NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

C. CRAIG COLE & ASSOCIATES,

Plaintiff/Appellee,

vs.

ALI MEHDIPOUR, an individual,

Defendant,

and

WCI, LLC, a limited liability company,

Defendant/Appellant.

Case No. 120,654

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE C. BRENT DISHMAN, DISTRICT JUDGE

AFFIRMED

C. Craig Cole
John E. Gatliff II
C. CRAIG COLE & ASSOCIATES
Oklahoma City, Oklahoma — For Plaintiff/Appellee

Barry Benefield
Oklahoma City, Oklahoma — For Defendant/Appellant

OPINION BY GREGORY C. BLACKWELL, JUDGE:

WCI, LLC appeals a fee award granted to C. Craig Cole & Associates (Cole) resulting from a suit by Cole to recover payment for legal services provided to the company. On review, we reject WCI's arguments that the fee is either inherently

unreasonable when compared to the amount in controversy or constitutionally prohibited and thereby affirm the award as within the court's discretion.

BACKGROUND

This fee appeal has considerable prior history that is relevant to the question of the reasonableness of the time spent litigating the underlying case. *See, generally,* Case No. 119,802. In January 2019, Cole filed a petition alleging that, in March 2018, it had been hired as counsel by WCI and defendant Ali Mehdipour and provided such representation until December 2018, when WCI failed to pay an outstanding bill of $17,895.15. Faramaz Mehdipour, a principal of WCI and Ali's brother, filed a *pro se* answer to this suit, purportedly on behalf of WCI. Faramaz alleged a lack of contract, malpractice, and fraud by Cole. He sought $1,000,000 in counterclaim damages, alleging that WCI had lost an important case because Cole had not followed his instructions.

The litigation over WCI and Ali Mehdipour's responsibility for this bill continued for some nineteen months. On April 12, 2022, the day set for trial, Ali Mehdipour appeared without counsel and announced that he could not proceed because he was not mentally competent to represent himself. The court found that Ali had not served preliminary or final witness and exhibit lists and failed to participate in the pretrial conference held on November 13, 2020. The court granted default judgment on Cole's claim against Ali for $17,895.15, with additional attorney fees, costs and interest accrued and accruing to be determined by a subsequent order. The court also entered judgment in favor of Cole on Ali's counterclaim.

After repeated attempts by Faramaz Mehdipour to appear *pro se* on behalf of WCI, the company eventually obtained counsel. However, that attorney withdrew on the day of trial, April 12, 2021, stating that communications had broken down between her and WCI to the point where she could not provide effective representation. The court continued the trial date and ordered WCI to obtain a licensed attorney "who shall appear herein within thirty days of the entry of this order." The order continued: "In the event Defendant W.C.I., L.L.C. fails to timely comply with this order to obtain substitute counsel, upon written application, judgment shall be entered against Defendant W.C.I., L.L.C. on all claims and counterclaims."

Two months later, WCI had not made an appearance through counsel. Cole filed a motion for default noting that the April 19 journal entry specifically ordered WCI to a make an appearance as quoted above. On July 19, 2021, the court held a hearing on the motion for default. No counsel appeared for WCI, and the court subsequently entered a journal entry granting default judgment against WCI for $17,895.15, together with additional attorney fees, costs and interest accrued, to be determined in subsequent proceedings. That judgment was affirmed by this Court in Case No. 119,802. Certiorari was denied and mandate issued on November 2, 2023.

In August 2021, Cole applied to the district court for attorney fees of $74,065. Neither Ali Mehdipour nor WCI filed a response to the fee request. Because of a series of delays due to illness, inclement weather, and the non-appearance of WCI's counsel on at least one occasion, hearing on the fee issue

was not held until May 2022. On July 5, 2022, the court issued an order granting Cole fees of $74,065 and costs of $4,215 against WCI and Ali Mehdipour.

On August 3, 2022, WCI attempted to amend its petition in Case No. 119,802 to include an appeal of this fee order. As that appeal had already been pending for more than a year and adding the fee issue would require supplemental briefing and delay of the issue of this Court's opinion, this Court ordered that the issue should be redocketed and given a new case number upon payment of filing fees. WCI complied with this order and appealed the grant of fees in this case. By order of the Supreme Court dated August 29, 2022, this case and the prior appeal were "made companion cases," requiring "separate records." The case was assigned to this Court on May 4, 2023, and stands ready for decision.[1]

STANDARD OF REVIEW

The reasonableness of attorney fees depends on the facts and circumstances of each individual case and is a question for the trier of fact. *Parsons v. Volkswagen of Am., Inc.*, 2014 OK 111, ¶ 9, 341 P.3d 662, 666–67. The standard of review for considering the trial court's award of an attorney fee

[1] For purposes of ensuring our own jurisdiction, we note the following filings that occurred post-judgment. On July 27, 2022, Cole filed a motion seeking a *nunc pro tunc* correction of the fee order because it indicated on the signature page that counsel for WCI had not appeared at the May hearing while its counsel had, in fact, been present. On September 21st, the court issued a corrected order with the signature of WCI's counsel replacing the phrase "did not appear" on the signature page. On October 24, 2022, during the pendency of this appeal, WCI filed a 12 O.S. § 1031 motion in the district court seeking to vacate the *nunc pro tunc* order. Although we have not been provided with a record copy of any order denying this motion to vacate, the docket sheet indicates that it was denied on December 21, 2022.

is abuse of discretion. *Id.* Reversal for an abuse of discretion occurs where the lower court ruling is without rational basis in the evidence or where it is based upon erroneous legal conclusions. *Id.*

ANALYSIS

WCI argues that the fee here was inherently unreasonable in comparison to the amount in controversy. Statutory law is clear that an attorney fee award is subject to the rule that it must be generally reasonable, and case law indicates more specifically that one factor to consider is whether the award bears some reasonable relationship to the amount in controversy. "While the amount recovered is one factor to consider, a reasonable attorney's fee should be determined on remand in accordance with an appropriate balancing of the guidelines delineated in *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, ¶ 3, 598 P.2d 659." *State ex rel Harris v. Three Hundred & Twenty-Five Thousand & Eighty Dollars*, 2021 OK 16, ¶ 24, 485 P.3d 242, 248 (footnote omitted).

The Oklahoma Supreme Court has, however, consistently declined to identify or apply any specific ratio between the amount recovered and the amount of fees requested to determine what is reasonable because each case is based on highly individual circumstances. *See Finnell v. Jebco Seismic*, 2003 OK 35, ¶ 19, 67 P.3d 339 ("While we are committed to the rule that a fee for legal services must bear some reasonable relationship to the judgment, we have never identified a percentage above which a fee's relationship to the damage award must be deemed unreasonable per se.").

Despite this general principle, WCI cites cases it considers exemplary of an unreasonable fee-to-recovery ratio. In *Sw. Bell Tel. Co. v. Parker Pest Control, Inc.*, 1987 OK 16, ¶ 1, 737 P.2d 1186, 1186, the defendant, pursuant to 12 O.S.1981 § 1101, offered to confess judgment in the sum of $1,500 against a claim for $3,867, and the plaintiff settled for $1,500. The trial court awarded the plaintiff a $5,000 counsel fee and the Supreme Court reduced this to $3,000. In *Mares v. Lockard*, 2000 OK CIV APP 9, ¶ 6, 2 P.3d 384, 386, the amount in controversy in the property damage claim was approximately $1,800 and the attorney fee award was $7,018.25. This Court found this fee "does not bear a reasonable relationship to the amount in controversy." *Id.*

These cases primarily illustrate that the amount approved or disapproved of in any specific case is of little assistance in determining a reasonable fee in a different case. The hours of work reasonably and necessarily required by the position and strategy of the parties, the procedural and legal complexity of the issue, and any fees incurred due to undue delay or frivolous positions taken by the opposing party have a substantial effect on the reasonableness of fee claimed. The *Burk* analysis properly focuses on these factors.[2] The later *Finnell v. Jebco Seismic* rule that there is no absolute fee-to-recovery ratio at which a fee becomes unreasonable is a nullity if the ratios presented in *Sw. Bell Tel. Co.* (3.3 to 1 is

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[2] The factors set out in *Burk v. Oklahoma City* are: the time and labor required; novelty and difficulty of the questions; skill requisite to perform the legal service; preclusion of other employment; customary fee; whether the fee is fixed or contingent; time limitations; the amount involved and results obtained; experience, reputation and ability of the attorneys involved; risk of recovery; nature and length of relationship with the client; and awards in similar causes. *State ex rel Harris v. Three Hundred & Twenty-Five Thousand & Eighty Dollars*, 2021 OK 16, ¶ 22, 485 P.3d 242, 247–48.

"unreasonable" and 2 to 1 is "reasonable") and *Mares* (3.9 to 1 is "unreasonable") are unrelenting boundaries.

Further *Spencer v. Oklahoma Gas & Elec. Co.*, 2007 OK 76, 171 P.3d 890 subsequently held that *all Burk* factors must be considered in determining if a fee was reasonable. *Id.* ¶ 15. The Court in *Spencer* was clear: an award based on nothing more than "the comparison of the fee to the amount recovered" is improperly decided. *Id.* In this case the fee to recovery ratio was approximately 4:1. We find no precedent that this is inherently unreasonable.

As to whether the award was an abuse of discretion, we turn mainly to the question of whether it was reasonable for Cole to expend $70,065 in the entire course of litigation. Critical to this is analysis is that WCI's defense in this case was not only aggressive but also largely unsubstantiated and bordered on bad faith. As noted in the prior appeal:

> The record generally demonstrates that, in almost nineteen months of litigation, WCI participated in this case only when participation might help it to avoid or postpone liability. It attempted to delay the resolution of the case not only by non-participation but also by filing serial motions for recusal and unsupported suits against the court and the opposing party that were subsequently dismissed on 12 O.S. § 2012(b) grounds. It filed a $1,000,000 counterclaim but took no action on it. It filed no witness or exhibit lists and was evidently not ready for trial when Faramaz Mehdipour joined a meritless *pro se* suit against the trial court, forcing his counsel to withdraw on the eve of trial. WCI then failed to obtain new counsel when ordered to do so. This was the conclusion of a pattern of acts that could be considered as abusive litigation practices or abuse of judicial process sufficient to show bad faith. The court had already sanctioned WCI for its refusal to cooperate in discovery.

Opinion, Case No. 119,802, pg. 11.

This was no simple matter of collecting a $17,895 bill. WCI appears to have avoided reckoning with this bill for some nineteen months by tactics of questionable legitimacy. It is not inherently unreasonable that appellees incurred fees of $70,065 given these facts.

WCI next argues that the fee in this case goes beyond statutory and common-law rules, and veers into the realm of unconstitutionality when compared to the amount in controversy. It argues that the fee constitutes a barrier to access to the courts because the prospect of such fees will reduce the ability of defendants with limited resources to defend against claims. WCI argues that the possibility of a prevailing-party fee substantially greater than the amount in controversy "chills" litigation and is against public policy and the constitutional goal of open courts.

WCI cites *Moses v. Hoebel*, 1982 OK 26, 646 P.2d 60, as showing that the fee here was unconstitutional. Although the *Moses* opinion is often cited for its discussion of access to the courts, it has no bearing on the issues here. *Moses* examined when a court could prohibit a litigant from refiling a case until he paid court-imposed costs occasioned by a prior vexatious dismissal. *Id.* As the Court noted: "The state's power cannot hence be invoked to exact from Moses a tribute in one case in order to pursue his claim in the refiled cause." *Id.* ¶ 10. This is not an issue here. *Moses* forbids conditioning further access to the court on payment of past fees, rather than holding the possibility of having to pay fees constitutes a barrier to access.

WCI argues that according to *Moses*, "litigation costs are subject to limitation in *Okla Const.*, Art. 2, § 6." However, *Moses*, as we noted above, does not involve the concept of constitutionally "excessive fees" or even "litigation costs." It involves an order preventing a party from refiling until prior fees were paid, and mentions Art. 2, § 6 only as preventing "the use of [an] unsatisfied recovery as a bar to block the debtor's access to the courts." *Id.* ¶ 13. *Moses* imposes no explicit limitation on fees via Art. 2, § 6.

While it is clear that the possibility of prevailing party fees may cause a defendant or a plaintiff of limited means to avoid litigation of any claim where the outcome is not reasonably certain to be favorable, the desire to preserve access to the court underlies the public policy represented by the American Rule[3] and is one reason why cases are not statutorily fee-bearing unless specifically made so by the legislature. *Eagle Bluff, L.L.C. v. Taylor*, 2010 OK 47, ¶ 16, 237 P.3d 173. The enunciation of this public policy is properly left to the legislature, and the legislature chose to make the claim in this case fee bearing. In doing so, the legislature presumably weighed the various competing public policies at play in this decision. We find no constitutional error in the court's fee award.

WCI finally argues that the fee award should be vacated for "fraud" underlying the original contractual award of $17,895.15. Even assuming WCI were permitted to raise this merits-based claim in this appeal of attorney fees,

[3] Oklahoma follows the American Rule concerning the recovery of attorney fees. It provides that each litigant pay for legal representation and that courts are without authority to assess attorney fees in the absence of a specific statute or contract. *Stump v. Cheek*, 2007 OK 97, ¶ 13, 179 P.3d 606, 612–13.

WCI points to nothing in the record in this appeal proving, or even attempting to prove this claim. Indeed, this portion of WCI's brief, *Appellant's Brief in Chief* at 8-10, contains no citation to the record on appeal, and numerous citations in WCI's summary of the record (as well as Cole's) are to the record in the *prior* appeal, *id.* at 2-3. We may not go outside the record of *this* appeal. Okla. Sup. Ct. R. 1.27(d) ("Companion appeals each contain separate records, are briefed separately, and are assigned to the same court for decision."); *House of Realty, Inc. v. City of Midwest City*, 2004 OK 97, ¶ 6, 109 P.3d 314, 317 ("Generally, this Court's appellate review is limited to those facts appearing of record certified by the clerk of the tribunal below."). As such, we will not disturb the court's judgment due to any alleged infirmity of the original agreement between WCI and Cole.

CONCLUSION

We hold that the attorney fee here was not inherently unreasonable or in violation of constitutional norms and was within the court's discretion. As such, it is affirmed.

AFFIRMED.

HUBER, P.J., and HIXON, J., concur.

February 9, 2024