

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM MICHIGAN COURT OF APPEALS
Whitbeck, C.J., Sawyer and Jansen, J.J.

KEVIN SMITH,

Plaintiff/Appellee,

v

LOUIE KHOURI, D.D.S. AND
LOUIE KHOURI, D.D.S., P.C. and
ADVANCE DENTAL CARE CLINIC, L.L.C.,
Jointly and Severally,

Defendants/Appellants.

Supreme Court No. 132823

Court of Appeals No. 262139

Lower Court No. 03-047984-NH

**BRIEF OF AMICUS ATTORNEY GENERAL MICHAEL A. COX IN SUPPORT OF
DEFENDANTS-APPELLANTS' POSITION ON APPEAL**

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INTRODUCTION

This case presents an opportunity for this Court to clarify the parameters of a reasonable attorney fee. More specifically, it explores whether the hourly fee customarily charged in the locality for similar services should form the basis for the reasonableness inquiry, and whether specialized knowledge and other factors—such as the complexity of the case, excellent advocacy, a successful result, and a contingency fee agreement—warrant an hourly rate that exceeds the range of prevailing rates in the locality, as set forth in accepted empirical data. The resolution of these questions will have a significant practical effect on the State, which may be required to pay attorney fees to a prevailing plaintiff who has argued that these factors warrant a fee that exceeds prevailing local rates. Therefore, the Attorney General seeks amicus status to brief these questions.

When this Court granted Defendants' leave to appeal the November 16, 2006 judgment of the Court of Appeals in *Smith v Khouri*, it limited the issue on appeal to whether, under the factors set forth in *Wood v DAIIE*,¹ the trial court abused its discretion in awarding \$65,556 in attorney fees on the basis of \$450 and \$275 hourly rates. This Court further instructed that special attention should be given to: 1) whether the trial court evaluated all factors relevant to the determination of a reasonable fee; 2) whether the trial court applied such factors to all the attorneys involved; 3) whether in particular the trial court properly applied factors pertaining to the fees customarily charged in the locality for similar legal services, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services; 4) whether it is relevant to consider the proportionality between the amount of attorney fees and the award of damages; and 5) whether, if the plaintiff retained his attorneys pursuant to a contingent fee

¹ *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982).

agreement, this fact should affect the calculation of reasonable attorney fees on the basis of hourly rates. This amicus brief addresses each of these questions.

In *Wood*, this Court adopted the factors for determining a reasonable attorney fee that had been previously articulated by the Court of Appeals in *Crawley v Schick*,² and applied them to the no-fault insurance scheme. Although the prevailing rate in the locality was not articulated in *Crawley*, the *Wood* Court recognized that the *Crawley* factors are only among those factors to be taken into consideration in determining the reasonableness of a fee. Even after *Wood*, both this Court and the Michigan Court of Appeals have considered Michigan Rule of Professional Conduct (MRPC) 1.5(a) when determining what constitutes reasonable attorney fees. The MRPC 1.5(a) factors include consideration of the fee customarily charged in the locality for similar legal services.

The United States Supreme Court has held that a reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant community. This determination is made by assessing the experience or skill of the prevailing party's attorneys and comparing their rates to the prevailing rates in the community for similar services by lawyers of reasonably comparable skill, reputation, and experience. The Supreme Court has also repeatedly held that the novelty and complexity of the issues, the special skill and experience of counsel, and the results obtained from the litigation are presumably reflected in the lodestar amount (number of hours reasonably expended on the litigation times a reasonable hourly rate) and, therefore, cannot serve as an independent basis for increasing the lodestar. Moreover, the United States Supreme Court and our State courts have held that where a statute mandates a reasonable attorney fee, the purpose of the statute should be considered. Remedial statutes, and court rules

² *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973).

such as the one that governs the mediation sanction at issue here, are not generally designed to produce a windfall for attorneys, or even to compensate them at the highest rate they might otherwise command. Finally, the United States Supreme Court has warned that attorney fees should not spawn a second litigation, underscoring the reasonableness of awarding fees within generally accepted empirical data.

Our highest Court's analysis should guide Michigan courts' analysis of relevant factors regarding the reasonableness of attorney fees. In every attorney fee case where reasonable attorney fees are mandated, Michigan Courts should consider the fee customarily charged in the locality for similar services, as set forth in empirical data such as the customary fee ranges presented in the State Bar of Michigan Economics of Law Practice survey. By using this data, our State courts will be in accord with the United States Supreme Court, will avoid added litigation over attorney fees, will assist attorneys in complying with MPRC 1.5, and will ensure that even the most skilled and specialized attorney are reasonably compensated.

ARGUMENT

I. Customary rates in the prevailing community should be considered in determining a reasonable attorney fee, and the trial court abused its discretion by not properly considering this factor.

An award of attorney fees will be upheld unless it appears on appellate review that the trial court's finding on the reasonableness issue was an abuse of discretion.³ An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes.⁴ When the reasonableness of a fee request is challenged, the trial court must generally conduct an evidentiary hearing⁵ and is required to make findings of fact.⁶ The party seeking attorney fees has the burden of proving that the request for attorney fees is reasonable.⁷

There are over 100 separate statutes that provide for the award of attorney's fees; while these provisions vary as to context and causes of action, the benchmark for fee awards under nearly all of these statutes is that the attorney fees must be "reasonable."⁸ Reasonable attorney fees are not necessarily equivalent to the actual fees charged.⁹

The United States Supreme Court has consistently looked to the marketplace as its guide to what is "reasonable."¹⁰ In *Blum v Stenson*, a case involving the reasonable fee to be accorded nonprofit legal service organizations under § 1988, and again in numerous more recent cases, the Supreme Court held that, generally, a reasonable hourly rate is to be calculated according to

³ *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982).

⁴ *Radeljak v Daimler Chrysler, Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

⁵ *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999).

⁶ *Miller v Meijer, Inc*, 219 Mich App 476, 480; 556 NW2d 890 (1996).

⁷ *In re O'Neill Estate*, 168 Mich App 540, 543; 425 NW2d 133 (1988).

⁸ *Pennsylvania v Delaware Valley Citizens' Council for Clean Air*, 478 US 546, 561-62; 106 S Ct 3088; 92 L Ed 2d 439 (1986).

⁹ *McPeak v McPeak*, 233 Mich App 483, 497; 593 NW2d 180 (1999).

¹⁰ *Missouri v Jenkins*, 491 US 274, 285-286; 109 S Ct 2463; 105 L Ed 2d 229 (1989) rev'd on other grounds 515 US 701 115 S Ct 2038; 132 L Ed 2d 63 (1995).

prevailing market rates in the relevant community.¹¹ The Court instructed that this determination is made by assessing the experience and skill of the prevailing party's attorneys and comparing their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.¹² *Blum* also limited the factors that may be considered in determining whether to make adjustments to the lodestar approach (number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate) first articulated by the Court in *Hensley v Eckerhart*.¹³ As discussed more fully in Argument II below, specialized knowledge, the novelty and difficulty of the case, the results obtained, and the excellence of advocacy are already represented in customary fee ranges and should not form a basis for an upward adjustment.¹⁴

Prior to *Blum*, the Supreme Court in *Hensley* adopted a hybrid approach¹⁵ that combined elements of the twelve factors employed by the Fifth Circuit in *Johnson v Georgia Highway Express, Inc*¹⁶ (the *Johnson* factors) and widely followed by other courts,¹⁷ and the Third Circuit's "lodestar" method, which involved first multiplying hours spent by a reasonable hourly rate and then making any necessary adjustments to this figure based factors such as the quality of the work, the complexity of the issues, and the result obtained.¹⁸ Even in *Hensley*, the Court noted that many of the *Johnson* factors, which include the novelty and difficulty of the issue, the

¹¹ *Blum v Stenson*, 465 US 886, 895; 104 S Ct 1541; 79 L Ed 2d 891 (1984).

¹² *Blum*, 465 US at 895.

¹³ *Hensley v Eckerhart*, 461 US 424, 433; 103 S Ct 1933; 76 L Ed 2d 40 (1983).

¹⁴ *Delaware Valley Citizens' Council*, 478 US at 565.

¹⁵ *Delaware Valley Citizens' Council*, 478 US at 564 (discussing *Hensley v Eckerhart*).

¹⁶ *Johnson v Georgia Highway Express, Inc*, 488 F2d 714 (CA 5, 1974).

¹⁷ See *Delaware Valley Citizens' Council*, 478 US at 562.

¹⁸ See *Lindy Bros Builders, Inc of Philadelphia v American Radiator & Standard Sanitary Corp*, 487 F2d 161, 167 (CA 3, 1973).

skill required,¹⁹ *the customary fee*, the results obtained, and *awards in similar cases*, were already "subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate."²⁰ The Court further refined its views in *Blum*, reaffirming the use of the lodestar, but clarifying that the resulting calculation was not just a "rough guess" or an "initial approximation."²¹ Rather, the resulting calculation was presumed to be the reasonable fee.²²

The United States Supreme Court has also been careful to take into consideration the purpose of an applicable statute in awarding a reasonable attorney fee. For example, in *Pennsylvania v Delaware Valley Citizens' Council for Clean Air*, the Court explained the remedial nature of fee-shifting statutes²³:

These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intend to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws.

This analysis should form the basis for any State court's inquiry into the reasonableness of attorney fees. At a minimum, it compels State courts to consider prevailing market rates in the relevant community in every case where a statute or, as here, a court rule, mandates

¹⁹ *Johnson*, 488 F2d at 717-719 (factors taken from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106 (1980)).

²⁰ *Hensley*, 461 US at 434, n 9 (emphasis added); see also, *Jenkins*, 491 US at 285-286 (a reasonable attorney's fee is one that grants the successful civil rights plaintiff a "fully compensatory fee," (citing *Hensley*, 461 US at 435) comparable to what "is traditional with attorneys compensated by a feepaying client." (citing S. Rep. No. 94-1011, p. 6 (1976)).

²¹ *Delaware Valley Citizens' Council*, 478 US at 565 (citing *Blum*, 465 US at 897).

²² *Delaware Valley Citizens' Council*, 478 US at 565 (citing *Blum*, 465 US at 897).

²³ *Delaware Valley Citizens' Council*, 478 US at 565 (emphasis added). See also, e.g., *In re Krueger Estate*, 176 Mich App 241; 438 NW2d 898 (1989) (The probate court must review a petition for attorney fees for reasonableness with an eye toward preservation of the estate's assets for the beneficiaries). But compare *Detroit v J Cusmano & Son, Inc*, 184 Mich App 507, 511 (1989) (Legislative intent of MCL 213.51 *et seq*, the Uniform Condemnation Procedures Act, is to place a property owner in as good a position as was occupied before the taking).

reasonable attorney fees, and to weigh carefully any decision to exceed those market rates. Consideration of accepted empirical data regarding local rates not only supports the purpose of remedial statutes and court rules but also supports the Supreme Court's repeated warnings that a "request for attorney's fees should not result in a second major litigation."²⁴ Attorney fees in excess of the prevailing local rates for similar services, especially those in excess of the upper end of local rates based on "special skill," experience, or results obtained rather than on an unusual circumstance, are far more likely to produce further litigation over attorney fees.

When this Court in *Wood v DAIIE*²⁵ was faced with determining whether the amount of attorney fees was "reasonable," it adopted the guidelines articulated by the Michigan Court of Appeals in *Crawley v Schick*²⁶ and applied them to the no-fault insurance scheme.²⁷ The *Crawley* guidelines are: 1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and, (6) the nature and length of the professional relationship with the client.²⁸ Although these guidelines do not include the customary local fee, this Court made clear that the *Crawley* guidelines are only among the factors to be considered in

²⁴ See, e.g., *Hensley*, 461 US at 437 (avoiding an interpretation of the fee-shifting statutes that would have "spawned a second litigation of significant dimension"); *Buckhannon Bd & Care Home v W Va Dep't of Health & Human Res*, 532 US 598, 604; 121S Ct 1835; 149 L Ed 2d 855 (2001) (accord); *Texas State Teachers Assn v Garland Indep Sch Dist*, 489 US 782, 791; 109 S Ct 1486; 103 L Ed 2d 866 (1989) (accord).

²⁵ *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982).

²⁶ *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). But see, *Maple Hill Apt Co v Robert W Stine*, 147 Mich App 687; 382 NW2d 849 (1985) (citing *In re L'Esperance Estate*, 131 Mich App 496; 346 NW2d 578 (1984) (holding that the *Crawley* guidelines should be followed only when a statute or court rule is silent on the method by which reasonable fees are to be determined).

²⁷ *Wood*, 413 Mich at 588.

²⁸ *Crawley*, 48 Mich App at 737 (citing 3 Michigan Law & Practice, Attorneys and Counselors, § 44, p 275, and Disciplinary Rule 2-106(B) of the Code of Professional Responsibility and Ethics).

determining the reasonableness of a fee, and noted that there is no precise formula for computing reasonableness.²⁹

Even after *Wood*, this Court has held that the factors to be considered when determining what constitutes reasonable attorney fees are listed in Michigan Rule of Professional Conduct (MRPC) 1.5(a).³⁰ The Court of Appeals, too, has held that a trial court may also consider the factors listed MRPC 1.5(a)³¹ and is required to consider them in certain types of cases, such as condemnation cases.³² The MRPC 1.5(a) reasonableness factors currently include consideration of the fee customarily charged in the locality for similar legal services³³:

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) *the fee customarily charged in the locality for similar legal services*;
- (4) the amount involved and the results obtained;

²⁹ *Wood*, 413 Mich at 588 (citing *Crawley*, 48 Mich App at 737).

³⁰ See, e.g., *Michigan Tax Management Servs Co v Warren*, 437 Mich 506, 512; 473 NW2d 263 (1991).

³¹ *RCO Engineering, Inc v ACR Indus, Inc*, 235 Mich App 48, 67; 597 NW2d 534 (1999) (vacated in part and on other grounds by 463 Mich 893; 618 NW2d 769 (2000) (quoting *Jordan v Transnat'l Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995) (holding that the factors to be considered when determining what constitutes reasonable attorney fees under MCR 2.403(O)(6) are listed in Michigan Rules of Professional Conduct 1.5); *Smith v Khouri*, unpublished opinion per curiam of the Michigan Court of Appeals, No 262139, 2006 Mich App LEXIS 3393, at 15 (November 16, 2006).

³² See *Dep't of Transportation v D & T Construction Co*, 209 Mich App 336, 341-342; 530 NW2d 183 (1995) (mandating that the MPRC 1.5(a) factors must be considered in a condemnation case); *In re Condemnation of Property (Dep't of Transportation v D & T Construction Co*, 209 Mich App 336; 530 NW2d 183 (1995) (holding that the court was required to consider the eight factors listed in MRPC 1.5(a) in determining the reasonableness of fees under the Uniform Condemnation Procedures Act, MCL 213.51 *et seq.*).

³³ Mich Rules of Prof Conduct (MRPC) 1.5(a)(1-8) (emphasis added).

- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

The Rules of Professional conduct are promulgated by this Court³⁴ under its authority to "provide for the organization, government, and membership of the State Bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members."³⁵ Attorneys in Michigan must conduct themselves at all times in conformity with the standards imposed on members of the bar as a condition of the privilege to practice law, including the rules of professional responsibility.³⁶ This Court has held that the weight to be given these factors requires the exercise of discretion by the trial court.³⁷

Both the MRPC 1.5(a) and *Crawley* factors are consistent with the Supreme Court's analysis in *Blum*. *Blum* does not strip the trial court of its discretion to weigh a variety of factors in determining a reasonable fee, but rather, offers additional guidance as to how our State courts should exercise their discretion in weighing these relevant factors. As *Blum* instructs, many of the relevant factors, including those articulated in *Crawley*, are already subsumed within factor three of MRPC 1.5(a)—the fee customarily charged in the locality for similar legal services. Therefore, State court analysis is consistent with Supreme Court analysis when it considers prevailing market rates as the basis for the reasonableness inquiry and recognizes that many otherwise relevant factors are already accounted for within the customarily-charged ranges indicated in accepted empirical data.

³⁴ *Morris v Doherty, PC v Lockwood*, 259 Mich App 38; 672 NW2d 884 (2003) (citing *Grievance Administrator v Underwood*, 462 Mich 188, 193; 612 NW2d 116 (2000)).

³⁵ *Morris*, 259 Mich App at 45 (quoting MCL 600.904).

³⁶ *Morris*, 259 Mich App at 48 (quoting MCR 9.103(A) ("license to practice law in Michigan")).

³⁷ *Dep't of Transp v Randolph*, 461 Mich 757, 766 n 11; 610 NW2d 893 (2000).

- A. The trial court abused its discretion by not properly considering prevailing local rates for Mr. Gittleman, and by not undertaking an adequate, independent evaluation of the qualifications of Tashman, Goldstein, or Tracie Gittleman and then applying the prevailing local rates appropriately.

Defendants in this case did not contest Plaintiff's entitlement to an award of attorney fees as a case evaluation sanction, but argued that the hourly fees of \$450 and \$275 were excessive. (Defs' Application for Leave to Appeal, p 21; Court of Appeals Br, p 27.) They further argued that the State Bar of Michigan's *Snapshot of the Economic Status of Attorneys In Michigan* (November 2003) indicates that the range of billing for equity partners in litigation practice is from \$100 to \$350 per hour with a median rate of approximately \$200 per hour; the median rate for non-equity partners is \$200 per hour; and, the median rate for associates is \$150 per hour. (Def's Court of Appeals Br, Exhibit C.) Despite this data, the trial court awarded Mr. Gittleman and Tashman \$450 an hour, and Goldstein and Tracie Gittleman \$275 an hour; the Michigan Court of Appeals affirmed these hourly rates.

Although this Court has held that a trial court need not detail its finding as to *each* specific factor considered, the trial court abused its discretion:

- by not considering the State Bar survey of local market rates as a basis for determining a reasonable hourly fee for Robert Gittleman;
- by not considering that Mr. Gittleman's special skill and professionalism, and the results obtained, would already be accounted for in the upper range of the local rates; and,
- by not conducting a sufficient factual inquiry into the professional standing, expertise, and experience of Tashman, Goldstein and Tracie Gittleman, and then applying the State Bar of Michigan data accordingly.

1. Robert Gittleman.

In discussing a reasonable hourly rate for Mr. Gittleman, the trial court applied the *Crawley* factors and based its award of his \$450 hourly fee on the fact that³⁸:

Mr. Gittleman's [sic] a recognized practitioner in the area of dental malpractice and has superlative standing in that area, has tried numerous cases. His skill, time and labor involved here was evidence [sic] from the professional way in which this case was tried. The amount in question, the results achieved . . . that was significant. . . . There were significant expense [sic] incurred based on my review of the billing and taking all of those factors into account, I think that the \$450 rate is reasonable.

This analysis does not mention the billing range for local attorneys, let alone compare the \$450 fee to local rates. Although the Court of Appeals considered the prevailing rates in the community, it reasoned³⁹:

We are mindful of defendant's claim that the amount of the trial court's award should be reduced to reflect the median rates charged by litigation attorneys in the community," and recognized that "it is important to utilize empirical data in determining a reasonable hourly rate," nevertheless held that "it is equally important to consider the experience of the attorneys, the difficulty of the issues, and the skill, time, and labor involved in the case.

The trial court also took "judicial notice of the fact that senior trial practitioners do bill on an hourly rate earned for their trial activities in the area of 450 dollars or more in this locale and therefore the Court does believe the rate is reasonable." (Pls' Br Opposing Defs' Application for Leave to Appeal, citing trial transcript, pp 23-33.) The Court of Appeals further held that "[t]here was evidence that courts of this state have consistently awarded Smith's attorneys with hourly rates greater than the \$150 advocated by defendants' comparison between this case and *Zdrojewski [v Murphy]*, 254 Mich App 50, 73; 657 NW2d 721 (2002)]."⁴⁰

³⁸ *Khoury*, No 262139 at *16-17 (quoting trial court transcript).

³⁹ *Khoury*, No 262139 at *17-18.

⁴⁰ *Khoury*, No 262139 at *18.

Applying the United States Supreme Court's analytical framework discussed above, Mr. Gittleman's experience in dental litigation, the difficulty of a dental malpractice case, the skill, time and labor involved in the case and the results obtained, are subsumed within customarily-charged local fees. While these qualifications may justify an award on the upper end of the range of fees customary among experienced litigation attorneys, they should not form the basis for an award that exceeds the fee customarily charged in the locality for similar services. Moreover, the fact that *some* senior trial practitioners may bill at an hourly rate of \$450 or more in this locale, does not make that rate reasonable, especially since the mediation sanction of MCR 2.403(O)(6)(b) is a remedial measure and not designed to compensate attorneys at the highest rate possible. Undoubtedly, some senior practitioners bill at a rate that would leave "a lawyer of ordinary prudence" with "a definite and firm conviction that the fee is in excess of a reasonable fee,"⁴¹ in contravention of MRPC 1.5(a).

The isolated cases submitted by Plaintiff's attorney as evidence of the reasonableness of the hourly rate of \$450 are also insufficient to demonstrate the reasonableness of Mr. Gittleman's rate. Plaintiff relies on testimony offered by Mr. Alan May before Oakland County Circuit Court Judge Jessica R. Cooper in *Kraft v Lepczyk*, No. 85-2900666 NM. According to Plaintiff, Mr. May testified that in 1985, Mr. Gittleman's services were worth more than \$300 per hour, in comparison to the average hourly rate of \$135 for a trial lawyer trying an average case before a jury in Oakland County. (Pl's Brief in Opposition to Leave to Appeal, Exhibit E.) Plaintiff fails to mention that although he requested a \$300 hourly rate in that case, citing *Crawley* and arguing that it was a reasonable attorney fee in the case, the judge found that \$200 per hour "adequately compensates plaintiff for the added expense necessitated by defendant's rejection of the

⁴¹ MRPC 1.5(a).

mediation evaluation, and includes consideration for counsel's skill, the difficulty of the case, and the results achieved." (Pl's Br in Opposition to Leave to Appeal, Exhibit E, trial court opinion, p 4.)

Additionally, Plaintiff argues that in 1998 Mr. Gittleman was awarded \$300 an hour in *Walter v Brockreide*, a Genesee County dental malpractice case. (Pl's Brief in Opposition to Leave to Appeal, Exhibit C.) Plaintiff did not, however, submit any analysis from the court indicating the basis for this award, merely a court order awarding the total amount of costs and fees. (Exhibit C.) Similarly, Plaintiff submits evidence that in 2004 Mr. Gittleman was awarded an hourly rate of \$400 by the Honorable Gene Schnelz, presiding in Oakland County Circuit Court, after a dental malpractice jury trial in *Nowak v Gantz*, No. 02-038692 NH. (Pl's Brief in Opposition to Leave to Appeal, Exhibit G.) But again, Plaintiff submitted only the judgment for the total attorney fee, absent any analysis to support this jury award. The point here is that even if there had been analysis in these few isolated cases, it does not establish that \$450 was a generally accepted fee for a dental malpractice case in the locality. Nor does it support an overarching policy of awarding a fee that exceeds generally accepted fee ranges based on "special skill."

The trial court also abused its discretion in not taking into consideration the nature and purpose of MCR 2.403(O)(6)(b), which is the court rule that governs reasonable attorney fees in this case. The purpose of MCR 2.403(O)(6)(b) is to impose a mandatory sanction⁴² on a party who has rejected an evaluation, by requiring that the rejecting party pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation

⁴² MCR 2.403(O)(1) and (6); *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129-130; 573 NW2d 61 (1997).

evaluation.⁴³ "Actual costs" include a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation.⁴⁴ The attorney fee to which a plaintiff is entitled is "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation."⁴⁵ The overall purpose of the mediation rule is to encourage settlement and deter protracted litigation. The purpose behind the mediation sanction rule is to place the burden of litigation costs upon the party that requires a trial by rejecting a proposed mediation award.⁴⁶ The mediation rule is not designed to be a windfall for the prevailing attorney, or to compensate him or her at the highest price he or she can command. Nor should it lead to protracted litigation over attorney fees.

2. Tashman, Goldstein, and Tracie Gittleman.

In an attorney fee issue, where any of the underlying facts are in dispute, the trial judge should make findings of fact on those issues prior to awarding attorney fees.⁴⁷

The trial court awarded an hourly fee of \$450 to Michael Tashman and an hourly fee of \$275 to Goldstein and Tracie Gittleman, even though, as the Court of Appeals acknowledged, "the trial court did not specifically address the professional standing and experience of each of the other three attorneys, in granting the entire amount of attorney fees requested by Smith. . ."⁴⁸ It merely "acknowledged the complexity of dental malpractice actions, as well as the skill, time,

⁴³ *Brown v Frankenmuth Mut Ins Co*, 187 Mich App 375; 468 NW2d 243 (1991).

⁴⁴ MCR 2.403(O)(6); *Michigan Basic Property Ins Ass'n v Hackert Furniture Distributing Co*, 194 Mich App 230, 234 (1992).

⁴⁵ MCR 2.403(O)(6)(b).

⁴⁶ *Michigan Basic Property Ins*, 192 Mich App at 153 (citing *Bien v Venticinque*, 151 Mich App 229, 232; 390 NW2d 702 (1986)).

⁴⁷ *Maple Hill Ap't Co*, 147 Mich App at 693 (1985) (citing *Desender v De Meulenaere*, 12 Mich App 634; 163 NW2d 464 (1968)).

⁴⁸ *Khoury*, No 262130 at *17.

and cost expended to obtain the favorable verdict in the instant case."⁴⁹ The Court of Appeals further reasoned that although it was "mindful of defendant's claim that the amount of the trial court's award should be reduced to reflect the median rates charged by litigation attorneys in the community," and felt it "important to utilize the empirical data in determining a reasonable hourly rate," it was "equally important to consider the experience of the attorneys, the difficulty of the issues, and the skill, time, and labor involved in the case." The court further indicated that the State Bar of Michigan data submitted by Defendants "does not reflect the range of hourly rates charged by attorneys who specialize in certain types of complex litigation, such as dental malpractice. The attorneys involved in the case were recognized specialists."⁵⁰

Although this Court held in *Wood* that a trial court "need not detail its findings as to *each* specific factor considered," the trial court abused its discretion by not making sufficient independent findings of fact as to Tashman, Goldstein, or Tracie Gittleman. As the Court of Appeals noted, the trial court did not adequately address the professional standing and experience of these three attorneys, let alone any special skill in dental litigation that would qualify them as "recognized specialists." On these sparse facts and without adequate independent investigation, a fee award in the upper range of the local rates would have been an abuse of discretion, and most certainly, the trial court abused its discretion in awarding fees to these three attorneys in excess of the empirical data submitted by Defendants. Even assuming *arguendo* that Mr. Gittleman is entitled to a \$450 hourly fee for his special knowledge and extensive experience in dental litigation, the trial court could not assume that Tashman, Goldstein, or Tracie Gittleman possessed a similar level of specialty knowledge or experience in

⁴⁹ *Khouri*, No 262130 at *17.

⁵⁰ *Khouri*, No 262130 at *18.

dental litigation and, thus, command fees in excess of the fees customarily charged in the locality.

Plaintiff has indicated that Michael Tashman billed only six hours of attorney fees in performing a particular doctor's deposition. (Pl's' Court of Appeals' Brief, p 34.) A paucity of hours, however, does not justify an excessive hourly rate. Plaintiff also argues that Tashman has tried many cases, including dental malpractice cases, and received favorable verdicts. (Pl's Br Opposing Leave to Appeal, p 38.) While Tashman appears to be an experienced and successful attorney, this information tells precious little about the extent of Tashman's skill and experience in dental malpractice cases, or how his qualifications and experience compare to Mr. Gittleman's. As to Goldstein and Tracie Gittleman, Plaintiff argues cursorily that they are entitled to "\$275 per hour for their work and research. . ." because "Lori Goldstein also tried this case with Mr. Gittleman and Tracie Gittleman has been in practice since 1991" and has tried numerous cases successfully. (Pl's Br Opposing Leave to Appeal, p 38.) This sparse explanation does not justify an hourly rate that exceeds the range of fees customarily charged in the relevant locality for similar services. Nor does the proximity of these attorneys to Mr. Gittleman automatically entitle them to a higher hourly rate.

II. Specialized knowledge, the novelty and difficulty of the case, the results obtained, and the excellence of advocacy are already represented in the customary local rates and do not warrant hourly rates that exceed the range of prevailing rates in the locality.

The trial court based the award of \$450 to Mr. Gittleman in part on the fact that "Mr. Gittleman's [sic] a recognized practitioner in the area of dental malpractice and has superlative standing in that area, has tried numerous cases."⁵¹ As noted previously, the trial court did not

⁵¹ *Smith v Khouri*, No 262130 at *16-17 (quoting trial court opinion) (emphasis added).

indicate that Tashman, Goldstein, or Tracie Gittleman had any particular skill or extensive experience in dental litigation.

A. United States Supreme Court case law precedent does not support an excessive hourly fee based on special skill.

The Supreme Court specifically held in *Blum* that "the novelty [and] complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" from the litigation are presumably fully reflected in the lodestar amount.⁵² Since a reasonable hourly rate is to be calculated according to prevailing market rates in the relevant community, and since this calculation is made by assessing the experience and skill of the prevailing party's attorneys and comparing their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation,⁵³ it follows logically that special skill, experience, excellent advocacy, and the results obtained are all presumably reflected in a rate that falls within the prevailing market rates. The *Blum* Court also indicated that upward adjustments of the lodestar figure are proper "only in certain 'rare' and 'exceptional' cases, supported by both specific evidence' on the record and detailed findings by the lower courts."⁵⁴

Moreover, in *Delaware Valley Citizens' Council for Clean Air*, the Court further explained the rationale behind why the lodestar figure includes most, if not all, of the relevant factors that constitute a reasonable attorney's fee⁵⁵:

[W]hen an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests. Calculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable

⁵² *Delaware Valley Citizens' Council*, 478 US at 565 (quoting *Blum*, 465 US at 898-900).

⁵³ *Blum*, 465 US at 895.

⁵⁴ *Delaware Valley Citizens' Council*, 478 US at 565 (quoting *Blum*, 465 US at 898-901).

⁵⁵ *Delaware Valley Citizens' Council*, 478 US at 565-566.

hourly rate, thus adequately compensates the attorney, and leaves very little room for enhancing the award based on his post-engagement performance.

Applying *Blum* and *Delaware* to this case, Mr. Gittleman's standing and experience in the dental malpractice area, as well as the time and labor involved in the case, the complexity of the issues involved, and the results achieved, would all presumably be accounted for in a rate that falls within the prevailing market rates as represented by the well-accepted data from the State Bar of Michigan. Where a local attorney possesses superior knowledge, expertise, or experience, it seems reasonable to compensate that attorney at the upper end of the range of fees customarily charged, in comparison to those who possess requisite skill and do an adequate job of representing the client, and might only be compensated in the middle of the range of fees customarily charged in the locality. A range logically encompasses low achieving, average, and superior attorneys and skill levels. But to additionally compensate attorneys for superior attributes nullifies this logic by assuming that those at the top end of the range have only average skill or are working on a case with no complex or novel issues. Mr. Gittleman's special skill in dental litigation is simply not an adequate basis for a fee award beyond the upper end of the fees customarily charged in the locality. Further, Mr. Gittleman agreed to use his skill and experience to the best of his ability when he accepted this case, and therefore, the results he obtained do not entitle him to an award in excess of fees customarily charged in the locality for similar services. This is simply not a "rare and exceptional case" where a court should award such excessive fees.

Cases from this State have been clear that reasonable fees are not equivalent to actual fees charged.⁵⁶ The State Bar of Michigan Economics of Law Practice survey has often aided

⁵⁶ See, e.g., *Zdrojewski v Murphy*, 254 Mich App 50; 657 NW2d 721 (2002) (citing *Cleary*, 203 Mich App at 212).

both Michigan courts and federal courts in their inquiry into what constitutes a reasonable fee.⁵⁷

According to the most recent State Bar of Michigan Economics of Law Practice survey, the median hourly billing rate was \$150 for law offices in Lansing, as well as for attorneys with 10-14 years of practice. The median hourly billing rate for firms with over 100 attorneys was \$250.⁵⁸ Based on that data, and the nature of the fee award as a mediation sanction, Mr.

Gittleman's hourly fee of \$450 is excessive.

- B. "Special skill" is not the type of unusual circumstances under which federal courts typically award hourly fees above those customary in the locality.

The Sixth Circuit, too, has recognized that reasonable rates are not necessarily those commanded by a particular attorney. In the context of § 1988 cases, the Sixth Circuit has held that reasonable fees are "different from the prices charged to well-to-do clients by the most noted lawyers and renowned firms in a region."⁵⁹ In *Gratz v Bollinger*, a case involving a challenge to the University of Michigan's admission policy, the federal district court used empirical data from the State Bar of Michigan Economics of Law Survey and, accordingly, allowed an attorney range

⁵⁷ See, e.g., *Temple v Kelel Distrib Co*, 183 Mich App 326, 332; 454 NW2d 610 (1990) (on remand, directing the lower court to use the empirical data in the State Bar of Michigan 1988 Economics of Law Practice survey, 67 Mich B J NO 11B, in determining a reasonable hourly or daily rate for purposes of the mediation rule); *Sutherland v Kennington Truck Servs*, unpublished opinion per curiam of the Court of Appeals, No 225034, 2002 Mich App LEXIS 78 (2002) (concluding that the trial court did not abuse its discretion in calculating a reasonable fee of \$175 per hour and noting that the court was referred to statistics from the 1997 Desktop Reference on the Economics of Law Practice in Michigan, 76 Mich BJ 1312-1313 (December, 1997)); *Borgess Med Ctr v Resto*, 273 Mich App 558, 582; 730 NW2d 738 (2007) (relying on data from the 2003 State Bar of Michigan Economics of Law Practice survey submitted by both parties); see also *Michigan Basic Property Ins Ass'n v Hackert Furniture Distrib Co*, 194 Mich App 230, 234; 486 NW2d 68 (1992) (holding that a trial court may properly consider the "locality" of a cause of action in determining a reasonable fee, and that although defendants' attorney could command \$150 per hour fee in the eastern part of the state, \$125 per hour was more appropriate in Kent County). See also, e.g., *Gratz v Bollinger*, 353 F Supp 2d 929, 948 (ED MI 2005) (costs and fees proceeding following Supreme Court disposition, 539 US 244 (2003)).

⁵⁸ 2003 State Bar of Michigan Economics of Law Practice Survey. The State Bar of Michigan has indicated that it expects to complete an updated survey by December, 2007.

⁵⁹ *Coulter v Tennessee*, 805 F2d 146, 149 (CA 6, 1989).

of \$188 to \$290 in 2004, despite the complexity and notoriety of the case.⁶⁰ In *Adcock-Ladd v Secretary of Treasury* too, the Sixth Circuit indicated that the lodestar is the hours reasonably expended multiplied by the court-ascertained reasonably hourly rate.⁶¹ Although the Sixth Circuit has held that the trial judge may, within limits, adjust the "lodestar" to reflect relevant considerations peculiar to the subject litigation,⁶² that Court followed the guidance of the United States Supreme Court in limiting these upward adjustments to unusual circumstances.⁶³

For example, the court reversed the district court's application of reasonable hourly fees at the situs of the lawsuit and instead applied an out-of-town District of Columbia firm's rates as the prevailing market rate because the plaintiff was required to depose a Washington bureaucrat in Washington, D.C.⁶⁴ But, the Court articulated the general principle that where a party voluntarily elects to represent a party in a case that will be litigated in a foreign jurisdiction rather than the lawyer's residence, local market rates should apply because that lawyer can reject the commission if he deems the customary local fee standards within the forum court's jurisdiction to be unattractive.⁶⁵ Generally speaking, "judges may question the reasonableness of an out-of-town attorney's billing rate if there is reason to believe that competent counsel was readily available locally at a lower charge or rate."⁶⁶

⁶⁰ See *Gratz*, 353 F Supp 2d at 948.

⁶¹ *Adcock-Ladd v Sec'y of Treasury*, 227 F3d 343, 349 (CA 6, 2000) (citing *Hensley v Eckerhart*, 461 US 424; 103 S Ct 1933; 76 L Ed 2d 40 (1983)).

⁶² *Adcock-Ladd*, 227 F3d at 349 (citing *Reed v Rhodes*, 179 F3d 453, 471-72 (CA 6, 1999)).

⁶³ *Hadix v Johnson*, 65 F3d 532, 536-37 (CA 6, 1995) (emphasis added).

⁶⁴ *Adcock-Ladd*, 227 F3d at 350; cf *Hudson v Reno*, 130 F3d 1193, 1208 (CA 6, 1997), overruled on other grounds, *Pollard v E I du Pont de Nemours & Co*, 532 US 843; 121 S Ct 1946; 150 L Ed 2d 62 (2001) (prevailing market rate is that rate which lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record).

⁶⁵ *Adcock-Ladd*, 227 F3d at 350 (citing *Hudson*, 130 F3d at 1208).

⁶⁶ *Hadix*, 65 F3d at 535 (citing *Chrapiwy v Uniroyal, Inc*, 670 F2d 760, 769 (CA 6, 1987)).

This federal rationale can be applied to the attorney fee questions in this case. Where there is readily available and competent counsel at a customarily-charged hourly fee, "special skill" does not justify compensating any of the four attorneys in this case beyond the local market rates. Nor is it an unusual circumstance warranting the highest hourly fee an attorney can command. Attorneys can reject a case if they do not choose to accept a reasonable fee.

C. Specialized areas such as medical malpractice do not justify an hourly fee based on special skill that exceeds the upper end of the fee range.

The medical malpractice arena or other more specialized areas of litigation do not automatically justify rates above those customarily charged in the locality. Although expert testimony is generally required in medical malpractice cases,⁶⁷ Plaintiff's attorneys were not functioning as experts when they examined Plaintiff's witness, Dr. Roger Druckman, or deposed and/or cross-examined Defendant's expert witness, Dr. Michael Jermov. They were functioning as attorneys proving the standard of care afforded to Plaintiff. To the extent that they demonstrated special skill, experience, and professionalism, and obtained a good result, they may be entitled to hourly fees in the upper range of the fees customarily charged in the locality. They are not, however, entitled to hourly fees that exceed those prevailing rates. It was their obligation to represent their client to the best of their ability, fully utilizing the skill and experience they possess.

III. A contingent fee agreement generally does not justify a court's departure from awarding a fee that exceeds the customary local fee.

Although the Michigan Court of Appeals has held that the existence of a contingency fee agreement may be considered as one factor in determining the reasonableness of an attorney

⁶⁷ *Woodard v Univ of Michigan Med Ctr*, 473 Mich 1, 6; 702 NW2d 522 (2005) (citing *Lock v Pachtman*, 446 Mich 215, 222; 521 NW2d 786 (1994)).

fee,⁶⁸ the United States Supreme Court held in *Pennsylvania v Delaware Valley Citizens' Council for Clean Air*, a case involving reasonable attorney fees pursuant to § 304(d) of the Clean Air Act, 24 USC § 7604(d), held that that it was "unconvinced that Congress intended the risk of losing a lawsuit to be an independent basis for increasing the amount of any otherwise reasonable fee for the time and effort expended in prevailing."⁶⁹ In reversing the judgment that adjusted the lodestar figure upward based on risk of loss, the Court rejected the respondent's argument that without the promise of multipliers or enhancement for risk-taking, attorneys will not take cases for clients who cannot pay, and the fee-shifting statutes will therefore not serve their purpose.⁷⁰ The court concluded that this scenario was "unlikely to be true in any market where there are competent lawyers whose time is not fully occupied by other matters."⁷¹

The Court further explained its reasoning for not increasing a reasonable fee due to risk of loss⁷²:

[E]nhancing fees for risk of loss forces losing defendants to compensate plaintiff's lawyers for not prevailing against defendants in other cases, a result not consistent with Congress' decision to adopt the rule that only prevailing parties are entitled to fees. If risk multipliers or enhancement are viewed as no more than compensating attorneys for their willingness to take the risk of loss and of nonpayment, we are nevertheless not at all sure that Congress intended that fees be denied when a plaintiff loses, but authorized payment for assuming the risk of an uncompensated loss. Such enhancement also penalizes the defendants who have the strongest case; and in theory, at least, would authorize the highest fees in cases least likely to be won and hence encourage the bringing of more risky cases, especially by lawyers whose time is not fully occupied with other work. Because it is difficult ever to be completely sure that a case will be won, enhancing fees

⁶⁸ *Liddell v Detroit Automobile Inter-Insurance Exchange*, 102 Mich App 636; 302 NW2d 260 (1981).

⁶⁹ *Pennsylvania v Delaware Valley Citizens' Council*, 483 US 711, 725; 107 S Ct 3078; 97 L Ed 2d 585 (1987) (resolving the issue of whether attorney fees might be enhanced based on risk of loss, which was not resolved in 478 US 546 (1986)).

⁷⁰ *Delaware Valley Citizens' Council*, 483 US at 725-726.

⁷¹ *Delaware Valley Citizens' Council*, 483 US at 726.

⁷² *Delaware Valley Citizens' Council*, 483 US at 724-725.

for the assumption of the risk of nonpayment would justify some degree of enhancement in almost every case.

The Court also noted that⁷³:

the reasons a particular lawsuit are considered to be "risky" for an attorney are because of the novelty and difficulty of the issues presented, and because of the potential for protracted litigation. Moreover, when an attorney ultimately prevails in such a lawsuit, this success will be primarily attributable to his legal skills and experience, and to the hours of hard work he devoted to the case. These factors, however, are considered by the court in determining the reasonable number of hours expended and the reasonable hourly rate for the lodestar, and any further increase in this sum based on the risk of not prevailing would result not in a "reasonable" attorney's fee, but in a windfall for an attorney who prevailed in a difficult case.

In sum, the factors used by the trial court in arriving at attorney rates of \$450 and \$275—fees in excess of those customarily charged in the locality for similar services—are those that are already reflected in the market rate. Mr. Gittleman's special skill and expertise should not be used to adjust the prevailing market rate, thus "removing any danger of double counting,"⁷⁴ nor is such an upward adjustment consistent with the goals of a mediation sanction under MCR 2.403(O)(6). By using these factors as an independent basis to justify his fee, the trial court's decision resulted in an outcome that falls outside of the principled range of outcomes. Hence, the trial court abused its discretion when setting the attorney fees at \$450 per hour. As to Tashman, Goldstein, and Tracie Gittleman, the trial court similarly abused its discretion by not conducting an independent inquiry into their qualifications and skills and then applying the customary fees in the locality accordingly.

⁷³ *Delaware Valley Citizens' Council*, 483 US at 726-727.

⁷⁴ *Delaware Valley Citizens' Council*, 478 US at 567.

CONCLUSION

In every attorney fee case involving a remedial statute or court rule that mandates reasonable attorney fees, Michigan courts should consider the fees customarily charged in the locality, and award an hourly rate in excess of those fees only in exceptional circumstances. Special skill, experience, the results obtained, and a contingency fee agreement are subsumed within the local market rates. Therefore, they are not exceptional circumstances warranting a fee in excess of those local market rates. In this case, the trial court abused its discretion by failing to consider the fees customarily charged in the locality; by relying upon special skill, professionalism and the results obtained as a basis for excessive hourly rates; and, by failing to conduct an independent inquiry into attorney qualifications.

WHEREFORE, Amicus Curiae Attorney General Michael A. Cox respectfully urges this Honorable Court to hold that the Court of Appeals abused its discretion in awarding \$65,556 in attorney fees on the basis of \$450 and \$275 hourly rates rather than fees within the range of attorneys in the locality.

Respectfully submitted,

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