For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

VIOLET SEWER MAHABIR, Appellant/Plaintiff, v. **HEIRS OF JAMES WELLINGTON GEORGE, ANNA MARIA GEORGE born Wilson, EMILE ROBERTS born George, ALFRED VICTOR LAMBERTUS, WILLIAM D. GEORGE, included but not limited to Heirs of BEULAH BATTISTE, Heirs of EARL CHRISTIAN, Heirs of MONROVIA GEORGE WELLS, CARMEN REYES, MARY FLORES, and anyone else claiming any right, title, estate, lien, or interest in Parcel No. 6ab Estate Hansen Bay A, East End Quarter, St. John, Virgin Islands, as shown on PWD No. A9-282-T80,** Appellees/Defendants.	**S. Ct. Civ. No. 2014-0025** Re: Super. Ct. Civ. No. 231/2009 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Michael C. Dunston

Considered: December 16, 2014
Filed: December 22, 2021

Cite as: 2021 VI 22

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Susan B. Moorehead, Esq.
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St. Thomas, U.S.V.I.
Attorney for Appellant,

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Attorney for Appellees Mary Flores, Heirs of Beulah Battiste, Heirs of Earl Christian,

Heirs of James Wellington George, Heirs of Monrovia George Wells, and Carmen Reyes,

Maria T. Hodge, Esq.
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Attorney for Appellees Martha George and Wilmar Corporation.

OPINION OF THE COURT

CABRET, Associate Justice.

¶ 1 In our previous opinion entered in this matter, we considered Violet Sewer Mahabir's appeal from orders of the Superior Court dismissing her claim of exclusive title to a property on St. John through adverse possession and ordering her to pay attorney's fees to the opposing parties.[1] In that opinion, we affirmed the Superior Court's holding that Mahabir failed to establish adverse possession. However, we remanded the record for the trial court to clarify its reasoning as to its awards of attorney's fees. In response, on March 21, 2019, the Superior Court entered a memorandum of decision regarding attorney's fees and costs, explaining its rulings in that respect.

¶ 2 Because we remanded only the record in this matter for clarification of the trial court's decisions to award attorney's fees and costs, and did not remand the case in its entirety, we retain jurisdiction over this appeal from the Superior Court's April 8, 2014, orders awarding attorney's fees and costs under Title 4, Section 32(a) of the Virgin Islands Code. *See Hodge v. Bluebeard's Castle, Inc.*, 62 V.I. 671, 684 (V.I. 2015) ("In a record remand, ... jurisdiction over the case remains with [the appellate] court, but the record [alone] is returned to the trial court.") (citation omitted). We review the Superior Court's rulings with respect to attorney's fees and costs for abuse of discretion. *See In re Guardianship of Smith*, 58 V.I. 446, 449 (V.I. 2013) ("This Court reviews the Superior Court's ruling on a motion for attorney's fees and costs for abuse of discretion. . . [but]

[1] For a detailed description of the factual and procedural background of this matter prior to remand, please refer to our previous opinion: *Mahabir v. Heirs of George*, 63 V.I. 651 (V.I. 2015).

[t]o the extent the review implicates an interpretation of law, however, we review that interpretation de novo.") (citation omitted).

As we previously noted:

> Mahabir argues on appeal that the Superior Court should have reduced the attorney's fees further or outright denied them because this case involved a "bona fide land dispute." With regard to Wilmar Corporation's motion, Mahabir argues that the Superior Court should have excluded $2,438 in fees related to settlement negotiations, $11,600 related to Wilmar Corporation's failed summary judgment motion, $1,137.50 related to issues raised by other parties, and $575 charged for attorney work unrelated to the litigation. With regard to the motion by the Heirs of George, Mahabir argues that the Superior Court should have excluded $2,825 in fees that pre-dated the filing of the complaint, $1,150 in fees not related to the litigation, $2,125 in fees related to settlement negotiations, and an unspecified amount for unidentified "excessive" and "vague" fee requests.

Mahabir v. Heirs of George, 63 V.I. 651, 667 (V.I. 2015). For the reasons discussed below, we conclude that the Superior Court abused its discretion in fixing its award of attorney's fees and costs, though not in any of the ways argued by Mahabir. Nevertheless, because the court's errors benefited, rather than prejudiced Mahabir, and because neither William George's successor in interest, Wilmar Corporation, nor the heirs of George filed a cross-appeal in this matter, we affirm the Superior Court's opinions and orders dated April 8, 2014, awarding attorney's fees and costs.

I. Discretion to Award Attorney's Fees Pursuant to 5 V.I.C. § 541

¶ 3 In its March 21, 2019, opinion explaining its April 8, 2014, orders, the Superior Court opined that it possessed exceptionally broad discretion in determining whether to award attorney's fees under title 5, section 541 of the Virgin Islands Code. First, the court asserted, without any citation to relevant authority, that its determination of the amount of attorney's fees that should be awarded under 5 V.I.C. § 541(b) is governed by the eight factors set forth in Supreme Court Rule 211.1.5(a). The Superior Court further stated that it considered several additional factors in shaping the award, including that appellant's claim had been brought in good faith; that it did not want to "punish" appellant through a large attorney's fee award; and "the certainty of payment to the

defense."

¶ 4 Section 541(b) provides that the court "may" award attorney's fees "in its discretion," but offers no further guidance as to how that discretion should be exercised. However, this does not mean that the court's discretion is unlimited, or that the court is permitted to consider, on an *ad hoc* basis, any and all factors it may deem relevant. First, it is inappropriate for the Superior Court to consider all eight of the Rule 211.1.5(a) factors when considering a motion for attorney's fees under section 541(b). Rule 211.1.5(a) is a rule of professional conduct that prohibits a lawyer from charging or collecting an unreasonable fee, and we agree with those courts holding that the factors that guide a determination of whether a fee is so unreasonable so as to justify professional discipline are not the same as those that determine what fees should be awarded pursuant to a fee-shifting statute. *See Monmouth Meadows Homeowners Ass'n, Inc. v. Hamilton*, 7 A.3d 1, 6-7 (Md. 2010) (holding that although there may be some overlap, the factors listed in Rule 1.5(a) of the Maryland Rules of Professional Conduct should be used to determine whether to award attorney's fees under a contract, while a different set of factors should govern the calculation of attorney's fees under a fee-shifting statute); *see also Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973) (adopting a four-factor lodestar test to govern attorney's fee awards under fee-shifting statutes).[2] Importantly, while we have previously considered the Rule 211.1.5(a) factors, we have never applied those factors in the context of a motion brought pursuant to section 541(b); rather, we only considered the factors when determining the reasonableness of a contingent fee in a case where a settlement on behalf of a

[2] However, a "vast majority of courts of appeals now permit or direct courts to use the percentage method in common-fund cases" instead of the lodestar method. *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1254 (Del. 2012) (*citing* FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.121 at 187 (2004) and Charles W. "Rocky" Rhodes, *Attorneys' Fees in Common-Fund Class Actions: A View from the Federal Circuits*, 35 THE ADVOCATE (TEX.) 56, 57–58 (2006)).

minor child needed to be approved by the court, *see Rojas v. Two/Morrow Ideas Enterprises, Inc.*, 53 V.I. 684 (V.I. 2010), and in a breach of contract case where an attorney sued a client for unpaid attorney's fees, *see Rainey v. Hermon*, 55 V.I. 875 (V.I. 2011).

¶ 5 Instead, we conclude that the appropriate rules to govern the exercise of the court's discretion to award attorney's fees under § 541(b) are those outlined by the Supreme Court of the United States in *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010), *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), *Blum v. Stenson*, 465 U.S. 886 (1984), and related decisions, interpreting a substantially similar federal statute, 42 U.S.C. § 1988, which provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." In these decisions, the Supreme Court has acknowledged that while the statutory language grants courts a certain level of discretion, that discretion is not unlimited. Thus, the Court has generally rejected the approach set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which permitted consideration of twelve highly subjective factors, including the eight factors found in ABA Model Rule of Professional Conduct 1.5(a), upon which Supreme Court Rule 211.1.5(a) was based. Rather, the United States Supreme Court adopted the method utilized in *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), and held that the calculation of attorney's fees under a fee-shifting statute must rely on objective criteria. *See Perdue,* 559 U.S. at 551-52 (explaining that the "lodestar" method pioneered in *Lindy Bros.* has "become the guiding light of our fee-shifting jurisprudence" because, among other reasons, "unlike the *Johnson* approach, the lodestar calculation is 'objective,' and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results") (internal citations omitted).

¶ 6 The United States Supreme Court has instructed that a court should first calculate the

number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate, calculated according to the prevailing market rates in the relevant community. *Blum*, 465 U.S. at 895; *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Importantly, "the figure resulting from this calculation is more than a mere 'rough guess' or initial approximation of the final award to be made," but rather "'the resulting product is presumed to be the reasonable fee' to which counsel is entitled." *Delaware Valley Citizens' Council*, 478 U.S. at 564 (quoting *Blum*, 465 U.S. at 897). "The value of an attorney's time generally is reflected in his normal billing rate." *Estien v. Christian*, 507 F.2d 61, 63 (3d Cir. 1975), quoting *Lindy Bros.*, 487 at 167; *Del. Valley Citizens' Council*, 478 U.S. at 564 ("[when] . . . the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee" to which counsel is entitled) (quoting *Blum*, 465 U.S. at 897). The court must then evaluate the attorney's experience and skill and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Blum*, 465 U.S. at 895 n.11. While in "rare" or "exceptional" cases an upward or downward adjustment may be warranted—such as "where the method used in determining the hourly rate employed in the lodestar litigation does not adequately measure the attorney's true market value," "when an attorney agrees to represent [a] plaintiff who cannot afford to pay the attorney" and "understands that no reimbursement is likely to be received until the successful resolution of the case," *Perdue*, 559 U.S. at 554-55, or the party seeking an award of attorney's fees fails to submit adequate documentation supporting the hours worked and rates claimed, *Hensley*, 461 U.S. at 433 —factors such as the novelty of the issue and the experience or quality of the attorney are presumptively already reflected in the attorney's hourly rate and the number of hours reasonably expended on the matter, and so should not be separately considered in order to

prevent "double counting." *Delaware Valley Citizens' Council*, 478 U.S. at 566.

II. Wilmar Corporation's Attorney's Fees and Costs[3]

¶ 7 Applying this standard, we conclude that the Superior Court abused its discretion when it substantially reduced the requested attorney's fees for Wilmar Corporation's counsel from $35,906.25 to $12,215.63. In its March 21, 2019, opinion explaining its April 8, 2014, orders, the Superior Court stated that it reduced the hourly rates for partners' time from $350 to $250 and the hourly rate for associates from $250 to $100 because it concluded that the actual hourly rates were "high compared to the customary and prevailing market rates for attorneys in the Virgin Islands." However, in her opposition to the attorney's fees motion, Mahabir never contended that the $350 partner rate or the $250 associate rate were unreasonable or not consistent with prevailing market rates. Moreover, in our September 25, 2015, opinion remanding the matter, we emphasized that determining a reasonable hourly rate requires "a case-specific inquiry into the prevailing market rates for counsel of similar experience and skill to the fee applicant's counsel." 63 V.I. at 667 n.8. In addition to reducing the rates *sua sponte*—and thus depriving Wilmar Corporation of the opportunity to defend the propriety of its attorneys' hourly rates—the Superior Court failed to make any attempt at an inquiry to determine the prevailing market rates, instead only stating that it was its "impression" that these were the prevailing rates charged. In fact, the record shows that the $100 hourly rate for associates used by the Superior Court is actually lower than the $125

[3] Mahabir argues that the Superior Court "should have exercised its discretion to not award any fees" in this case and includes citations to various cases in which the District Court of the Virgin Islands declined to award any attorney's fees to the prevailing party. However, Mahabir does not argue, and cites no authority in support of the proposition, that the Superior Court erred in awarding some reasonable portion of fees to the Appellees, the undisputed prevailing parties in this action. And a mere assertion that the Superior Court should have used its discretion differently is not equivalent to an argument that the court abused its discretion. *See, e.g.*, *Shebelskie v. Brown*, 752 S.E.2d 877, 881–82 (Va. 2014) (observing that "when a decision is discretionary 'the court has a range of choice, and ... its decision will not be disturbed as long as it stays within that range'") (alteration omitted).

hourly rate for court-appointed Criminal Justice Act attorneys in the U.S. District Court that was in effect in 2011.[4] Notably, "no fee is reasonable unless it would be adequate to induce other attorneys to represent similarly situated clients seeking relief comparable to that obtained in the case at hand." *Hensley*, 461 U.S. at 449.

¶ 8 In her brief on appeal, Mahabir argues that the award of fees and costs to Wilmar Corporation should have been further reduced by $11,600 to exclude fees related to its motion for summary judgment because that motion was ultimately unsuccessful. On remand, the Superior Court explained that "[b]ecause the motion was unsuccessful, the court agreed that some reduction in fees related to the motion was appropriate, but was not convinced that none of the time should be awarded merely because the arguments presented did not prevail at that stage of the proceedings, since Defendants ultimately prevailed." Therefore, the court partially reduced, but did not completely exclude, the award of fees related to the motion.

¶ 9 In a case presenting multiple "distinctly different claims for relief that are based on different facts and legal theories," it is true that "work on an unsuccessful claim cannot be deemed to have been "'expended in pursuit of the ultimate result achieved,'" and therefore hours devoted exclusively to working on that unsuccessful claim must not be included in calculating the fee awarded. *Hensley*, 461 U.S. at 435. However, "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention [or motion] raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what

[4] Although these specific errors were not raised by the parties on appeal—which is unsurprising given that Appellees did not file a cross-appeal—in order to provide guidance to the Superior Court, we exercise our discretion to reach these issues as they significantly impacted the Superior Court's fee award and therefore affected the parties' substantial rights. *See* V.I. R. App. P. 22(m) ("the Supreme Court, at its option, may notice an error not presented that affects substantial rights."); *see also Marsh-Monsanto v. Clarenbach,* 66 V.I. 366, 383 (V.I. 2017) ("An error affects substantial rights when it would change the outcome of the proceedings.").

matters." *Id.* In *Grand Union Supermarkets v. H.E. Lockhart Management, Inc.*, 2013 WL 163830, at *2 (D.V.I. January 10, 2013) (unpublished), the District Court of the Virgin Islands considered this same argument in fixing an award of attorney's fees and costs under 5 V.I.C. § 541: that a prevailing party should not be awarded fees for work on unsuccessful motions. The court characterized this argument as a "misinterpretation of the relevant case law, which permits reduction of fees when a party succeeded on *some claims or defenses but not others*." *Id.* at *2 n.1 (emphasis added) (citing *Galt Capital, LLP v. Seykota,* 2007 WL 4800135, at *3 (D.V.I. Dec. 20, 2007) (unpublished) (noting that "where the prevailing party achieved only limited success, the court should award only that amount of fees that is reasonable in relation to the results obtained") (internal quotation marks omitted)). Because the defendant ultimately achieved success by obtaining a judgment in its favor, and because the legal work that contributed to that ultimate success—including the filing of unsuccessful motions—was not frivolous, the District Court concluded that this work did not generate unnecessary fees and that a reduction for the fees incurred in performing the work was unwarranted. *Id.* Finding this reasoning persuasive, we conclude that Superior Court did not abuse its discretion by failing to wholly exclude from its calculation hours spent working on the unsuccessful motion. On the contrary, the Superior Court abused its discretion in reducing, by any amount, the hours spent working on the summary judgment motion solely because Wilmar Corporation, though ultimately successful in its defense of the lawsuit, did not succeed at that particular stage of the litigation.[5]

III. Heirs of George Attorney's Fees and Costs

[5] We need not consider Mahabir's remaining arguments as to other billing entries which, according to her, should have been excluded from the fee award—$2,438 in fees claimed for work performed in connection with settlement negotiations, $1,137.50 billed for work performed by Attorney Hodge related to Genevieve Marsh's motion to consolidate, and an additional $575 billed for discussions with Marsh's counsel about the possibility of forming a non-profit corporation—because these challenged portions of the fee award amount to substantially less than the amounts that were improperly reduced in her favor.

¶ 10 Turning to the Superior Court's award of attorney's fees to the Heirs of George, the Superior Court substantially reduced the Heirs' hours not only because it found the hours unreasonable, but also because "the defense benefited from the certainty of payment" and Mahabir's "claim had been brought in good faith and [she] should not be unduly punished for her attempt to assert her rights." With respect to certainty of payment, again, that counsel for the Heirs was likely to be paid regardless of the result of the litigation is a factor already reflected in counsel's $250 hourly billing rate, in that attorneys who are uncertain as to whether their client will pay their fees will typically charge a higher rate to account for the uncertainty that they will be compensated for their work. *See, e.g., Bodine v. Federal Kemper Life Assur. Co.*, 138 B.R. 88 (M.D. Fla. 1992) (recognizing "that contingent fee risk . . . contribute[s] significantly to the relative hourly value of a successful claim"). And while the fact that Mahabir brought her claim in good faith may be relevant to determining whether attorney's fees should be awarded as a sanction under Rule 11 of the Virgin Islands Rules of Civil Procedure, it is not a permissible factor to determine whether they should be awarded under section 541(b). This Court has already held that the Legislature enacted section 541(b) for the express purpose of abrogating the American Rule in all matters other than non-frivolous personal injury cases, and that the statute "makes awards of attorney's fees and costs in civil case the norm rather than the exception." *Hansen v. Bryan*, 68 V.I. 603, 614 (V.I. 2018). Moreover, this Court has already rejected the contention that attorney's fees should be denied under section 541(b) because the matter involved an issue of first impression, and in fact noted that matters where the outcome may be uncertain "are perhaps the cases where an attorney's fee award—when authorized—is most needed." *Id.* Thus, we conclude that the Superior Court abused its discretion in reducing its fee award on this basis.

¶ 11 Mahabir argues that the Superior Court should have excluded $2,825 in fees that pre-dated

the filing of the complaint, $1,150 in fees not related to the litigation, and $2,125 in fees related to settlement negotiations. In its memorandum of decision on remand, the court explained that in general, because the Heirs failed to file a reply to Mahabir's opposition to the motion for fees, the court "did not have the benefit of an explanation of why the [c]ourt should not give credence to [Mahabir's] arguments," and therefore "adopted many of [Mahabir's] criticisms of the billing statement and made her requested deductions," including each of the above deductions requested by Mahabir. Thus, the Superior Court did not abuse its discretion by failing to exclude these billing entries from its award as the court did, in fact, exclude each of these entries as unreasonable.[6]

IV. Conclusion

¶ 12 For the foregoing reasons, we conclude that the Superior Court abused its discretion in substantially reducing its award of attorney's fees to each defendant. However, because the court's errors benefited Mahabir, and because neither Wilmar Corporation nor the Heirs filed a cross-appeal, the Superior Court's April 8, 2014, opinions and orders awarding attorney's fees are affirmed.

Dated this 22nd of December 2021.

BY THE COURT:

MARIA M. CABRET
Associate Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: _____

[6] Mahabir also argues that the Superior Court should have further reduced its award by an unspecified amount for unidentified "excessive" and "vague" fee requests. Mahabir's argument in this respect is itself too vague to merit consideration. *See* V.I. R. APP. P. 22(m) ("Issues that were… only adverted to in a perfunctory manner or unsupported by argument and citation to legal authority, are deemed waived for purposes of appeal.").

Deputy Clerk

Dated: 12/22/2021