VERMONT SUPREME COURT
109 State Street
Montpelier VT 05609-0801
802-828-4774
www.vermontjudiciary.org

Case No. 26-AP-005

Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SEPTEMBER TERM, 2026

Joan Falcao v. Mitchel Richardson*	}	APPEALED FROM:
	}	Superior Court, Grand Isle Unit,
	}	Civil Division
	}	CASE NO. 30-5-19 Gicv
		Trial Judge: Navah Spero

In the above-entitled cause, the Clerk will enter:

Defendant appeals from the civil division's award of attorneys' fees to plaintiff. We reverse and remand for further proceedings consistent with this decision.

As relevant here, the record reflects the following. Plaintiff and defendant executed a promissory note in connection with plaintiff's loan of $16,000 to defendant. The note provided: "In the event this note shall be in default, and placed with an attorney for collection, then the undersigned agree to pay all reasonable attorney fees and costs of collection." Plaintiff filed the underlying suit in 2019, seeking recovery of the balance owed on the loan as well as her attorneys' fees under the terms of the note.

Following litigation regarding, among other things, various additional claims raised by both parties, a bench trial was held over three days in 2023. The civil division ultimately determined that the promissory note was not an enforceable agreement and instead awarded plaintiff damages under an unjust-enrichment theory. Plaintiff appealed. This Court concluded that the note was enforceable according to its terms—including the attorney-fee provision—and reversed and remanded for further proceedings. Falcao v. Richardson, 2024 VT 78, ¶ 23, 220 Vt. 310.

Following remand, the trial court held a status conference in January 2025. At the hearing, the court indicated that the issue of attorneys' fees remained to be addressed and directed plaintiff to file a motion for fees. It noted that "unless defendant just agrees to what the fees are, I imagine we'll need to have a hearing on the reasonableness of the fees." The court then told defendant's counsel that, while it did not need "an extensive opposition" to plaintiff's motion, "it would be helpful to have an opposition that just frames up the issues." It indicated, "[w]hatever you want to argue, just at least identify the issues so that we know what we're talking about" and plaintiff's counsel "can have whatever witnesses he needs available to himself and his client."

Plaintiff then filed a motion seeking $105,745 in attorneys' fees pursuant to a "lodestar" calculation. See Kwon v. Eaton, 2010 VT 73, ¶ 21, 188 Vt. 623 (mem.) (explaining that Vermont uses lodestar approach in calculating attorney-fee awards). This amount encompassed the fees of plaintiff's first attorney, who withdrew prior to trial due to complications from an illness, as well as the fees of the firm plaintiff retained thereafter. Attached to the motion were invoices from both firms and a spreadsheet totaling the fees.

Defendant filed an opposition to the motion. Although much of the filing addressed a separate issue not relevant here, defendant asserted that "the fees sought by [plaintiff] are unreasonable." He argued, based on the bills submitted by plaintiff, that not all of the fees she sought to recover related to collection of the note, but instead pertained to other claims, defenses, counterclaims, or parties.

Plaintiff replied to defendant's opposition, contending that the issues shared a common core of facts and that she could therefore recover for fees incurred in connection with those issues under this Court's case law. See, e.g., Kneebinding, Inc. v. Howell, 2018 VT 101, ¶ 121, 208 Vt. 578 (explaining that where there are grounds for fee award in case involving claims that share common core of facts, "dividing the suit into a series of discrete claims and apportioning the attorney's fees for each is an abuse of discretion"). Plaintiff further noted that because defendant's opposition did not address any of the factors this Court has identified as relevant to the reasonableness of attorney's fees, "[i]t may be inferred that defendant does not disagree with the plaintiff's analysis of the lodestar adjustments."

The court issued an order indicating that it had reviewed the parties' filings and setting the issue of attorneys' fees for a one-hour hearing at which "[e]ither party may present evidence or oral argument." At the outset of the September 2025 hearing, plaintiff's counsel indicated that he was "not really planning to present witnesses necessarily" because his understanding was that defendant's opposition was predicated only on the relation of the involved claims to the note. Defendant's attorney argued that it was plaintiff's burden to authenticate the bills and admit them into evidence and objected to the court's consideration of the invoices outside that process. Defendant also admitted a transcript of the hearing at which plaintiff's first attorney withdrew, contending that the attorney's description of his health condition supported a conclusion that the hours he spent on the case were unreasonable. The trial court ultimately concluded that defendant had forfeited any arguments related to the reasonableness of the fee award that were not expressly raised in his opposition to plaintiff's motion. In doing so, it relied on Vermont Rule of Civil Procedure 54(d)(2)(D), which provides that courts "shall, insofar as possible, resolve issues relating to fees without extensive evidentiary hearings."

The court subsequently issued a written decision awarding plaintiff $84,108 in attorneys' fees—the requested amount, less certain fees that the court determined were unrelated to the core facts surrounding the note and related defenses. Consistent with its oral ruling, the court rejected defendant's argument that plaintiff's motion must fail because she did not present evidence of the reasonableness of the requested fees, concluding that defendant was not allowed to "ambush plaintiff with new arguments at the motion hearing."

Defendant moved for reconsideration. As relevant here, he asked the court to revisit its conclusion that he forfeited his argument as to the reasonableness of the fees, pointing to the language challenging the fees' reasonableness in his opposition to plaintiff's motion. The court declined to reconsider its fee award, concluding that the opposition was insufficiently specific to put plaintiff on notice of the nature of defendant's arguments. This appeal followed.

On appeal, defendant argues that the court erred in awarding plaintiff her attorneys' fees in the absence of a record on which to base the conclusion that the requested fees were reasonable. We agree.

The relevant legal framework is well established: reasonableness is the "touchstone" of "an award of attorney's fees under Vermont law." Perez v. Travelers Ins. ex rel. Ames Dept. Stores, Inc., 2006 VT 123, ¶ 13, 181 Vt. 45; see Hum. Rts. Com'n v. LaBrie, Inc., 164 Vt. 237, 250 (1995) (recognizing that fee awards must be "reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims" (quotation omitted)). Determining the reasonableness of attorney's fees "is ordinarily a question of fact." Fine Foods, Inc. v. Dahlin, 147 Vt. 599, 605 (1986). "[C]ourts must begin with the 'lodestar figure,' . . . the number of hours reasonably expended on the case multiplied by a reasonable hourly rate." Kwon, 2010 VT 73, ¶ 21 (quotation omitted). This figure serves as a "starting point" from which the court may depart upward or downward based on various factors, including the novelty of the legal issues, the attorneys' experience, and the results obtained in the litigation. Perez, 2006 VT 123, ¶ 10.

Crucially, "[w]hile it is true that the determination of 'reasonable attorney fees' is largely within the court's discretion," the party seeking the award "has the burden to provide evidence of services upon which value can be determined." Bruntaeger v. Zeller, 147 Vt. 247, 254 (1986); see Ring v. Carriage House Condo. Owners' Ass'n, 2014 VT 127, ¶ 21, 198 Vt. 109 (declining "to diverge from the lodestar method in cases involving contractual provisions on attorney's fees or to abandon our general principles" placing burden of proof on moving party). Where, as here, reasonableness is disputed and no such evidence is offered, "the award is without foundation" and we will remand on that basis. Fine Foods, 147 Vt. at 605-06; see Vt. Nat. Bank v. King, 135 Vt. 551, 551-52 (1977) (per curiam) ("The burden was on the [party seeking fee award] to provide evidence of its services and the value of them where, as here, the trial court was being asked to adjudicate the matter.").

Rule 54(d)(2)(D) did not authorize the trial court to relieve plaintiff of her burden under the circumstances of this case. The rule provides only that the trial court "shall, insofar as possible, resolve issues relating to fees without extensive evidentiary hearings and may refer issues relating to the value of services or other items recoverable under this rule to a master under Rule 53." V.R.C.P. 54(d)(2)(D); see Reporter's Notes—1996 Amendment, V.R.C.P. 54 (explaining that this language "is intended to discourage extensive evidentiary hearings and to make clear that any necessary factual investigation may be conducted by a master"). As set forth above, where reasonableness is contested, it is not "possible" for a court to resolve the issue where the moving party does not shoulder its burden of proof.* V.R.C.P. 54(d)(2)(D); cf. Samis

* We recognize that Gokey v. Bessette held that while "[w]e have always required counsel to present evidence in support of any request for attorney's fees," in circumstances where "the fee requested is not large, it is within the discretion of the trial court to award a reasonable fee without requiring the submission of evidence." 154 Vt. 560, 567 (1990). However, the fee award at issue in Gokey was $700 and reasonableness was not in dispute. Id. (clarifying that Court was not "abrogating our longstanding practice in the usual case"). Gokey has no bearing here, where defendant clearly signaled that he was holding plaintiff to her burden of proof and plaintiff requested in excess of $100,000 in fees.

v. Samis, 2011 VT 21, ¶ 11, 189 Vt. 434 (explaining that while procedural rules have the force and effect of law, they cannot " 'abridge, enlarge or modify any substantive rights of any person provided by law' " (quoting 12 V.S.A. § 1)).

Moreover, contrary to plaintiff's assertion, this case is not like Burton v. Jeremiah Beach Parker Restoration and Construction Management Corp., 2010 VT 55, 188 Vt. 583 (mem.). There, the trial court awarded attorney's fees under a statutory provision, and we held that the other party failed to properly raise its challenge to the validity of that statute below and, as a result, did not preserve it for our review on appeal. Id. ¶¶ 5-6. Here, it is undisputed that the note provided for a fee award—what was disputed both below and on appeal is the reasonableness of the requested award. This case is thus far more analogous Bruntaeger v. Zeller, 147 Vt. 247. There, the defendant objected below to the reasonableness of a requested fee award, and the "plaintiff's counsel submitted a bill and offered no further evidence to the trier of fact." Id. at 254. We explained that while the award "may be entirely reasonable," the record evidence was insufficient to sustain it. Id. at 255. We therefore reversed and remanded for a new hearing at which the plaintiff would bear the burden of establishing the reasonableness of the fees. Id. The same result lies here. Defendant's opposition was sufficient to put both plaintiff and the court on notice that reasonableness was disputed, and that plaintiff would thus be required to meet her evidentiary burden on this point. As a result, the court erred in making the award without a record to support it.

Reversed and remanded for further proceedings consistent with this decision.

BY THE COURT:

____
Paul L. Reiber, Chief Justice

____
Harold E. Eaton, Jr., Associate Justice

____
Christina E. Nolan, Associate Justice