

In the Supreme Court

Appeal from the Court of Appeals
Hon. William C. Whitbeck
Hon. David H. Sawyer
Hon. Kathleen Jansen

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.,

Docket No. 132823
COA No. 262139
Oakland CC No. 2003-047984-NH

Defendants-Appellants.

APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to MCR 7.302. The Court of Appeals affirmed judgment of the trial court on November 16, 2006. Defendants filed a timely application for leave to appeal on December 28, 2006. The Supreme Court granted leave to appeal consistent with its Order dated July 20, 2007 (**Appellants' Appendix**, pp 103a).

QUESTION INVOLVED

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT AWARDED PLAINTIFF'S PRINCIPAL ATTORNEY, ATTORNEY FEES AS A CASE EVALUATION SANCTION AT THE RATE OF \$450.00 PER HOUR WHERE IT DID NOT EMPIRICALLY DETERMINE THE ORDINARY HOURLY RATE FOR THE LOCALE OF A SIMILARLY SITUATED ATTORNEY IN ORDER TO CORRELATE THE FIGURE WITH THE *CRAWLEY FACTORS* AND ORDERED ATTORNEY FEES FOR ADDITIONAL ATTORNEYS WITHOUT CONSIDERING ANY *CRAWLEY FACTORS*?

DEFENDANTS / APPELLANTS ANSWER: YES;

PLAINTIFFS / APPELLEES ANSWER: NO;

THE TRIAL COURT ANSWERED: NO;

THE COURT OF APPEALS ANSWERED: NO.

STATEMENT OF FACTS

Defendants will not address the substantive facts of this matter in great detail as they are largely irrelevant to this appeal and as the basic facts have been previously briefed in their Application for Leave to Appeal and are sufficiently stated within the Opinion of the Court of Appeals found at **Appellants' Appendix**, p 96a. The essential substantive facts are that plaintiff presented to Defendant, Dr. Louie Khouri, on September 26, 2001 for the extraction of his right, lower wisdom tooth. Plaintiff experienced post-operative numbness. The numbness is apparently permanent.

Plaintiff filed the instant lawsuit against Dr. Khouri and his professional corporate entities on March 5, 2003, alleging that the permanent numbness was the result of dental malpractice. The matter went to case evaluation on March 23, 2004 and an award of \$50,000.00 was rendered in favor of plaintiff and against defendants. Plaintiff accepted; defendants rejected and the matter proceeded to trial. Trial commenced on December 16, 2004, lasting ½ day. Trial continued for a full-day on Friday, December 17, 2004 and concluded on Tuesday, December 20, 2004 (Trial Court Docket Entries, **Appellants' Appendix**, pp 2a). The jury returned a verdict of past economic damages totaling \$300 00 and future non-economic damages of \$2800 00 per year for thirty-six years commencing in 2005 (Copy of Verdict Form, previously attached as Exhibit B to Defendants' Response to Plaintiff's Motion and Brief for Taxed Costs, **Appellants' Appendix**, p 8a). Judgment was entered January 19, 2005 (**Appellants' Appendix**, p 13a). It adjusted the award of past-economic damages to \$323.36 to reflect the addition of pre-judgment interest. The judgment reduced the award of future non-economic damages to the present value of \$46,331.18. Therefore, the total judgment, exclusive of costs and case evaluation sanctions was \$46,654.54.

Plaintiff filed a motion for taxable costs and case evaluation sanctions on February 11, 2005 (Plaintiff's Motion and Brief for Taxed Bill of Costs (without exhibits), **Appellants' Appendix**, p 15a). Plaintiff requested attorney fees totaling \$68,706.50 or 147% of the judgment in addition to costs totaling \$30,023.34 (See Plaintiff's Bill of Attorney Fees, previously attached as Exhibit C to Plaintiff's Motion and Brief for Taxed Bill of Costs, **Appellants Appendix**, p 45a). The attorney fee rate that was requested was \$450.00 per hour the principal attorney, Robert Gittleman, and \$275.00 per hour for his associates. Defendants objected to the request for costs and attorney fees by responding to plaintiff's motion on February 25, 2005 (Defendants' Response to Plaintiff's Motion and Brief for Taxed Bill of Costs (without exhibits), **Appellants' Appendix**, p 30a). Defendants contended that a reasonable hourly rate in Oakland County was previously determined to be \$150 for an experienced malpractice attorney in a complicated medical malpractice case. Defendants further argued that the instant case was simple, trial was short, the adjusted verdict was less than the case evaluation award, there was little pretrial court involvement, limited pretrial discovery, and that the requested fee was higher than the judgment.

The trial court ultimately awarded all of the requested \$68,706.50 in attorney fees less an amount to which the parties stipulated resulting in an award of attorney fees totaling \$65,556.50 (Order, March 23, 2005, **Appellants' Appendix**, p 86a). The trial court stated in material part:

I have read all the papers and I've taken into account the objections that defendants raised. First with respect to the hourly rate of 450 dollars an hour, I do believe that's a reasonable rate applying the Crawley factors that need to be taken into account, those factors under Crawley v. Schick, 48 Mich. App., 727, 1973. Those are factors that the Court looks to in determining the entire reasonableness of fees and also in connection with the reasonableness of the rate, the Crawley factors require us to look at the professional standing and experience of the attorney. There's no question Mr. Gittleman's a recognized practitioner in the area of the dental malpractice and has superlative standing in that area, has tried numerous cases. His skill, time and labor involved here was evidence from the

professional way in which this case was tried. The amount in question, the results achieved, there was a favorable verdict for plaintiffs in this case that was significant. The case was of difficulty because of the complexity of the issues involved. It's challenging to try a malpractice case and to attempt to reduce the complexity to a level that lay people can address the issues appropriately and I thought the case was tried in an extremely professional way and the difficulty of the case was translated on a personal level so that the jurors could understand the case. There were significant expense incurred based on my review of the billings and taking all of those factors into account, I think that the 450 dollars rate is reasonable.

The Court also can take 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.

The Court has looked at the billings. The Court does not believe that there's any duplication and the Court believes that the billings are sufficiently specific. The total amount billed here is \$68,706.50. The Court believes that that is a reasonable attorney fee with costs for the kind of results achieved in this case. For all those reasons, the Court's going to grant the request for case evaluation sanctions in that amount. [Motion Transcript, Plaintiff's Motion for Costs and Case Evaluation Sanctions, Defendant's Motion for Judgment Non Obstante Verdicto, dated March 23, 2005 pp 31-33, contained within **Appellants' Appendix**, pp 81a-83a.]

The matter proceeded through the appeal process. Defendants appealed by right to the Court of Appeals and filed their appellate brief on December 28, 2006 (Excerpt of Brief on Appeal, **Appellants' Appendix**, p 91a) Defendants will not detail the entire substance of the appeal herein but rather will limit the facts to the issue presented.

Defendants maintained the objections to the attorney fees that were raised in the trial court. Defendants further responded to the trial court's assertion that it took judicial notice that some senior trial attorneys in this locale bill at a rate of \$450.00 per hour and plaintiff's absence of proof of a reasonable hourly rate in the community, by pointing out that according to the State Bar of Michigan's *Snapshot of the Economic Status of Attorneys in Michigan*, which it published in November, 2003, the range of billing for equity partners in litigation was between \$100.00 per

hour and \$350.00 per hour, with a median rate of \$200.00 per hour (Document previously attached as Exhibit C to Defendants' Brief on Appeal, found at **Appellants' Appendix**, p 92a). This supplemented the proof offered in the trial court presented by defendants wherein the Court of Appeals concluded in 2003 that \$150.00 per hour was a reasonable hourly rate for an experienced plaintiff's medical malpractice attorney that obtained a \$900,000.00 verdict in Oakland County, in a difficult case involving three theories of negligence.

The Court of Appeals affirmed plaintiffs award of attorney fees (Opinion of the Court of Appeals, **Appellants' Appendix**, pp ____). Defendants sought leave to appeal in this Court. Leave was granted on July 20, 2007.

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO PROPERLY APPLY THE CRAWLEY FACTORS WHEN IT AWARDED PLAINTIFF ATTORNEY FEES AS A CASE EVALUATION SANCTION

STANDARD OF REVIEW

Defendants appeal the trial court's award of attorney fees as a case evaluation sanction pursuant to MCR 2.403(O)(1) and (O)(6), which require the trial court to award a prevailing party taxable costs and "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." A trial judge's decision regarding what constitutes a "reasonable fee" is reviewed for abuse of discretion. *MDOT v Randolph*, 461 Mich 757, 763, 768; 610 NW2d 893 (2000); *Zdrojewski v Murphy*, 254 Mich App 50, 72; 657 NW2d 721 (2003)

INTRODUCTION

This Court asked defendants to specifically address several questions regarding the reasonableness of attorney fees to determine whether the trial court abused its discretion by awarding plaintiff \$65,556 in attorney fees as a case evaluation sanction according to the factors set forth in *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982). Those questions are: (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 agreement, this fact should affect the calculation of reasonable fees on the basis of hourly rates.

Defendants will attempt to answer these questions. Defendants will first outline the factors that courts of Michigan have considered. These do include: the fees customarily charged in the locality, the proportionality between the amount of attorney fees and the award of damages, and the existence of a contingent fee agreement. Defendants will then address whether the trial court abused its discretion by failing to properly consider the factors. Finally, defendants will address whether the trial court applied the factors to all of the attorneys involved in plaintiff's case

1. A trial court should consider the factors enumerated in *Crawley* as well as the fee customarily charged in the community for the type of litigation at issue, the existence of a contingent fee agreement, and the proportionality between the amount of attorney fees requested and the award of damages when it assesses a reasonable fee as a case evaluation sanction.

This Court adopted the "*Crawley Factors*" plus, for determining the reasonableness of an attorney fee awarded in *Wood v DAHE*, *supra*, 413 Mich 573. It said, "[w]hile a trial court should consider the guidelines of *Crawley*, it is not limited to those factors in making its determination" *Id*.

The *Crawley Factors* were pronounced in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). That court stated:

Among the factors to be taken into consideration in determining the reasonableness of a fee include: (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. [*Id*]

Both *Wood* and *Crawley* demonstrate that a court may consider additional factors such as the prevailing rate in the community, the existence of a contingent fee, and the proportionality between the requested fee and the damage award as a factor because the holdings in both cases expressly state that a court is not limited to the enumerated factors.

A court should consider additional factors when determining a reasonable hourly rate for attorney fees to assess as a case evaluation sanction. One such factor is the fee customarily charged in the locality for similar legal services. In fact, as further explained below, the customary hourly rate for an attorney in the locality for similar legal services is the “gold standard” in the federal system of civil justice. The United States Supreme Court concluded that a “reasonable fee” under the federal fee shifting statutes is “to be calculated according to the prevailing market rates in the relevant community.” *Blum v Stenson*, 465 US 886, 895; 104 S Ct 1541 (1984).

The prevailing market rate in the relevant community has been recognized as an important factor in Michigan. The Court of Appeals concluded in *Michigan Basic v Hackert Furniture Dist Co*, 194 Mich App 230; 486 NW2d 68 (1992) that the trial court did not abuse its discretion by distinguishing between prevailing attorney fees in the eastern part of this state and its jurisdiction of Kent County. Therefore, the Court of Appeals has recognized that the fee customarily charged in the locality is an important factor to consider.

Unfortunately, many decisions of the Court of Appeals regarding what constitutes a reasonable hourly rate in the locality are unpublished. The Court of Appeals used the 2000 Desktop Reference on the Economics of Law Practice in Michigan in *RVP Development Corp v Furness Golf Const Co*, unpublished opinion per curiam of the Court of Appeals, issued August 3, 2004 (Docket Nos. 241125 & 241126) (**Appellants’ Appendix**, p 104a), to conclude that the

trial court's award of an attorney fee of \$385 per hour was violative of fact and logic because it was higher than the highest hourly rates charged in Michigan (**Appellants' Appendix**, p 111a). A similar survey was used in *Sutherland v Kennington Truck Services, Ltd*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 2002 (Docket No 225034) (**Appellants' Appendix**, p 113a). The Court rejected a requested fee of \$250 per hour holding as follows:

After a thorough examination of the record, we conclude that the trial court did not abuse its discretion in calculating a reasonable attorney fee for attorney Steinberg's services at a rate of \$175.00 an hour. The trial court was presented with evidence of the relative experience of each attorney and affidavits stating that the rates were reasonable, given the legal experience of each attorney and the locality of the action. The court was also referred to statistics published by the State Bar of Michigan in *The 1997 Desktop Reference on the Economics of Law Practice in Michigan*, 76 Mich BJ 1312-1313 (December, 1997), which listed a reported median hourly rate of \$125.00, unchanged from 1994. Defendant argued that the \$125 hourly rate was more appropriate as a "typical" hourly rate for this "typical" rear-end, whiplash accident. Following a hearing, the trial court evaluated the various factors referenced above and determined that an hourly fee for attorney Steinberg equal to the fee sought for attorney Wheaton was appropriate because: (1) attorney Steinberg's experience was comparable to attorney Wheaton's; (2) the case involved an average negligence action; and (3) while attorney Steinberg might command a larger hourly fee in Wayne County, his requested fee was not reasonable in Monroe County. Under the circumstances, we are satisfied that the trial court's fee determination was based on a consideration of proper factors and did not constitute an abuse of discretion. [**Appellants' Appendix**, p 114a]

The fee customarily charged in the locality for similar legal services, based upon the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services, is a relevant factor to consider.

The question then becomes, how does one determine this customarily charged fee. The Court of Appeals directed a lower court in *Temple v Kelel Distributing Co*, 183 Mich App 326; 454 NW2d 610 (1990), how to do this in a manner remarkably similar to what was done in the above-cited unpublished cases:

On remand, we direct the lower court's attention to the *1988 Economics of the Law Practice Survey*, 67 Mich B J No. 11B (1988). In determining a reasonable hourly or daily rate for purposes of the mediation rule, the lower court should utilize the empirical data contained in the Law Practice Survey as well as data contained in other reliable studies or surveys. Such data should be utilized and coordinated with other relevant criteria such as the professional standing and experience of the attorney; the skill time, and labor involved; the amount in question and the results achieved; the difficulty of the case; the expenses incurred; and the nature and length of the professional relationship with the client. [*Id* at 332-333, citation to *Wood* omitted.]

The fee calculation should be derived from reliable surveys establishing what attorneys charge in the locality. These fees should further be considered in light of the fee arrangement and damage award.

Defendants further submit that not only may a court consider a contingent fee arrangement, but a court should consider a contingent fee arrangement as a relevant factor. The *Crawley Court* did in fact implicitly consider a contingent fee arrangement before determining whether the fee was likewise reasonable under the above-stated factors. *Crawley* involved the determination of a reasonable attorney fee under the Worker's Disability Compensation Act. The Circuit Court awarded the plaintiff attorney fees of \$18,333.33, which represented **one-third** of the plaintiff's gross award. *Crawley, supra*, 48 Mich App 735. The Court of Appeals first addressed whether the **one-third** should be derived from a gross award or a net award and **then** determined whether the fee was reasonable. The Court stated:

Having found an attorney fee based upon the gross recovery to be proper, a complete disposition of the question necessitates a review of whether the fee was excessive notwithstanding the fact it was based on the gross recovery. [*Crawley*, 48 Mich App 737.]

The Court did not specifically state that it considered the fee to be contingent; however, *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 96; 537 NW2d 471 (1995) has been cited as authority for the proposition that the list of enumerated items to consider in determining whether

a fee actually charged by an attorney is excessive found at MRPC 1.5 is a factor that may be considered in determining what is a reasonable fee to be assessed as a case evaluation sanction.¹ This rule permits contingent fees and likewise requires them to be reasonable. Not only must a contingent fee be reasonable, but it is generally known and accepted that a customary contingent fee in a personal injury action such as the instant is **one-third** and is in fact capped at that amount. MCR 8.121(B).

To summarize, the Court in *Crawley* first determined whether what is customarily known as a contingent fee is to be calculated based upon a gross or net award. It then determined whether the fee was reasonable based upon the enumerated factors. Defendants submit that courts have historically considered the existence of a contingent fee arrangement and should continue to consider a contingent fee as a factor.

Defendants do not contend that a court must order fees based upon a contingency arrangement. In fact, the Court of Appeals has specifically held that the Michigan Court Rules, MCR 2.403, require a fee as a case evaluation sanction be based upon a reasonable hourly or daily rate. *Temple, supra*, 183 Mich App 326. The Court of Appeals specifically discussed the reason that MCR 2.403(O)(6) was amended to add the language that a fee must be based upon a “reasonable hourly or daily rate.” It appears that the Supreme Court was concerned that fees awarded based strictly upon a contingent fee could become exorbitant, namely six or seven figures. The Court stated:

The commentary by the Mediation Evaluation Committee to its proposed amendment is instructive. The Committee’s ‘Note’ following the proposed rule

¹ *Jordan* did not involve either case evaluation or mediation sanctions; but rather, involved an award of statutory attorney fees involving claims sounding in consumer protection. Defendants acknowledge that MRPC 1.5 addresses the excessiveness of fees charged as opposed to the determination of what is a reasonable fee decided by a court.

change states that the amendment was intended to require mediation sanctions to be based on a reasonable daily or hourly rate rather than on a contingent fee:

Language is added to subrule (O)(4) (as renumbered) to make clear that the attorney fee component of costs must be determined on the basis of a daily or hourly rate, rather than on the basis of a contingent fee. [MCR 2.403(O)(4), note 426 B Mich 21.]

Additionally, the subsequent “Discussion” by the Committee clearly reveals that the intent of the Committee was to halt the practice by some judges of awarding mediation sanctions based on a contingent fee:

There is no unanimity in interpreting what a ‘reasonable attorney fee’ means for purposes of making an award of costs. Some judges have, for example, awarded a plaintiff whose lawyer has the case on a contingent basis an attorney fee calculated as a percentage of the verdict, typically one-third, which can amount to six or seven-figures. The committee did not think this was widespread, but decided that it would be best to modify the rule to prevent it. [426 B Mich 25.] [*Id.*]

The clear intent of the modification of the rule was to prevent an exorbitant fee award and certainly not to endorse a practice of awarding fees that would exceed not only a contingent fee, but the judgment itself. Although not bound by the existence of a contingent fee, federal courts have likewise held that their existence is a relevant consideration in determining the market value of a lawyer’s services. *United Slate v G & M Roofing*, 732 F2d 495 (C A 6, 1984).

Comparing an attorney fee award to a contingent fee involves comparing proportions. It is relevant to consider the proportion of the amount of attorney fees awarded as a case evaluation sanction to the damage.

The Court of Appeals did raise, in dicta, the practical question of to what degree the value of a case has in relation to an award of attorney fees in *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 32; 335 NW2d 710 (1983). In that case, the Court remanded the case for an evidentiary hearing regarding the award of a reasonable attorney fee because the trial court did not consider any of the *Crawley Factors* before awarding attorney fees. The trial court awarded

the defendant \$9,304 in attorney fees following a directed verdict for two defendants and a settlement with one defendant in a case that was mediated at \$12,500. After holding that the trial court considered none of the *Crawley factors*, the Court of Appeals stated:

[b]ut even a superficial application of the *Crawley* factors raises questions as to the reasonableness of the attorney fees award: the \$9,304 fee was charged for a claim evaluated at \$12,500; the questionable difficulty of the case; and the appropriateness of the time allocated to various tasks listed on the bill of costs. [*Petterman, supra*, 125 Mich App 32]

The Court was clearly concerned about the proportion of the fee awarded to the value of the case, albeit in dicta. However, the Court of Appeals subsequently and expressly considered the proportion of the fee awarded to the damage award in *Burke v Angies, Inc*, 143 Mich App 683; 373 NW2d 187 (1985). It held:

[o]n review, we do not find that the fees were excessive as the fees are approximately 10 percent of the award, the case is complex, detailed and difficult thereby requiring large amounts of time and the fees were reduced to the average price in the geographical area. We do not find this case to rise to the level of *Petterman, supra*, where the fees were 75 percent of the amount of the award [*Id.*]

Similarly, in *Temple, supra*, 183 Mich App 332, the Court of Appeals found “patently unreasonable” a fee award that represented 46% of the judgment. The Court stated:

Plaintiff’s counsel claimed below that he incurred 136 hours of legal work as a consequence of defendant’s rejection of the mediation evaluation. Accepting as true the reasonableness of the number of hours claimed, the award represents an hourly rate in excess of \$1,000 an hour. We hold that such a rate for legal work is patently unreasonable. [*Id.*]

Courts have clearly been concerned about the proportion of an attorney fee to the damage award and this proportion should be considered a relevant factor. It follows, that when assessing a reasonable attorney fee, a trial court should consider the *Crawley Factors* and both the existence of a contingent fee arrangement and the proportion of the fee sought to the damage award.

2. Courts have had difficulty applying the *Crawley* Factors; however, the difficulty may be remedied by clarifying that the starting point of the analysis is determining the prevailing hourly rate in the venue of the damage award based upon empirical evidence and coordinating that rate with the facts of the case.

Courts have struggled in many jurisdictions with how to apply the *Crawley* and *Crawley-like* Factors. The analysis begins in Michigan. The *Crawley Panel* itself noted that there is no precise formula for computing the reasonableness of an attorney's fee, adding that each case must be considered under its own facts. *Crawley, supra*, 48 Mich App 737. Other common assertions in Michigan cases are that the trial court is not limited to the *Crawley* Factors and that the trial court is not required to detail its findings as to each factor considered (See as a single example, *Burke, supra*, 143 Mich App 693). However, in many cases, a common problem is that the trial court has articulated no reason for its determination regarding reasonableness. Defendants believe that the problem in Michigan is that no starting point for the analysis has been consistently identified. As a result, in many cases, the trial court has considered none of the factors. This occurred in *Temple, supra*, 183 Mich App 332, where the trial court granted a fee of in excess of \$1,000 per hour without applying any factors; however, the Court of Appeals created the starting point. It instructed the trial court to begin with an empirical analysis of the prevailing hourly rates in the community.

The federal system has likewise struggled with the determination of what constitutes a reasonable attorney fee under federal fee-shifting statutes and has likewise created a similar starting point. Federal Courts now use what is referred to as the modified lodestar method in determining what is a reasonable fee. This original lodestar method was adopted by the Supreme Court in *Hensley v Eckerhart*, 461 US 424; 103 S Ct 1933 (1983) because of difficulty with a method of considering multiple factors taken from the American Bar Association Code of

Professional Responsibility that included many of the *Crawley Factors*, factors similar to MRPC 1.5, and more, including the existence of a contingency relationship. The *Crawley-like* method was developed by the Fifth Circuit in *Johnson v Georgia Highway Express, Inc*, 488 F2d 714 (CA 5, 1974), with respect to the fee-shifting provision of 42 USC Sec 1988 which, much like the case evaluation rules, authorized courts to award a reasonable fee to prevailing parties in civil rights litigation. The factors identified in determining a reasonable fee included: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson, supra*, 488 F2d 717-719.

Difficulty in applying the factors and inconsistency in results across the Circuits was noted with the *Johnson* method.

This approach required trial courts to consider the elements that go into determining the propriety of legal fees and was intended to provide appellate courts with more substantial and objective records on which to review trial court determinations. See *Johnson, supra*, at 717. This mode of analysis, however, was not without its shortcomings. Its major fault was that it gave very little actual guidance to district courts. Setting attorney’s fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results. [*Pennsylvania v Delaware Citizens’ Council for Clean Air*, 473 US 546, 562-563; 106 S Ct 3088; 92 L Ed2d 439 (1986).]

These problems led to the development of the lodestar method. The original lodestar method involved two-steps:

First, the court was to calculate the ‘lodestar,’ determined by multiplying the hours spent on a case by a reasonable hourly rate of compensation for each

attorney involved. * * * Second, using the lodestar figure as a starting point, the court could then make adjustments to this figure in light of '(1) the contingent nature of the case, reflecting the likelihood that hours were invested and expenses incurred without assurance of compensation; and (2) the quality of the work performed as evidenced by the work observed, the complexity of the issues and the recovery obtained.' [*Delaware Valley Citizens' Council, supra*, 478 US 563, citations omitted.]

However, problems were noted with the method.

This formulation emphasized the amount of time expended by the attorneys, and provided a more analytical framework for lower courts to follow than the unguided "factors" approach provided by *Johnson*. On the other hand, allowing the courts to adjust the lodestar amount based on considerations of the riskiness of the lawsuit and the quality of the attorney's work could still produce inconsistent and arbitrary fee awards. [*Delaware Valley Citizens' Council, supra*, 478 US 563.]

In essence, the *Delaware Valley Court* concluded that it is proper to create a lodestar amount which is presumed to be a reasonable fee, but improper to enhance it upward because of the quality of the work rendered. The Court offered some very useful thoughts about fee-shifting statutes.

These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended 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. [*Pennsylvania, supra*, 478 US 565.]

[Similarly, it is generally accepted that the existence of case evaluation sanctions were designed as an incentive for settlement and not to improve the lot of attorneys.]

The *Delaware Valley Court* continued:

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

lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance. [*Delaware Valley Citizens' Council, supra*, 478 US 566.]

Defendants are not suggesting that this Court should adopt the modified lodestar method that has been applied by the Federal Courts and are mindful that the Court declined to do the same in *MDOI v Randolph*, 461 Mich 757; 610 NW2d 893 (2000). However, the goal of both the state and federal systems is to find a rate that approximates that which is being charged in the community. It appears that the federal trend for the starting point to determine a fee (like that in Michigan) is to determine the reasonable hourly rate for the community. See *Adcock-Ladd v Secretary of Treasury*, 227 F3d 343, 347, 351 (C A 6, 2000), (reasonable rate for appropriate community determined using *Laffey Matrix*, an official market-supported reasonable attorney fee rate guide adopted by the United States Court of Appeals for the District of Columbia); *Moysis v DTG Datanet*, 278 F3d 819, 828 (C A 8 2002), (as a general rule, a reasonable hourly rate is the ordinary rate for similar work in the community where the case has been litigated).

Defendants submit that the starting point for determining what is a reasonable attorney fee is determining the reasonable hourly rate charged in the community. This should be determined using empirical evidence. Only then should the court consider additional relevant factors. These conclusions are consistent with the holding in *Temple, supra*, 183 Mich App 333-333, where the Court of Appeals directed the trial court to use empirical evidence to determine the reasonable hourly rate in the community and then to coordinate it with other relevant material. The conclusions are consistent with the holding of *Johnston v Detroit Hoist & Crane Co*, 142 Mich App 597, 601; 370 NW2d 1 (1985), where the court properly exercised its discretion by using an approach calculated to determine a reasonable fee for the locale for the type of legal service being rendered. In addition, the Court of Appeals held that a reasonable fee

should be determined based upon “the particular facts of the case and community legal practice” in *Petterman, supra*, 125 Mich App 33. Similarly, in *Burke, supra*, 143 Mich App 693, the fee awarded was reasonable where it was approximately 10% of the award, the case was complex, and “the fees were reduced to the average price in the geographical area.” (Emphasis added.)

(3) The trial court abused its discretion because it did not properly evaluate all factors relevant to the determination of a reasonable fee when it awarded plaintiff \$65,556 in attorney fees as a case evaluation sanction on the basis of \$450 and \$275 hourly rates.

The trial court abused its discretion when it awarded plaintiff \$65,556 in attorney fees as a case evaluation sanction. Defendants do not dispute that plaintiff was a prevailing party who was entitled to case evaluation sanctions pursuant to MCR 2.403(O)(1). The attorney fee awarded was required to be “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.” MCR 2.403(O)(6)(b).

The first step of the analysis should have been determining the reasonable hourly rate for similar services in the Oakland County locale. *Temple, supra*, 183 Mich App 332-333; *Johnston, supra*, 142 Mich App 601. Plaintiff had the burden of proving this reasonable hourly rate. *Petterman, supra*, 125 Mich App 33; *Papo v Aglo Restaurants*, 149 Mich App 285, 300; 386 NW2d 177 (1986).

Plaintiff did not offer proof of the reasonable hourly rate within the locale. It is expected that plaintiff will claim that he produced evidence of prior awards of his attorney fees of his attorney as evidence of the hourly rate. The case law makes it clear that the question is not what a particular attorney bills that is important in determining the reasonable hourly rate; but rather, it is the empirical evidence of what is the reasonable rate in the community. *Temple, supra*, 183 Mich App 332-333; *RVP Development, supra*, **Appellants’ Appendix**, p 104a.

The trial court did not consider objective evidence, such as *Zdrowjewski, supra*, 254 Mich App 72, that held in 2003 that \$150.00 per hour was a reasonable hourly rate in Oakland County, for an experienced medical malpractice attorney, in a complicated case. Rather, the judge 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.” (**Appellants’ Appendix**, p 83a). According to *A Snapshot of the Economic Status of Attorneys in Michigan. Excerpts from the 2003 Economics of Law Practice Survey* (**Appellants’ Appendix**, p 92a-95a), hourly rates vary according to type of practice and the average hourly rate for trial attorneys was approximately \$200 per hour in that year.

The Court of Appeals has found it grossly violative of fact and logic to award an hourly rate, “higher than the highest hourly rates charged in Michigan.” See *RVP Development, supra*, **Appellants’ Appendix**, p 111a. Defendants believe that it was an abuse of the discretion for the trial court to take judicial notice of a billing rate of \$450 per hour without empirical evidence presented by plaintiff, without considering that the rate actually billed by some attorneys is not the standard, *Johnston, supra*, 142 Mich App 601; and without distinguishing between the type of practice and the size of the firms.

The trial court purportedly focused on the remainder of the *Crawley Factors* when it rendered its award; however, this analysis was flawed because the prevailing rate was not determined; therefore the court used an improper figure with which to correlate the *Crawley Factors*. It stated, “there’s no question Mr. Gittleman’s a recognized practitioner in the area of dental malpractice and has superlative standing in that area, has tried numerous cases.” (**Appellants’ Appendix**, p 110a.) It continued, stating that the 2-day trial was complex; noting that it is challenging to try a medical malpractice case; and that the verdict was “significant;”

finding that the case was tried in a professional manner and delivered in a manner that jurors could understand (**Appellants' Appendix**, p 110a).

Defendants recognize that the trial court was not required to make specific findings as to each *Crawley Factor* when correlating them with the average rate in the community. However, defendants believe that when all of the factors are considered, they militate against a high attorney fee award.

The proportionality between the verdict and the award of attorney fees is relevant to the consideration. The Court of Appeals held in *Petterman, supra*, 125 Mich App 33, in a case where the trial court awarded a fee that was 75% of the verdict, that “even a superficial application of the *Crawley* factors raises questions as to the reasonableness of the attorney fees award.” In this case, the fee award was **142%** of the verdict

Defendants do not contest that plaintiff's attorney, Robert Gittleman, is an experienced attorney of professional standing, that has developed a specialty skill in prosecuting dental malpractice actions. However, defendants submit that this is exactly what made a case that others might conclude to be a complicated malpractice case, a simple dental case that was tried in just over two-days (including jury deliberations).

It is this experience that should permit an attorney taking a case on a contingent basis to be able to assess the case at the outset and realize the probable fee. The case was evaluated at \$50,000.00 and plaintiff accepted the case evaluation. This fact suggests, that due to his experience, plaintiff's attorney anticipated the result and therefore expected to earn a fee of approximately \$15,000.00 in this matter. The case went to trial and actually resulted in a judgment, that was arguably significant but that was less than the case evaluation award. This

should certainly raise questions about the reasonableness of an award of attorney fees amounting to 142% of the judgment.

Defendants request that this Honorable Court conclude that the trial court abused its discretion by failing to begin its analysis by determining the average hourly rate for this locale based upon the type of practice and the relative simplicity of this two-plus-day trial instead of taking judicial notice that some senior attorneys, practicing in an unidentified area of law in this locale bill out at \$450.00 per hour. Defendants do not believe that additional *Crawley Factors* warrant an enhancement of any hourly rate beyond the average rate in the community that has been endorsed as an appropriate figure by the Michigan Court of Appeals for experienced malpractice attorneys. See *Burke, supra*, 143 Mich App 693; *Zdrojewski, supra*, 254 Mich App 72.

4. The trial court abused its discretion by awarding all of the requested attorney fees when it awarded fees for the services of multiple attorneys but only considered the skill and professional standing of Robert Gittleman.

The trial court awarded plaintiff virtually all of the attorney fees requested which included fees for Michael Tashman, Lori Goldstein, John McPhee, and Tracie Gittleman; however, it applied no *Crawley Factors* to any attorney but Robert Gittleman. The Court of Appeals has held that it is an abuse of discretion to determine a reasonable hourly fee for an attorney without considering any *Crawley Factors*. See *Petterman, supra*, 125 Mich App 32-33. The trial court applied no *Crawley Factors* to Michael Tashman, Lori Goldstein, John McPhee, or Tracie Gittleman; yet awarded the fees requested for their services. This was an abuse of discretion and remand is required.

CONCLUSION

Trial courts are required in Michigan to apply the *Crawley Factors* when they determine a reasonable attorney fee to be awarded as a case evaluation sanction. Courts are not limited to these factors and should begin their analysis by determining the average hourly rate in the locale using empirical evidence. Courts should then correlate the ordinary hourly rate in the community with the *Crawley Factors* to determine a reasonable hourly rate. Defendants submit that when empirical evidence is considered and the reasonable hourly rate of the locale is correlated with the professional standing and experience of plaintiff's attorney; i.e., his ability to properly assess the value of the case prior to trial; the relative simplicity of this case for an experienced dental malpractice attorney; the trial's short nature; the fact that the judgment was lower than the case evaluation award; and that the fact that plaintiff recovered significant costs for going to trial; it should be evident that the award of \$450.00 per hour was unreasonable.

RELIEF REQUESTED

Defendants respectfully request that this Honorable Court determine that the trial court abused its discretion by awarding Robert Gittleman fees at the rate of \$450.00 per hour and by rendering an award of attorney fees for other attorneys without applying any *Crawley Factors* to the award. Defendants request that this matter be remanded to the trial court with an instruction to the trial court to begin its analysis of a reasonable attorney fee by using empirical evidence to first assess the average rate of fees for an attorney in the locale, in a firm commensurate in size to plaintiff's attorney, with comparable experience, and practicing the same type of law.

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DATED: October 12, 2007