IN THE COURT OF APPEALS OF IOWA

No. 0-455 / 99-375
Filed December 22, 2000

ELWOOD, O'DONOHOE, O'CONNOR & STOCHL,
Plaintiff,

vs.

IOWA DISTRICT COURT FOR CHICKASAW COUNTY,
Defendant.

FILED
DEC 22 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Chickasaw County, Margaret L. Lingreen, Judge.

Elwood, O'Donohoe, O'Connor & Stochl appeals the district court's rulings on attorney fees and fees for court-appointed experts pursuant to Iowa Rule of Appellate Procedure 303. **WRIT SUSTAINED; AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

W. Patrick Wegman, Charles City, and Judith O'Donohoe of Elwood, O'Donohoe, O'Connor & Stochl, Charles City, for plaintiff.

Mark Smith, First Assistant State Public Defender, Des Moines, for defendant.

Heard by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

VAITHESWARAN, J.

A law firm was appointed to represent Nathan Kolbet after the car he was driving struck a horse-drawn buggy, killing two occupants of the buggy. We must decide whether the district court abused its discretion in reducing the amount of attorney and expert witness fees requested by the firm. We answer yes, in part, to this question. We sustain the writ of certiorari, affirm in part, reverse in part, and remand.

I. Background Facts and Proceedings

The State charged Kolbet with two counts of homicide by vehicle and two counts of serious injury by vehicle. Iowa Code §§ 707.6A(1), (2)(a), (4) (1997). The district court found Kolbet indigent and appointed Judith O'Donohoe of Elwood, O'Donohoe, O'Connor & Stochl as defense counsel.

During trial, O'Donohoe sought leave to employ five expert witnesses. She included with her application an estimate of each expert's costs. The district court granted the application but limited the amount each expert could expend to the sum set forth in the application, pending further order of the court. Eight days later, O'Donohoe sought leave to employ two surrebuttal experts. The court also granted this application but retained jurisdiction to determine the reasonableness of the fees. The court simultaneously scheduled a post-trial hearing on "the issue of reasonable fees for Defendant's expert witnesses for trial testimony and expert witnesses for surrebuttal trial testimony."

Following the hearing and submission of the experts' actual expenses, the district court ruled that six of the seven experts' fees and certain travel expenses

should be reduced. The court denied O'Donohoe's request to reconsider this ruling. O'Donohoe filed a notice of appeal.

Several months later, the court considered O'Donohoe's attorney fee and cost application. The court awarded $23,195 of the $35,637.50 fee request and $3,734.04 of the $7,656.18 cost request. The Iowa Supreme Court granted O'Donohoe's petition for writ of certiorari, consolidated the writ with O'Donohoe's appeal from the expert fee ruling, and transferred the case to this court for disposition.

II. Timeliness of Appeal from Expert Fee Ruling

As a preliminary matter, the State contends O'Donohoe's appeal from the expert fee ruling is untimely because her notice of appeal was filed more than thirty days after the district court initially ruled on the issue. We disagree.

Proceedings to determine statutorily authorized fees, although ancillary to criminal cases, are civil in nature. *See Halverson v. Iowa Dist. Ct.*, 532 N.W.2d 794, 799 (Iowa 1995). Accordingly, the Iowa rules of civil procedure govern these proceedings. *Id.* One of those rules allows a party to seek enlarged or amended findings or conclusions on issues of fact tried without a jury. Iowa R. Civ. P. 179(a), (b). O'Donohoe did just that. Within ten days of the date the court filed and served its first expert fee ruling, O'Donohoe served a motion to reconsider, raising factual disputes with respect to the court's fee awards. That motion was in substance a rule 179(b) motion for enlarged or amended findings or conclusions. *See Woody v. Machin*, 380 N.W.2d 727, 729 (Iowa 1986); *Beck v. Fleener*, 376 N.W.2d 594, 596 (Iowa 1985). Therefore, the motion extended the time for appeal until thirty days after the court ruled. Iowa R. App. P. 5. As

O'Donohoe filed her notice of appeal within thirty days of the ruling denying her motion to reconsider, her appeal was timely.

III. Expert Fees and Expenses

O' Donohoe appeals two aspects of the court's ruling on expert fees and costs: (1) the refusal to consider costs and fees beyond those she initially estimated for her five primary experts and (2) the award of mileage rather than airfare for those experts who flew to the trial. We will address each argument in turn.

A. Fees and Costs of Primary Experts. O'Donohoe designated the following five experts to testify in her client's defense: (1) James Sobek, an accident reconstruction specialist, at an estimated cost of $5,000; (2) Carlyle Paul Cozad, a human factors consultant, at an estimated cost of $3,000; (3) Thomas Burr, a forensic scientist, at an estimated cost of $800; (4) Nils Varney, a neuropsychologist, at an estimated cost of $3,200; and (5) Dennis Harmening, an accident reconstruction specialist, at an estimated cost of $750. The court agreed these experts were reasonably necessary and approved the application, with the following proviso:

> The Court authorizes the expenditure of necessary and reasonable fees for the securing of witnesses, not to exceed the sums identified by Defendant in the application, without further Court order. The Court may schedule a further hearing on the issue of reasonableness of fees.

At the post-trial hearing on the reasonableness of fees, the district court declined to award any fees or costs to these witnesses in excess of the amounts specified in O'Donohoe's initial application, reasoning:

> [T]he amounts expended were not to exceed the amounts identified by Defendant in his application without further Court Order.

> Defendant never requested nor secured an additional Order from this Court authorizing fees in excess of those identified by Defendant in his original application.

In its ruling reconsidering this order, the court stated:

> The Court's Order of August 19, 1998, set the maximum expert fees in the amount requested by the Defendant, unless Defendant secured additional Court Order. The Court did not prohibit additional expert fees; the Court merely provided that further Court Order would be needed. Defendant chose not to make further application for expert witness fees in excess of those he initially identified in his application. Defendant should not now be heard to complain about the need for additional expert fees.

O'Donohoe maintains the court should have awarded the experts' actual fees and expenses instead of the estimated sums. We review the court's ruling for an abuse of discretion. *State v. Leutfaimany*, 585 N.W.2d 200, 207 (Iowa 1998); *State v. Van Scoyoc,* 511 N.W.2d 628, 631 (Iowa App. 1993).

Iowa Code section 815.5 authorizes a court to award "reasonable compensation" to expert witnesses retained on behalf of indigent defendants.[1] Witnesses secured for these defendants are required to file claims for compensation "supported by an affidavit specifying the time expended, services rendered, and expenses incurred on behalf of the defendant." Iowa Code § 815.4. We believe Iowa Code section 815.4 mandates a district court consider the amounts actually expended by the experts before determining the amount each expert should receive. The court did not do so here, relying instead on the cost estimates contained in O'Donohoe's application to retain experts. It is true the court advised O'Donohoe actual expenditures above the estimates would not be approved without further court order. However, O'Donohoe reasonably could

[1] The parties do not challenge the predicate requirements for obtaining an expert witness. *See* Iowa R. Crim. P. 19(4) (requiring defendant to be indigent and services to be necessary to preparation and presentation of adequate defense).

have believed such an order would be forthcoming without further application by her, as the court took the initiative to schedule a post-trial hearing on the reasonableness of fees. For this reason, we conclude the court's refusal to consider expenses and fees exceeding O'Donohoe's estimates amounted to an abuse of discretion.

B. Transportation Costs O'Donohoe also called two surrebuttal witnesses: Jerry Hall and Kathey Verdeal. The court awarded their requested fees but refused to authorize payment for airfare, electing instead to approve mileage expenses for travel to Iowa at the rate of .24 cents per mile. The court additionally refused to award airfare expenses to primary experts Sobek, Cozad, and Varney. With respect to the latter three experts, the court reasoned:

> With the exception of James Sobek, Defendant in his applications for expert witnesses made no reference to travel expenses. Defendant chose not to secure prior Court approval for travel expenditures on behalf of his witnesses and he should not now be heard to complain of the Court's ruling which allows for the lesser of over-the-road mileage as opposed to air travel.

As previously noted, we are not convinced O'Donohoe was required to secure prior court approval each time an expert incurred a travel expenditure, as the court had already set a hearing to evaluate the reasonableness of fees and costs. Therefore, we reject this basis for denial of airfare to the three experts. For reasons noted below, we conclude each of the five experts whose travel awards have been contested were entitled to airfare rather than mileage.

C. Disposition. We now proceed to determine the amounts each expert should have been awarded. The difference between fees and costs sought and fees and costs awarded for each of the five experts is as follows:

	Requested	Allowed	Difference
Sobek	$6,246.99	$5,329.78	$ 917.21
Cozad	$3,570.89	$3,060.80	$ 510.09
Burr	$ 838.16	all	none
Varney	$1,990.00	$1,557.60	$ 432.40
Harmening	$1,848.17	$ 857.13	$ 991.04
Hall	$3,248.01	$3,046.41	$ 201.60
Verdeal	$5,504.50	$2,408.00	$3096.50

1. Sobek. The district court allowed Sobek $5000 in professional fees, $230.40 in mileage (.24 x 960 miles), and $99.38 for a hotel room necessitated by the State's decision to depose him. Sobek had sought $5,737.61 in fees and costs plus $410 required to change his plane ticket to accommodate the State and $99.38 for the extra hotel night. As Sobek came from Indiana and his hourly fee for driving from that state to New Hampton, Iowa would have exceeded the cost of his airfare, we conclude he should have been awarded airfare rather than mileage. We further conclude the balance of his requested fees and costs were reasonable.

2. Cozad. The district court awarded Cozad $2,600 in professional fees, $412.80 in mileage (.24 x 1,720) and $48 in out-of-pocket expenses. As he came from New York, we believe he is entitled to airfare of $817.89 rather than mileage.

3. Varney. The district court awarded Varney professional fees of $1,500 and mileage of $57.60 (.24 x 240 miles). At the fee hearing, a member of O'Donohoe's firm made a professional statement that Dr. Varney calculated his costs driving and flying and, "the time factor was such it was cheaper to have him fly." We find his fee request reasonable in light of this statement.

4. Harmening. The district court allowed Harmening $750 in professional fees, $44.73 for a hotel, and mileage of $62.40 (.24 x 260 miles). We believe he is entitled to the full amount of professional fees claimed, which totaled $1,593.75 for 12.75 hours of travel, preparation, deposition and trial time. He is also entitled to compensation for his hotel room. However, we agree with the district court that his mileage expense claim is excessive because it was calculated at the rate of .50 per mile.

5. Hall. The district court awarded Hall $2,952.50 in professional fees and $31.51 in out-of-pocket expenses but awarded him mileage of $62.40 (.24 x 260) rather than airfare of $264. Hall spent 1.2 hours on the plane and charged professional fees for that time. If he had driven, his rate of $150 per hour would have rendered driving more expensive. Accordingly, we conclude he is entitled to the full sum requested.

6. Verdeal. The district court awarded Verdeal professional fees of $2,000 and mileage of $408 (.24 x 1500 miles). As Verdeal was traveling from Colorado, we conclude she was entitled to claim airfare.

IV. Attorney Fees

O'Donohoe next contends the district court should not have reduced her request for attorney fees. Preliminarily, the parties disagree on the appropriate standard for reviewing these proceedings, with the State maintaining review is for errors of law and O'Donohoe contending an abuse of discretion standard applies. Both parties are correct.

Certiorari proceedings are at law and are appropriate where the district court is alleged to have exceeded its jurisdiction or acted illegally. *Halverson*,

532 N.W.2d at 797. Certiorari is the proper vehicle for challenging a court-appointed fee award. *Green v. Iowa Dist. Ct.*, 415 N.W.2d 606, 607 (Iowa 1987). The legal standard for determining attorney compensation is based on a number of factors, including:

> [t]he time necessarily spent, the nature and extent of the service, the possible punishment involved, the difficulty of handling and importance of the issues, responsibility assumed and results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar service.

Id. at 607-08 (quoting *Hulse v. Wifvat*, 306 N.W.2d 707, 711 (Iowa 1981)). When a correct legal standard is applied, we affirm unless there was an abuse of discretion. *Id.* at 608. We believe the district court correctly applied the legal standard set forth above and therefore review the decision only for an abuse of discretion.

O'Donohoe first contends the district court should not have reduced her fees on the ground she did not use a paralegal or investigator to perform the same services at a lower rate of compensation. She maintains her firm practices in a small town with limited access to paralegals and/or investigators. The record does not contain affidavits or other evidence establishing paralegals were unavailable in the community or were not cost-effective. However, we determine all the activities the court said a paralegal could perform were more appropriately performed by an attorney, given the complexity of the case. These activities included legal research on key trial issues, witness interviews, motion preparation, juror evaluation, and accident reconstruction. We additionally note that even if a paralegal had performed those activities, O'Donohoe would have had to review the work and could have charged for that review. For these

reasons, we conclude the district court's reduction of O'Donohoe's fees based on her failure to use a paralegal or investigator amounted to an abuse of discretion.

Second, O'Donohoe contends she should have been compensated for time she spent conferring with Kolbet's parents. She notes they served as key witnesses and assisted with the investigation in addition to otherwise supporting their twenty-year old son. In refusing to compensate O'Donohoe for this time, the court reasoned the parents were not her firm's client and Kolbet was an adult at all times. O'Donohoe's itemized billing statement reveals the conferences with Kolbet's parents were not to prepare them for trial but primarily to keep them apprised of developments in their son's case. While we find O'Donohoe's efforts in this regard laudable, we cannot conclude the district court abused its discretion in refusing to compensate her for this time. *Cf. Norton v. Iowa Dist. Ct.*, 554 N.W.2d 301, 303 (Iowa App. 1996) (considering a similar argument but ultimately not reaching the issue of whether time spent with a juvenile's parents was compensable).

Third, O'Donohoe contends the district court abused its discretion in refusing to compensate her for time she spent consulting with experts before they were formally approved by the court. We agree. Given the complexity of this case, we believe a reasonable attorney would have had preliminary discussions with potential experts in anticipation of formally retaining them.

Finally, the court determined some of the time spent by O'Donohoe was excessive, and reduced it. We believe this was well within the district court's

discretion. *See Halverson*, 532 N.W.2d at 800. We also conclude the court had discretion to reduce O'Donohoe's compensation for out-of-pocket expenses.

We conclude O'Donohoe's law firm is entitled to additional compensation for six of the seven experts it retained. We further conclude the law firm is entitled to additional attorney fees for time spent doing work the court concluded a paralegal or investigator could perform and for time spent conducting preliminary discussions with potential experts. We sustain the writ of certiorari, affirm in part, reverse in part and remand.

WRIT SUSTAINED; AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.