

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

Defendant-Appellants.

APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES.....ii

JURISDICTIONAL STATEMENT.....iv

COUNTER-STATEMENT OF QUESTIONS INVOLVED.....v

STATEMENT OF FACTS.....1

ARGUMENT - THE TRIAL COURT DID NOT ABUSE
IT'S DISCRETION WHEN IT AWARDED
PLAINTIFF'S REQUESTED ATTORNEY
FEE OF \$450 PER HOUR AND
ASSOCIATES AT \$275 PER HOUR.....3

STANDARD OF REVIEW.....3

RELIEF REQUESTED.....21

INDEX OF AUTHORITIES

CASES:

<u>Aiken-Zeigler, Inc. v. Waterbury Headers Corp.</u> , 461 Mich. 219, 600 NW2d 638 (1999).....	3
<u>Bennett v. Weitz</u> , 220 Mich. App. 295, 559 NW2d 354 (1996)....	18
<u>Cam Construction v. Lake Edgewood Condominium Association</u> , 465 Mich. 549, 640 NW2d 256 (2002).....	4
<u>Cleary v. The Turning Point</u> , 203 Mich. App. 208, 512 NW2d 9 (1993).....	20
<u>Crawley v. Schick</u> , 48 Mich. App. 727, 311 NW2d 217 (1973).....	5,6,7,8,11
<u>Elia v. Hazen</u> , 242 Mich. App. 374, 619 NW2d 1 (2000.).....	3, 16
<u>Grievance Administrator v. Underwood</u> , 462 Mich. 188, 612 NW2d 116 (2000).....	16,19
<u>Harvey v. Harvey</u> , 470 Mich. 186, 680 NW2d 835 (2004).....	7
<u>Howard v. Canteen Corp.</u> , 192 Mich. App. 427, 481 NW2d 718 (1991).....	7
<u>Joerger v. Gordon Food Service, Inc.</u> , 224 Mich. App. 167, 568 NW2d 356 (1997).....	3
<u>Kraft v. Lepczyk, D.D.S., Oakland County Circuit Court</u> , Case No. 85-290666-NM, Honorable Jessica R. Cooper, presiding.....	9,10,11
<u>MacIntyre v. MacIntyre</u> , 472 Mich. 882, 693 NW2d 822 (2005).....	7
<u>Maple Hill Apartment Co. v. Stine</u> , (On Remand), 147 Mich. App. 687, 382 NW2d 849 (1985).....	13
<u>Marketos v. American Employers Ins. Co.</u> , 465 Mich. 407, 633 NW2d 371 (2001).....	3,4
<u>Mars v. Bd of Medicine</u> , 422 Mich. 688, 375 NW2d 321 (1985)....	3
<u>McAuley v. General Motors Corp.</u> , 457 Mich. 513, 578 NW2d 282 (1998).....	16,19,20
<u>Michigan Basic Property Insurance Association v. Hackert Furniture Distributing Company, Inc.</u> , 194 Mich. App. 230, 486 NW2d 68 (1992).....	9

<u>Nowak v. Gantz, D.D.S., Case No. 2002-038692-NH, Court of Appeals Docket No. 258688, unpublished April 18, 2006, Supreme Court denied leave SC No. 131293.....</u>	12
<u>Perez v. Keeler Brass Co., 461 Mich. 602, 608 NW2d 45 (2000)..</u>	19
<u>Petterman v. Haverhill Farms, Inc., 125 Mich. App. 30, 335 NW2d 710 (1983).....</u>	13
<u>Portelli v. I R Constr Products Co., 218 Mich. App. 591, 554 NW2d 591 (1996).....</u>	16
<u>Rafferty v. Markovitz, 461 Mich. 265, 601 NW2d 367 (1999)....</u>	3,5
<u>Temple v. Kelel Distributing Co., 183 Mich. App. 326, 454 NW2d 610 (1990).....</u>	19
<u>Tryc v. Michigan Veterans' Facility, 451 Mich. 129, 545 NW2d 642 (1996).....</u>	16,19
<u>Turner v. Auto Club Ins. Ass'n, 448 Mich. 22, 528 NW2d 681 (1995).....</u>	16,19
<u>Walter v. Brockreide, Case No. 95-39426-NH, Honorable Geoffrey Neithercut presiding, (1998).....</u>	13
<u>Wood v. DAILE, 413 Mich. 573, 321 NW2d 653 (1981).....</u>	5,6,7,8,11
<u>Zdrojewski v. Murphy, 254 Mich. App. 50, 657 NW2d 721 (2003)....</u>	2
<u>COURT RULES AND STATUTES:</u>	
MCR2.403.....	11,15,16,18,19,20
MCR 2.403 (O) (6) (b).....	5
MCL 8.3a;MSA 2.212(1).....	19

JURISDICTIONAL STATEMENT

Appellant correctly states the Jurisdictional Statement.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION
WHEN IT AWARDED PLAINTIFF'S REQUESTED ATTORNEY FEE
OF \$450 PER HOUR AND ASSOCIATES AT \$275 PER HOUR?

Defendants/Appellants Answer: Yes.

Plaintiff/Appellee answers: No.

The Trial Court answered: No.

The Court of Appeals answered: No.

COUNTER-STATEMENT OF FACTS

This case is a dental malpractice case by a general dentist, defendant Louis Khouri, D.D.S., who negligently extracted Kevin Smith's wisdom tooth number 32 by substandard surgical technique causing permanent nerve dysfunction to his lip, chin, tongue and face. Trial began December 16, 2004. The jury verdict for plaintiff was December 20, 2004. The jury awarded plaintiff \$300 in past economic costs and \$2,800 every year for thirty-six years totalling \$100,800. See Verdict Form at 11a and 12a, Appellant's Appendix.

The verdict was reduced to gross present cash value of \$46,331.18 by Order of the trial court on January 19, 2005. See 13a-14a, Appellant's Appendix.

Mediation was \$50,000, which plaintiff accepted and defendant rejected. Oral argument on plaintiff's Motion for Costs and Case Evaluation Sanctions was March 23, 2005. The fee hearing transcript is reproduced in Appellant's Appendix, pp 51a-85a. The trial court awarded plaintiff attorney fees of \$450 per hour for Mr. Robert Gittleman and Mr. Michael Tashman, and associates at \$275 per hour.

Defendant appealed by right to the Court of Appeals which affirmed the trial court on November 16, 2006. The Court of Appeals reiterated the trial court's opinion:

Applying the relevant factors, the trial court stated:

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 [sic] from the professional way in which this case was tried. The amount in question, the results achieved...that was significant. The case was of difficulty because of the complexity of the issues involved.... There were significant expense [sic] incurred based on my review of the billings and taking

all of those factors into account, I think the the 450 dollars rate is reasonable.

Court of Appeals Opinion, p. 6, see Appellant's index, p. 101a.

The Court of Appeals further held:

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, which amount is substantially less. However, although it is important to utilize empirical data in determining a reasonable hourly rate, it is equally important to consider the experience of the attorneys, difficulty of the issues, and the skill, time, and labor involved in the case. Clearly, the hourly rates granted here exceed those listed in the information provided by defendants, but we cannot base a reasonable rate for Smith's attorneys on information that 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.

Further, we reject defendants' argument that the amount of attorney fees granted by the trial court is excessive compared to the fees awarded in medical malpractice cases in the same locality. There 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, supra. We are therefore persuaded that the trial court did not abuse its discretion in granting the amount of attorney fees that Smith requested.

Court of Appeals Opinion, p. 7, see Appellant's Appendix, p. 102a.

Thereafter, this Court granted leave to appeal July 20, 2007 regarding the attorney fee award of \$450 and \$275 requesting five issues be addressed.

**THE TRIAL COURT DID NOT ABUSE IT'S DISCRETION WHEN IT
AWARDED PLAINTIFF'S REQUESTED ATTORNEY FEE OF \$450
PER HOUR AND ASSOCIATES AT \$275 PER HOUR.**

STANDARD OF REVIEW

This court reviews the trial court's award of attorney fees for abuse of discretion. Joerger v. Gordon Food Service, Inc., 224 Mich App 167, 178; 568 NW2d 365 (1997). A reasonable attorney fee must be based on a reasonable hourly or daily rate, as determined by the trial judge, for services necessitated by the rejection of the evaluation. MCR 2.403 (O) (6) (b), Rafferty v. Markovitz, 461 Mich 265; 267; 601 NW2d 367 (1999).

An abuse of discretion is found only in extreme cases where the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion and bias." Elia v. Hazen, 242 Mich. App. 374, 377, 619 NW2d 1 (2000), quoting Aiken-Ziegler, Inc v. Waterbury Headers Corp., 461 Mich. 219, 227, 600 NW2d 638 (1999). An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. Aiken-Ziegler, Inc. v. Waterbury Headers Corp., 461 Mich. 219, 227; 600 NW2d 638 (1999), quoting Mars v. Bd of Medicine, 422 Mich. 688, 694; 375 NW2d 321 (1985).

Interpretation of a court rule, like a matter of statutory interpretation, is a question of law that this Court reviews de novo. Marketos v. American Employers Ins. Co., 465

Mich. 407, 413; 633 NW2d 371 (2001). Cam Construction v. Lake Edgewood Condominium Association, 465 Mich. 549, 640 NW2d 256 (2002).

INTRODUCTION

This Court granted leave to address the following issues: (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 attorney fees on the basis of hourly rates.

Appellee will answer questions 1, 2 and 3 under A below and question 4 and 5 under B below.

ANALYSIS

A. WHETHER THE TRIAL COURT EVALUATED ALL FACTORS RELEVANT TO THE DETERMINATION OF A REASONABLE ATTORNEY FEE; WHETHER THE TRIAL COURT APPLIED SUCH FACTORS TO ALL ATTORNEYS INVOLVED; AND 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?

Appellee answers yes.

A reasonable attorney fee must be based on a reasonable hourly or daily rate, as determined by the trial judge, for services necessitated by the rejection of the evaluation. MCR 2.403(O)(6)(b), Rafferty v. Markovitz, 461 Mich. 265, 267; 602 NW2d 367 (1999).

Appellee contends the trial court evaluated all factors relevant in Crawley v. Schick, 48 Mich. App. 727, 311 NW2d 217 (1973) and Wood v. DAILE, 413 Mich. 573, 321 NW2d 653 (1981). The trial court is not required to detail findings on each specific factor. Wood, *infra*.

The Crawley, *infra*; guidelines for measuring the reasonableness of attorney fees consist of :

- (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;
- (6) The nature and length of the professional relationship with the client.

The Supreme Court in Wood stated:

While a trial court should consider the Guidelines of Crawley, it is not limited to those factors in making its determination. further, the trial court need not detail its finding as to each specific factor considered. The award will be upheld unless it appears upon appellate review that the trial court's finding on the "reasonableness" issue was an abuse of discretion. (emphasis added).

In this case, the trial court held \$450 per hour is a reasonable rate applying the Crawley v. Schick, 48 Mich. App. 727, 311 NW2d 217 (1973) guidelines, stating Mr. Gittleman is 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 from the professional way in which this case was tried.” March 23, 2005 transcript, p. 32-33. The court noted the difficulty and complexity of this case and the ability the trial attorneys were able to break down the issues for the jury on a personal level. Id.

The trial court further 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.” Id.

The appellant may request an evidentiary hearing to examine Mr. Gittleman and any other witnesses regarding a reasonable hourly rate pursuant to Crawley, *infra*. and Wood, *infra*. On March 23, 2005, the trial court specifically asked appellant, “Do you want an evidentiary hearing?” p. 27 Appellant answered “as far as the hourly rate, I don’t think that an evidentiary hearing is required.” The trial court again asked defendant-appellant if he wanted an evidentiary hearing and defendant replied “no.” Id. at page 28. Appellant’s Appendix, pp.77a-78a.

Defendant agreed with the trial court to rule on a reasonable attorney fee “based on what was has been submitted to me.” Id. at page 28. By appellant’s counsel indicating on the record he did not want the evidentiary hearing, he permitted the court to make findings of fact with regard to a reasonable attorney fee with what had been presented to the court by Motions, Briefs, Exhibits and oral argument. The circuit court

is not required to hold any evidentiary hearing where the court can make independent findings without a hearing. In MacIntyre v. MacIntyre, 472 Mich. 882, 693 NW2d 822 (2005), this Court affirmed the Court of Appeals and held an evidentiary hearing is not required by the trial court where the trial court is able to make independent determinations without a hearing. See also Harvey v. Harvey, 470 Mich. 186, 187, 680 NW2d 835 (2004) in which the trial court was not required to hold an evidentiary hearing to determine minor custodial placement where the trial court could make a determination independently without a hearing.

Defendant failed to request an evidentiary hearing. Defendant further affirmed he did not want to hold an evidentiary hearing regarding attorney fees when asked by the trial court. Thus, it was proper for the trial court to rule based on all the evidence presented before it. If this court were to remand this issue, that would only allow defendant a second bite at the apple, after he expressly waived presenting any further evidence regarding attorney fees.

In Howard v. Canteen Corp., 192 Mich. App. 427, 438-439; 481 NW2d 718 (1991), the Court of Appeals remanded directing the trial court to hold an evidentiary hearing on the reasonableness of attorney fees where the trial court failed to hold an evidentiary hearing and the defendant was not given the opportunity to challenge specific hours and rates. In this case, the trial court asked defense counsel twice if they wanted an evidentiary hearing and twice defense counsel answered no. Appellant's counsel had every opportunity to challenge any requested attorney hourly fee but declined to do so.

The court reviewed plaintiff's Motion for Mediation Penalties with attachments and defendant's response with attachments and properly applied the Crawley and Wood guidelines and ruled.

The trial court is not required to state with each specific fact when ruling on mediation penalty attorney fees pursuant to Wood, infra. The trial court documented Mr. Gittleman's experience in the community and the law, the difficulty of trying a dental malpractice case, the speciality of a dental malpractice case requiring the practitioner to reduce complex facts, evidence and standard of care issues for lay persons to understand who have never attended dental or medical school. The expenses and verdict was significant as well. The jury awarded \$2,800 per year for thirty-six years totaling \$100,800 before reduction to gross present cash value of \$46,331.18 as required by statute. The jury verdict was double the mediation award of \$50,000.

The trial court also held \$450 an hour was the going rate for an attorney in Oakland County such as Mr. Gittleman. The trial court may take into account fees generally charged by attorneys in that circuit when ruling on the reasonableness of attorney fees. In Michigan Basic Property Insurance Association v. Hackert Furniture Distributing Company, Inc., 194 Mich.App. 230, 486 NW2d 68 (1992), the trial court found that, while a \$150 per hour rate may be reasonable in Michigan's eastern metropolitan counties, a rate of \$125 was more reasonable in Grand Rapids and the western part of the state.

The trial court's decision awarding \$450 per hour in Oakland County to an attorney with such superlative standing as Mr. Robert Gittleman is neither grossly violative of fact and logic nor did it show a perversity of will, a defiance of judgment, or

the exercise of passion or bias. Mr. Gittleman is not only an accomplished attorney, but Mr. Gittleman has been invited and lectured at numerous seminars to lawyers and dentists, authored several articles in dental and trial lawyer journals, and represented and defended dentists nationwide as far as Alaska in administrative licensing hearings and court. He has also argued in many tribunals and courts across the country. He has practiced since 1966 and specializes in the narrow field of dental malpractice and dental licensing defense cases. Mr. Gittleman's CV is reproduced in Appellee's Appendix.

At trial, Mr. Gittleman elicited direct testimony from retained expert witness, Dr. Roger Druckman, D.D.S., and redirected Dr. Druckman after defendant's cross-examination. Mr. Gittleman cross-examined Dr. Michael Jermov, D.D.S., defendant's retained dental expert and cross-examined the defendant general dentist. Their examinations require skill not only in evidence rules, but also require expertise in dentistry.

To lump all trial attorneys together and cap attorney fee awards to the highest fee in the scale of an economic survey is ignoring those few that are above the average or even above the highest attorney fee in the survey. Such a cap denies any exceptions to the general rule. Mr. Gittleman is the exception to the rule, and should not be lumped together with an average trial attorney. In 1990, during the Mediation Sanction evidentiary hearing in the Kraft v. Lepczyk, D.D.S., Case No. 85-290666 NM, Oakland County Circuit Court, Honorable Jessica R. Cooper presiding, expert Alan May testified Mr. Gittleman was worth \$300 per hour.

Plaintiff attached to his Motion for Case Evaluation Sanctions the Kraft, *infra*. Opinion dated September 13, 1990, Honorable Jessica R. Cooper presiding. The trial

court in this case reviewed that Opinion as well as other exhibits such as Mr. Gittleman's CV to arrive at the attorney fee rate. Judge Cooper's Opinion is reproduced in appellee's Appendix. In fact, all documents reproduced in Appellee's Appendix were presented to the trial court other than the Court of Appeals and Supreme Court opinion and order in Nowak v. Gantz.

Judge Cooper held:

There is no dispute that Mr. Gittleman is a highly skilled advocate and a nationally recognized expert in the dental malpractice field. His curriculum vitae accurately reflects his accomplishments. For this reason, he is entitled to a reasonable attorney fee commensurate with his level of expertise. Additionally, this was a difficult, complex and time-consuming case. As noted, the verdict awarded was substantially greater than the mediation evaluation which plaintiff was prepared to accept, but which defendant rejected. Each of the first five Crawley factors thus militate in plaintiff's favor. There is no evidence in the record of a long-term attorney-client relationship between plaintiff and his counsel, so the final Crawley factor favors defendant.

The court is constrained, however, to award counsel an hourly fee of \$300. Plaintiff is unable to show that any court has awarded such an hourly fee in any other similar case. Defendant's expert suggested that \$150 per hour is appropriate, but the court believes that the average practitioner in this county bills at the \$125 to \$150 per hour range. See Survey at 23, showing that South Oakland County attorneys in the 50th percentile charge \$125 per hour. The court similarly rejects defendant's assertion that because the Survey shows that plaintiff personal injury attorneys in the 90th percentile charge \$135 per hour, plaintiff's counsel's fees should be no more than that amount. The Survey amounts are based on statewide general personal injury attorneys. Plaintiff's counsel is a recognized specialist in the narrow field of dental malpractice, so his fee should not be based on the earning ability of attorneys practicing a more traditional form of personal injury law. Unfortunatley, the Survey does not reflect counsel's specialty.

For purposes of this hearing, the court finds that an attorney with the skills and dental malpractice experience

of Mr. Gittleman is therefore entitled to a reasonable attorney fee of \$200 per hour.

Kraft, infra. at 3-4. See Appellee's Appendix.

Appellant argues the economic snapshot taken in June, 2003, attached to his Appendix, pp. 92a-95a, should direct a trial court to the range of a reasonable attorney fee for case evaluation sanctions and in essence, cap a reasonable attorney fee to the high range of the survey. This writer does not deny the economic snapshot aides the trial court in measuring an appropriate attorney fee given specific circumstances surrounding a particular case. In fact, it is within the discretion of the trial court to award a reasonable attorney fee pursuant to MCR 2.403 and Crawley, infra. and Wood, infra. and use such aides to do so. However, as Honorable Jessica R. Cooper pointed out, the survey admitted in the Kraft case was based on statewide general personal injury attorneys, and failed to measure attorney fees for personal injury lawyers that specialized in dental malpractice, a narrow field not practiced by general personal injury attorneys. Thus, the survey was flawed as it did not fairly and adequately represent the facts of Kraft, infra., nor, Mr. Gittleman's knowledge, experience, training and specialized field of dental malpractice, which was not and is not presently practiced by the general personal injury community.

The Court of Appeals in this case held:

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, which amount is substantially less. However, although it is important to utilize empirical data in determining a reasonable hourly rate, it is equally important to consider the experience of the attorneys, difficulty of the issues, and the skill, time, and labor involved in the case. Clearly, the hourly

rates granted here exceed those listed in the information provided by defendants, but we cannot base a reasonable rate for Smith's attorneys on information that 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. *Emphasis added.*

The snapshot of economic status of attorneys in Michigan defendant relies upon to measure a reasonable attorney fee is flawed, since it only measures a random sample of attorneys who allegedly represent general personal injury cases. This survey does not separate or denote types of practices, i.e. whether general or specialized, or even identify fields of practice. The snapshot fails to take into account the dental malpractice attorney who is a recognized specialist in this narrow field and earning ability higher than a general practice/traditional attorney. Thus, the snapshot does not reflect Mr. Gittleman's dental specialty or his reasonable attorney fee.

This snapshot should not be used to cap trial courts awarding attorney fees for case evaluation sanctions as it is extremely general, not specific and flawed.

Mr. Gittleman also attached as part of plaintiff's Motion for Case Evaluation sanctions Nowak v. Gantz, D.D.S., Case No. 2002-038692-NH, Honorable Gene Schnelz presiding, Oakland County Circuit, in which the court awarded Mr. Gittleman \$400 per hour for case evaluation sanctions. That case was appealed by this appellant's counsel, affirmed by the Court of Appeals, Docket No. 258688; and this Court denied leave by Order dated January 29, 2007, SC No: 131293. Even this Court upheld Mr. Gittleman's award of \$400 per hour as a reasonable attorney fee for case evaluation sanctions where defendant-appellant argued it was not reasonable. See appellee's Appendix.

Mr. Gittleman was awarded \$300 per hour in the case of Walter v. Brockreide, Case No. 95-39426 NH attached to his Motion for Case Evaluation Sanctions and at p. ? of appellee's Appendix. If appellant doubted any of the attorney fees awarded by multiple trial courts, they certainly had the opportunity to hold evidentiary hearings, but specifically informed the trial court they waived any evidentiary hearing.

The Court of Appeals held previous courts have awarded plaintiff's counsel hourly rates above average rates and held:

Further, we reject defendants' argument that the amount of attorney fees granted by the trial court is excessive compared to the fees awarded in medical malpractice cases in the same locality. There 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, *supra*.

The trial court properly applied the appropriate factors and guidelines awarding reasonable attorney fees to both Mr. Gittleman, Mr. Tashman and the associates. The court is not required to detail its finding on the record. Further, defense counsel was given the opportunity to hold an evidentiary hearing but expressly declined the court's offer. Defense counsel also expressly requested the court to rely on the parties submissions of Motions, Briefs and Exhibits. March 23, 2005, pp. 27, 28. The trial court made findings sufficient with Petterman v. Haverhill Farms, Inc., 125 Mich. App. 30, 32; 335 NW2d 710 (1983); Maple Hill Apartment Co. v. Stine, 147 Mich. App. 687, 692-693; 382 NW2d 849 (1985).

The trial court did not abuse its discretion awarding \$450 an hour for Mr. Gittleman and Mr. Tashman and \$275 an hour for associates. An abuse of discretion

must be so grossly violative of fact and logic that it evidences defiance, passion and bias.

There was no defiance, passion or bias, nor was the attorney fee award of \$450 and \$275 grossly violative of fact and logic.

B) 1. WHETHER IT IS RELEVANT TO CONSIDER THE PROPORTIONALITY BETWEEN THE AMOUNT OF ATTORNEY FEES AND THE AWARD OF DAMAGES?

Appellee answers no. Proportionality between the amount of attorney fees and the award of damages is wholly irrelevant at common law and pursuant to MCR 2.403. At common law, it is well known a judge or jury award could be absolutely different if tried with the same facts over and over. Of course, depending on the jurisdiction, an award of \$10,000 in one county may be considered very large given the population jury pool compared with another; whereas, a \$1,000,000 dollar verdict may be considered quite low in another jurisdiction for the same injury. A one tooth case with admitted liability could be tried around this state or country with a different damage outcome everytime. One jury could hear a one tooth case with the same facts and admitted liability, and award a different dollar verdict than another, even where the same attorney tries the case everytime, so how could an award of MCR 2.403 attorney fees be related to the award of damages. The award of damages is not science, nor is there any graph or stated damage award for a particular injury in Michigan. Michigan only caps non-economic malpractice damages. Michigan does not designate x dollars for loss of a limb or any other injury to a sum certain. It is the province of the trier of fact to determine the damage amount and it will be different every time given the same facts, evidence and argument. There are so many variables involved in trying a lawsuit, attempting to proportion an attorney fee on a damage award is inequitable and unjust.

The plain language of MCR 2.403 is unambiguously clear and does not direct any calculation of an attorney fee based on any proportion to the damage award. In

Grievance Administrator v. Underwood, 462 Mich. 188, 193-194; 612 NW2d 116 (2000),

this Court ruled the proper mode of interpreting a court rule:

When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. McAuley v. General Motors Corp., 457 Mich. 513, 518; 578 NW2d 282 (1998). Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. See Tryc v. Michigan Veterans' Facility, 451 Mich. 129, 135; 545 NW2d 642 (1996). Similarly, common words must be understood to have their everyday, plain meaning. See MCL 8.3a; MSA 2.212(1); see also Perez v. Keeler Brass Co., 461 Mich. 602, 609; 608 NW2d 45 (2000).

If the language is clear and unambiguous, judicial construction is neither required nor permitted, and the court must apply the statute as written. Turner v. Auto Club Ins.

Ass'n, 448 Mich. 22, 27; 528 NW2d 681 (1995).

The primary intent of judicial interpretation of statutes is to ascertain and give effect to the intent of the legislature. The first criterion in determining intent is the specific language of the statute. The Legislature is presumed to have intended the meaning it plainly expressed. Courts may not speculate regarding the probable intent of the Legislature beyond the words expressed in the statute. Where the language employed in a statute is plain, certain, and unambiguous, the statute must be applied as written without interpretation. When the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. Such a statute must be applied, and not interpreted, because it speaks for itself. Portelli v. I R Constr Products Co., Inc., 218 Mich. App. 591, 606-607; 554 NW2d 591 (1996). See also Elia v. Hazen, 242 Mich. App. 374, 381;

MCR 2.403 does not direct the trial court to award a reasonable attorney fee based on proportionality of the verdict and award of attorney fees or expressly provide for such a calculation. Such comparison is also unjust and inequitable. For instance, a personal

insurance protection (PIP) case worth \$1,000 versus a PIP case worth \$100,000 can require the same amount of time spent by the attorney to prove the case since the attorney must still bring witnesses and cross examine expert and lay witnesses. The same amount of time and money is spent proving one medical bill or ten medical bills in a PIP case. However, the PIP case with ten medical bills will obviously have the larger verdict. Such a comparison to calculate attorney fees based on the verdict award would be unjust.

Proportionality between the amount of damages and attorney fee award is irrelevant.

B) 2. WHETHER, IF THE PLAINTIFF RETAINED HIS ATTORNEYS PURSUANT TO A CONTINGENT FEE AGREEMENT, THIS FACT SHOULD AFFECT THE CALCULATION OF REASONABLE ATTORNEY FEES ON THE BASIS OF HOURLY RATES?

Appellee answers no.

MCR 2.403 permits a reasonable attorney fee award regardless of a contingent fee agreement. The court rule does not specify differences in awarding a reasonable attorney fee based on whether the client hired the attorney at an hourly rate, by a contingency fee agreement, combination, barter agreement or any other fee agreement. The drafters of MCR 2.403 provided for mediation penalties for to the necessity of having to pursue a case to trial or verdict, including payment of attorney fees for having to pursue such cause or defense due to rejection of mediation. MCR 2.403. MCR 2.403's language is unambiguous and takes precedence over the common law. Bennett v. Weitz, 220 Mich.App. 295, 559 NW2d 354 (1996).

MCR 2.403 does not designate any instruction to fashion the attorney fee according to a contingent fee agreement or any other agreement. The purpose of MCR 2.403 has nothing to do with how the attorney was originally hired to pursue or defend the case. Any correlation between a contingency agreement and awarding attorney fees pursuant to MCR 2.403 would be unfair and create confusion since there are multiple ways attorneys are hired. Some attorneys may even take a case pro bono or for a friend and waive a fee to pursue or defend their client. However, the attorney accepting a case pro bono is entitled to penalties pursuant to MCR 2.403, If this Court singled out pro bono case or contingency cases, that would circumvent the intent of MCR 2.403. The plain language of MCR 2.403 is unambiguously clear and does not direct any calculation of an attorney fee based on any proportion to the damage award. In

Grievance Administrator v. Underwood, 462 Mich. 188, 193-194; 612 NW2d 116 (2000),

this Court ruled the proper mode of interpreting a court rule:

When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. McAuley v. General Motors Corp., 457 Mich. 513, 518; 578 NW2d 282 (1998). Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. See Tryc v. Michigan Veterans' Facility, 451 Mich. 129, 135; 545 NW2d 642 (1996). Similarly, common words must be understood to have their everyday, plain meaning. See MCL 8.3a; MSA 2.212(1); see also Perez v. Keeler Brass Co., 461 Mich. 602, 609; 608 NW2d 45 (2000).

If the language is clear and unambiguous, judicial construction is neither required nor permitted, and the court must apply the statute as written. Turner v. Auto Club Ins. Ass'n, 448 Mich. 22, 27; 528 NW2d 681 (1995).

MCR 2.403 does not direct the trial court to consider how the attorney was originally hired, i.e., by contingency fee agreements, hourly rate or pro bono, since that is wholly irrelevant to the intent of MCR 2.403.

In Temple v. Keel Distributing Co., 183 Mich.App. 326, 454 NW2d 610 (1990), the court reaffirmed that attorney fees must be calculated based upon a reasonable hourly or daily rate, rather than on the basis of a contingent fee. The Court of Appeals has specifically held that reasonable attorney fees are not the equivalent of actual attorney fees. The trial court has the discretion to award a party reasonable attorney fees calculated at a rate higher than the rate actually charged the party by his or her attorney. Cleary v. The Turning Point, 203 Mich.App. 208, 512 NW2d 9 (1993). Reasonable fees are not equivalent to actual fees charged. Cleary, *infra*. The fee a party may contractually

agree to with his attorney or the total amount a client spends on litigation is irrelevant to the recovery of a reasonable MCR 2.403 attorney fee. McAuley v. General Motors Corp., 457 Mich. 513, 578 NW2d 282, 287 (1998).

The fact a contingent fee agreement exists is irrelevant to awarding attorney fees pursuant to MCR 2.403.

RELIEF REQUESTED

Plaintiff-Appellee requests this Honorable Court affirm the Court of Appeals and
Trial Court.



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Dated: November 13, 2007

State of Michigan

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

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

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

Defendant-Appellants.

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PROOF OF SERVICE

Tracie R. Gittleman, first being duly sworn, deposes and says that on the 14th day of November, 2007, she served via United States Mail two copies of the Plaintiff/Appellee's Kevin Smith Brief on Appeal and Plaintiff/Appellee's Appendix upon the following:

Gary N. Felty, Jr., Esq.
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Tracie R. Gittleman

Subscribed and sworn to before me
this 14th day of November, 2007.


Sue A. Alexy, Notary Public
Oakland County, Michigan
My Commission Expires: 3-30-13