STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1457

Kenneth Darula,
Respondent,

vs.

BMW of North America, LLC,
Appellant.

Filed May 21, 2012
Reversed and remanded
Rodenberg, Judge

Hennepin County District Court
File No. 27CV1020562

Todd E. Gadtke, Daniel J. Brennan, Gadtke & Brennan, P.A., Maple Grove, Minnesota (for respondent)

Lenae M. Pederson, Katherine A. McBride, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota; and

Timothy V. Hoffman (pro hac vice), Sanchez, Daniels, Hoffman, L.L.P., Chicago, Illinois (for appellant)

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Appellant challenges the district court's award of attorney fees to respondent. Appellant argues that the district court erred in determining both a reasonable number of hours and a reasonable hourly rate for respondent's counsel. We reverse and remand.

FACTS

This litigation arises from the purchase of an automobile by respondent Kenneth Darula. Darula experienced performance issues with the car, eventually retaining attorneys Todd E. Gadtke and Daniel J. Brennan to represent him against the manufacturer of the automobile, appellant BMW of North America. Darula filed suit on the basis of state and federal statutory product-unsuitability claims.[1] Eventually, Darula settled his claims against BMW for $14,000 and, by the terms of the parties' settlement agreement, he retained possession of the car. The settlement agreement excluded legal fees and costs, which respondent's counsel retained the right to seek by motion. Respondent's attorneys filed a motion under Minn. Gen. R. Prac. 119 for fees, as allowed by the applicable law. After slightly reducing the number of hours claimed as reasonable by respondent's counsel, the district court awarded attorney's fees of $55,612.50, plus costs. Neither party disputes the settlement or that respondent's attorneys are entitled to reasonable attorney fees, but BMW appeals the amount of fees awarded.

[1] Both parties' briefs refer to this as a "Lemon Law" case, but the pleadings allege more than liability under Minn. Stat. § 325F.665 (2010), and include federal statutory claims.

D E C I S I O N

Minnesota uses the lodestar method of calculating attorney fees. *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 620–21 (Minn. 2008). Under this method, the district court determines "the number of hours reasonably expended on the litigation" and the "reasonable hourly rate," then multiplies the two to determine the reasonable compensation for the attorneys' services. *Anderson v. Hunter, Keith, Marshall & Co, Inc.*, 417 N.W.2d 619, 628–29 (Minn. 1988) (quotations omitted). Reasonably expended hours do not include "'hours that are excessive, redundant or otherwise unnecessary'" on the theory that hours that could not be billed to a client cannot be billed to an adversary under statutory fee-shifting authority. *Id.* at 629 n.10 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 1939–40 (1983)). In determining the reasonableness of the hours and rates, the court considers "all relevant circumstances," including "the time and labor required; the nature and difficulty of the responsibility assumed; the amount involved and the results obtained; the fees customarily charged for similar legal services; the experience, reputation, and ability of counsel; and the fee arrangement existing between counsel and the client." *Milner*, 748 N.W.2d at 621 (quotation omitted).

This court reviews the district court's award of attorney fees for an abuse of discretion. *Milner*, 748 N.W.2d at 620. Generally, the district court is most "familiar with all aspects of the action from its inception through post-trial motions" and is in the best position to evaluate the reasonableness of requested attorney fees. *Anderson*, 417 N.W.2d at 629. "The reasonableness of the hours expended and the fees imposed raise questions of fact, and the district court's findings will be reversed only if they are clearly

erroneous." *City of Maple Grove v. Marketline Constr. Capital, LLC*, 802 N.W.2d 809, 819–20 (Minn. App. 2011) (citing *Amerman v. Lakeland Dev. Corp.*, 295 Minn. 536, 537, 203 N.W.2d 400, 400–01 (1973)).

Here, respondent's counsel, in making their fee petition, submitted their own billing time records, affidavits from each attorney attesting to their experience, an affidavit from a paralegal working on the case, affidavits from two other attorneys practicing in the same area of the law in the Minneapolis area, a number of fee orders from other similar cases, and a survey of attorney fees from around the country. Appellant's counsel submitted an affidavit from one of its attorneys, a number of fee orders from other similar cases, and billing statements from other cases involving respondent's counsel.

The district court largely accepted the evidence submitted by respondent's counsel and discounted that submitted by appellant. As to the hourly rate claimed by respondent's counsel—$350 for attorney Brennan and $375 for attorney Gadtke—the district court noted that respondent's evidence indicated that these rates were in the same range as rates being charged by other attorneys. The district court rejected the hourly rate of defense counsel as an appropriate basis for determination of a reasonable hourly rate for respondent's counsel, based upon the fact that respondent's counsel had undertaken representation of respondent in this case on a contingency basis. The district court adopted virtually outright the hours respondent's counsel claimed were expended, with the exceptions of 2.7 hours that it determined could not have been billed to a client and .1 hours for a task that should have been performed by the paralegal on the case. The

district court found reasonable the remaining 150.1 hours, largely for work performed by attorney Gadtke.

I. Hourly rate

A reasonable rate is determined in accordance with what a paying client would reasonably pay on an open market for the services rendered by the attorney. *See Hensley*, 461 U.S. at 447, 103 S. Ct. at 1947 (attorneys should be awarded "market-rate fees"). In the context of attorney fee shifting pursuant to statutory authority, the market is essentially a creation of the fee-shifting statute. Both parties agree that there are no clients who are billed at an hourly rate for cases of this sort. The services of respondent's counsel are not therefore valueless, but the district court must, in such circumstances, carefully examine the claimed hourly rate in the context of the broader legal market, because a reasonable hourly rate is one at which counsel could bill a paying client. *Anderson*, 417 N.W.2d at 629 n.10.

As an initial matter, there is no support whatsoever for the $165 per hour billing rate for respondent's counsel's paralegal. While the number of hours billed at that rate was small, the district court must still assess the reasonableness of that hourly rate. The district court did not address the reasonableness of that rate at all, and there is no support for it in the evidence, given that even the survey submitted by respondent's counsel indicates that $110 is the average rate for those services. As a result, this rate is untethered from the client-based market that the district court must consider when assessing reasonableness.

With respect to the reasonable hourly rate for respondent's counsel, respondent correctly notes that there is some uncertainty in taking these cases, because the fee agreement dictates that the attorneys will not be paid if the client does not recover. While the present arrangement is contingent upon a favorable outcome, it is quite different from contingency fee arrangements under which the attorneys' compensation is directly related to the amount of the recovery. The arrangement here is a binary one; either counsel is successful and they are entitled to reasonable fees or they are unsuccessful and they receive nothing.

The binary nature of the arrangement in this case means that recovery for the client in any amount triggers the possibility of an award of fees that need not be directly proportional to the amount recovered.[2] However, "the amount involved and the results obtained" is nonetheless a "relevant circumstance[]" for the consideration of the district court. *Milner*, 748 N.W.2d at 621 (quotations omitted). While the picture of the overall amount involved and the completeness of the results obtained is somewhat muddied, it appears that the amount of attorney fees awarded in this case is equal to or greater than the total amount involved.[3] While fee-shifting statutes are meant to encourage representation in cases with little purely monetary value, when the interest involved is an economic one, the amount involved is necessarily a relevant consideration in determining a reasonable hourly rate.

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[2] As discussed below, appellant has effectively waived the issue of whether the degree of success below warrants adjustment of the fees.

[3] Respondent here purchased a used 2008 BMW 535xi for $44,412.25, including taxes and fees.

Respondent's counsel here performed an initial consultation with the client about the potential case, for which no charge was made. Such consultation surely entails screening out cases with limited chances of success. As a result, the risk inherent in accepting this type of case is small and any upward adjustment in the hourly rate in consideration of that risk must be similarly sized.

In part, fee-shifting statutes are meant to address the availability of quality representation for cases that may not otherwise receive such attention. *Hensley*, 461 U.S. at 447, 103 S. Ct. at 1946–47 (noting that fee-shifting provisions may attract attorneys to cases with minimal monetary recoveries). A district court may therefore consider what rate would reasonably incentivize quality representation. But this should not be a justification for excessive or inflated hourly rates. Instead, these rates should be anchored in reality, with consideration given to what an attorney with similar experience could reasonably charge a paying client for work of similar difficulty and to what amount would compensate for the risk of non-payment in a given case.

In this case, respondent's counsel submitted evidence indicating that the attorneys bill $375 and $350 per hour for work on cases of this sort, that one of the attorneys had billed and received $350 per hour for work on a recent case, and that other attorneys bill similar rates.

The evidence submitted to the district court that attorney Brennan negotiated and was paid $350 per hour for work on a recent case did not include any information about the complexity of the work, the amount of time involved, or even the type of case in

which that rate was charged. Without more information, that evidence is not sufficient to support the inference that $350 is a reasonable hourly rate for this case.

The evidence pertaining to the billing practices of other attorneys is similarly unhelpful. Those billing practices and the related submissions for court-approved attorney fees, like the stated "rates" of respondent's counsel in this case, are not market rates. They are the rates used in support of motions for awards of fees. Those rates are not negotiated with, billed to, or paid by any client. The rates reflect what is being claimed as reasonable (and sometimes awarded) before other courts in other similar cases.

On the other hand, the hourly rate of appellant's counsel is indicative of what a paying client would pay for capable and qualified counsel in this type of case. It is an hourly rate actually negotiated and paid by a client. It is not an "apples-to-oranges" comparison, as the district court termed it. The complexity of the work is similar on both sides of the case, even if the billing arrangement is different.

A reasonable hourly rate for purposes of applying the lodestar method must be tethered to market conditions and to rates at which attorneys are compensated by paying clients. The district court failed to consider these factors in determining a reasonable hourly rate for the services of respondent's counsel.

II. Hours expended

A determination of the number of hours reasonably expended in furtherance of respondent's cause must likewise be subject to a searching review. Reasonably expended hours do not include "'hours that are excessive, redundant or otherwise unnecessary'" or

hours that could not be billed to a client. *Anderson*, 417 N.W.2d at 629 n.10 (quoting *Hensley*, 461 U.S. at 434, 103 S. Ct. at 1939–40). In this case, the record does not sufficiently indicate which hours could be billed to a client or which were unnecessary. The district court accepted this record as sufficient, but in doing so, the district court engaged in abbreviated and conclusory analysis.

A reviewing court generally defers to the district court's determination of reasonableness because the district court is more familiar with the parties and the dispute than the appellate court. *Id.* at 629. But that justification for deference is of limited utility in this case, where virtually all of the district court's involvement in the matter related to the fee dispute. Other than the issues related to fees, the parties' only direct contact with the district court was a telephonic conference on a discovery dispute, which lasted less than 18 minutes according to the billing of respondent's counsel. The fact that the district court had almost no involvement in the case other than in determining attorney fees on motion of the respondent undermines the application of the general principle that the district court's familiarity with the case warrants a significant degree of deference. Because the vast majority of the time billed by respondent's counsel in this case was for tasks that did not involve the court, this case is distinguishable from another case involving appellant and other litigants in which the district court conducted a bench trial and was therefore very aware of and familiar with the nuances of the case. *Green v. BMW of N. Am., LLC*, No. A11-581, 2011 WL 6306657, *7–8 (Minn. App. Dec. 19, 2011), *review granted* (Minn. Feb. 28, 2012). Where the parties have settled a case with minimal court involvement prior to the motion for attorney fees, the district court must go

beyond the billing records submitted in furtherance of a petition for fees to dissect the particular number of hours reasonably required to complete the task(s) for which fees are sought, and must consider in the context of the broader legal market whether the task(s) for which fees are sought is properly the work of one attorney, more than one attorney, or a paralegal.

Appellant correctly notes that the details and disputes in this case are very nearly identical to those in other cases, and that respondent's attorneys limit their practice to cases of this type. As a result of this, many of the documents submitted by the parties in this case are very nearly identical to those in other cases. Pleadings and discovery documents here were done based upon numerous prior cases involving appellant and these same attorneys. Counsel must, of course, give careful attention to the unique issues in each case, but where "boilerplate" documents are used, the time billed for assembly of those documents should reflect the efficiencies inherent in repurposing documents across cases. In this case, respondent's counsel billed numerous hours for the creation of documents that are nearly identical to documents created for other cases, and for the review and analysis of documents that appear to have been largely similar across cases. Where the creation or review of a document does not entail new legal research but is merely an adaptation of work already performed by the attorney in other cases, district courts should closely scrutinize the time claimed to be necessary for those tasks. This scrutiny should include an analysis not only of how much time such a task should take, but also whether such a task could or should be done by a paralegal.

Also deserving of scrutiny in this case was the decision of respondent's counsel to have two attorneys prepare for the mediation and expert deposition, particularly when only one attorney attended the latter. Absent a compelling explanation for the necessity of duplicative work, this seems presumptively excessive.

The only evidence on the necessity of the hours claimed in this case comes from the billing records submitted by respondent's counsel. The parties submitted billing records that respondent's counsel had submitted to other district courts in other fee-petition disputes, but those records neither pertained to this case nor showed the reasonableness of those hours in the other cases. Rather, they amount to bare assertions of reasonableness. It may be helpful for the district court to have the billing records of both parties for comparison of the time spent on similar tasks. This type of comparison might help offer an anchor in reality for the district court's determination of a reasonable number of hours for which compensation should be allowed.

In addition to the analysis specific to the number of hours discussed in this section, we note that many of the considerations discussed above in relation to the hourly rate are also pertinent to reasonableness of the hours expended. For example, the number of hours determined to be reasonable does not have to bear a directly proportional relationship to the amount involved in a case based solely on an economic interest, like this one, but the amount involved is nonetheless relevant in determining the reasonableness of hours expended.

III. Adjustment to Lodestar number

On appeal, appellant argues that the district court abused its discretion by failing to compare the recovery for respondent against the amount of attorney fees sought by respondent's counsel. In support of this argument, appellant notes that the settlement in this case included a recovery of only $14,000 for the client. But that argument was not raised before the district court, and respondent's counsel therefore did not have the opportunity to offer argument or evidence as to the value of the vehicle that the client kept and whether the respondent achieved a completely successful result. Because it was not initially raised before the district court, and because we do not have sufficient evidence on which to address the issue, we conclude that this argument is waived. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). In so concluding, we recognize that there is debate about applying proportionality in fee-shifting cases. *See Green*, 2011 WL 6306657, at *9–10 (Johnson, C.J., concurring in part and dissenting in part) (noting disagreement about whether and how proportionality should apply in this context). Further, we note that the Minnesota supreme court has granted further review of the issue of the award of attorney fees in the *Green* case.

We recognize the burden that district courts bear in resolving fee disputes that arise in this context. The parties have, without significant court involvement, settled the underlying dispute, and have preserved for district court determination the sole issue of attorney fees and costs. The district court is called upon to determine reasonable fees in the context of a dispute about which it knows very little other than that the case has been settled, the attorneys for the consumer are entitled to reasonable fees, and counsel have

submitted a variety of surveys, orders from other cases and the like in support of counsel's fee petition. While the record here is voluminous, particularly as to the number of hours claimed to have been reasonably expended in this case, much of it is not particularly helpful in resolving the dispute about the reasonableness of the fees claimed. We conclude that the district court's abbreviated analysis was insufficient. Finally, we note that the district court may wish to require the parties to adduce additional evidence or argument in order to aid its analysis.

Because a district court must engage in a searching review to adequately assess the reasonableness of the hours and rates asked for in a fee petition, and must base its determination of the reasonableness of the hourly rate and of the number of hours for which fees are awarded on market-based considerations, we conclude that the district court abused its discretion by conducting an insufficient analysis. We therefore reverse and remand for reconsideration of respondent's petition consistent with this opinion.

Reversed and remanded.