVIEW

When an appeal questions the reasonableness of an attorney's fee awarded by the trial court, then the standard of review is whether there has been an abuse

of discretion by the trial court. *Burk*, 1979 OK 115 ¶ 22, 598 P.2d 659. An abuse of discretion “occurs when a court bases its ruling on an erroneous legal conclusion or there is no rational basis in the evidence for the decision.” *Strack v. Continental Res., Inc.*, 2021 OK 21, ¶ 10, 507 P.3d 609.

ANALYSIS

Palmer first argues the trial court erred in failing to apportion the attorney fees among fee-bearing and non fee-bearing claims. Palmer alleges Bertram brought counterclaims for unjust enrichment, trespass, and nuisance, which are non fee-bearing claims, and the trial court erred in not reducing the attorney fee award by the work attributable to those claims.

Oklahoma follows the American Rule that a prevailing party is not entitled to attorney fees unless there is a statute or enforceable contract that provides for fees. *Tsotaddle v. Absentee Shawnee Housing Auth.*, 2001 OK CIV APP 23, ¶ 31, 20 P.3d 153, 162. Palmer does not dispute Bertram is entitled to fees under Title 12 O.S. § 940(A) but questions whether the award should be apportioned..

“An attorney fee award is recoverable to a prevailing party only for the work attributable to a claim for which such fees are statutorily recoverable.” *Lee v. Griffith*, 1999 OK 32, ¶ 5, 990 P.2d 232, 233. Based on this rationale, the Oklahoma courts generally apportion attorney’s fees between claims for which fees are recoverable and those claims for which they are not. *See Sisney v. Smalley*, 1984 OK 70, 690 P.2d 1048. However, Oklahoma courts recognize there are certain circumstances in which it is impracticable and/or unnecessary “to completely segregate fee-bearing from non fee-bearing claims, such as when a

lawsuit consists of closely interrelated claims.” *Silver Creek Inv., Inc. v. Whitten Const. Mgmt., Inc.*, 2013 OK CIV APP 49, ¶ 14, 307 P.3d 360, 366.

Palmer again argues that Bertram brought counterclaims of trespass and nuisance at trial and should not receive attorney’s fees on these claims. This Court addressed this argument in the companion case, Case No. 118,714, and determined Bertram did not bring trespass and nuisance as counterclaims but asserted those as affirmative defenses to Palmer’s claim.

At the hearing on attorney fees, Bertram’s expert witness, Michael Duncan, testified that there was no practical way to separate the time spent on Bertram’s defense because the litigated claims were so intertwined. Mr. Duncan opined that all of the work done by Bertram’s attorneys was done to prevail on Palmer’s claim of trespass. Palmer did not present any evidence at the hearing and did not dispute Mr. Duncan’s opinion.

Here, the hours expended by Bertram’s attorneys were so interrelated so as to make apportionment impracticable and unnecessary. The crux of Bertram’s case was to defend against Palmer’s allegation of trespass by Bertram. “The reasonableness of an attorneys’ fee request is a question of fact for the trier. The trial court is in a far better position to judge the demands of the case than are we.” *Finnell v. Seismic*, 2003 OK 35, ¶ 21, 67 P.3d 339, 347. We find the trial court did not err in not apportioning its award of attorney fees.

Palmer next argues the trial court failed to correctly apply the factors set forth in *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659.

First, Bertram's fee application cites *Burk* and applies the *Burk* factors to the present action. Also, at the second hearing on the application for attorney fees, Bertram's attorney questioned his attorney fees expert, Mr. Duncan, extensively on the *Burk* factors. Furthermore, the trial court's order awarding fees references that it considered *Burk*. This Court finds this argument to be without merit.

As his next allegation of error, Palmer asserts the trial court erred in awarding attorney's fees in the amount of \$200 per hour. Palmer claims this was not a reasonable hourly rate in the relevant community and there was no evidence to support an award in excess of \$175 per hour.

At the hearing on attorney's fees, Bertram's expert, Mr. Duncan, testified that the hourly rate of \$225 for a partner in a law firm and \$195 for an associate is a reasonable rate in the legal community.² He reiterated that the rates "appeared very reasonable" and were modest compared to what he had seen in the legal community.³ Mr. Duncan noted that on several occasions the time billed was discounted and billed at half rate.⁴ On cross-examination, Mr. Duncan stated that the rates of attorneys in Lincoln County, the site of the trial, were similar to rates throughout central Oklahoma, including Oklahoma City.⁵

Palmer did not present any evidence to dispute Mr. Duncan's testimony.

² Tr. (1/20/2021), pg. 10.

³ *Id.* at 13.

⁴ *Id.* at 15.

⁵ *Id.* at 18.

In the attorney fee award, the trial court reduced the hourly rate of the attorneys from that requested by Bertram. The trial court reduced the rate for the more seasoned attorneys from \$225 per hour to \$200 per hour and for the less experienced attorney, the rate of \$195 per hour to \$175 per hour. The trial court reasoned that “[t]his is more in line with the current rates for such cases in the community and the comparative experience of the lawyers.”

Based upon our review of the appellate record, we find that the hourly rate awarded was neither contrary to law nor without a rational basis in the evidence. We find the hourly rate awarded was reasonable and the trial court did not abuse its discretion.

Palmer also challenges the trial court’s award of costs, specifically the trial court’s award of copy expenses and the prior attorney’s fees. However, Palmer did not raise these specific issues before the trial court. In his response to Bertram’s attorney fee and costs application, Palmer made a single, general statement that the trial court should award only those attorney fees and costs that are reasonable and directly related to defending Palmer’s trespass claim. Palmer did not provide additional argument or legal authority. Nor did he raise the argument regarding the copying costs or the attorney fees paid to prior counsel. In addition, Palmer glossed over the issue of costs at the hearing on Bertram’s application.⁶ Palmer’s arguments on costs below were limited to

⁶ A transcript of the initial hearing on Bertram’s application for attorney’s fees and costs, held on November 18, 2020, is not included in the appellate record. “[T]he party assigning error on appeal bears the burden of presenting the appellate court with a record on appeal in support of the assignments of error.” *Jackson v. Jackson*, 2002 OK 25, n.12, 45 P.3d 418.

questioning Bertram's request for expert witness fees. Palmer prevailed on this issue, however. No other question concerning Bertram's request for costs was presented below.

A party "must preserve error in the lower tribunal with proper argument and authority, or the error is waived when raised for the first time on appeal." *State ex rel. Oklahoma State Bd. of Med. Licensure and Supervision v. Rivero*, 2021 OK 31, ¶ 33, 489 P.3d 36. The appellate court will not review an issue that a trial court has not had the opportunity to address. *Messler v. Simmons Gun Specialties, Inc.*, 1984 OK 35, ¶ 22, 687 P.2d 121. We find Palmer failed to raise this issue before the trial court and the alleged error is waived on appeal.

CONCLUSION

Based on the foregoing, the trial court's order awarding fees and costs is affirmed.

AFFIRMED.

WISEMAN, P.J., BARNES, J (sitting by designation), concur.

September 29, 2022