

¶ 3

FACTS

¶ 4 The facts necessary to our disposition of this appeal are as follows. On October 23, 2007, the Estate obtained a judgment after a jury verdict in the amount of \$58,878.53 against Rosewood on its sixth amended complaint, which, *inter alia*, alleged a violation of the Act (210 ILCS 45/1-101 *et seq.* (West 2002)). This court affirmed the judgment on appeal. See *Schwab v. Rosewood Care Center, Inc.*, No. 5-08-0019 (Jan. 21, 2010) (unpublished order under Supreme Court Rule 23 (eff. May 30, 2008)). On November 9, 2007, the Estate filed a motion for costs and fees pursuant to section 3-602 of the Act (210 ILCS 45/3-602 (West 2006)). In the motion for costs and fees, the Estate sought \$176,348 in attorney fees and \$27,815.42 in costs, for a total of \$204,163.42.

¶ 5 Exhibit 2 to the motion for fees and costs consists of itemized statements for attorneys Craig Jensen, Elizabeth Parker, and Lance Mallon. According to the statements, Craig Jensen spent 380.03 total hours on the case at a rate of \$300 per hour, for a total of \$114,090. Elizabeth Parker spent 218.39 total hours on the case at a rate of \$200 per hour, for a total of \$43,678. Lance Mallon spent a total of 92.9 hours on the case at a rate of \$200 per hour, for a total of \$18,580. Exhibit 3 to the motion for fees and costs is a bill of costs showing a total of \$27,815.42. Exhibit 4 is an affidavit of an employee of the Lakin Law Firm, attesting to the accuracy, necessity, and reasonableness of the bill of costs. Rosewood subsequently filed a memorandum of law objecting to the motion for fees and costs and the Estate filed a reply.

¶ 6 On April 28, 2010, the circuit court held a hearing on the Estate's motion for fees and costs. During that hearing, the circuit court heard oral argument from the attorneys as to which items of attorney fees Rosewood was disputing. At the time, Rosewood made an oral objection to the fact that the Estate's hours and descriptions were not based on a contemporaneous recording of time spent, and it also objected to specific items on the time

records. After hearing the oral objections of Rosewood's counsel, the circuit court set the matter for an evidentiary hearing.

¶ 7 On May 27, 2010, the circuit court held an evidentiary hearing on the Estate's motion for fees and costs. At the hearing, the Estate amended its petition for costs down to \$6,538.41, representing the taxable costs rather than the actual costs of suit. The Estate entered eight exhibits into evidence at the hearing. Exhibit 1 was represented to be a list of the taxable costs. Exhibit 2 was represented to be a copy of a contingency fee contract between the decedent and counsel for the Estate. Exhibit 3 was represented to be a letter from counsel to the Estate informing the Estate that counsel was electing to proceed in a petition for attorney fees and costs under the Act rather than collecting the 40% fee due under the contingency fee contract. However, these three exhibits are not in the record on appeal.

¶ 8 Exhibits 4 through 8 are part of the record on appeal. Exhibit 4 is a copy of the itemized attorney fees asserted by the Estate. Exhibit 5 is a copy of the billing statement of counsel for Rosewood, totaling \$252,029 for over 1,000 hours of work. Exhibit 6 is a copy of "Missouri Bar Economic Survey for 2008, Section II, Workplace Characteristics of Bar Members Practicing Law in 2008," consisting of tables showing average charges for trial work. Exhibit 7 is a list of time entries that counsel stipulated were reasonable, although counsel for Rosewood made clear on the record that he had other legal objections to their being awarded under the Act. Finally, Exhibit 8 is a list of billing entries with those items to which counsel for Rosewood objected at the previous hearing marked with a "D."

¶ 9 Lance Mallon testified that he is an attorney practicing law in Illinois since 1974. His office is currently located in Wood River. He practices personal injury, workers' compensation, and some social security and disability law. Approximately 60 to 70% of his cases involve personal injury. Mr. Mallon testified that he did a considerable amount of work on behalf of the decedent and the Estate prior to referring the case to the

LakinChapman firm as cocounsel. Mr. Mallon attested that his billing records in Exhibit 4 are true and accurate as to the hours he spent on the case. Mr. Mallon testified that although his time entries for letters all state that he spent .2 hours, many were actually longer than that and that he charged .2 of an hour to be "more than fair." Mr. Mallon testified that he charges \$200 per hour for his services and that this rate is a reasonable rate in the legal community for similar services by lawyers with reasonably comparable skills, experience, and reputation. On cross-examination, Mr. Mallon testified that he did not keep contemporaneous time slips for his time and that his billing statements on Exhibit 4 are a reconstruction of his time from looking at his file. Mr. Mallon testified that he has never actually charged anyone an hourly rate to handle a case against a nursing home, as he handles most of these types of cases on a contingency fee basis.

¶ 10 Staci Yandle testified that she is an attorney and has been practicing law since 1987, mainly in the area of personal injury. Ms. Yandle testified that about 60 to 70% of her practice is devoted to nursing home litigation. After testifying at length regarding her education and experience, Ms. Yandle testified that nursing home cases are particularly complex and difficult as compared to other personal injury cases because they must be viewed in light of the complex regulatory system to which the nursing homes are subject. In addition, Ms. Yandle testified that damage issues are complex in nursing home cases because of the underlying medical conditions of patients and the resulting causation issues. According to Ms. Yandle, the present case presented these complexities.

¶ 11 Ms. Yandle testified that she charges \$300 an hour for nursing home cases when she charges under the Act. She testified that she is familiar with the skills and standing of the three attorneys who represented the Estate in this matter and that they are competent and qualified experts in the field of nursing home litigation. She testified that the amount of hours billed for this case was reasonable and customary and that a billable rate of \$300 an

hour is a reasonable rate in the legal community for similar services by lawyers with reasonably comparable skill, experience, and reputation. Ms. Yandle testified that her opinions were given to a reasonable degree of professional certainty.

¶ 12 On cross-examination, Ms. Yandle testified that she has tried one nursing home negligence case to verdict. Her testimony that the 691 hours spent by the attorneys was reasonable is based not on the end result, a \$58,000 verdict, but rather on the nature of these cases in general and the nature of this specific case and the activities performed by the attorneys in terms of the amount of evidence generated. Ms. Yandle testified that although she bills on a contingency basis for this type of case, as did counsel for the Estate, she keeps an hourly bill in the file with contemporaneous time sheets.

¶ 13 Elizabeth Parker testified that she is an attorney and has been practicing law since 2001. She is an associate at the LakinChapman firm practicing exclusively in nursing home litigation and medical malpractice. She testified that her billing records in Exhibit 4 are true and accurate. Craig Jensen testified that he has been a licensed attorney since 1988 and has been practicing exclusively in the area of personal injury since 1996, with the last 8 to 10 years in the areas of nursing home litigation and maritime law. He testified that his billing records in Exhibit 4 are true and accurate. On cross-examination, Mr. Jensen testified that he accepted this case on a contingency basis. He took 29 depositions and requested \$1 million from the jury. The only settlement demand he ever made was for \$850,000, and Rosewood never made an offer. After 21 hours of deliberation, the jury rendered a verdict for \$58,000, which represented medical expenses. The jury awarded nothing for pain and suffering, loss of enjoyment of life, or emotional distress. Mr. Jensen testified, upon court inquiry, that he thought the case was worth a lot more than the verdict. Rosewood put on no direct evidence.

¶ 14 On July 13, 2010, the circuit court entered an order finding the Estate's request for

attorney fees totaling \$175,548 to be reasonable. In the order, the circuit court noted that Rosewood failed to inform the court as to what it believes would be a reasonable award and the Rosewood's attorneys worked over 1430.4 hours in preparing the case and billed approximately \$300,000 in total fees and costs, which was ultimately negotiated to approximately \$200,000. The circuit court found this to be probative of the reasonableness of the Estate's attorney fees and costs and found the testimony of the Estate's attorneys and expert witness, Ms. Yandle, to be credible. The circuit court ordered Rosewood to pay the Estate \$175,548 for attorney fees and \$6,538.41 in taxable costs. On August 11, 2010, Rosewood filed a notice of appeal.

¶ 15

ANALYSIS

¶ 16 We begin our analysis with a statement of the applicable standard of review. Section 3-602 of the Act (210 ILCS 45/3-602 (West 2008)) provides that "[t]he licensee shall pay the actual damages and costs and attorney's fees to a facility resident whose rights *** are violated." "The legislature's use of the term 'shall' indicates the fee shift is mandatory." *Rath v. Carbondale Nursing & Rehabilitation Center, Inc.*, 374 Ill. App. 3d 536, 543 (2007). "Once the trial court makes a determination as to the reasonableness of attorney fees and related costs, that determination will not be disturbed absent an abuse of discretion." *Harris Trust & Savings Bank v. American National Bank & Trust Co. of Chicago*, 230 Ill. App. 3d 591, 595-96 (1992). "Accordingly, we will reverse the amount of attorney fees only if no reasonable person would make the same decision as the trial court." *Shoreline Towers Condominium Ass'n v. Gassman*, 404 Ill. App. 3d 1013, 1024 (2010).

¶ 17 Rosewood's first argument on appeal is that the circuit court abused its discretion in its attorney fee award because it considered improper factors in determining the amount of the award. In general, factors to be considered in determining whether an attorney fee petition is reasonable include: (1) the skill and standing of the attorneys employed, (2) the

nature of the case, (3) the novelty and difficulty of the issues involved, (4) the degree of responsibility required, (5) the usual and customary charge of the same or similar services in the community, and (6) whether there is a reasonable connection between the fees charged and the litigation. *Harris Trust & Savings Bank*, 230 Ill. App. 3d at 595. The purpose of section 3-602 is to encourage private enforcement of and compliance with the Act. *Rath*, 374 Ill. App. 3d at 543. Because the Act establishes a right to fees but is silent as to the manner in which those fees are to be computed, and its purpose is to encourage, where warranted, the bringing of lawsuits by nursing home residents and their representatives, we look to civil rights case law for guidance on the computation of these fees, as such law also acknowledges the need for private sector enforcement of the laws. *Berlak v. Villa Scalabrini Home for the Aged, Inc.*, 284 Ill. App. 3d 231, 240 (1996).

¶ 18 We begin with Rosewood's argument that defense fees in the case were an improper factor for the trial court to consider. We find no error. While the circuit court did state in its order that the defense fees were an indicator of the time and effort required to litigate the case, it also stated that it had reviewed the entire record on the matter, including all pleadings on the motion and exhibits, all arguments and evidence presented at the April 28, 2010, hearing on the motion, and all evidence presented at the May 27, 2010, hearing on the motion, including documents, exhibits, affidavits, and testimony of the Estate's attorneys and its expert on attorney fees. In addition, this court can affirm the circuit court on any basis appearing in the record, regardless of the basis relied upon by the circuit court. *AIDA v. Time Warner Entertainment Co., L.P.*, 332 Ill. App. 3d 154, 158 (2002). Accordingly, the fact that the circuit court considered the amount of fees incurred by the defense is not reversible error in and of itself, and we will review the fee award to determine if the record supports it.

¶ 19 Second, Rosewood argues that the circuit court committed reversible error in failing to consider the contingency fee contract between the Estate and its attorneys, in which

counsel agreed to accept a fee of 40% of the decedent's recovery. While the existence of a contingency fee contract is a relevant factor to be considered in determining the reasonableness of attorney fees, such a contract should not place a ceiling upon fees recoverable by prevailing parties. *Berlak*, 284 Ill. App. 3d at 241 (citing *Lenard v. Argento*, 808 F.2d 1242, 1247 (7th Cir. 1987)). The evidentiary weight to be placed on such a contract should be determined based on whether the nature of the injury, as borne out by the award returned by the jury, would reasonably induce an attorney to represent the plaintiff even without the expectation of statutory attorney fees. *Id.* at 241. "The test[,] in order to be practicable and predictable in its implementation[,] must be an objective one without the illusive complexity of attempting to determine the subjective anticipation of the individual attorney." *Id.* at 241-42.

¶ 20 Here, Rosewood argues that because the Estate asked the jury for \$1 million in damages, the attorneys expected a contingency fee that was amply large to induce them to represent the decedent and/or her Estate without the expectation of statutory attorney fees and that, therefore, the circuit court should have given this factor great evidentiary weight. However, under the objective standard enunciated in *Berlak*, although the Estate's attorneys appear to have dramatically overvalued the case, the damages to the decedent, as borne out by the actual award to the Estate, was so small that the contingent fee would have been nominal and inadequate relative to the effort that such recovery entailed. Accordingly, any failure on the part of the circuit court to consider the contingency fee contract was harmless, since under the facts of this case the existence of this agreement would have had very little relevance. See *Id.* at 242.

¶ 21 Third, Rosewood argues that the circuit court erred in failing to consider the limited success achieved by the attorneys for the Estate. As explained in *Berlak*, while the success achieved by the attorney is a factor that may be properly considered, the proportionality of

the attorney fee award to the amount of recovery is not determinative because to hold otherwise would be to undermine the legislative intent that the attorneys be compensated for all time reasonably expended on a case. *Id.* at 240 (citing *City of Riverside v. Rivera*, 477 U.S. 561, 575-76 (1986) (plurality opinion)). Accordingly, we find no reversible error in the circuit court's purported failure to consider this factor.

¶ 22 We turn now to Rosewood's argument that the circuit court abused its discretion by allowing the Estate's counsel's claimed hourly rates. The Estate's attorneys, Craig Jensen, Elizabeth Parker, and Lance Mallon, submitted their bills at the hourly rates of \$300, \$200, and \$200 respectively. The Estate's attorneys, as well as their retained expert, all testified that these rates were reasonable and customary for nursing home cases in which a statutory fee award is sought. Rosewood did not put on contrary evidence that these rates were not reasonable, usual, and customary. Accordingly, we will not disturb the circuit court's determination that these rates are reasonable.

¶ 23 Finally, we will consider Rosewood's argument concerning the specific items of charges that Rosewood contends were inadequately documented. Rosewood objects to an award of fees based on the records of time spent by Lance Mallon because he testified that he did not maintain contemporaneous time records but, rather, recreated his time sheets by reviewing his file. Noting that the matter of fixing attorney fees is one of the few areas in which the trial judge may rely on the pleadings, affidavits on file, and his own experience, our appellate courts have held that the failure to keep contemporaneous time records does not bar an award of attorney fees. See, e.g., *Van Fleet v. Van Fleet*, 50 Ill. App. 3d 172, 176 (1977). The same is true regarding Rosewood's argument that certain items, such as "trial preparation" and "discovery review," were insufficiently detailed. "Evidence of the actual number of hours spent by the attorney is relevant, but the failure of the attorney to keep time records does not negate the reasonableness of the fee award." *Kirkpatrick v. Strosberg*, 385

Ill. App. 3d 119, 139 (2008).

¶ 24 The circuit court can use its own knowledge and experience to assess the time required to complete particular activities, including whether it observed the progression of the case and the research involved. *Id.* at 139. Because the common law record and report of proceedings for all dates prior to the motion for fees and costs is not part of the record on appeal, we must presume that the circuit court's evaluation of what was involved to prosecute this case to verdict was accurate. See *Reed v. Hoffman*, 48 Ill. App. 3d 815, 819 (1977) ("The appellant must furnish a record sufficient to establish reversible error [citation], and any doubt arising from the incompleteness of the record will be resolved against the appellant.") For these reasons, we cannot say that the circuit court abused its discretion in finding that the amount of time the Estate's attorneys claimed to have spent in review of discovery and preparation for trial was reasonable.

¶ 25

CONCLUSION

¶ 26 For the foregoing reasons, the July 13, 2010, order of the circuit court of Madison County, which awarded the Estate \$175,548 in attorney fees and \$6,538.41 in costs pursuant to section 3-602 of the Act (210 ILCS 45/3-602 (West 2008)), is affirmed.

¶ 27 Affirmed.