

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

J. MICHAEL BRANDON; and MARY J.
BRANDON,

Plaintiffs,

vs.

Case No. 13-10843-NZB

HON. CHRISTOPHER P. YATES

ADMINISTRATION SYSTEMS RESEARCH
CORPORATION, INTERNATIONAL,

Defendant.

OPINION AND ORDER PROVIDING INTERIM AWARD
OF ATTORNEY'S FEES AND COSTS TO PLAINTIFFS

If famed artist Rube Goldberg and renowned civil procedure professor Charles Alan Wright ever had a child, it would look just like the parties' litigation, which has evolved into the apotheosis of complexity for complexity's sake. In the tenth published opinion issued in these cases,¹ the Court shall consider the plaintiffs' request for an interim award of attorney's fees, which was presaged by the Court's decision on February 25, 2014, resolving a motion for advancement of fees and costs to Plaintiffs J. Michael Brandon and Mary J. Brandon. After careful review, the Court concludes that Defendant Administration Systems Research Corporation International ("ASR") must provide to the Brandons \$78,388.26 as indemnification for attorney's fees and costs.

The Brandons have filed two motions for interim attorney's fees. First, on April 9, 2014, the Brandons asked for \$122,685.76 as compensation for their partial victories in some early skirmishes. Then, on April 5, 2016, the Brandons filed a second motion for attorney's fees and costs, requesting

¹ Predictably, the parties have not confined their litigation to a single case. The first lawsuit involves the basic dispute between the parties. This second suit concerns indemnification.

\$325,457.65 from Defendant ASR. Needless to say, the Court is not enthused about dealing with serial requests for attorney's fees. Nevertheless, the Court is now convinced that the Brandons must be afforded some measure of relief at this juncture to defray the seemingly ruinous expenses of this litigation that may never end.² Consequently, the Court shall consider the Brandons' victories so far as the basis for an interim award of attorney's fees and costs.

As the Court's opinion issued on February 25, 2014, makes clear, the Brandons are entitled "to recoup expenses incurred in the successful defense of claims against them." Thus far, they have conclusively prevailed on their initial motion for summary disposition, which the Court resolved in an opinion rendered on May 29, 2013. In most other regards, the Brandons either have not yet won a final victory or they have won on behalf of Orchard Vista Properties, LLC, rather than on their own behalf, so the Court must largely restrict the award of attorney's fees and costs at this juncture to the expenses associated with the Brandons' initial motion for summary disposition.³ Nevertheless, the Brandons did secure a final victory on October 17, 2013, on a breach-of-contract claim brought by Todd Stacy in his individual capacity. Also, on February 25, 2014, the Brandons scored a partial win on the issue of indemnification. For that, they are entitled to some attorney's fees and costs.

The Brandons' request for attorney's fees requires the Court to employ the three-part analysis prescribed by our Supreme Court in Smith v Khouri, 481 Mich 519 (2008). The Court must "begin

² To be sure, the Court has scheduled a jury trial in the lead case for September 12, 2016, but previous trial dates have come and gone without resolution of this intractable legal battle.

³ The governing indemnification provision, which the Court quoted in its opinion issued on February 25, 2014, provides for indemnification for any ASR director or officer "against reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of any civil . . . suit . . . except in relation to matters as to which he shall be adjudged in such action, suit or proceeding to be liable for negligence or misconduct in the performance of his duties." See Complaint, Exhibit A (Bylaws of ASR, Article VII – Indemnification).

the process of calculating a reasonable attorney fee by determining” the “reasonable hourly or daily rate customarily charged in the locality for similar legal services[.]” Id. at 522. Then that hourly rate “should be multiplied by the reasonable number of hours expended.” Id. Finally, “the court may consider making adjustments up or down in light of the other factors listed in Wood [v DAIIE, 413 Mich 573 (1982)] and MRPC 1.5(a).” Id. The Court shall address each of these three issues in turn to arrive at an interim award of attorney’s fees for the Brandons.

In assessing the reasonableness of the Brandons’ attorneys’ hourly rates, the Court notes that Defendant ASR raised no objection to those rates in the Defendant’s Brief in Response to Plaintiffs’ Motion for Attorneys’ Fees and Costs or in the Defendant’s Brief in Response to Plaintiffs’ Second Motion for Attorneys’ Fees and Costs. Beyond that, the hourly rates – although high by traditional standards – simply reflect the experience and standing of the Brandons’ counsel and the difficulty of the work required by the Brandons. The Brandons have been represented by three attorneys from Barnes & Thornburg LLP: (1) partner Scott Murphy, whose hourly billing runs from \$460 to \$485; (2) former partner Jeffrey Muth, who billed at an hourly rate of \$415; and (3) William Leeder, who serves in an of-counsel capacity and bills at an hourly rate of \$335. All three of those attorneys have appeared before the Court on numerous occasions and have shown themselves to be lawyers of the highest caliber. Moreover, their billing rates are consistent with the rates established for similarly qualified attorneys in the 2014 Economics of Law Practice report from the State Bar of Michigan. Not surprisingly, the Brandons’ attorneys have stated without dispute that “ASR’s counsel agreed that the rates were reasonable and commensurate with both the rates charged to ASR and Stacy and the rates charged in the applicable market.” See Brief in Support of Second Motion for Attorneys’ Fees and Costs at 7 n4. Thus, the Court approves those hourly rates as reasonable.

The billed hours listed by the Brandons' attorneys, however, cry out for close scrutiny. Much to the Court's amazement, for example, the Brandons have requested 1.3 hours for the work of a law student who was then an unlicensed summer associate at Barnes & Thornburg and now, coincidentally, is a law clerk working for the Court.⁴ See Brief in Support of Motion For Attorneys' Fees and Costs at 8 (summary table). Beyond that, the Brandons have reported 1.2 hours of billing by a paralegal identified as "N. Kimball," whose hourly billing rate is listed at \$205 for a single, repeated activity: "Manage litigation docket."⁵ Obviously, the Court must disallow indemnification for those cryptic references and the related work. In contrast, much of the billing by Attorneys William Leeder and Jeffrey Muth from the inception of the lead case through the resolution of the motion for summary disposition is readily compensable. Specifically, the Court concludes that Attorney William Leeder devoted 55.8 compensable hours to the motion and Attorney Jeffrey Muth spent 25.3 compensable hours on that same project.⁶ Multiplying those hours by the attorneys' hourly rates, the Court arrives at \$18,693 for Attorney Leeder and \$10,499.50 for Attorney Muth for a total of \$29,192.50.

⁴ To make matters worse, the Brandons' brief identifies 1.3 hours performed by the summer associate at a billing rate of \$180.00 per hour, but somehow arrives at a total of \$414 for her work, rather than the figure of \$234 that results from multiplying \$180 by 1.3 hours. And if that weren't enough, the billing records show that the entire block of 1.3 hours was completed on July 24, 2013, yet that work was attributed to the category "Initial Analysis of the Complaint; Case Assessment; and Briefing and Oral Argument of the First Motion for Summary Disposition," which was argued on March 22, 2013, and decided in a written opinion issued on May 29, 2013 – almost two months *before* the billing attributed to the project.

⁵ The Court found seven virtually identical entries of 0.2 hours for the paralegal's time on February 13 and 14, 2013, May 30, 2013, July 12, 2013, October 7, 2013, November 19, 2013, and January 24, 2014. What any of that work had to do with a motion argued on March 22, 2013, and decided on May 29, 2013, is a complete mystery to the Court.

⁶ The Court arrived at these figures for compensable hours by awarding credit for all of the time billed by Attorney Leeder and Attorney Muth through March 25, 2013, and then adding all of the time billed on May 29 and 30, 2013, in the aftermath of the Court's decision.

With respect to the Brandons' second motion for summary disposition, they have requested indemnification for the work of three attorneys: Jeffrey Muth; William Leeder; and Brittany Harden. Although the Brandons' brief contains a table identifying Attorney Harden's hourly billing rate as \$220, the brief offers no explanation of who she is or why that billing rate is reasonable for her. As a result, the Court has no choice but to disallow the request for indemnification for the few hours she spent on the Brandons' litigation.⁷ The Court does find, however, that Attorney Leeder and Attorney Muth both devoted a substantial number of compensable hours to reviewing the amended complaint and then drafting a motion seeking summary disposition with respect to the claims in that pleading. Specifically, beginning on June 12, 2013, Attorney Leeder invested 67.7 hours on the second motion for summary disposition and Attorney Muth spent 20.9 hours on that project.⁸ Multiplying the hours of the attorneys by their respective hourly rates yields \$22,679.50 in billing by Attorney Leeder and \$8,673.50 in billing by Attorney Muth. The Brandons prevailed on only one small portion of their second motion for summary disposition, though, so the Court must reduce the compensable billing of each attorney to 25 percent of actual billings in order to reflect the Brandons' limited success on their second motion for summary disposition. Accordingly, the Brandons are entitled to \$5,669.88 for Attorney Leeder's work and \$2,168.38 for Attorney Muth's work for a total of \$7,838.26.

⁷ The Brandons' request for reimbursement identifies only 6.9 hours attributable to Attorney Harden, who apparently now works as an associate for another major law firm in Grand Rapids.

⁸ The Court included all hours billed by Attorneys Leeder and Muth from June 12, 2013, through the date of the oral argument on the second motion for summary disposition, *i.e.*, July 29, 2013, and then augmented those figures with all of the hours billed on October 18 and 21, 2013, in the wake of the Court's ruling on October 17, 2013. Although the Court's computation results in numbers of hours for both attorneys slightly in excess of the Brandons' request, the Court notes that the compensable hours attributable to both attorneys for the first summary-disposition motion came up short of the Brandons' request, so the difference may simply be the result of the varying methods of allocation employed by the Brandons and the Court.

The Brandons' final request for indemnification involves the attorney's fees associated with the motion for advancement of fees and costs, which the Court decided on February 25, 2014. That request flows naturally from the ASR indemnification provision quoted in footnote 3, *supra*, which entitles any director or officer to reimbursement for "reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of any civil" suit "except in relation to matters as to which he shall be adjudged in such action, suit or proceeding to be liable for negligence or misconduct in the performance of his duties." See Complaint, Exhibit A (Bylaws of ASR, Article VII). Indemnification under that provision would be a relatively hollow promise if the director or officer had to bear the cost of litigating against ASR to obtain such indemnification from the company. Therefore, to the extent that the Brandons had to expend attorney's fees to obtain from ASR the indemnification contractually afforded to them under the ASR bylaws, the Brandons must be compensated by ASR. Beginning on March 26, 2013, and continuing through February 25, 2014, when the Court issued its ruling on the issue of indemnification, Attorney Muth devoted 22.3 hours to the effort, Attorney Leeder spent 94.8 hours on the project, and Attorney Scott Murphy spent 0.6 hours to the project.⁹ Consequently, the Brandons are entitled to indemnification for the legal work of Attorney Leeder in the amount of \$31,758, for the legal billing of Attorney Muth in the amount of \$9,254.50, and for the effort of Attorney Murphy in the amount of \$276 for an aggregate award of \$41,288.50 for the research and the resulting motion that prompted the Court to rule in favor of the Brandons on their right to indemnification.

⁹ The Brandons' table for the indemnification motion makes no mention of Attorney Scott Murphy, but the Court found that Attorney Murphy appropriately billed 0.6 hours on the project on February 10, 2014, so the Court added Attorney Murphy to its analysis. Conversely, the Brandons' table includes 4.8 hours for Attorney Harden, but the Court has no basis to assess the reasonableness of her hourly billing rate, so the Court must disallow recovery for her work.

The final step of the analysis requires consideration of whether an adjustment should be made to the yield of the first two steps of the analysis. The amount of attorney's fees yielded by those first two steps is \$78,319.26.¹⁰ That may seem like an eye-popping number, but the effort required to win three significant motions supports an award of that size. Commercial litigation frequently turns into a Herculean undertaking, and the Brandons had to devote substantial effort to the tasks of narrowing the claims advanced by Todd Stacy and securing indemnification for their victories from ASR. As a result, the Court sees no reason to reduce the byproduct of the first two steps of the analysis. And in the same fashion, the Court finds no basis to increase the figure of \$78,319.26. The Brandons may wonder why it costs so much to move the ball in a commercial dispute, but an objective observer of this litigation might justifiably respond that the Brandons have contributed to the time and expense of the proceedings by gilding each and every lily that they have presented to the Court. All the Court has left to do is add the costs of the filing fees for the three motions, *i.e.*, \$69, to the attorney's fees of \$78,319.26 to arrive at an interim award of \$78,388.26,¹¹ which ASR is hereby ordered to pay to the Brandons under the indemnification section of the ASR bylaws.

IT IS SO ORDERED.

Dated: May 25, 2016



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

¹⁰ The components are \$29,192.50 for the initial motion for summary disposition, \$7,838.26 for the second motion for summary disposition, and \$41,288.50 for the indemnification motion.

¹¹ Anyone who wishes to check the Court's assessment of attorney's fees or its computation of the interim award can simply refer to the marked-up copy of Exhibit G to the Brief In Support of the Brandons' Motion for Attorneys' Fees and Costs, which is appended to this opinion and order.